* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 21, 2011

(FRIDAY SESSION)

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 21st day of October, 2011, between the hours of 9:01 a.m. and 5:02 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

11-19 HB 906

11-20 HB 906, Final report of Task Force on Post-Trial Rules

11-21 HB 79

11-22 HB 79, Final report of Task Force on Additional Resources for Complex Cases

--*-*-*

CHAIRMAN BABCOCK: Welcome, everybody. Thanks for being here. We'll start as we always do, with a status report from Justice Hecht.

HONORABLE NATHAN HECHT: Earlier this week the Court approved the changes in the rules for expedited foreclosure, and they have gone to the *Bar Journal* to be published on November 1st and to take effect with any changes after comments on, excuse me, January 1st.

We also approved this week changes in some of the rules governing citation, service, although if you were here at the last meeting you know that those rules are scattered all through the rules book. Basically we conformed the rules governing service of citation and service of writs of injunction to the statute. We weren't sure that the statute covered more than citation, but it was easy to do injunctions, and so we did that, but we did not change the rules governing service of all kinds of other process that are -- that is involved in ancillary proceedings.

The task force on rules in small claims and justice proceedings met, had its organizational meeting a couple of weeks ago. It's chaired by Judge Russ Casey of the Fort Worth area, and so they're beginning to work on their project. The task force on rules and expedited

actions to be chaired by former Chief Justice Tom Phillips is supposed to meet Wednesday of this week, coming week, and has already done quite a bit of spade work on that, and then finally when we get to it, because we've got plenty of other things to do, but a subcommittee of the State Bar appellate section is going to propose rules that would confine the length of briefs based on characters and words rather than on pages, because in an electronic age it's harder and harder to tell what constitutes a page and much easier to tell the prescribed length otherwise since word processors count words and characters. So the Federal circuits have had this -- a rule like this for a long time, and so they're going to look at that for the Texas rules and propose something in due course. And that, I believe, is all I have. I would be happy to answer any questions.

CHAIRMAN BABCOCK: I've gotten a couple of questions from the bar that relate to the work that Justice Peeples and his subcommittee are working on relating to the motion to dismiss, the 12(b)(6) motion, and the question is this: The statute, the enabling statute the Legislature promulgated, took effect September 1. Our rules, we don't have to report to you until March 1, so the lawyers say, "Well, can I file a motion to dismiss now?"

HONORABLE NATHAN HECHT: No.

CHAIRMAN BABCOCK: Okay.

HONORABLE NATHAN HECHT: I mean, you can.

HONORABLE STEPHEN YELENOSKY: You can file it.

HONORABLE NATHAN HECHT: You can. It's a free country, but --

HONORABLE DAVID PEEPLES: Have they ever heard of a special exception?

HONORABLE STEPHEN YELENOSKY: Or a no evidence motion that's just based on the law? We can do it now.

CHAIRMAN BABCOCK: Okay. That's the answer I will give them from the source. All right. Richard has the parental rights termination issue, and Professor Dorsaneo claims that you will need close, strict scrutiny on your work. I don't know why he said that.

MR. ORSINGER: Yeah, and I thought we would be out of here by lunch. He told me it will take all day, so -- first of all, as was attached to the agenda, we have the letter of assignment dated July 13, 2011, from Justice Hecht, and this was the commission we received from the Supreme Court. On page two of the letter, House Bill 906 amends section 107.013, 107.016, 109.002, and 263.405 of the Family Code regarding post-trial procedures in cases for termination of parental rights. Section 263.405(c) calls for rules accelerating the disposition by the

appellate court and the Supreme Court of an appeal of a final order granting termination it have parent-child relationship. The amendments will require revisions to Rule 28 of the Rules of Appellate Procedure. The committee should consider whether revisions in Chapter 13 of the Civil Practice & Remedies Code are necessary.

So that was our assignment, and in connection with the assignment a task force was put together toward the end of August, and you-all are already familiar from a previous meeting in September, that was the meeting -- pardon me, August 27th of 2011, the Saturday session, a little bit, some of you who were here might be familiar with the task force, but the liaison from the Supreme Court was Justice Eva Guzman. The chair was a family law district judge from Midland, Dean Rucker, who is board certified in family law; and we had as a member of the task force Supreme Court Justice Debra Lehrmann, who those of you who know her career know that she has been involved with children's rights for three decades. After our initial meeting there was added Sandra Hachem from the office of the Harris County Attorney, who prosecutes government-sponsored termination proceedings as her main job, and she was an excellent resource, and she actually took over the responsibility of preparing and revising the rule revisions that we developed and progressed.

Everyone on the committee contributed, and I don't want to take the time to discuss them all, but I just wanted to point out that we also had on the task force Justice Ann Crawford McClure from the El Paso court of appeals, who in the process has been promoted to the chief justice, and so we had the perspective of someone who has administrative responsibility for a court of appeals on this task force. And we also had Charles A. Spain, Jr., also known as Kin Spain, who is the senior staff attorney from the First Court of Appeals in Houston and who I know has been interested in the subject matter of termination appeals for at least a decade and a half that he and I have been working together to try to find legislative solutions to the problems, and so he was a very important contributor to the task force because he has to deal with the practicalities of handling all of the complications associated with termination appeals, and we were assisted in our process by Marisa Secco, the Supreme Court rules committee lawyer or rules attorney, and she's going to help me today in this presentation.

You can interrupt at any time. I'm sure that those of you who have studied have much to say. Before we get in today's task, though, I thought it might be good to recap what has already happened, because the Legislature had a requirement that provisions -- certain provisions

become effective on September 1 and other provisions will become effective I believe in March, March 1 of 2012, so the task force had a very accelerated process of making changes that we felt were essential to be made by September 1. They were brought to the committee meeting on Saturday, August 27 of 2011. They were vetted there. There was a preliminary task force report. Most of it was carried forward by the Supreme Court in the rule promulgated; but in the -- at the end of the committee meeting it was determined that some of the language that was in the task force report was surplusage; and it, in fact, did not get carried forward into the rule; and I e-mailed this around yesterday for those of you who care, but this is something that has already become a rule, and I'll just briefly summarize that.

The statute, House Bill 906, at a general level is attempting to respect the constitutional dimensions of the termination of the parent-child relationship while also giving weight to the public policy in resolving appeals from termination proceedings quickly so that children who are in foster care and whose terminations are affirmed on appeal can go ahead and be placed, typically in an adoptive environment, and the appellate process is slow, and it's particularly a burden on the children whose futures are held in suspense while

the appellate process is going. The Legislature has been aware of this for sometime. They've tried different fixes. Up until the recent statutory amendments there were different efforts that they made. One of them required that the appellate points to be raised by a parent in an appeal from a termination had to be set out in writing and filed within 15 days of the date the judgment was signed. That often was not done due to oversight by the trial lawyer or the lawyer who was handling the appeal, and many courts of appeals felt like they were precluded from judicial review. Some of them even declared that it was unconstitutional and a denial of due process. So the old system was not working, and so the Legislature adopted House Bill 6, and I'll take you briefly through it and then you can see where the emergency or quick action in the preliminary report came from.

On House Bill 906 there was an amendment there in section 1 of the bill, an amendment to section 107.013 of the Family Code, and that's what we colloquially call the presumption of indigence. It said basically if a parent has been determined indigent for purposes of the trial, which means they're entitled to a free lawyer paid for by the county, then that presumption of indigence will continue without the necessity of filing a new affidavit of indigency and having another hearing to see whether they

qualify for a free appellate lawyer and an appellate record with no advance payment. So the Legislature basically said we're going to eliminate the new evaluation of their indigency, and there's a presumption that it goes forward. That would be section 1 of that bill.

Now, section 2 of the bill, I want to skip to subdivision (2). It says that an attorney appointed under this subchapter to serve as an ad litem for a parent or alleged father continues to serve until the earliest of three events, either the case is dismissed, the case goes final after the judgment is signed or after an appeal, or the attorney is relieved or replaced by the trial judge after a finding of good cause. So the impact of that is that the trial lawyer who was in there for the trial is also in there for the appeal, if there is one, unless they're relieved, and that was a significant change.

Section 3 of the bill didn't change the Family Code; but I do want to point out that the preexisting law, which still continues in section 3 of the bill, which is section 109.002(a) of the Family Code, says that these appeals shall be given precedence over other civil cases and shall be accelerated by the appellate courts; and section 4 of House Bill 906, largely unchanged, says that the appeals will be governed by the procedures for accelerated appeals under the Texas Rules of Appellate

Procedure.

Then if you look to subdivision (b) of section 4 of House Bill 906, you see that there is an advisory statement that is required to be included in the final order after a termination case, and it has to be all caps or underlined or boldface, and it is a warning or a proviso. It says, "A party affected by this order has the right to appeal. An appeal in a suit in which termination of the parent-child relationship is sought is governed by the procedures for accelerated appeals in civil cases under the Texas Rules of Appellate Procedure. Failure to follow the Texas Rules of Appellate Procedure for accelerated appeals may result in the dismissal of the appeal." Now, that warning is supposed to be included in every judgment that terminates a parent-child relationship.

Under House Bill 906, section 4, subdivision (c), there is a new proviso that says, "The Supreme Court shall adopt rules accelerating the disposition by the appellate court and the Supreme Court of an appeal to a final order" -- "appeal of a final order granting termination of the parent-child relationship rendered under this subchapter," and they have deleted the provision of the 15-day filing of the statement of the points to be made on appeal. So the Legislature has basically given a narrow delegation of what the Supreme Court rule-making authority

is -- the confines of it. What the initial task force report was to introduce into Texas Rule of Appellate Procedure 20.1 that this presumption of indigence, that once indigence has been established in the trial court, the presumption is that it continues, and that was in 20 point -- 20.1, subdivision (a)(1), that we put the presumption of indigence in there, and it was adopted by the committee and been enacted by the Supreme Court.

Then there were a few other rules statements where an exception had to be recognized because of that change about the presumption of innocence. Then in Rule 25, TRAP 25.1, civil cases, subdivision (8), this is the rule that requires or states the contents of a notice of appeal, and the task force recommended that we add onto the list of things that must be in the notice of appeal a subdivision (8), which says that the notice of appeal must state if applicable that the appellant is presumed indigent and may proceed without advance payment of costs as provided in Rule 20.1(a)(3). So when we get over to the Supreme Court, they essentially implemented those provisos, and that is out there already as a promulgated rule, and I know that we shouldn't replow that ground unless someone has detected some kind of deficiency since that time, and so with that background then I would prepare to move into the most recent task force activities, unless there is

someone that wants to say something about what's transpired so far.

CHAIRMAN BABCOCK: Any comments, questions? Okay.

MR. ORSINGER: Okay. So what we'll do then is move into the current task force report, and the structure of it is that it sets out the meetings, which were all telephone conferences, which worked quite successfully I might add, and then one face-to-face meeting here in Austin, and then we have come up with recommendations that we think fulfill or embody the directives given by the Legislature, and the first one that's listed in the task force report relates to the process of findings of fact and conclusions of law, which we are already familiar from in ordinary nonjury appeals.

Now, many of these cases have jury verdicts, and in that instance the jury charge is going to contain all the necessary law and findings of fact that are required to evaluate the case on appeal, but if the case is not tried to a jury then the only way to find out what law the court applied and what facts the court found is this process of securing from the trial judge findings of fact and conclusions of law, and that procedure is a well-established procedure starting at 296 of the Rules of Civil Procedure, and it's triggered by a request, which has

to be filed within 20 days of when the judgment is signed, and then there's a process of a deadline for the court to file. If the court doesn't file, there's a deadline for a reminder. If the court does file, there's a deadline to request additional and amended findings, and all of those deadlines if expressed or pushed out to their extreme constitute 85 days worth of time passing just in the fact finding process.

So the first thing that we did as a task force was to figure out what we could do to compress that time frame so it would still allow everyone to do their job, but it wouldn't take so much time, and the first suggestion we made was let's set up a separate rule to govern the finding and conclusion process and these kinds of appeals so that we don't complicate the ordinary process, but we can have an accelerated process that mimics the sequence of events and the terminologies that we're already familiar with. So the task force has proposed that we adopt an amendment to the Rules of Civil Procedure, and you'll find that in Appendix A to the task force report, and that is a proposed Rule 299b, and now would be a good time to say that the way the report is structured is the proposed rule changes are appendices to the end, but the report explains the operation of these rules and the task force motive and some of the factors it considered in

arriving at its recommendations.

So if you look at Appendix A, which is page 13 of the task force report, you'll find a brand new rule tagged onto the end of the other findings rules that unique to these kinds of cases; and a distinction that we're going to have to make, and we may as well make it now, is that it's not only government termination cases that are affected by these rule changes. It's also privately brought termination cases, because any person with standing can bring a suit to terminate the parent-child relationship; and you quite often will find that in a divorce, remarriage, and a stepparent adoption situation, that you'll have a privately brought termination case, not a government brought termination case. But it's also important to understand that there are some cases where the State of Texas will bring a lawsuit not to terminate the parent-child relationship, but to have a governmental agency appointed as the managing conservator of the child while leaving the parent still with a parent-child relationship.

So the rules that we're talking about here really are broader than just government termination cases, even though that's going to be the bulk of them, but they'll govern also private termination cases and cases brought by the state to be appointed managing conservator.

PROFESSOR DORSANEO: Richard?

MR. ORSINGER: Yes.

PROFESSOR DORSANEO: Both of those kinds of cases are accelerated? One of them under 109.002 and the other one under another chapter later; is that right?

MR. ORSINGER: Yes. Yes. Although I'm not going to tell you which chapter later, but we believe that the managing conservatorship cases have to be accelerated just like the termination cases because of the language in the statute.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: Okay.

PROFESSOR DORSANEO: I think it's 263, but I may be wrong.

MR. ORSINGER: All right, Bill. You can apply for your board certification until, I think, March.

PROFESSOR DORSANEO: In many subjects.

MR. ORSINGER: Point well taken. All right. So, anyway, back to the trial court process, the first suggestion here you'll find in proposed Rule 299b, subdivision (a), is that we eliminate the day -- the passage of time that it takes to get your first set of findings and conclusions by requiring that the trial judge sign and file findings and conclusions when they sign the judgment, and we will require it in every case, and it will

not be dependent on the appellant's request, and there will be no delay associated with the appellant's request. The trial judges, they will be aware of this obligation. The county attorneys will be aware of this obligation, and we can eliminate a potential delay of 20 days by just saying that when the judge signs the judgment and the trial is fresh in his or her mind then she also or he also signs findings and conclusions that same day, so we've eliminated 20 of the 85 days just by that.

So the proposed rule change says, "In a suit for termination of the parent-child relationship or a suit affecting the parent-child relationship filed by a government agency for managing conservatorship," that is tried without a jury, "the court shall file its findings and conclusions at the time the final order is signed. Finding of fact shall be stated with the clerk of the court" -- "filed with the clerk of the court as a document separate and apart from the final order. The court shall cause a copy of its findings and conclusions to be mailed to each party in the suit."

The reason we want a separate document, not only does that conform to the practice, but if you were to include findings in the judgment and a request would be made to amend the findings, you would have to amend the judgment to amend the findings, which would then reset the

appellate clock and introduce delay. So we want the judgment not to contain findings. That's the prevailing practice right now for nonjury trials, and the findings must be filed on the day the judgment is signed, and then all of the ensuing processes will start running on the day of the judgment. So I'll offer that up for criticism or comment.

CHAIRMAN BABCOCK: Okay. Yeah, Richard.

MR. MUNZINGER: The judge is trying a nonjury case that's within the purview of these rules. The evidence is concluded, and the judge says, "I grant custody to the state" or "I do" whatever. The effective moment of the judgment is at the time the judge makes the verbal statement in the court, true or false?

MR. ORSINGER: If it's a noninterlocutory oral pronouncement then it's effective immediately. If it's interlocutory because there's some unresolved relief then it's probably not effective immediately.

MR. MUNZINGER: Well, let's assume that it's not interlocutory, but it is final, so now the child is taken from daddy or mama or whoever.

MR. ORSINGER: If you don't mind, I don't want to be overly picky here, but it's not final. It's just noninterlocutory. Finality really has to do with appealability and plenary power, so it's --

CHAIRMAN BABCOCK: Where's the kid going?

MR. MUNZINGER: Bad choice of words on my part.

PROFESSOR DORSANEO: No, you were right. He's wrong.

MR. MUNZINGER: It's effective, and the child is effectively removed from the custody of the parent, and the status has changed when the judge verbally announces his or her ruling.

MR. ORSINGER: Correct.

MR. MUNZINGER: Now, this rule contemplates that the final judgment includes the findings of fact, but the delay is still there if the judge doesn't timely enter the findings of fact. In other words, I like what you've done in the rule. All I'm saying is I don't know that you have cured the problem of delay because you still don't have a written judgment.

MR. ORSINGER: Yes, so we haven't certainly eliminated any delay that may exist between oral rendition and the signing of judgment, and we can certainly consider that, but it would not make any sense to require findings and conclusions before the judgment because it's not until the judgment is actually put down on paper that you really know what you're appealing. So probably if you were worried about the delay between rendition and signing, we

should address that over in a judgment rule because that's really not a finding and conclusion problem. You see what I'm saying?

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I was just going to point out in regard to Munzinger's concern, the child in a termination case is already not in the custody of the parent in this kind of a situation because the child's already been removed and is already in kind of a temporary foster situation until these decisions are made anyway.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I was just going to say Richard's draft says it's signed, so he is -- I think as he's explained clearly enough that it's from the date the draft of the judgment is signed, not from the date of the judgment necessarily. That might be the judgment, or it might be after the judgment.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Richard, I may be confused. I don't understand -- and if we're not up to this point, the second paragraph under (a), are we talking about that yet?

MR. ORSINGER: No. If we can get (a) out of the way first then --

HONORABLE STEPHEN YELENOSKY: Well, it is in

(a).

CHAIRMAN BABCOCK: No, it's in (a). The second paragraph of (a).

MR. ORSINGER: The first paragraph of (a). Well, if you want I can -- let's talk about this.

CHAIRMAN BABCOCK: Well, we've got some more comments about the first paragraph apparently. Frank.

MR. GILSTRAP: You're talking about judgment, but the term you use in a rule is "final order." What is a final order?

MR. ORSINGER: Well, the reason we do that is because under the Family Code they tend to talk in terms of orders rather than judgments. To the extent they talk about judgments, they talk about decrees, and so I think that the safer approach is to use the word "order," but I think we mean judgment, and if to conform with the terms in the Rules of Procedure we want to use "judgment," then I think probably we should use "judgment."

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I don't like the fact that you have "mailing the findings of fact." I would prefer to say sent or given, because it seems to me, especially with the 10-day limit in the next paragraph that -- and with the way people are doing things electronically, the judge could easily e-mail the findings

to the parties, so -- or hand them out at the time he signs the final order.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Can you just substitute the word "delivered" for "mailed," and it can be delivered by e-mail or fax or whatever? It doesn't have to be mailed.

CHAIRMAN BABCOCK: Okay. Professor Carlson.

PROFESSOR CARLSON: Richard, did you make any attempt to look at the findings of facts and conclusions of law this committee signed off on in February or March of this year?

MR. ORSINGER: No.

PROFESSOR CARLSON: Do you know if this will dovetail with that?

MR. ORSINGER: No, I don't.

PROFESSOR CARLSON: Great.

CHAIRMAN BABCOCK: And what is the implication of that?

PROFESSOR CARLSON: We've sent to the Court draft findings of facts and conclusions of law rule, and these are working off of a former version, which is no longer the committee's recommendation. I don't know where the Court comes out on it.

MR. ORSINGER: Well, these would conform to the existing rules, but they wouldn't conform to a possible

future change in the rules.

CHAIRMAN BABCOCK: Worth noting, I would think.

MR. ORSINGER: But, I mean, Elaine, is it possible for us to distill the differences, and would they have an impact on our accelerating the timetable, do you think?

PROFESSOR CARLSON: I don't know. I would have to go back and look at our proposals. I don't think so, but I don't know for sure.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: On the last sentence of that paragraph, whether mailed or delivered, would you want to add something like "promptly" or "immediately"?

MR. ORSINGER: Absolutely, yeah. What about using -- does the word "delivery" connote physical delivery, or would we agree that that's broad enough to include mail or e-mail? Because I don't want to require it to be mailed or e-mailed if the judge is -- if the litigant is there or the litigant's lawyer is there and you hand-deliver the findings. That's better than mail or e-mail.

HONORABLE STEPHEN YELENOSKY: "Delivered."

MS. CORTELL: Does "delivered" connote physical delivery, or would it be broad enough to include

mail or e-mail?

HONORABLE TERRY JENNINGS: Well, you get into a problem there because at least one of the parties to this lawsuit is usually living in poverty, and they may not even have access to a computer, and some of them may not even have a physical address to mail it to, so some --

HONORABLE STEPHEN YELENOSKY: They both have lawyers.

HONORABLE TRACY CHRISTOPHER: They're going to have lawyers.

HONORABLE STEPHEN YELENOSKY: They're going to have lawyers.

HONORABLE TERRY JENNINGS: Well, my experience is that on a lot of these appeals is that there are a number of miscommunications between lawyers and their clients, because their clients are hard to get a hold of or --

HONORABLE STEPHEN YELENOSKY: But I would never get --

HONORABLE TERRY JENNINGS: -- they get lost in --

HONORABLE STEPHEN YELENOSKY: I would never be mailing it to them if they have a lawyer. I would be sending it to their lawyer.

HONORABLE TERRY JENNINGS: Well, a lot of the

problems that I'm seeing involve notice to the clients, especially when you get into a situation where there's this confusion about whether they're going to be pro se or not and all that.

HONORABLE STEPHEN YELENOSKY: But that's a bigger problem, and you would be suggesting a delivery to the party directly even if they have a lawyer, which is a huge change.

HONORABLE TERRY JENNINGS: Well, the way the proposed rules read now is to each party. You could say to the lawyer or whatever, but there is a practical problem, and all I'm saying is that there is a practical problem. I'm trying to point that out.

MR. ORSINGER: Let me point out, Justice Jennings, that it may be somewhat different because of the Legislature's decision that when you're in for the trial you're in for the appeal.

HONORABLE TERRY JENNINGS: Right.

MR. ORSINGER: Because that didn't used to be the case, and sometimes there was this gray area where the trial lawyer has finished and the appellate lawyer hasn't started, and --

HONORABLE TERRY JENNINGS: And that's what I'm talking about, and if that's been fixed then --

MR. ORSINGER: Well, you know, the

communication difficulty may exist, but it will be the same one that existed during the trial.

HONORABLE TERRY JENNINGS: Right.

MR. ORSINGER: Because it's going to be the same lawyer.

HONORABLE TERRY JENNINGS: Right.

MR. ORSINGER: And so -- and I don't think that by the use of the word "party" here we meant to say the individual client as distinguished from the lawyer if they have an attorney of record. I'll rely on one of the rules professors over here to comment on that, but when we use the term "party" in the Rules of Procedure, doesn't that mean the lawyer representing the party? So when we require that these findings and conclusions be mailed or delivered to a party, that can be fulfilled by mailing or delivering to the lawyer representing the party, right?

PROFESSOR DORSANEO: Right.

MR. ORSINGER: We don't need to specify or distinguish between attorney and party.

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: How often are findings in these cases more detailed than just the formal finding of grounds for termination and best interest of the

child?

MR. ORSINGER: I wouldn't be able to tell you that, but some of the appellate judges here could maybe.

CHAIRMAN BABCOCK: Yeah. Justice Bland.

HONORABLE JANE BLAND: Not often. Not often. And in our area they're often included in the final judgment. They're not in a separate document, and I'm not sure statutorily -- I think statutorily they have to state the statutory grounds for the termination in the judgment, so I'm not certain about the separate document requirement.

MR. ORSINGER: Well, if we don't have Rule 296 findings in a separate document then when you amend them -- if you amend them on request, you've issued a new judgment, which starts the appellate timetables all over again, and that's really just not necessary.

CHAIRMAN BABCOCK: Justice Gaultney, then Justice Patterson.

HONORABLE DAVID GAULTNEY: I think there may be some findings that are required to be in the judgment, so what happens as a practical matter, what does an appellate court do when a case gets before us and the only findings are in the judgment? And, I mean, the rule says they shall be filed, which sounds mandatory. Do we ignore the findings that are in the judgment, or do we require an additional process to obtain separate findings?

HONORABLE STEPHEN YELENOSKY: That's paragraph (2).

MR. ORSINGER: Yeah. And under the existing practice, Rule 299(a), it says, "Findings of fact shall not be recited in a judgment." So that's just a strict prohibition, and then it says if there's a conflict between findings in the judgment and findings under Rule 297 and 8, the latter control for appellate purposes. Now, the discussion at the task force was that in most of these cases as a practical matter there are not separate findings, and they are included in the judgment, and the appellate court goes ahead and handles the appeal based on the findings in the judgment, even though the rules say that's really not what you're supposed to be doing, but that's -- as a practical matter, they don't send it back down for findings that are separate. They just decide the appeal and the judgment, and I would like for some of the appellate justices here to confirm that that's what goes on.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I haven't seen that happen, Richard, but I do think that we get both detailed findings of fact and also cursory that look -- that satisfy the judgment, the basic information, so I think we kind of get them both. One of the values, I think, of this rule is

that if it is required at the time, and these are usually drafted by the parties, it's going to be less detailed, I would think, with this rule, and it will be just to satisfy the elements. So I think that that's maybe one of the advantages of this rule, but I've never seen when we're required to have findings of fact that we haven't had those, because we have sent cases back in instances where they've failed to make the findings.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I do know that Rule 299a was remodeled and I think changed significantly in our discussions before. Whether the changes to the earlier rules were -- or would be problematic in this context, I'm not sure, but I know 299a was changed a lot, and 299a as currently written is not a good rule. I mean, you have to ask the appellate judges what it means. Okay. You can't tell what it means on its face. If you say, "Findings of fact shall not be recited in a judgment," that that's a flat prohibition, well, yeah, standing alone it is, but when it starts talking about if there's a conflict between findings of fact stated separately and ones in the judgment, you kind of think, well, maybe they can be stated in the judgment, and the Family Code does require findings to be in the judgment I think in this context. That's caused me some difficulty in reconciling these issues. So

all of that is problematic, and I think the right answer probably would be if there were changes in the findings that that might well change the judgment or would require the judgment to be changed.

MR. ORSINGER: Well, if you require the judgment to be changed every time a finding changes then you're building delay in cases that don't need to have delay.

PROFESSOR DORSANEO: I'm not saying every time, but sometimes the findings --

MR. ORSINGER: If it's in the judgment, though, it will reset the appellate timetable every time a finding is changed because you have to amend the judgment. Let me also point out that if there is -- if there's two diverging lines on what the finding process ought to be, this rule is a standalone rule that applies only to these kinds of appeals. So while there's some value in them being -- mimicking each other, the fact that we may adopt something now because we have a deadline of March 1 of 2011 and we may go somewhere else with the other rules, the decision can be made when the other 296, 297, 298 are amended that we can either conform at that time or we can have two separate tracks, because there is a narrow subdivision of nonjury trials, and they're all in a self-contained rule, and they don't involve any other

appeals. So that would limit the harm. You see what I'm saying?

PROFESSOR DORSANEO: Yeah, well, I think that's fair enough. It's different. We don't need to talk about the other thing.

CHAIRMAN BABCOCK: Justice Bland, then Justice Jennings.

HONORABLE JANE BLAND: The reality is that in these cases the findings are the grounds for termination that are set forth in the statute, and the trial courts include those grounds in the final judgment, and they do not make separate findings on a separate document, and I think it's different in different parts of the state.

HONORABLE TERRY JENNINGS: Right.

HONORABLE JANE BLAND: And my -- and my only thinking is that to require findings in a separate document when none of the trial judges, at least in some parts of the state, are doing it that way, doesn't make a lot of sense, because it doesn't hurt to make the findings in a separate document if that's how some places in the state do it, but if we're going to require it and then the judgment is going to be somehow defective, and -- without it doesn't make a lot of sense to me because statutorily the trial courts have to state one of the statutory grounds, and that's what they do, and they include that in the judgment.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Right, and yeah, it may be different in different parts of the state, but my experience has been the same as Judge Bland. I don't recall ever seeing -- it may have happened. I don't recall ever seeing separate findings of fact and conclusions of law in these kinds of cases; and it may be because counsel has never requested them and they just rely on the judgment, because usually what happens is, is the department will make its allegations in its petition, alleging a parent has violated certain laundry list provisions of the statute; and then in the judgment the court will find that the parent violated, you know, subdivision (d), (e), and (o) of the statute; and they never have made findings of fact and conclusions of law. Now, that may just be a matter of the lawyers in Harris County just haven't been requesting them, but -- and this goes back to the old world before the new statute. A lot of times lawyers weren't even appointed to represent someone on appeal until after the deadlines had run, which was a huge problem, which I'm hoping is -- this new statute is going to address.

MR. ORSINGER: If I can respond, as a practical matter, and I don't know from personal experience, but I do think that a lot of times the findings

were not timely requested, and that's why you didn't see them.

HONORABLE TERRY JENNINGS: Or never requested, yeah.

MR. ORSINGER: And in this situation, when it's a government sponsored lawsuit, if the rule provides that they are required and it's the trial judge's duty to give them, not the appellant lawyer's duty to request them, I would assume that the government lawyer is going to understand that when they draft the judgment they need to draft the findings; and but let me say that I don't think that it's fundamentally different whether the findings are in the judgment or are in a separate thing; and this proposed Rule 299b doesn't contain the prohibition that findings of fact shall not be recited in the judgment, which is in 299a. That provision is not here, but what concerns me about all of this is that in cases where the trial judge actually does issue new findings or alter old findings, if they are only in the judgment, you have to amend the judgment, and that introduces an unnecessary delay, and I say weighing against that is the fact that under the prevailing practice nobody files findings anyway, well, I think that's part of the deficiency of the current practice.

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: The important thing here is that the appellant, whose rights have been terminated, needs to know how many theories that he or she has to attack on appeal. That's the important thing that we should keep our eyes on the ball, doesn't matter whether it's in the judgment or findings of fact in a separate instrument. I mean, I think Richard has persuasively told us why it needs to be in a separate instrument, but the appellant needs to know that, and here's an example. I've tried a bunch of these. They usually fall into three categories: Somebody didn't support a child within his or her ability; somebody affirmatively abused a child, an act of comission; or somebody allowed -- neglected, allowed someone else to abuse the child, an act of omission. I mean, it's usually nonsupport, abuse, or neglect, just speaking generally; and so the appellant needs to know am I facing all three of these on appeal or only neglect and so forth; and there needs to be an additional finding that it's in the best -- that termination is in the best interest of the child.

And I mean, what I think -- if we really want to speed these things up, which I think we do, maybe we need to say that to make findings that roughly parallel the E.B. case, which is the Supreme Court case that mandated broad form jury questions, that was a termination

case, and they said keep it general in the language of statute when you submit one of these cases. We could do a lot of good, it seems to me, if we just made a special statement. I don't know what the Supreme Court is going to do with these other, you know, findings of fact rules that we sent, but if we say we don't want it evidentiary, on so-and-so date, you know, the boyfriend beat the child and the mother stood there and watched it and didn't call the police. I'm serious. You know, and on another date something else happened, on another date she did something herself, and all of this adds up to neglect. I don't think we want that.

What we want is something that's in the degree of generality of E.B., which would tell the mother, you've got -- you didn't support, you abused yourself, and you allowed someone else to abuse, which is neglect. You've got to defeat all three of those on appeal, or only one of them, and to me that's the important thing, not where it is, judgment or findings, and if we would say don't give us 50 separate acts of abuse or neglect, just tell us which of these theories the mother or the father has to face on appeal, we would speed these cases down the road.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: And correct me

if I'm wrong, Justice Peeples or Richard, but there was earlier a reference to the difference between statutory grounds and perhaps more detailed facts, although obviously there can be a gray area there, but aren't we already required to specify essentially which subparagraphs of the potential statutory termination are found or relied upon? Aren't we already required to put that in the judgment, Richard, Justice Peeples?

MR. ORSINGER: I will see if I can answer that question.

HONORABLE STEPHEN YELENOSKY: My understanding is that the AG will come in typically, or, I'm sorry, the district attorney, will come in and say we're proceeding on 161 whatever, (e)(1)(2), and it's very important for the other party to know what they're proceeding on before you ever get to the judgment and at the point of the judgment what they succeeded on. Separately, you know, I guess it could depend on the case. There could be cases in which you would want to put some level of detail in the findings of fact. You know, this is a termination of parental rights, and I think there can be a higher expectation of specificity or some judges are going to want to put it, and I wouldn't want to put it in the order for the reasons that Richard said, but, Richard, what's the answer to the grounds that have to be stated?

MR. ORSINGER: Okay. Section 161.206, subdivision (d), of the Family Code says, "An order" -- and that's an order, not a judgment there, Bill. "An order rendered under this section must include a finding that," number one, "a request for identification of a court of continuing exclusive jurisdiction has been made as required by section 155.101," and number two, "all parties entitled to notice, including the Title IV-D agency have been notified." That seems to me that they're not mandating that you have the findings that would be the basis for the relief granted.

HONORABLE STEPHEN YELENOSKY: Well --

HONORABLE JANE BLAND: That's not the right section.

HONORABLE STEPHEN YELENOSKY: No, there's another section, and I'll look for it.

MR. ORSINGER: Okay. I've got a Family Code here if anyone wants to borrow it.

CHAIRMAN BABCOCK: Justice Patterson in the meantime.

HONORABLE JAN PATTERSON: I agree with Justice Peeples that there are only certain things that an appellant needs to know to move forward. I also agree that there's a lot of confusion about the requirement of findings of fact and conclusions of law. Is this a time

when we can clarify, Richard? I mean, is there a reason to use the term "findings of fact and conclusions of law" when we're really talking about the grounds for termination? Because I think findings of fact and conclusions of law are a particular thing that can contain facts, and when you just have a conclusion as to abandonment, neglect, those are combinations of fact and law, so we're sending out a signal that we want something different than just that, but I agree that that's really the main thing that we're desiring for this.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE JAN PATTERSON: And that also is the reason why there's confusion about whether it can be in the judgment or not, because they sometimes do look alike, which will lead us into that second paragraph which really causes a lot of confusion, but I'll hold my comments to that.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I've got a number of comments, and the first being I'm always very nervous when we carve out an entirely new procedure from the rules for a particular type of cases, because it really does create a lot of confusion on the practitioner, especially if we're using the same type labels.

CHAIRMAN BABCOCK: Although there is

precedent for that in the family area.

HONORABLE TOM GRAY: I understand, but I think this is an opportunity to eliminate rather than create a parallel universe for family law cases. My first more or less detailed comment, there was a conversation over here about they're all going to have lawyers and getting the notices. That is true, as I understand the existing -- or the preexisting 263.405, but I don't think -- and I'm obviously subject to correction on this. There was a time when all termination cases, the parties, if they were indigent, got court-appointed lawyers. Then when we got the dramatic changes to 63.405, it was -- they dropped the appointment of lawyers in private termination cases, and it was only the government termination cases that got the appointed counsel. So when we're talking about lawyers, that's in government sponsored, appointed if they're indigent, but it is not necessarily the case in private termination cases, so be careful about assuming that there will be a lawyer involved.

With regard to the conversation that was going on more or less down here about the judgments or orders, all of these appeals are coming up from an interlocutory order. They deal in the sense that we frequently refer to over in the Probate Code of an order that deals with a finite solution for some of the parties.

The will is admitted to probate, heirs are determined. Those are interlocutory orders in a probate proceeding that are appealable just like the termination order is an appealable order. That child is still in the system. That child is still in the same case, and it's going on, but in that sense it is a -- has been determined to be really under case law a judgment that affects the child that is subject to immediate appeal.

As far as where the findings need to be or not be, I don't think there should be any opportunity to have a separate findings of fact and conclusions of law in these cases. As the judges from Houston have pointed out, the process -- the ones that I see, they're always in the judgment. I think they need to be in the judgment; and I think they need to be limited, as Judge Peeples said, to which grounds for termination have been found by the fact finder; and if they do that, it will address Richard's concern that each modification is going to result in a new judgment. It should, if you are changing the grounds on which termination is being granted. The ground upon which termination is granted has consequences later.

If it is in a separate document, not part of the judgment, that is a real problem, but if you terminate a parent's rights to child A because they have abused the child, and they come back in a later proceeding and that

finding has to be in the judgment under the concept that I'm thinking, if that finding is in the judgment, that ground is therefore in the judgment, and the party has appealed or not appealed and been successful or not successful on appeal, it goes with it. The finding may or may not wind up being out there, but the -- the judgment is there. It's archived, and then later when they have another child and the state again seeks termination then -- and one of the grounds of termination is previous abuse of a child, and that can impact the finding in the subsequent case, and so I just don't think you're going to have realistically this perpetual restarting of the appellate clock by new judgments in the event that you require the finding of only the ground -- the grounds that you're terminating on if you require that to be included within the judgment. See if that was all the -- I think that covers the bulk of the comments I had.

MR. ORSINGER: Chip, can I ask a follow-up question?

CHAIRMAN BABCOCK: Yeah, sure. Then can I ask mine?

MR. ORSINGER: These rules are supposed to be broad enough to include managing conservatorship cases, too, which of course, don't have those eight grounds for termination. Do all of those policies hold when it's just

a custody case and not a termination case?

HONORABLE TOM GRAY: In all candor, that was a new wrinkle when I got the report and I started reading that it was going to pick up more than just the termination cases. As I read what was the marching orders of the Supreme Court from the Legislature and -- I didn't think it would be that broad to reach out and get the other custody decisions, but I -- that was a nuance that I missed, Richard, and so my arguments are primarily directed towards termination cases because those are the ones that really hit the constitutional dimensions that are really problematic.

CHAIRMAN BABCOCK: Justice Gray, you said that you don't believe that there needs to be a separate findings of fact, separate and apart from the judgment, but, Justice Peeples, you said you were persuaded that there did need to be?

HONORABLE DAVID PEEPLES: I was after hearing Richard speak. You know, if we keep them general, like E.B., what amendment or change can there be but another ground coming in, and that is important?

HONORABLE TOM GRAY: Or the elimination of a ground. Maybe you convinced the trial judge that one of the grounds is not supported and they pull it out and then it targets the appeal, it makes the appeal move faster.

HONORABLE DAVID PEEPLES: And, again, in terms of speed, if you let the bar, the bench and bar, know that they need to be simple and general, this won't slow things down very much, but if you allow them to be evidentiary, you know, there can be 25 bits of evidence that support one ground in these cases.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, and I wanted to clarify, just because I haven't seen findings of fact and conclusions of law being used in -- at least through our appellate courts, doesn't mean that I'm against asking or requiring findings of fact. I mean, Richard I think made a good point. When you have different grounds like endangerment or you left the child with someone else who endangered the child or they failed to comply with a service plan under (o) or whatever that subdivision is, I do think because this is kind of quasi-criminal and because of the taking a child away from a parent is so severe and in many cases considered a punishment, you do have to have, I think, some kind of specific allegation, "You violated this subdivision," and I do think in a judgment you should have -- and I think it is statutorily required, although I can't put my finger on it. You should have to have a specific finding that you violated (e) or (d) or (o) or whatever.

A findings of fact could be helpful on appeal because oftentimes when the allegation is subdivision (d), endangerment, there really becomes a question of, well, did that parent's conduct really rise to the level of endangerment, was the evidence legally and factually sufficient to support a finding of endangerment, and a finding of fact could be helpful to the appellate court to understanding what the trial court was thinking. You know, what specific behavior or action of a parent was the trial court focusing on, and then maybe requiring the trial court to go through that exercise might make the trial court rethink, well, you know, having thought through this and looking at these specific instances, they may change their mind and say, well, you know, this really isn't -- this doesn't constitute endangerment.

So my point is although it hasn't been utilized I could see Richard's point that maybe it is something that practitioners should be doing, and it should be required. If that was your point.

CHAIRMAN BABCOCK: Justice Jennings, is the -- or actually, anybody, is the practice now or what you've seen in practice that the proponent of the termination or the conservatorship, if it's granted, is the one providing the findings of facts and conclusions of law? They give it to the judge, they say "Please sign this"?

HONORABLE TERRY JENNINGS: Practice is not --

HONORABLE DAVID PEEPLES: Yes.

HONORABLE TERRY JENNINGS: Yeah, but this is not a very sophisticated practice.

CHAIRMAN BABCOCK: Don't tell that to Orsinger.

HONORABLE TERRY JENNINGS: Well, when you're dealing with people with court-appointed lawyers and they're having court trials instead of jury trials, they're not getting the representation that Richard would provide.

MR. ORSINGER: Thank you.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I don't know what the origin --

CHAIRMAN BABCOCK: Is that good or bad? Justice Gray. Sorry.

HONORABLE TOM GRAY: I don't know what the origin of the form is, but the forms that we get in Waco are extraordinarily consistent, and they -- you know, they look like the -- you've got all the other provisions about a decree in there of some things that are happening, but they get down to almost check boxes of the grounds of termination and the finding of best interest, and I don't know if that's because of local practice or that the AG has standardized the form for termination orders or where it

comes from, but the -- much like what Jane described, the ground is set out in the order that terminates the parental rights, and it's basically the statutory text, and the trial court makes that finding, and then sometimes it -- the one thing I have noticed is sometimes best interest is first and -- but most often it's last. Every once in a while for some reason it winds up -- but it's very standardized in what we're seeing, except in those private termination cases. They can be much broader then.

CHAIRMAN BABCOCK: Uh-huh. Okay. Yeah, Buddy, sorry.

MR. LOW: Richard, Rule 299a starts out by "Findings of fact shall not be recited in the judgment." Now, I hear -- I know that those are traditional where they're requested, and here they are mandated, but that rule does state that they shall not be, and if there's a conflict then it's resolved. Did you -- when that issue came up, did you focus on the fact that we do have a statement that they tell the judge they shall not be in the judgment?

MR. ORSINGER: Yes. I mean, we were well aware that the supposedly prevailing current practice is to have separate findings. Now, in this particular environment where you're dealing with pro se litigants --

MR. LOW: Right.

MR. ORSINGER: -- or young, inexperienced lawyers who have been appointed either for the trial or the appeal, there -- I'm hearing around the table from the court of appeals judges that that rule is not prevailing in this subtype of family law litigation, even though it's supposed to be separate. So we were not proposing what Justice Gray and others here are, that we deviate in these kinds of appeals from others and that we continue to have separate findings in ordinary civil litigation but findings folded into the judgment in this. I mean, it's a plausible argument, and as long as its application is narrowly to this area then I don't see the harm in it other than potential delay.

MR. LOW: No, 299a doesn't make it fatal. I mean, you know, it says -- it recognizes that it may be done, and as far as Judge Peeples' point, aren't the findings of fact supposed to just take the place of the way it would be submitted to the jury? In other words, we have broad submission, and findings don't go, you know, just detail by detail. Isn't that right?

MR. ORSINGER: That is right, and the term that the appellate practice uses is ultimate issues.

MR. LOW: Right.

MR. ORSINGER: And so perhaps an amendment to this language would be that the findings should consist

only of ultimate issues, and that's a term I think the appellate lawyers in this room will agree with me that ultimate issues has a heritage or a pedigree on the appellate side, because you're only supposed to submit ultimate issues to the jury, so we've got 30 years worth of -- or more longer jurisprudence on what is an ultimate issue, and maybe that's the way to address David Peeples' concern.

CHAIRMAN BABCOCK: Justice Patterson, and then Justice Bland.

HONORABLE JAN PATTERSON: I think that language would be helpful. In my experience most of the litigation over findings of fact is for purposes of delay, either they were not filed or they were untimely filed. So the litigation doesn't tend to be over the substance, but there's a certain gamesmanship over what they are and how to file them, and so I think this is the opportunity to clarify that they can be simple and they're not required to be factually detailed or evidentiary, and so we may want to use different language than findings of fact and conclusions of law.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I haven't seen a real problem with this aspect of termination cases; i.e., I haven't had anybody litigating about where these findings

are or that the findings are inadequate, and it would be my suggestion that we just take the sentence out. "Findings of fact shall be filed with the clerk of the court as a separate document and apart from the final order." If we delete that sentence we will still have the rule that requires findings of fact at the time the final order is signed, which I think is the objective of the task force, that the trial judge enter the findings at the same time the trial judge signs the order, but not micromanage where those findings should be found, whether they should be in a separate document or in the order, because I don't think it's a problem that's out there right now and I agree with Judge Patterson that we don't want a lot of satellite litigation about these findings.

HONORABLE JAN PATTERSON: Right.

HONORABLE JANE BLAND: We want to just -- once we have them -- we need them, and they're required by statute by clear and convincing evidence the trial judge has to find particular things to grant a termination. So once we have those findings we can proceed, and we don't want a lot of extra litigation about where they are contained and how they ought to be amended, and we might be inviting it by including this one sentence in the rule that we don't really need to accomplish our purpose, our purpose being that we would like the trial judge to make the

findings at the same time the trial judge enters the judgment -- or, I'm sorry, signs the order, signs the order.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: It seems like we're importing a lot of different understandings or perhaps misunderstandings of the phrase "findings of fact and conclusions of law" into this regime, perhaps unnecessarily. I think the focus that everybody seems to agree we ought to have is advising the litigants of the statutory grounds on which the fact finder or the trial court relied. That perhaps, maybe as Tom suggested, should be in the judgment, just require the trial judge to state in the judgment which statutory grounds for termination he relied upon. There may be room for findings of underlying fact, you know, the abuse situations, and maybe that procedure ought to be available, phrased -- using the term I guess I've just said "underlying facts," which is at least -- you know, we see that sometimes in the context of administrative law where you refer to a fact that, you know, on which an ultimate -- you put some of these together, and it's the basis for a finding of ultimate fact, but you have the statutory ground determination stated in the judgment, and this might be a way to clear up some of the confusion since it surrounds this.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Yeah, it's -- Richard, it seems to me that aside from the -- that if we're trying to give somebody notice of what they need to know in order to attack the judgment, and I can't find the statute that I thought existed. Okay?

MR. ORSINGER: Let me clarify what -- I gave you my Family Code so you could find the provision that requires these findings in the judgment, and even Professor Dorsaneo cannot find it.

PROFESSOR DORSANEO: Well, I usually find things by assigning other people to find them.

MR. ORSINGER: Oh, I see.

PROFESSOR DORSANEO: No, I swear that there at least was such a provision, but even if there isn't, it seems to be a better idea to put them -- put the findings in the judgment, especially if the findings are going to need to be made at the time of the judgment. Having a separate piece of paper that's mailed to somebody in addition to the judgment in order to tell them, you know, what the judgment -- what you need to do to attack the judgment, what you need to attack, doesn't seem like a very good way to do things to me. I mean, it seems more confusing than helpful, and I agree with Justice Gray. It ought to all be in the judgment, and I don't -- I see

you're trying to eliminate something to make things move faster that actually makes things perhaps go more slowly.

MR. ORSINGER: What's that?

PROFESSOR DORSANEO: Well, this whole findings of fact/conclusions of law process, separate from the judgment in the context of these kinds of orders, and certainly the termination orders. Just put -- just do the judgment and don't -- don't worry about this slowing things down. We're not going to do this.

MR. ORSINGER: So you're -- would you allow for a procedural opportunity for someone to ask that the findings and the judgment be modified, or are you just going to eliminate that? You file a motion for new trial or a motion to modify judgment.

PROFESSOR DORSANEO: Not distinct from the appellate review, no.

MR. ORSINGER: Okay. So what you're suggesting, Bill, is completely sidestep the whole finding and conclusion process, put your findings and conclusions in your judgment. If you don't like them, file a motion to modify the judgment or a motion for new trial, and there is no finding of fact and conclusion of law process. There's just a judgment process. Is that what you're suggesting?

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: Okay. Well, I think that's a

serious suggestion, but going back to what Justice Bland said before, we must say where these findings and conclusions are going to be, because I don't think the Family Code tells you, and Rule 299a says they can't be in the judgment, so we've got -- if we're going to set up a no finding, no conclusion process independent from the judgment, no reminders, no additional or amended findings, then I think we better clearly say that these findings have to be woven into the judgment and are not subject to the Rule 296 through 299a process.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: I want to come back to what Justice Pemberton said. It may be that you just want the grounds in the judgment and don't use the word "findings and conclusions."

MR. PERDUE: "Findings" is what's confusing everything.

HONORABLE NATHAN HECHT: Typically the cases we get, at least, which is just a fraction of them, it's one or two or three grounds, and the trial was pretty short and usually a day, maybe two days at the most, it was pretty clear what the thrust of the -- at least when it's the department that's involved, it's pretty clear what the thrust of the department's position is, and so you don't really need the finding and conclusion procedure that we're

accustomed to in nonjury trials, but if you needed it for some reason, leave it out there, and if somebody wants to request findings, let them request them and let them just follow the usual procedure, but for the most -- the appellant, if it's a parent, will know what he's facing from the judgment itself, and maybe this -- separating the two procedures would simplify it.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I do like the idea of the option, because as Justice Jennings pointed out, sometimes these are -- you don't want to complicate what the litigants have to do because sometimes it is a daunting process for some of the lawyers who are involved in that area. On the other hand, there may be instances -- and I think one of the things we have to contemplate is that there may be a use for those times when is neglect or abuse shown by poverty or by terrible things that aren't working in a house and sometimes the litigant will want the judge to establish what is the ground for the neglect or the abuse, because sometimes they may want to challenge those facts. So I think there is a place for them in the process, but it should be voluntary or perhaps in the exceptional case and shouldn't be so complicated that lawyers can't figure it out because it really is a very complicated process for all lawyers I think.

CHAIRMAN BABCOCK: Judge Yelenosky, then Buddy.

HONORABLE STEPHEN YELENOSKY: Well, here's my proposal, that we say that "The judgment shall contain findings of fact stated only in the statutory language." Because if you look at what we're calling grounds or findings of fact, usually when we refer to grounds we're talking about, you know, a statement of law of some sort. The grounds are based on whatever, but the statutory grounds uniquely in this context really are factual findings. For example, we wouldn't normally say that a ground for something is that somebody left the child alone. That's a finding of fact.

So in stating -- in -- I don't know if it's required to be in the order or not. I can't find it either, but it's clearly required to be in the petition, what are the statutory grounds that the state is proceeding on, and so in the judgment the court should be required to state which of those, if any, obviously, it is ruling on, and "in the statutory language" will necessarily provide a factual finding at the level of generality that we want. So I don't know how anybody could complain that they didn't get separate findings of fact if the judgment itself says that "I find by clear and convincing evidence that," quote, subparagraph whatever, "you voluntarily left a child,"

blah, blah, blah, or "that you abused the child," whatever it is. "It is both a statutory ground and a general finding of fact."

CHAIRMAN BABCOCK: Okay. Buddy, let's hear your comments and then let's move on to the next paragraph of 299b, subparagraph (a), for a brief discussion. Buddy.

MR. LOW: But the more we relate back to traditional findings of fact, the more chances for delay. I mean, like somebody requests and then we go back to that. Well, it's the child's interest and the speed that we're interested in, so calling it findings of fact and so forth may slow the process down. Now, the appellate judges, they keep talking about for appeal, but not everybody is going to appeal. They don't see the ones that aren't appealed, but that person is entitled to know and should know the grounds on which they lost parental rights. They may -- they don't have to appeal, but if they do know, if they state the grounds, as Judge Peeples said, and they can appeal that ground if they want to.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: A couple of final points then. Somebody is going to have to think through the consequence of all of this debate that's premised on eight statutory grounds for termination, when you move that over to the noninconsequential cases -- number of cases where we have

only managing conservatorship that is not based on a statutory laundry list and if we abandon findings of fact and conclusions of law, we have to do something about Rule 299, which has to do with omitted findings, because we have problems with omitted findings and deemed findings for nonjury trials just like we do jury trials, and that's fixed in Rule 299, and if we abandon the finding process, what do we do about amended -- omitted findings or deemed findings, and we haven't -- we haven't debated that. I've mentioned it several times. The focus of this debate has been on the termination cases, but there is a body of law out there on findings and conclusions that we're stepping away from when we abandon the finding and conclusion process, and we're either going to have to reinvent a parallel universe for this new world of findings inside a judgment or we're going to have to do it by rule.

CHAIRMAN BABCOCK: Okay. Richard, are you prepared to defend the next paragraph?

MR. ORSINGER: Okay. I'm prepared to --

HONORABLE STEPHEN YELENOSKY: Before you do that, can I respond to that? Richard, why is it a problem if you don't change the rule to -- if you change the rule to say, "In an order or judgment terminating parental rights" then you put aside all those orders or judgments that don't terminate, that just establish managing

conservatorship.

MR. ORSINGER: Well, then what do we do about the 85 -- we have to perfect an appeal and file a brief in an accelerated appeal before the finding of fact process is concluded, which is -- does not work, and so would you suggest that the task force proposals for an accelerated finding process apply to the state custody proceedings and that our findings and conclusions in the decree would apply to termination proceedings? Maybe that would work, but if we just leave managing conservatorship proceedings under the current findings process then we're having briefs filed before we even have findings in some cases, and that's -- that's a dysfunction that we need to try to fix, I feel like.

HONORABLE STEPHEN YELENOSKY: Yeah, I can see that. I'm just saying that one of the solutions may be -- because all of this discussion has been about orders in which we're trying to put grounds or findings and there is a termination, that it may be something you want to separate.

CHAIRMAN BABCOCK: Justice Jennings and Justice Patterson are not willing to let this thing go. Go ahead.

HONORABLE TERRY JENNINGS: I don't know if this would help solve the problem, but going back to what

Judge Pemberton said about the confusion between what we're talking about when we say findings of fact, would it be helpful to have a sentence, maybe a first sentence, saying, "In a suit for termination of the parent-child relationship the trial court shall state the grounds for terminating the relationship," and then I think the problem is, is you have in here, Richard, "shall file as findings of fact." Then you would start another sentence saying something to the effect of, "Upon the request of a party, the court shall make its finding of fact," which is the problem I think you were trying to solve all along, which is we want any additional findings made at the time a judgment is filed. Would that help solve the problem of distinguishing between the two, that we're talking about two separate things here? To the extent that a party wants findings, perhaps it could move ahead of time and say, "Look, if you're going to find against me, I'm going to want findings" -- "separate findings of fact," which I'm treating differently as a grounds for termination.

MR. ORSINGER: I think that the proposal has a lot of worth, but in a situation where you have a court-appointed representative or a pro se litigant and a managing conservatorship case, we don't want those people waiving their findings because they're ignorant or unable to request them in a timely way. So I feel like in the

government sponsored managing conservatorship cases, findings should be required, and if they're not going to be in a judgment then they ought to be required in a separate process, because there's too much waiver. I think.

HONORABLE TERRY JENNINGS: But isn't the parent getting -- at least they're getting in the rule -- they're getting their ground for termination and if they want to request additional findings.

MR. ORSINGER: Well, you're back to termination. I thought you were talking about managing conservatorship.

HONORABLE TERRY JENNINGS: No, I'm talking about termination. I'm sorry. We're talking -- again, I'm -- yeah.

MR. ORSINGER: Yeah. The idea that there is an optional finding process that stands in addition to the judgment containing findings seems perfectly all right to me as long as we say which one prevails over which in the event of a conflict.

HONORABLE TERRY JENNINGS: I hate to say it, but maybe a separate paragraph, one for termination cases, one for managing conservatorship.

CHAIRMAN BABCOCK: Justice Patterson, did you have anything else you wanted to add?

HONORABLE JAN PATTERSON: I'll let it go.

CHAIRMAN BABCOCK: Okay. Now, we've got this next paragraph which is -- deals with judges that are not going to follow the rule --

MR. ORSINGER: Okay. So --

CHAIRMAN BABCOCK: -- and we'll talk about that until our break, so you guys decide when our break is.

MR. ORSINGER: Okay. If I may by way of introduction, this is meant to parallel the existing practice that if you don't have findings you can request them, but it's on an accelerated basis. Obviously you don't need this paragraph if the findings are required to be included in the judgment and you're just going to rely on judgment rules. If the findings are omitted from the judgment then you would have to attack the judgment by some kind of motion to modify judgment rather than filing a reminder.

CHAIRMAN BABCOCK: Yeah. Fair enough. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, again, it's all dependent on needing it, and if the other things go through, we wouldn't, but it's confusing to me -- I'm not sure you mean what you say, because here I am the trial judge, and the first paragraph's told me I have to file the findings with the judgment, right?

MR. ORSINGER: Right.

HONORABLE STEPHEN YELENOSKY: And so I don't. Day one goes by, day two goes by. My staff attorney says, "Hey, you need to file those findings of fact," and I say, "Oh, yeah, I do," and then comes across my desk a reminder, and it is suddenly giving me an extra 15 days. I no longer have the pressure. Why do you want to do that? It seems to me you don't want to extend it by request. You simply want to say after X period of time if a judge has not filed findings of fact then you can ask the appellate court to order him or her to do it, and in the meantime if you want to refer to attorneys sending reminders to judges, that's fine, but it shouldn't extend it.

CHAIRMAN BABCOCK: Justice Christopher.

MR. ORSINGER: Well, if I can respond, we have to decide whether there is a reminder process at all, and if so, how many days does it take to trigger the reminder, and a lot of people would say that they want a reminder process, not a motion in the appellate court because sometimes it will be inadvertent and the trial judge will fix it for me.

HONORABLE STEPHEN YELENOSKY: I'm not saying you shouldn't have a reminder process.

MR. ORSINGER: So what's the time --

HONORABLE STEPHEN YELENOSKY: I'm saying the reminder should not extend it beyond whatever cut off time

you have.

MR. ORSINGER: What I'm asking you then is how many days would you suggest that we have to file the reminder?

HONORABLE STEPHEN YELENOSKY: No deadline. You just put a deadline saying -- because in the first paragraph you've told me as a trial judge I'm supposed to do this. Then you set a deadline by which if I haven't done it the appellate court can order me to do it. In the meantime if you want to refer to "counsel may send a reminder to the judge that it was supposed to be filed with the judgment," that's fine, but there shouldn't be any deadline for them to remind me nor should their reminder give me more time than I would otherwise have.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I agree. I would eliminate the reminder notice because that eliminates the trap of, well, you forgot to send a reminder notice, so now you don't get your findings of fact. So, you know, if we're going to make something totally different, let's get rid of all of those sort of ridiculous requirements that are in 296 through 299 now in terms of past due notices and you waive them if you haven't done everything exactly when you were supposed to do it.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Yeah, we ditched that in the -- in our last go round for the normal rules.

CHAIRMAN BABCOCK: Right. Right. Okay. Justice Patterson.

HONORABLE JAN PATTERSON: And my experience is that a lot of courts seem to wait for that second notice, because it does give them -- it does extend their time, and that may be actually where like 50 percent of the litigation is, is, "Well, I requested the judge" -- or you didn't, or the waiver. Very often there's a waiver argument that they didn't make that request, so I think that is a really troubled paragraph, and I've never understood where we got that from, and I wonder if -- if we eliminate that and if we say that -- in the paragraph above that findings of fact may be filed with the clerk so that leaves it open as to whether the findings can be in the original judgment or separate, that we provide that option, but I definitely agree we ought to get rid of the reminder. That's a trap.

CHAIRMAN BABCOCK: Okay. Any other comments on this paragraph? All right. We're on a break.

(Recess from 10:27 a.m. to 10:50 a.m.)

CHAIRMAN BABCOCK: In the house today is Katie Fillmore, who may be making comments. That's Katie back there.

MR. ORSINGER: And Katie is with the Supreme Court --

MS. FILLMORE: Commission for Children, Youth, and Families.

MR. ORSINGER: Permanent Supreme Court Commission for Children, Youth and Families, and Katie worked on our task force all the way and is really involved in these matters. She passed some very long notes during the morning debate, so we've now authorized her to share her insights with us directly.

Before we move on from the last subject matter, Carl Hamilton utilized the break perhaps more industriously than the rest of us, and he has found a provision in the Family Code that may help us on these managing conservatorship cases. It's section 263.403 of the Family Code. It's titled "Monitor return of child to parent," and it has to do with one of those situations where the child has come back up for review and the court can -- rather than either dismissing the case or rendering a permanent judgment the court can issue a temporary order, but if the court issues a temporary order, it's required to, and I quote, "include in the order specific findings regarding the grounds for the order." And they mention that later on, "If the court renders an order under this section, the court must include in the order specific

findings regarding the grounds for the order."

Now, what would be wrong with borrowing that language for final decrees involving -- appealable decrees involving child managing conservatorship for the state by saying that "Any order that fits that category of managing conservatorship to the state shall include in the order specific findings regarding the grounds for the order." That's language in the Family Code. I haven't heard any complaint that it doesn't work. It follows the debate that we had about termination, but obviously we don't have a statutory checklist that we can require be mentioned, but that's an alternative that seems to me to be very workable, and then the question is just how do you design the Rule 299b so that we have two tracks, one for termination cases and custody cases.

MS. SECCO: Can you repeat the section of the Family Code?

MR. ORSINGER: Yes. That was section 263.403, and it has to do with monitored return of child to parent, and I would like to thank Carl Hamilton for finding that, because Carl doesn't have many of those cases.

CHAIRMAN BABCOCK: We all thank Carl and wonder how in the world he did find it, but we'll leave that to another day. Okay, let's go to paragraph (b).

MR. ORSINGER: Okay. Now, remember that just

because there may be a consensus here that we're going to have all findings on termination cases in the decree that that doesn't foreclose the Supreme Court from having a finding and conclusion process that's independent, so we're going to follow that through. There was a strong feeling we should eliminate the notice of past due findings, and so I don't know whether subdivision (b) really is going to be necessary if we don't even have a reminder process, but somebody should have the right to complain if the court has failed to rule on an affirmative claim or defense that's important to them, and if we -- the task force is treating it like it's a separate finding, and we have an ordinary process of amending or requesting additional.

If we put them in the decree then we either have to allow a separate rule process for requesting that the findings or conclusions in the decree be amended or we don't have it at all, and we just say if you don't like the decree, including the findings in the decree and including the conclusions in the decree, then Rule 329b let's you file a motion to modify judgment, so go over there and handle it in the judgment arena rather than this fact finding process which we have now discontinued for these kind of cases.

So this is -- you will see this is the very same process about additional or amended other than the

timetable is accelerated. We have the same issue about serving on the party in accordance with Rule 21a. There was a proposal Justice Christopher made that you ought to be able to hand it to them if they're in court or you ought to be able to e-mail it to them, and there has to be deadlines if there's going to be a -- there must be a deadline to request amended or additional findings and conclusions, and there must be a deadline to respond to them. So I'll open that up, I guess.

CHAIRMAN BABCOCK: Okay. Any thoughts about that? Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: Well, on that mailing business, I looked and for -- this may be a slight digression. I don't think so. I think it's within the issues that you're raising, but on the mailing issue the provisions of Rule 306(a) that talk about providing notice of the judgment, provide for mailing by first class mail, you know, in an envelope, not in some other manner. The current rules on findings of fact that have to do with the findings themselves being provided provide for mail, just as your original draft says, and I suppose mail normally meant to most people first class mail and not e-mail and not third class mail. So I would suggest on the mail business that we make -- that we say "first class mail" and then maybe some -- and then maybe some other things, which

will make this rule a little bit inconsistent with the -- with the 296 through 299 rules, but we can worry about that later.

CHAIRMAN BABCOCK: Okay. Any other comments? Judge Yelenosky and then --

HONORABLE STEPHEN YELENOSKY: Are you suggesting that we do require it to be by mail or that we start with that and then list other things?

PROFESSOR DORSANEO: Well, I just was -- mail is what we -- what -- and I think that means first class mail, is what we go by. We don't use Rule 21a because this isn't exactly a notice or a pleading or something covered by 21a.

HONORABLE STEPHEN YELENOSKY: And you're not speaking of the earlier part of the rule where the court sends the findings. We didn't resolve that, I guess. There was some talk about whether that should say "mail."

PROFESSOR DORSANEO: No, but to me, saying "mail" there is consistent with the way -- consistent with the way the findings rules operate now.

HONORABLE STEPHEN YELENOSKY: And in practice, though, if we fax it nobody complains.

PROFESSOR DORSANEO: Yeah, the biggest problem is when you don't fax it or send it, which happens a lot, because then your time runs out to do anything about

it.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just wanted to say one more thing about the, you know, past due notice. If the Court does decide to keep the past due notice in there, it's unclear for me whether the failure to request a past due notice has any effect and whether you can still ask the appellate court for an order if you haven't done the past due notice. So although I still think we should eliminate it, that seems like it's a hole right there.

MR. ORSINGER: Well, I agree totally. We do not want waiver because we can expect poor compliance, and I don't know where you would say that this is the requirement but you don't really have to follow it because it doesn't hurt you if you don't, but maybe we ought to just all agree that we won't affirm based on the failure to comply, but I also --

HONORABLE TRACY CHRISTOPHER: But there's old case law that says you're out of luck.

MR. ORSINGER: I know. That's why we might need some new case law. I'm hoping we don't need another 10 years of all the ins and outs of the Alice In Wonderland of Rule 296 stuff.

Let me also point out that the -- we skipped over the paragraph 299b(a) second subdivision, which says that the remedy for the court failing to give you findings is to file a motion with the court of appeals. That's kind of radical. Initially the people on the task force wanted a mandamus, which is unnecessary, and so I think the view was, look, it's a simple fix. The way it's done right now, if you are careful enough to see your deadline and remind the court that they didn't and the court still doesn't give it to you, then typically you put it as a point of error in your brief, and sometimes the appellate court will say it's unnecessary to the appeal, so it's harmless error. Other times they'll say, "We can't decide the appeal so we're going to abate the appeal and remand it to the trial court to forward findings." So then you get to rebrief the whole case.

Well, we don't want that. We want it fixed before the finding is filed, and so our thought is, look, if the appellate court has jurisdiction and if the judge isn't playing ball, why don't we just file a motion with the court of appeals and get it ordered and then the judge will play ball, and then you'll find out there was an e-mail that we'll have to discuss at the end of this process that it should state that the motion with the court of appeals must be filed after the notice of appeal is

filed, because I don't think the appellate court has jurisdiction of a motion other than ancillary to its appellate jurisdiction, which is triggered by the filing of the notice of appeal. So we'll come to that in a minute, but we've kind of skipped the seriousness of that, but that's a large departure from current practice, is that you just file a motion and complaint and you get an order right away in two or three days, and then the trial judge is going to be held in contempt if they don't give you findings, so we regress there, Chip.

CHAIRMAN BABCOCK: Oh, I don't think it's regression.

HONORABLE JAN PATTERSON: Why did you reject mandamus?

MR. ORSINGER: Because that requires somebody who's probably never handled an appeal, much less a mandamus, to do a mandamus and get it all right.

HONORABLE JAN PATTERSON: Okay.

MR. ORSINGER: And the first two or three or four or five mandamuses you file you don't get right, and so that means the clerk calls you and says the staff attorney tells you you didn't do this, you didn't do that. Why do we need all that? All we want is some findings from a judge whose job it is to give them to you. So the idea is, look, it's not a big discretionary deal. You don't

need a reporter's record to decide. You've either got the findings or you don't. If you don't, you need some kind of letter, order, private telephone call, something from the court of appeals to the trial judge saying "Get with it."

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Richard, if I understand the timing of the reminder notice and provisions, that's going to have to occur -- the trial court's ultimate failure in that responsibility is going to have to occur more than 20 days after the date the final order was signed, and therefore, the appeal will have to have been perfected by that date because it's an accelerated appeal, notice of appeal due in 20 days.

MR. ORSINGER: Okay. So that means if they perfect their appeal on time and don't request an extension or whatever then you're saying it automatically follows that the motion to the court of appeals will be later than the perfection date. Okay. Well, that's --

HONORABLE TOM GRAY: It seems to be mathematically impossible to do it otherwise, but --

MR. ORSINGER: Okay. Then maybe we don't need that. You'll see. It's not in the task force report, but there was, if you will, an undercurrent of minority view that we should put a little sequence in there. We'll discuss that later, but perhaps it's not necessary.

HONORABLE STEPHEN YELENOSKY: But you still need to note that point because the Supreme Court could decide that the numbers should be less than those.

MR. ORSINGER: Okay. Well, we have an e-mail on that that I was going to take up later. We can take it up now, but it hadn't been passed out yet.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, this particular rule says "after an appeal is perfected." I think the e-mail that you're talking about is in reference to a different motion.

MR. ORSINGER: Well, then I withdraw it then.

HONORABLE TRACY CHRISTOPHER: So, I mean, this one specifically says "after an appeal is perfected," so it's not --

MR. ORSINGER: Good. I'm glad you pointed that out. I'm wrong. I brought the other debate into this one, and we didn't need it. I apologize. "After an appeal is perfected," which may be unnecessary Justice Gray says.

PROFESSOR DORSANEO: Doesn't hurt anything.

MR. ORSINGER: No, it certainly doesn't. And this is a recipe for someone that may be doing their first appeal, so --

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Just one other thought. I like the idea of the motion. If you eliminate the past due notice, you might serve a copy of the motion on the trial court judge, just so he knows or she knows that, oh, I have forgotten to do this and I better start working on it.

MR. ORSINGER: Well, it certainly is consistent with the view that we should try to fix the error in the trial court before we complain to the court of appeals, and we're sort of giving that up in the acceleration process, but we certainly don't want an additional delay with a judge who is noncompliant in a directive that was not discretionary to begin with. So that's well-taken, that it -- you don't require first notice to the judge, but you require that a copy of your motion to the court of appeals be given to the judge, and that gives them a day or two to comply before they get rebuked by the appellate court.

CHAIRMAN BABCOCK: Good point. Okay. Any other comments about this? All right. Now the easy stuff is behind us, let's go to Appendix B.

MR. ORSINGER: Okay. So, now, when the Legislature in House Bill 906 says it's going to be an accelerated appeal, that is very meaningful, but there's a lot of implications to that, because there are different

kinds of accelerated appeals; and some of them are in the accelerated appeal rule and some of the applicable provisions are not; and accelerated appeals are confusing; and they have different dates; and statutes have different deadlines on different accelerated appeals; and it's not the easiest thing in the world to figure out when to perfect your accelerated appeal, when your motion for new trial is due, when your reporter's record and clerk's record is due, when your brief is due; and it was our view that there will be a lot of lawyers that are looking at the Rules of Appellate Procedure for the first time on an extremely short deadline and the best thing we could do for them would be to create a new subdivision of the appellate rule on accelerated appeals that contains everything they need to know; and if we don't repeat it, we cross-refer to it so they know where to look, because right now, you really do have to look through three or four rules to figure out what all your deadlines are on an accelerated appeal.

The first thing that's's mentioned in Appendix B is the mandate, and that's really the last thing we considered, but mandates are issued by the court of appeals if there's no appeal to the Supreme Court or if the Supreme Court denies review. If the Supreme Court reverses or affirms then the mandate comes from the Supreme Court.

Somebody correct me if I'm wrong.

MS. SECCO: That's right.

MR. ORSINGER: Okay. So one of the delays that apparently the courts of appeals have experienced as a practicality is that the mandate does not come out as soon as it could, and that reason for that may vary from court of appeals to court of appeals, but the truth is the judges sign an opinion that states their ruling on the issues and then they remand for further proceedings consistent with this opinion, and then it's somebody else besides an appellate judge has to write a judgment. I think. I've never served on an appellate court, but correct me if I'm wrong, and then after the judgment is written then somebody has to do a mandate which excerpts the controlling part of the judgment, and it's actually the mandate that goes back to the trial court clerk, and the mandate is what they're supposed to follow, not the judgment and not the opinion.

And so there's a drafting process that's associated with this, and judgments and opinions are handed down on the same day, in my experience, but mandates always occur later, and there's always a backlog, and there's unnecessary delay. It's just pure administrative delay on the mandates, and there are deadlines on mandates right now, but from what I'm hearing they're not necessarily observed uniformly across the state. So one of the things

the task force thought we could do was to really tighten up the mandate delay, and we discussed all these different rules and different dates, and I think that the ultimate conclusion was that all we should do is say the mandate should be issued very quickly and not put in a very specific date deadline.

So Rule 18.6 says that "In cases subject to Rule 28.4 the clerk shall" -- that rendered the judgment -- "the clerk of the court that rendered the judgment must issue the mandate on the first date that may be issued under Rule 18.1." And Rule 18.1 then is going to be a general mandate rule, and so we didn't change any timetables. We just reminded everybody that the rule is not the first day when you can send the mandate. It's the last day when you can send the mandate. So that's all there is on that.

CHAIRMAN BABCOCK: Okay. Any comments on that?

HONORABLE TOM GRAY: There are some different procedures within the courts of appeals on how judgments get written and approved, and they're not all like Richard described, but not that would substantively affect this and --

CHAIRMAN BABCOCK: Does that impact how the language of this 18.6(b) should be written?

HONORABLE TOM GRAY: No, I was trying to find -- the Court of Criminal Appeals just modified their rule on mandates, and I was -- I don't think I wound up with that here, but I was trying to compare what they did. There's --

CHAIRMAN BABCOCK: What rule book is that in?

HONORABLE TOM GRAY: Well, it's in the Rules of Appellate Procedure, but they just ordered it I think last week; and what happened, there was a rule that, as y'all may or may not know since most of y'all practice in the civil arena, in the criminal petition process the petitions used to get filed with us and then we would forward that to the CCA; but we had a -- it used to be a 30-day and then it changed to a 60-day window in which we could modify the opinion after the petition was filed with the -- with us and before it was forwarded to the CCA; and in changing the rules and the issuance of the mandates, there are -- where the petitions would get filed now with the Court of Criminal Appeals, they don't want us issuing the mandate while the petition is filed or pending at the higher court; and they modified their rule on that; and I don't remember exactly how it would work into this; but I don't think it's going to impact what we're doing here on the mandates.

CHAIRMAN BABCOCK: But you're saying the

Court of Criminal Appeals amended or supplemented 18.6 of the TRAP rules?

MS. SECCO: No, I'm looking at it right now. It's Rule 31.4, stay of the mandate.

HONORABLE TOM GRAY: And it's a rule that's particular to criminal cases.

MS. SECCO: Criminal cases.

HONORABLE TOM GRAY: And also, Richard, there is a provision that it's the -- the mandate requires the lower court to enforce or the trial court to enforce the judgment.

MR. ORSINGER: Of the appellate court?

HONORABLE TOM GRAY: Of the appellate court.

MR. ORSINGER: Okay. Then I misstated that.

HONORABLE TOM GRAY: But it doesn't affect what you're proposing as a rule change.

MR. ORSINGER: Okay. I got out on thin ice when I was talking about how the courts of appeals -- I just see it from the standpoint of a practitioner.

CHAIRMAN BABCOCK: That's okay. We'll pluck you out of that freezing water. Keep going.

MR. ORSINGER: I'll try not to go out on thin ice again. Now then, Rule 20 is something that we've already visited because it was part of the September 1 proviso, but it has to do with the presumption of

indigence, and I don't see any reason to discuss that again unless somebody else has a new insight.

CHAIRMAN BABCOCK: Gene. New insight.

MR. STORIE: The only thought I had was maybe to say "contested" rather than "challenged," just to match everything up.

MR. ORSINGER: Okay. Let's think about that. I don't know if the word "challenged" is there because it's in another rule or because it's in a statute or whether we just picked it.

MS. SECCO: I think we used the word "challenge" or the task force used the word "challenge" because it's in Rule 20.1. The current Rule 20.1 on contest to indigence uses challenge when there's a contest to the affidavit, so we just used the same language for the presumption, but that doesn't mean it's the best language.

MR. ORSINGER: Or maybe both rules should be changed, but they probably shouldn't be inconsistent.

MS. SECCO: Right.

MR. ORSINGER: I mean, they wouldn't conflict, but they would not be the same word for the same concept.

MR. STORIE: Right.

CHAIRMAN BABCOCK: Keep going.

MR. ORSINGER: And we furthermore, we call

that a contest. Even though it can be challenged, in the next two sentences they're called a contest.

MR. STORIE: Right.

MR. ORSINGER: You see that, Marisa?

MS. SECCO: Uh-huh.

MR. ORSINGER: Yeah. So we ourselves in the same rule are describing it differently, and then here in the top of page 15, "The party filing the contest must prove that the parent," so at any rate, there you have it.

CHAIRMAN BABCOCK: All right. Keep going.

MR. ORSINGER: We will -- let's process on through the rest of that rule because that's all behind us. Now we'll go onto the real --

CHAIRMAN BABCOCK: Professor Dorsaneo has a comment.

MR. ORSINGER: Oh, you do? Okay.

PROFESSOR DORSANEO: I wanted to -- that second paragraph under (e), "The contest must articulate" -- pretty good word there instead of "state" -- "facts showing a good faith belief that the parent is no longer indigent," does that good faith come from -- is that some kind of a statutory requirement or I'm wondering about "good faith" being in there.

MS. SECCO: It's not in the statute that provides for this challenge procedure, which is -- I'll

have to look at the bill really quickly.

PROFESSOR DORSANEO: I looked. I didn't see it myself, but that doesn't mean it's not there.

MR. ORSINGER: It may be in the Family Code because originally this contest procedure was described only for the appointment of a trial lawyer, not an appeal. We're just piggybacking on it.

MS. SECCO: It's in section 107.103 of the Family Code as amended by -- and it just states that "A parent is presumed indigent unless the court determines that a parent is no longer indigent due to a material and substantial change," but it does not say anything about good faith.

PROFESSOR DORSANEO: Well, we're talking about this contest being done by a clerk, a court reporter, a court recorder, you know, some governmental person.

MR. ORSINGER: What we were told is that in these kinds of cases the reporter will be paid by the county, so it is unlikely that the reporter would file a contest in this kind of case. I was unclear whether the clerk's record would be paid for independently other than by the same county, and so I think that the feeling was it would likely be the county attorney who was filing the objection to -- pardon me, the contest or was contesting or challenging the continued indigency. So it's likely going

to be a representative of the county but not the court reporter.

MR. JACKSON: Where does it say --

CHAIRMAN BABCOCK: Hang on. David Jackson.

MR. JACKSON: Where does it say that in the rules, though, Richard? The only place I can find where anybody else is responsible for the record is Rule 20.02, and that's in criminal cases.

MR. ORSINGER: I do not know the answer to that. All I can tell you is that the county attorney that was on the task force said that the county is required to pay for it. Now, if she's wrong then I'm wrong.

MR. JACKSON: That's the only place I've been able to find that we get paid by anybody, is in a criminal case.

MR. ORSINGER: Well, do you know whether it's a practice that the reporter is paid for these records?

MR. JACKSON: Well, that's why it's in the rules that we can object to it. I mean, that's been kind of an issue that's been ongoing for decades in indigency cases.

MR. ORSINGER: Well, David, let me be sure. Are you saying that there's a gap in the rules or statute or are you saying --

MR. JACKSON: Well, in some --

CHAIRMAN BABCOCK: Don't talk over each other. Hang on.

MR. ORSINGER: Are you saying that there are instances in which court reporters are not being paid for these kinds of indigency records?

MR. JACKSON: Right. If they're truly indigent, the court reporter pays for it. The court reporter pays somebody to transcribe their notes or does it themselves and doesn't charge anyone.

MR. ORSINGER: Okay. That's completely contrary to what the task force understood.

MS. SECCO: I think that it's in the Family Code --

MR. JACKSON: If it's in there --

MS. SECCO: -- requiring the county to pay for the record for an indigent party.

MR. JACKSON: Can you tell me what rule it is? Because if it's in there, Richard's right, we don't need to have any issue with it.

MS. SECCO: Section 109, and Katie Fillmore is here with the children's commission. I just asked her.

MS. FILLMORE: 109.003.

CHAIRMAN BABCOCK: Of the Family Code?

MS. FILLMORE: Uh-huh.

MR. ORSINGER: What does it say, Katie, for

those of us who don't have it? Can you read it out?

Okay. 109.103, "Payment for statement of facts," subdivision (a), "If the party requesting a statement of facts in an appeal of a suit has filed an affidavit stating the party's inability to pay costs is provided by Rule 20, Rules of Procedure" -- "Appellate Procedure and the affidavit is approved by the trial court, the trial court may order the county in which the trial was held to pay the costs of preparing the statement of facts. (b), nothing in this section shall be construed to permit an official court reporter to be paid more than once for the preparation of the statement of facts." So that's a "may." By the way, you don't object to (b), do you?

MR. JACKSON: No.

MR. ORSINGER: That's a "may" and not a "must," so it may be that it's the county commissioner's decision whether to pay the court reporters and they're not actually required to, but they just happen to in Houston.

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: I'm going back. So you said the county is the one that challenges if it's not going to be the court reporter, and I guess if the court reporter is not getting paid in a particular place, the court reporters will challenge, but you said the county. How does the county get the right to contest? Is the

county in some way a party?

MR. ORSINGER: Well, the county attorney is the lawyer who's prosecuting the case for the Department of Family and --

PROFESSOR DORSANEO: Protective.

MR. ORSINGER: -- Services.

PROFESSOR DORSANEO: Yeah. So -- all right, so you talk the Department of -- I have to look myself -- Family and Protective Services, it's talked into making this contest by its attorney?

MR. ORSINGER: No, what we are told, and I do not litigate these, so I can't speak from personal experience, but what we were told is that it's the county attorneys that file it if anybody files it because the clerk -- the county pays for the clerk's record no matter who pays for it. The reporter is paid by the county, so it's only the county attorneys that do it, and some counties are aggressive about that, and some counties are not aggressive about that, is what we understood.

PROFESSOR DORSANEO: Okay. But in that sentence that I started talking about, I suggest that "good faith" be -- we talk about whether "good faith" should be in there, because "good faith" in this context seems to me a little bit out of place, and it seems to me it ought to be an objective test as to whether somebody is no longer

indigent, okay, which ought to involve things that can be added up perhaps, and I also object to the use -- to articulating things because I think that means the same thing as "state," but maybe articulating is a --

MR. ORSINGER: What if it's an inarticulate statement?

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: The county appears -- the county attorney appears on behalf of the district clerk, and it's often a different lawyer, different -- in a county as large as ours it's a different department of the county attorney's office. It's not somebody representing the DFPS, and often -- or sometimes this contest is a form that they file and -- in which they say, "The affidavit of indigency doesn't comply and it doesn't state specific facts," so to the extent that y'all have recommended the good faith belief, I don't think that's such a bad idea because I know for a while it was just the routine in some sorts of cases in Harris County that if an affidavit of indigency was filed, a contest, a form contest, was automatically filed in response. So to encourage a review and a thoughtful decision about whether or not to contest indigency, I think the "good faith" sentence in there is good.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Maybe "good faith" means honesty in fact, doesn't it? So is that what we want to litigate, is whether these people are liars?

MR. ORSINGER: You know, we gave some consideration to requiring that the contest be under oath, et cetera, et cetera, but this contemplates that there's going to be a hearing with sworn testimony, and so, you know, you could argue that if a contest was filed in bad faith and the evidence made it clear then the court has the sanction power if it wishes, and that good faith may or may not make it any different from what you would have at the end of a hearing where something was advanced in bad faith or without attention to the true facts.

CHAIRMAN BABCOCK: Justice Christopher, and then Justice Gray and Justice Patterson.

HONORABLE TRACY CHRISTOPHER: Well, I'm hopeful that since we already have a presumption of indigence that these contests will be few and far between, but what I would like is that the rule would say that the contest must state specific facts showing that the parent is no longer indigent. Otherwise, the pleading will say, "The parent is no longer indigent due to a material and substantial change in the parent's financial circumstances." There won't be a single fact in there.

MR. ORSINGER: Is it practical that the

person who may be making the contest will even have access to the facts?

HONORABLE TRACY CHRISTOPHER: Then they shouldn't be contesting it on the grounds that there was a substantial and material change unless they have the facts.

MR. ORSINGER: Well, I mean --

HONORABLE TRACY CHRISTOPHER: And that's our problem with the boilerplate that happens.

MR. ORSINGER: From the court reporter's side, though, if, in fact, court reporters do file these because judges may but are not required to have the county pay, if they, I guess, sat through the entire trial then perhaps they would be aware if they -- if the testimony revealed that they had assets that were more than what the trial court originally thought, but if a court reporter is there for just a few days, didn't hear the whole trial, I mean, requiring a factual predicate in advance of triggering the hearing, does that adequately protect the people whose resources are being called upon, would be the question. That's what we considered.

HONORABLE TRACY CHRISTOPHER: Well, there's no discovery in these contests, so basically everybody just shows up and has a contest, and you know, if you don't require them to have some sort of factual showing, they'll contest everything, and then you'll have to have a hearing

on every single one, at which point the parent will say, "I have no facts, I have no cash, I have no job, I'm still poor," and the court reporter will say what? I mean, you know, I mean, that's why I think they ought to have the facts ahead of time. They ought to know that she's got a bank account or they ought to know that she has a job or, you know, something. They ought to know those facts ahead of time before they file this.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Nice discussion, and it may or may not be something that you can get to, because the contest has to be filed within three days of the notice of appeal, and there's no provision that the court reporter be provided with the notice of appeal, so they may not even know that it's happened. The clerk may get a copy of the notice of appeal, but not necessarily, because -- immediately, because the notice of appeal may get filed with the appellate court instead of the trial court. So it's going to be real easy for that three days to disappear before anybody that wants to contest it is there.

The only one of these that I have ever seen successfully contested in our court, the indigent parent tried to negotiate with the court reporter to trade some antique furniture that she had leftover from when she went out of the antique business for the -- for the record and

so the reporter contested the indigent status at the appropriate time, and they had found a reference in the county clerk's office to a piece of property. They didn't run the record and see how much the indebtedness on the property was, and this may or may not factor into this notice and contest provision, but the -- it was fairly obvious to me as I wrote my dissent that the parent or previous parent whose rights had been terminated had no present financial ability to pay for the record.

Now, we might could have abated the appeal while she sold the antique furniture or sold the piece of property and tried to convert it to cash to pay for it, but it just wasn't there; and so ultimately we wound up abating it for another hearing on indigency, and the new trial judge determined that she was indigent; and it went on, but it -- they don't happen very often; but when these contests occur, they do take up an inordinate amount of time in the appellate process because, as you would expect, the reporter or if it's the court clerk that's doing it, they don't start the record until they get the financing worked out; and this is just a very time-consuming process once you get off into that; and given the unlikelihood of someone recovering from this presumption, I'm with Judge Christopher that anything we can do to make sure that the contest is a real contest we need to do it, because this is

a black hole for time on these cases.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I agree. We're talking -- the reason we have the presumption is to avoid delay, and this is also a second stage of the indigency analysis, so it should contemplate some material change in circumstances that can be shown by facts and not a good faith assertion, and so I would urge the contest must state facts demonstrating that the parent is no longer -- and I think it's going to come out at the trial or there will be some knowledge or -- but it should be -- should have some basis in fact.

CHAIRMAN BABCOCK: All right.

HONORABLE TERRY JENNINGS: I have a question.

CHAIRMAN BABCOCK: Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: Refresh my memory here. Does this new presumption of indigency that's ongoing, the trial court sua sponte can't say, "I hereby find you're not indigent anymore" under the new law? I've seen situations where someone was appointed counsel for trial and then the trial court will sua sponte say, "You're on your own as far as the appeal goes," which I thought was part of the problem the presumption language in the new statute was supposed to get rid of.

MS. SECCO: It does say -- the statute

specifically says "unless the court after reconsideration on the motion of the parent, the attorney ad litem, or the attorney representing the governmental entity," so it contemplates that there's a motion filed by one of those parties, although --

MR. ORSINGER: They don't list the clerk or the court reporter, do they?

MS. SECCO: No. Well, they do say "an attorney representing the governmental entity."

MR. ORSINGER: Well, but I don't think the court reporter would be covered by that. The clerks might be. What section are you reading?

MS. SECCO: Section 107.013. The rule was written in the passive rather than stating who the challenger would be, and I think there was some confusion about who -- you know, who was contemplated to be a challenger.

HONORABLE TERRY JENNINGS: I think the law as it is, can't a trial court say -- and I know we're not talking about the appointment of counsel, but under the law as it currently reads can a trial court continue to sua sponte say, "Okay, well, I appointed you a lawyer for trial, but you're on your own as far as appeal goes"?

MS. SECCO: Nothing specifically says anything about the court acting sua sponte. I don't know

that there's anything in the statute that would prevent a court from doing that sua sponte and just say, "The court determines that parent is no longer indigent." So I could think of a circumstances where the court could still sua sponte determine that the parent is no longer indigent because of a material and substantial change.

MR. ORSINGER: As a practical matter, the trial itself, the evidence at a trial may reveal that there's been a change since the original indigency determination, and the way I read the previous existing law was sua sponte motion -- sua sponte ruling by the court would be okay, but under this amended language it appears to be that the presumption can be overcome only upon a motion filed by one of three types of people, and so to me that's much narrow -- much more narrowly drawn than the law before. So that presents the question of whether we can even include court reporters by rule and assuming we intended to.

CHAIRMAN BABCOCK: Okay. Any other comments about this? All right.

MR. ORSINGER: Okay. The remainder of that presumption of indigence is just to reflect the exceptions that need to be stated in other global statements and then you get down to subdivision (i)(5), which is an accelerated disposition in the trial court. If the court sustains a

contest then the unsuccessful party can seek review by a motion filed in the appellate court without advance payment of costs, so I just amend what I just said. This is what you do in the appellate court after you lose a contest, and there was -- the task force was divided on the question of whether the government should even be allowed to appeal a negative ruling on a challenge, and I'd say probably half the people on the task force felt like the government should just take their lumps from the trial court and have no appellate review and the other half felt like there are situations sometimes where trial judges have a record of appointing certain people for these kinds of tasks and whatnot and that if there is an abuse of discretion that the government should be able to appeal and ask the court of appeals to consider that. So this amended rule is written as if either side can appeal, either the contesting party or the noncontesting party, but the task force was divided on that, and I want to present that question here, because our drafting of this was very closely the opposite of what it was.

MR. MUNZINGER: Which rule are you talking about right now, Richard?

MS. SECCO: (i)(5).

MR. ORSINGER: I'm talking about Rule 20.1, subdivision (i), subdivision (5), on page 15 of the task

force report.

MS. SECCO: I'll just correct Richard quickly.

MR. ORSINGER: Please.

MS. SECCO: I think right now the task force took out the provision that addressed --

PROFESSOR DORSANEO: It's not there.

MS. SECCO: Right.

MR. ORSINGER: No, I was saying that this report doesn't prohibit the government from appealing. Right?

MS. SECCO: Right, but the rule currently doesn't address it. That rule is only the review and order sustaining the contest.

MR. ORSINGER: What I'm saying is it could have as easily be drafted to preclude it because about half the task force wanted to do it that way, and the person that drafted this just exercised some editorial prerogative.

CHAIRMAN BABCOCK: Would that be you?

MR. ORSINGER: Yes, that would be me.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Well, I think the government ought to have the right to appeal it. These are times when people are very, very concerned about their tax obligations

and about the ability of government to pay for itself. If we're honest with ourselves, we know that there are trial courts around the state who have certain predilections and certain attitudes, and why would you deprive the government of the right to appeal to preserve the taxpayers' funds? I think it's short-sided and wrong.

CHAIRMAN BABCOCK: Don't get too worked up about this.

MR. MUNZINGER: I'm finished.

CHAIRMAN BABCOCK: Justice Bland. Justice Bland.

HONORABLE JANE BLAND: If the intent is to have any unsuccessful party appeal then the first -- the first part of the sentence, "if the court sustains a contest," that means --

MR. ORSINGER: Yes.

HONORABLE JANE BLAND: -- if the government entity wins.

MR. ORSINGER: Yes.

HONORABLE JANE BLAND: So you would have to fix that.

MR. ORSINGER: We would.

HONORABLE JANE BLAND: As far as taxpayer resources, it's an open question to me whether the cost of preparing a clerk's record and in most instances a pretty

short reporter's record is not far, far outweighed by the amount of clerk, lawyer, and judicial resources spent resolving these things at the expense of the delay of resolution of a child's placement in a home. I will just give you the other side of the coin on that.

MR. ORSINGER: So I need to amend my introductory statement, as Justice Bland has pointed out. Actually, this is written that it's only the party who -- the indigent party who will be appealing under this introductory clause, not the government, so it's the opposite of what I just said then, which is if the court sustains the contest that means that the indigent gets no free record and, therefore, only the indigent will be appealing as this is written. If we want to give the government the right to appeal then we should say "when the court rules on a contest" or make some kind of neutral statement that's not outcome determinative.

HONORABLE JAN PATTERSON: And change the title.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I may be overlooking a nuance here, but the last sentence doesn't seem to specify the date by which the record to appeal the indigency determination should be filed, and I think it should specify it. That's why I'm talking about these things can

become black holes of time.

MR. ORSINGER: Could you restate that? I didn't understand that.

HONORABLE TOM GRAY: It provides for the filing of the record from the indigency hearing, the last sentence of the rule as proposed.

MR. ORSINGER: Right.

HONORABLE TOM GRAY: It doesn't say when to file it.

MR. ORSINGER: What would you suggest? How much time? Three days?

HONORABLE TOM GRAY: I mean, these things are going to be really, I would hope, really short. Three days, five days, maybe three business days if you want to, you know --

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: Is there any problem about "after perfection of the appeal" in this first sentence? "The appellant must file the affidavit of indigence in the trial court with or before the notice of appeal." I mean, does that -- it's just not a problem? Is there going to be -- are you contemplating there's going to be a pending appeal? Remember, we talked about before where you put that --

MR. ORSINGER: Well, Bill, you know, there

may not be a pending appeal if the contest is overruled and the person doesn't have the money to pay for it and doesn't have the free lawyer to do it, but I don't think the appellate court has the jurisdiction to grant a motion unless it has appellate jurisdiction to begin with.

PROFESSOR DORSANEO: Unless we just change that.

MR. ORSINGER: Well, we better not change that. I mean, there's too much --

PROFESSOR DORSANEO: Why don't you put in there "after the perfection of the appeal" in the first sentence?

MR. ORSINGER: Where would that go?

PROFESSOR DORSANEO: First sentence of --

MR. ORSINGER: Where in the sentence would it go?

PROFESSOR DORSANEO: After the first part, "the court sustains the contest." "After the perfection of the appeal the unsuccessful party may seek review," or put it there, "of the court's" -- you know, "of the court's order by filing a motion." I don't care. It could go lots of places that it would be all right with me.

MR. ORSINGER: We ought to call it "filing the notice of appeal" just so the people who don't know how to perfect it know what to do after filing the notice of

appeal. Are you all right with that?

PROFESSOR DORSANEO: (Nods head.)

MR. ORSINGER: Marisa, I'm afraid that I might have convoluted the record on this issue about the government appealing.

MS. SECCO: Yes.

MR. ORSINGER: Would you straighten that up?

MS. SECCO: Sure. All I wanted to say about the current rule is that it doesn't address when the government -- the government's ability to appeal it. We just took that provision out because the task force couldn't decide on it, so the current rule only contemplates an order sustaining the contest, an appeal of the order sustaining the contest, and we don't -- right now there is just no rule. So we were leaving that up to the advisory committee to make that recommendation, so I just don't want anyone to be confused about why this only says "order sustaining contest." Previously in the first draft that was done by the task force, there was a paragraph (6) which stated that an order -- and I can't remember the language that was used, but, you know, an order that was denying the contest basically would have to -- was not appealable.

CHAIRMAN BABCOCK: We haven't voted on anything in a while. I feel a vote coming on. How many

people think that the government should have the right to appeal?

HONORABLE DAVID GAULTNEY: May I ask a question first?

CHAIRMAN BABCOCK: Yeah, question first from Justice Gaultney.

HONORABLE DAVID GAULTNEY: Richard, are we just talking about the cost of the reporter's record and the clerk's record? I mean, you're not talking about entitlement to an attorney, are you? Is that something that's being determined by this affidavit as well?

MR. ORSINGER: Yes. This is the way you overcome --

HONORABLE DAVID GAULTNEY: So that's -- so if the trial judge determines the person is indigent, he gets an attorney, and he doesn't have to pay his -- he doesn't have to pay the appellate court costs. The question is does the government get to appeal not only the court reporter's costs and everything, but the entitlement to an attorney?

MS. SECCO: Yes.

HONORABLE DAVID GAULTNEY: Is that the issue?

CHAIRMAN BABCOCK: Right. That's the issue. Pete.

MR. SCHENKKAN: And before we get to the vote

on that, it would help me in understanding this if I could get some kind of a feel for what the risk of abuse of giving the government the power to appeal this would be. I'm kind of thinking, without any knowledge of this context, that the risk would be small that the government wouldn't bother with an appeal of one of these things unless they had a pretty strong reason because they're going to make the appellate court pretty mad by taking up some time with a marginal or frivolous appeal of an indigency determination. Is that wrong?

CHAIRMAN BABCOCK: Justice Christopher. Are you angered by this?

HONORABLE TRACY CHRISTOPHER: I would like to point out that on the criminal side there is no appeal of an indigency finding, so, you know, so that's number one, and secondly, at least in Harris County the -- it was the policy of the county attorney to file a contest to absolutely every affidavit of indigency, period, without knowing anything about the person or their factual circumstances, whether they had assets, et cetera. Despite constant scolding from some judges, they kept filing.

CHAIRMAN BABCOCK: Know any people like that?

HONORABLE TRACY CHRISTOPHER: And so given that history, I would say that there could be a possibility of abuse.

MR. SCHENKKAN: Answered my question.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, and that's not really what we're focusing on here, because what we're dealing with is the right to appeal, and we're talking about the right to appeal of indigent persons, and their ability to effect their appeal or bring their appeal forward with a record and hopefully with counsel, and so that's not really the focus here is on the government's point, and Judge Bland's point is very well taken that you have to -- to the extent that you want to bring that into the equation, which I don't know that it's proper to bring it into this equation, but to the extent you want to bring it into the equation you have balancing test of, well, we are trying to do this efficiently and expeditiously because there's a child sitting in limbo. So let the person go forward with the appeal and minimize the time the child's in limbo.

CHAIRMAN BABCOCK: All good arguments. Yeah, Marisa.

MS. SECCO: And I just also wanted to mention that on state funds, it costs $2,000 a month to keep a child in foster care, and so that -- and these appeals, according to Kin Spain, who was on the task force, can take anywhere between two and six months, so we're talking about

extending the time line from two to six months, plus $2,000 a month.

HONORABLE TERRY JENNINGS: And I've seen reporter's records in these cases that are no more than 10 pages long.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The only part about allowing the government to appeal as well, if you're worried about delay you can always write into the rule that you go ahead with the appeal and get the record written and you can determine whether it's going to have to be paid for and by whom after the fact and don't let that slow down the appeal, but I made my point earlier.

CHAIRMAN BABCOCK: Can we vote?

MR. MUNZINGER: Yeah, I'm ready.

MR. ORSINGER: If I could just say one thing, Chip. I'm not entirely sure right now that the court reporter won't be involved. I mean, it appears the Family Code doesn't mandate the court reporters be paid. It's just discretionary with the district judge, but the amendment to the Family Code doesn't appear to include the court reporter on the list of people whose motions can trigger this hearing to overturn the original presumption, so I know we're talking here about the government's nickel, but are we sure we're talking about the government?

CHAIRMAN BABCOCK: Okay.

HONORABLE TERRY JENNINGS: Well, it's the government that's trying to take away the parental rights.

MR. JACKSON: If you change "may" to "shall," we're done. We're out.

MR. ORSINGER: Yeah, that's in the Family Code, though.

CHAIRMAN BABCOCK: We may not have the authority to make that change right here. All right. Everybody who is in favor of permitting the government to appeal an adverse ruling on the issue of indigency, raise your hand.

All those opposed, raise your hand. There are 9 in favor, 14 opposed, so the Court will take into account the sense of our group. Professor Dorsaneo.

PROFESSOR DORSANEO: I just would like the rule to say something. If the government is going to be able to appeal, say that the order, you know, denying the contest is subject to review on appeal, just something simple, if that's what's going to be the case.

MS. SECCO: That was in the previous draft, so we'll just reinsert likely -- if the Court decides that that's the route they want to take, we'll just reinsert what was in the previous task force draft. One sentence.

CHAIRMAN BABCOCK: Good.

MR. ORSINGER: I think rather than say, "review on appeal" we should say, "review by the appellate court," because this is a little mini-appeal based on a free record, a so-called Arroyo record, on just the evidence on the contest, and that's free. You can get to the court of appeals for free if you're an indigent and you lose this contest, and so it's not really an appeal, Bill, but it's reviewed by the appellate court.

PROFESSOR DORSANEO: I was contemplating that it would be for the government.

MR. ORSINGER: Well, it's going to be an abbreviated record, because we have to know whether the record is free and whether there's a court-appointed lawyer or not before the brief is filed and before the court reporter types everything up. So this is an accelerated process to have a mini-appeal on a mini-record, which is just the review associated with the contest hearing, and you get that for free. Whether you win or lose you get that review for free.

PROFESSOR DORSANEO: I don't think the government needs to find that out until the -- until later. I don't see why they're just not like everything else that would be a part of the appeal if it's the government part.

MR. ORSINGER: Well, an appeal at the end of the case that says you should have not had a free appellate

lawyer is a meaningless appeal because you'll never get the money out of it, so the question is whether you spend the money, not whether you recover it, and if it's just part of the regular appeal then let's not have an appeal because it's going to be too late. The horse is out of the barn.

CHAIRMAN BABCOCK: Okay. Justice Bland.

HONORABLE JANE BLAND: Just not to leave Professor Dorsaneo's comment, Richard, about noting somewhere in this provision (5) about something about after timely filing a notice of appeal.

MR. ORSINGER: Do you like that? Do you think that's important?

HONORABLE JANE BLAND: Yes, and that was the subject of the e-mail that Kin Spain sent around to you and I think to some of the other judges.

MR. ORSINGER: And it might be -- actually, this might be the time to --

HONORABLE JANE BLAND: It was the exact same comment that Professor Dorsaneo had, and so that will take care of it.

MR. ORSINGER: Since this is repeatedly coming up why don't we just go ahead and pass this around. There's three of them there. Only one of them is the current topic.

Now, Justice Gray commented before that maybe

it wasn't so important before because surely you would have perfected your notice of appeal by the time that this review for the failure to give findings occurred, which may be gone anyway, but I think it's mathematically possible. I don't know, Justice Gray, if you've calculated it yet, but I think it's mathematically possible that this review could proceed the filing of a notice, and for those of us who believe that the notice is essential to court of appeals jurisdiction then we would want it to be after filing.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: What does the motion say?

MR. ORSINGER: Well, the motion is an effort to overturn the trial court's ruling on the contest.

MR. HAMILTON: Then that's done by a motion?

MR. ORSINGER: Well, we want it to be done by a motion because we don't want it to be -- you have to know before the brief is written whether you have a lawyer to write the brief, and so it's got to be done by some accelerated process. It can't be in appellant's brief because this is determining whether the appellant has a lawyer or not and whether they can get a reporter's record, so it's going to be an accelerated process. The name has come up a number of times. I'll just go ahead and put it in the record. It's a Texas Supreme Court decision, *In Re:*

Arroyo, A-r-r-o-y-o, decided in 1998 988 SW 2d 737. It denied mandamus in one of these indigency appeals on the grounds that an appeal was an adequate remedy, and the adequate remedy they said was you can get relief from an order sustaining a contest to an affidavit; and they outlined an accelerated process here, which, if you will, is a kind of an informal, quick appellate court review of the trial court's decision on indigency; and these so-called Arroyo hearings are -- I think Justice Bland is talking about are a black hole that end up causing a delay in the disposition of the case. Right, or --

HONORABLE JANE BLAND: Correct, because they're not quick hearings because they involve ordering up the record from the trial court, and we do have a problem I think Justice Gray was trying to address by asking for a deadline. We have a problem with the reporters getting the record up to us promptly, but most importantly with the -- sometimes when a -- sometimes with pro ses, but not always with pro se, sometimes by represented counsel, when they appeal the contest, the order sustaining the contest to the indigency, the party then thinks they've invoked the appellate court's jurisdiction, and so to put something in provision (5) about a notice of appeal being filed as a reminder, file a notice of appeal and then file your motion with the trial -- I mean, with the appellate court seeking

relief from the trial judge's decision in the indigency contest. Otherwise, you've got parties that file -- about the time that they're -- otherwise you've got two things.

One is you've got parties that file a -- an appeal from or a motion requesting relief from the indigency contest and are proceeding along with that, not realizing they've never filed a notice of appeal, and I mean, we have rules that would say if you're tending -- or policies that if they're trying to invoke the jurisdiction of the appellate court -- and presumably those would come into play, but I would hate that somebody might lose their appellate rights because they thought they've invoked the appellate court's jurisdiction by filing one of these Arroyo motions, when, in fact, they haven't because they've never filed a notice of appeal.

The other issue that comes up is that often the motion seeking relief in the appellate court from the trial judge's order sustaining a contest doesn't get filed in the appellate court until numerous efforts have been made to order the record, and we send out a notice saying, "There's been no arrangement to pay for the record. Accordingly, we are going to dismiss this appeal" within a certain amount of time and then we get for the first time an Arroyo type motion filed in our court, and so that's why this provision (5) is such a good addition, and it would be

great if we could add in this idea that the notice of appeal should be filed as well, just to make -- just so we don't have Arroyo motions floating around out there that are not married to a notice of appeal.

CHAIRMAN BABCOCK: So you're in favor of this addition that Kin is proposing, the 10 days after the notice of appeal is filed, whichever is later?

MS. SECCO: That's actually already in the rule.

PROFESSOR DORSANEO: It's in there now.

MS. SECCO: That's already in the rule.

CHAIRMAN BABCOCK: All right. So what about this e-mail is --

MS. SECCO: This is not the -- I think that this is an earlier e-mail.

MR. ORSINGER: Okay. Then I pulled the trigger on the wrong target this time. Okay.

HONORABLE JANE BLAND: No, I think at least the way that he was explaining it is it's filed within 10 days after the order sustaining the contest is signed or within 10 days after the notice of appeal is signed, and the idea here is under that first sentence there's no notice of appeal -- that the notice of appeal needs to come out of that --

MS. SECCO: Right.

HONORABLE JANE BLAND: -- and maybe be how Professor Dorsaneo suggested, somewhere at the very front.

MS. SECCO: Right.

HONORABLE JANE BLAND: And then have the 10 days run however you want it to run, but don't have a standalone provision that allows this without any notice of appeal.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: All right.

MS. SECCO: I do want to mention just one thing, that this review of orders sustaining contests does not justify the presumption context, and I think that's probably not apparent to the committee, that this is all orders sustaining contests to indigents, whether or not there is a presumption of indigence or if it's just the usual procedure with an affidavit. So this is not just something that would apply in parental termination cases. It would apply in all cases.

CHAIRMAN BABCOCK: Okay. Any other comments on (i)(5)? All right. Richard, should we go to the 28.4?

MR. ORSINGER: Yes, 28.4. As I said initially, it was our view that we ought to collect together all of the special rules that apply to these kinds of appeals into one rule, and if there's other -- elsewhere in the appellate rules a rule that's well-designed and

would function properly we cross-refer to it, but if we're changing it, we're changing it in the context of reading this rule. So if you go to this rule if you're handling one of these appeals, either because of the language under this rule or by cross-referencing you to the appropriate other rule, you will see the rules governing your appeal, and consistent with that the very first thing in this is kind of a preemption clause, Rule 28.4(a)(1), "The Rules of Appellate Procedure, including the rules for accelerated appeals, apply to parental termination and child protection cases, except that to the extent of any conflict this 28.4 prevails." That means that this subdivision of 28.4 trumps all of the other contrary rules as well as 28.1, 2, and 3.

So it's our effort to make sure that this rule will govern in the event of a conflict with the ordinary appellate procedures, and it was our view that that's very important because these accelerated appeals trigger a bunch of the different Rules of Appellate Procedure. It's hard even for a board certified lawyer that doesn't do them regularly to keep track of it, and so it's an important part in our view to make these things work so that we don't have waivers, is that all they have to do is find this one subdivision and follow it, and they're okay. That's an important philosophical point that somebody may disagree with. I don't know. If we don't do

it this way, we have to salt these changes through all the other appellate rules, and people who are not handling these appeals are going to have to see whether they're covered by 28 point -- so it's just our view is this is an isolated area, and let's make the changes in just this area, and let's not affect all these other areas elsewhere.

CHAIRMAN BABCOCK: Professor Dorsaneo, what do you think about that?

PROFESSOR DORSANEO: Well, I wanted to do that earlier rather than the way we ended up doing it, so I --

CHAIRMAN BABCOCK: Okay. But you're thinking it's never too late.

PROFESSOR DORSANEO: It's never too late to do something right. But I --

MR. ORSINGER: Okay, subpart -- I'm sorry, go ahead.

PROFESSOR DORSANEO: You kind of snuck it in there. I mean, it's right there in (a)(1), and you told me what it means, I might say that this subdivision governs and then say some more -- you know, you know, it's worded in a way that it's hard for -- for it to be apparent as to what it's trying to say.

MR. ORSINGER: Well, maybe two sentences, you're saying that this subdivision shall apply to appeals

in such-and-such type cases and then a new sentence saying that this rule prevails over any others that conflict?

PROFESSOR DORSANEO: Uh-huh. "This subdivision governs" or "notwithstanding" something.

MR. ORSINGER: Okay. Then we're ready to move on to (2). These are the definitions that we mentioned at the outset. Because of the way that House Bill 906 refers to the Family Code we've got to cover both termination appeals, both government sponsored and private, as well as managing conservatorship appeals where the government is appointed as managing conservator without termination. So those two categories are given special definitions of "'Parental termination case" is a, quote-unquote, phrase used throughout the rule, and a "child protection case," quote-unquote, is described as "a suit affecting the parent-child relationship filed by a government entity for sole managing conservatorship."

So you're going to see that that dual track follows throughout, and the task force report, for whatever historical help it will have, refers to the definition of suit affecting the parent-child relationship in the Family Code. So then you want to move on to (b), Chip?

CHAIRMAN BABCOCK: Yes, let's move on to (b).

HONORABLE TOM GRAY: I would like to make one comment.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: That because the Legislature has vacillated on some of the statutes applicable to termination suits, if it is a termination sought by a governmental entity or private termination, I would like to see (2)(a) make the distinction that you made verbally that it applies to those suits if it's an issue whether sought by government or private, otherwise some folks that have been operating in this area may limit it to governmental terminations.

MR. ORSINGER: We could do that by going back and -- I mean, it's all implicit if you look at the definition of suit affecting the parent-child relationship and especially -- but we're looking at it in the context of House Bill 906. The ones that are applying it won't, so --

HONORABLE TOM GRAY: I'm just thinking about what you just described as the purpose of this new rule, that I'm not entirely comfortable with, but if that's the purpose, I think you need to make sure that folks involved in private terminations -- and we don't see that many of those, but if they get off into that area in this rule, they understand fully that this is for private terminations as well.

MR. ORSINGER: What would you think about adding a sentence -- or comma, "including" -- maybe this

"without limitation" is a contract term and not a rule term, but "including private terminations" and let's pull out of the Family Code a more accurate term.

HONORABLE TOM GRAY: Yeah. I thought what you said on the record, whether sought by government or private or the individual or -- anything like that, just something to flag the nongovernment termination attorney this is where they've got to go.

MR. ORSINGER: You said that you weren't sure that you agreed with the concept. Are you saying you're not sure that you agree with having a standalone rule? Is that what you meant? What is your concern about having a separate rule just for these appeals?

HONORABLE TOM GRAY: Well, the reason I didn't vocalize it before is it's just a general discomfort of breaking out a rule that tries to pull together all of the other rules that you have to deal with in any appeal and pare it down for this particular rule. For example, I guess, to lead a segue on into (b), (b) doesn't provide anything different. It simply references you back to the two rules on how to perfect an appeal. It doesn't change those rules at all, so it's not unique to this procedure. It simply tells you where to go to perfect an appeal, and that seems -- I mean, all of those other rules, you've already said all those other rules apply, and now you have

a rule that tells them where the rule applies, and now this rule trumps those rules, but it's sending you to those rules anyway, and it's --

MR. ORSINGER: Let me -- let me say in response to that, that we're aware of that, and the choice is to let these people figure out that they have to look at Rule 25.1 and Rule 26.1(b) and 26.3 and then later on they're going to have other rules that they have to look for, and we can just turn them loose on it, like the -- you know, in a rodeo and just have them outrun the bull, or we can give them a recipe to follow. It was our view that the easiest way for the people that we expect to be handling these appeals would be to pull all the provisions into one rule and where they're different we state them and where they're the same we cross-reference them, and if that's -- that's just a philosophical decision on trying to avoid waiver of error, and it may have negative consequences that outweigh the benefits, and I think it ought to be discussed. I mean, the task force made that decision, but as Justice Gray has pointed out, it's not a decision that is frequented out.

CHAIRMAN BABCOCK: Yeah, Eduardo.

MR. RODRIGUEZ: Well, if we're talking about trying to help people who are not familiar with this area that are going to be appointed to represent some of these

parties, why not just put Rule 25.1, 26.1(b), and 26.3 right here instead of saying "go back here" and "go back there" and "go back there"? "To perfect an appeal under this rule is perfected by doing the following" and just list them.

MR. ORSINGER: We can sure do that. There are -- there will be a lot of repetition that would make the rule lengthy, but that would actually make this rule self-contained.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Actually, with regard to that, an appeal under this rule, that (b) on page 17, for the regular accelerated appeals that same sentence is in there. So to an extent when 28.1 was created it was more explanatory as revised than the way it stood. Previously -- I mean, as this thing evolved the first accelerated appeal rule did explain everything as a standalone rule and then it wasn't and then it's evolved into something that provides specific guidance as to where you will look, and I like the idea of specific guidance, by cross-reference works fine with me where it's fairly clear. I'm not so sure as we move through this that -- as to what the differences are, Richard, and for people familiar with the accelerated appeal procedure with the appeal procedures, you know, that's probably -- that's probably

important, too. So I'm less clear once I get to (c), the letter (c), appellate record, how much guidance I want to give.

MR. ORSINGER: Okay. Well, we'll take that up when we get there. The task force report tells you a little bit more about what we envisioned when we went through this appellate record paragraph by paragraph, but we'll discuss that today.

CHAIRMAN BABCOCK: Just -- oh, I'm sorry. Go ahead.

MR. ORSINGER: Subject to Chip's control.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Before we leave (2)(a), I would like to suggest that because (2)(b) references "filed by a government entity" that it makes it clear that (a) need not reference that and that it's the broader and that no additional words should be necessary there.

CHAIRMAN BABCOCK: Okay. Any more comments on (a)? Any more comments on (b)? Moving on to (c).

MR. ORSINGER: Okay. The appellate record purpose here, I think that probably we all agree that other than the period of time that these cases are under submission in the court of appeals, the longest delaying factor in disposition is getting the reporter's record up,

and so the overriding purpose is to accelerate the filing of the record and to curtail to some extent the court of appeals inclination to grant delays associated with that record. Subdivision (c)(1), that's Rule 28.4(c)(1), discusses the responsibility for the preparation of the reporter's record, and there's already a requirement in Rule 35.3(c), the appellate rules, which says -- that's not the correct rule reference. There's already a requirement that the trial judge, 35.3(c), "The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed." I repeat, "The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed."

That does not appear to be strong enough to make it happen quickly, so we were trying to bolster that by saying that in addition to having a joint responsibility that the trial court shall direct the court reporter to commence preparation of the reporter's record when the reporter's responsibility to prepare it arises under 35.3(b), and that has to do with making arrangements for payment or proof that you can move forward without paying for it. So the discussion was that court reporters are sometimes late in getting these records filed not because they don't work at night and not because they don't work on the weekends, but because they have to spend their days in

court recording hearings and trials, and there's just not enough time left in the court reporter's daily lifetime to get these records out on that quick turnaround, and when you have a trial judge ordering you to transcribe a hearing or a prove up or whatever, that takes you out of your office and away from preparing a record. So the real pressure point here is not the court reporter who has to do what the judge tells her or him to do. The real pressure point here is the trial judge who diverts the court reporter from the important responsibility of getting this accelerated record up to pay attention to the other important responsibility of recording -- reporting ongoing daily activities.

So our proposal is that we would say that the trial judge is now responsible to get the court reporter started in this process and that as a practical and political matter that's where the pressure needs to be put anyway, is on the trial judge. Now, there's all kinds of trial judges and appellate judges in here. I hope I didn't offend you again, but what about that?

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: So the way it arises is we're down the road. Presumably, the way I read the rules, the trial court already under the current rules has this responsibility. If you look at 13.3, priorities

of reporters; 13.4, report of reporters; there's a supervision responsibility there. The rule that you cite requires that the trial court is jointly responsible for ensuring that the appellate record is timely filed. So the way I read the rules right now, although one says "in addition to the responsibility imposed," I'm not sure it adds much to what his current -- her current responsibility is.

I think so where it comes up is you're down the road, the record is late, and the appellate court is trying to get the record filed, and under this rule the trial court said, "Well, I told the reporter to commence filing it, what else do you want me to do?" So maybe it's at that point that the rule can speak, okay, so and that is, what we would like to see is for the trial court to determine the reasons that the record hasn't been filed and notify the appellate court and, secondly, direct completion of the reporter's record, not commencement, completion, and get it completed and filed at that point because we're down the road past the reporter having gone through the time to file it and we still don't have it, and I agree, and I commend the committee that this I think is a very important part or factor in the delay, so to the extent we can figure out the way to deal with this I think we're making progress.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo, did you have a comment?

PROFESSOR DORSANEO: Well, I -- like David, I don't -- I don't see that this (c)(1) is anything but redundant, so -- and as I'm working through a lot of this (c), there are some differences, but pretty much it's the same. The extension of time actually seems to -- maybe that's a concession of reality, but it does -- it does seem to even lengthen the process rather than what's contemplated when we drafted the appellate rules. So I'm not sure -- completely sure what I'm going to think when I think about it for a while, but I would prefer to have the rule look more like 28.1 than to go into just redundant detail putting everything in one place. Maybe a sentence that refers to the rules that need to be examined in order to understand how this appellate record process works, you know, comparable to a sentence like the one in perfecting an appeal. You know, "An appeal under this rule is perfected by filing a notice of appeal in compliance with Rule 25.1." Well, it could say the same thing about the record rules, you know, "in compliance with Rules 34 and 35."

So I've got the general comment that I don't know that the regular rules aren't -- if people knew what they were, aren't fine in and of themselves, and then

you're making some changes in the general rules that maybe even need to be made generally, but I'm not sure about whether they need to be made in these cases or generally, the extension of time and other adjustments.

CHAIRMAN BABCOCK: Right. Okay. Yeah, Justice Peeples.

HONORABLE DAVID PEEPLES: If -- Richard, if the -- one of the real points of delay is getting the record done, I think it may take better language than you've got in (c)(1), which says, "The trial court shall direct." You might just say the trial court is responsible for making sure that the reporter gets it done, including arranging for a substitute reporter. I mean, there's other places in the rules where we have encouraged, you know, things to be on the record; and I think you're exactly right in what you said earlier, that if the trial judge has his or her reporter out in court all the time reporting what's happening today, that makes it very hard for that reporter to get this record done; and sometimes what it takes is to get a substitute reporter; and I know that's hard out in the country. Most of this happens in big cities anyway, but the more directly you can speak to trial judges and tell them "The buck stops with you," and you might just have something there, you know, "including making substitute arrangements." That might get these

cases -- the records there more quickly.

CHAIRMAN BABCOCK: David Jackson.

MR. JACKSON: It might help a little if -- a court reporter for every hour that we're writing in the courtroom, it takes anywhere from two to three hours to make that into a signed, certified record. So, you know, if you're sitting in court for eight hours on one of these hearings or if in a case where it's a real short hearing where it's only an hour or two, the reporter is going to spend -- if it's an hour he's going to spend two to three hours getting out that record. So you may be able to write a provision where the judge allows the reporter in those cases time to prepare the record, and if it's a case where the county is paying the court reporter to transcribe the record, I'm going to make a lot of reporters mad, but I would suggest that the reporter who has to have a substitute reporter be responsible for paying that substitute reporter while they're making the transcript fee.

CHAIRMAN BABCOCK: Justice Patterson. I'm sorry. Justice Gray, I skipped you.

HONORABLE TOM GRAY: I yield.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think all of that's a little bit micromanaging and that the change is

significant because it leaves it with the trial judge. Always before there was joint responsibility between appellate courts and trial judges, and we actually had a practice at one time where we would send court reporter notices, "Where is the record," "where is the record," and we changed that at some point to also send a copy to the trial judge, and that was very effective in getting the job done. So I think as long as the ultimate responsibility rests with the trial judge, they know how to get it done and can accomplish it. So it's important that it rest with a single person and notice to that person, so I'm not sure that we need to go into how they do it, because they'll know what's appropriate in their county.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Three big time periods in these appeals: Getting the record, primarily the reporter's record, briefing, and opinion. I'll address the other two as we get to them, but with regard to the record, we previously -- before the current rules it was the party's responsibility to get the record. That was problematic because they had no control over the trial court or the reporter. Current rules place the responsibility on the appellate court and the judge jointly. The other person that's obviously in the mix is the paying for the reporter. There is nobody that has more

control over the ability to get it done other than physically typing it out than the trial court judge. The problem is that in many of these cases that I see from our district they are tried by visiting judges with visiting reporters. They are not the regular court reporters that hear these. Sometimes they're a couple of day hearing and then it's a week finding that reporter again. They're in private practice. It's just a problem. If the responsibility was placed solely on the trial judge to get the reporter's record done, it would help, particularly in the -- where it's the designated or the elected trial court with the official reporter, because they are the ones who can say, "Don't take any other reports or hearings, trials, until you get that done," and get a visiting reporter in here. If we're serious about expediting this process, that's going to be the way to expedite this portion, like David said.

If it's the official -- if it's the elected judge and the official reporter, if that reporter can't do anything else until that report is timely done, because I'll just say this now rather than delay it, when you get down to these other provisions and you talk about no more than 60 days cumulative, we've got no nothing when it comes to the appellate court other than the possibility of contempt, which we've used a couple of times, and if you

want to dump a case or an appeal over into a real black hole, dump it over to a -- into a contempt proceeding on the reporter to try to get a record. Let me tell you, it doesn't get any worse than that in delay. I mean, we've -- this year we've had to reverse two criminal cases because we just could not get the reporter -- the reporter's record, and so that is not where we want these cases to wind up. The trial judge -- I wish David Evans was here because I'm sure he has an opinion on this, but they are the ones who have -- even over the visiting reporters, they have the ability to say, "You're not going to do anything else until this is done."

CHAIRMAN BABCOCK: Okay. Justice Gaultney.

HONORABLE DAVID GAULTNEY: I think that's part of the problem and part of the solution. In other words, it's my understanding, at least in our area, and all I know is we don't get the record in a particular case and we try to get it. It's my understanding that you'll have a visiting judge or a cluster court judge who will go with a court reporter to a case. Now, obviously they've got cases to try, they want the court reporter trying the cases that they've got, but there's an existing judge with their own court reporter whose court the case was filed in. It's the visiting judge that's handling it, so but it's my understanding that perhaps that court reporter and that

judge don't necessarily view it as their responsibility because there's a visiting judge and a visiting court reporter that actually tried it. Okay. So if you say, "Where's the record?" The response is "It's the visiting judge and visiting court reporter's responsibility," even though the case is in a particular court. All right.

So but there is a requirement under 13.4 for the reporter to report monthly to the trial court on the business, on what -- it's the amount and nature of the business pending. So there is the ability of whichever court judge we make the responsibility to ultimately to get this done, to monitor and make sure that this is given priority, if that's what we're trying to accomplish over other business. I think, though, that perhaps copying whichever court we place the responsibility on, and maybe it's the visiting judge first, that copying them on extensions or notices or anything so they know that a problem is arising might be of some assistance.

CHAIRMAN BABCOCK: Okay. Justice Christopher, did you have your hand up? No?

HONORABLE TRACY CHRISTOPHER: Well, I guess my first question is are we sure that the -- that there is a delay in filing the records, and do we know what the delay is caused by before we go off in this sort of Draconian, "Trial judges, we've got to write a whole rule

to make you pay attention to this." You know, I've looked through the Fourteenth Court of Appeals statistics to the extent I can, and it looks like the records are getting filed in three months. Now, you know, maybe we want to make it, you know, 30 days, but it's not going to happen in 30 days. It's going to happen in 60 days, because we've given them 60 days under this rule. So, you know, there's going to have to be a little bit of tightening up if we really, really, really want it all done by 60 days; and, oh, by the way, the clerk's record is taking just as long as the reporter's record according to the statistics I'm looking at; and you know, putting something in the rule of appellate procedure that the trial judges never read is not particularly useful. I'm just going to -- you know, and --

HONORABLE STEPHEN YELENOSKY: Speaking as an appellate judge who was a trial judge.

HONORABLE TRACY CHRISTOPHER: You know, it's kind of like, "What, there's something in the appellate rules that I have to follow that I didn't know anything about? There's this monthly report. When did that get passed?" You know, I mean, really, I'm just -- I'm being realistic here. So I think we have to think outside the box if we're trying to create a priority system here at the district clerk's office and with the court reporter and with the trial judge, and putting some namby-pamby rule

here is just not going to do it. It's just not.

MR. ORSINGER: Chip, can I respond?

CHAIRMAN BABCOCK: Sarah, could Richard respond?

HONORABLE SARAH DUNCAN: Sure.

CHAIRMAN BABCOCK: He's been called namby-pamby once too often.

MR. ORSINGER: House Bill 906, section 4 of House Bill 906 amends the Family Code to say that "An appeal of the final order rendered under this subchapter is governed by procedures for accelerated appeals in civil cases," and the current rule is that if you have an accelerated appeal the record is due 10 days after the notice of appeal was filed, and that might work for a temporary injunction hearing, but that doesn't work for a two-week jury trial, and so we were -- on the task force we were sensitive to the fact that if we took the Legislature seriously that it was due in 10 days there would be only the most perfunctory termination trials could comply, and so we moved that out to a longer compliance deadline; but a 60- or 90-day turnaround on getting the record filed, if you meant that that applied to termination cases, would be treating this appeal as if it was an ordinary appeal or at least much closer to the deadlines of an ordinary appeal than an accelerated appeal, so --

HONORABLE TRACY CHRISTOPHER: Well, what I'm telling you is that's what's happening right now, and it's already considered an accelerated appeal, okay, and I know that our task here is to make it more accelerated, really make it an accelerated appeal, and I just think we have to think outside the box if we're going to do that, because they're accelerated appeals right now.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: First, a question of Chief Justice Gray and Gaultney. I don't know if y'all are talking about taking the appellate court out of the equation completely. When I was at the Fourth Court we didn't have a problem. Chief Justice Lopez was on the court reporters in all cases, but particularly in these cases. The report that was filed with the trial judge was required to be filed -- is required to be filed with the appellate court clerk. Chief Justice Lopez made it her personal responsibility to look at those reports every single month. We didn't have a problem with contempt putting it in a black hole. It was remarkably effective at getting records once everybody understood that we were serious.

So I agree that it is the trial judge who has the most knowledge of the court reporter's workload, both in and out of court. I actually think the court of appeals

can be more effective at getting these records with appropriate procedures than the trial judge. The trial judge is just trying to run his or her court and get cases disposed of; and my understanding, a big part of the problem was that, you know, if court reporters hire -- is it a scopist, to do the records, they have to pay that other court reporter a portion of the fee, and I think it's pretty substantial, isn't it?

MR. JACKSON: Pretty good expense.

HONORABLE SARAH DUNCAN: And so there's a real tension there between keeping all the money for myself as the court reporter, pleasing my trial judge, pleasing the appellate court, and I -- I'm not sure that putting all of this on the trial judge is really going to resolve the problem because that's where the tension is.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: No, I agree with you, the appellate court has a responsibility. I'm not saying that, but the -- what I'm going off of is something that I -- frankly, it's been my experience, and that is there's a statement on page seven that the task force believed that much of the delay in this type of appeal results from a conflict between the reporter's duty to report hearings and trials on an ongoing basis and the duty to prepare records for the appeals. I think that's the

issue, and the judge who has the most control over that is the trial judge, and the trial judge can set those priorities. Now, yes, the appellate court has a role in it and can be very active and is very interested in doing it, and it -- but there is a limit, absent extraordinary measures, so I think that the -- and as far as the namby-pamby rules --

HONORABLE TRACY CHRISTOPHER: I'm just telling you --

HONORABLE DAVID GAULTNEY: No, I know what you mean. I know what you mean, but in my experience actually the trial court judges do pay attention when the clerk says, "Well, did you know that this is -- there's this responsibility? Do you know that actually these" -- even if they were not originally aware of them, you know, even if they were not originally aware of them, once they become aware of them it becomes a priority. So --

HONORABLE TERRY JENNINGS: And then you would have a rule to enforce.

HONORABLE SARAH DUNCAN: Once we sent a copy of the show cause order that we had sent to the court reporter to that court reporter's trial judge, we tended to get a record pretty quickly, because that trial judge does not want his or her court reporter, one, to take the time for a contempt proceeding, but they also don't want the

negative publicity that's very, very possible. So I'm not saying -- I agree, with all due respect for Mr. Orsinger, this rule isn't going to cut it, but I think we can lay out procedures for the appellate courts and the trial courts to work together to get it within a faster period of time.

CHAIRMAN BABCOCK: Justices Bland, Gray, and Jennings.

HONORABLE JANE BLAND: Okay. So I agree with the comments that have been made about number (1) here being redundant and really don't serve the purpose of getting the trial judge's attention. I would jettison it, start with number (2), but instead of saying it must be filed within 30 days, say it must be filed within 10 days, as the Legislature instructed us to enact. That will signal to the trial judge and to the court reporter that these records are to go ahead of the ordinary press of business. Then you still have these other provisions, sort of pressure relief valves, that will allow for some extension of time, but by saying that the record is due in 10 days, like it appears the Legislature was saying that they thought the record should be due in 10 days, that signals the trial judge and the court reporter that this is a drop-everything, prepare-the-record sort of moment, get it done ahead of everything else, and that is what trial judges listen to. It's what appellate judges listen to.

It is -- we all have accelerated everything these days, and so let's just put this to the top of the line. I think that's what the Legislature wanted us to do. That would be my suggestion.

CHAIRMAN BABCOCK: Justice Gray. I'm sorry. Justice Gray.

HONORABLE TOM GRAY: I think she covered enough of what I was going to say.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: You know, exacting in on what she said, maybe we should say in this one, "We really mean it," and also, like the term "good cause," doesn't that have a meaning within the statute? I don't think it's defined, but, for example, in regard to briefing when someone moves to extend time to file a brief, I thought there was something in either the rule or the case law that says, well, good cause means something more than you're really, really busy or you really have a full schedule or you're filing a bunch of other briefs. I thought it had a specific meaning.

MR. ORSINGER: Well, the rule ordinarily for briefs says "reasonable explanation," and it was the task force view that "good cause" was a higher showing than just a reasonable explanation.

HONORABLE TERRY JENNINGS: I thought in the

statute good cause did have -- although it wasn't defined, I thought it had a meaning, and I thought the meaning was something other than you're really busy.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Good cause once was the standard for extensions of time in the appellate rule book, and the Supreme Court interpreted that language to mean good -- the good cause as to why it could not have been done, which was regarded as a very, very tough standard.

CHAIRMAN BABCOCK: Not namby-pamby.

PROFESSOR DORSANEO: Huh?

CHAIRMAN BABCOCK: Not namby-pamby.

PROFESSOR DORSANEO: Not namby-pamby, and actually, probably the current appellate rules, 10 days may be too fast for records in accelerated appeals generally, but the current appellate rules, you know, contemplate if you don't get it up there then there's going to be -- you know, there's going to be in relatively short order a notice sent to the trial judge and to the parties that it needs to be done by this time, and if that doesn't happen then we're into -- then we're into big trouble. So, you know, if the good cause standard means what it used to mean you won't be able to satisfy the standard very often, so it's not much of a standard. Reasonable explanation is a better standard for extensions, and we know what -- and we

know what that means if we're going to want an extension, but maybe this is a circumstance where we pick a time and say that you just do it.

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

HONORABLE TRACY CHRISTOPHER: I think if we looked at the delay, a large part of the delay in getting the records done here is payment of the record, all right, either paying the district clerk or paying the court reporter. Okay. The rule that we're writing here deals with both types of cases, one where they're free, one where people are paying. You know, to me if the district clerk knows this is a free record, it ought to be done in 10 days. Okay. If the district clerk says, "Well, I'm waiting around for them to, you know, get my money in," it's going to take a little more time; and the problem is the people appealing who have to pay, you know, maybe they're not indigent, but they don't have a lot of money, and coming up with, you know, a thousand dollars if it's a complicated case for a court clerk record and then, you know, another couple thousand dollars for the reporter's record takes them time. All right. They're not indigent, but most of us, you know, cannot just pull out $3,000 and plop it down on day one so that the record can get done. I mean, that's really the issue.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: If we start with the 10 days as the aspirational rule that the Legislature apparently has said that we should start with, it will help, because what will happen after 10 days is we won't have the record at the appellate court, so now it signaled to us the record has not been filed. We then will send a notice, at which point the court reporter will say, "I didn't know a notice of appeal was filed," or "No one has made arrangements to pay, can I have some extra time to get it done," but instead of all of that happening 30 or 60 days out, it happens within two weeks of -- after the 10 days is gone, so that I fully understand that we won't get all records filed within 10 days, but what we will do by starting out with the 10 days is that we will start the extensions from that and start to get a handle on what the problem is, whether it's a party not having made arrangements to pay, whether they haven't -- nobody has been informed of the fact that the party is indigent, just some kind of follow-up on the missed deadline, and instead of it being a missed deadline 60 days out, it's a missed deadline 10 days out.

CHAIRMAN BABCOCK: Let's take a vote. How about lunch? Everybody in favor, raise your hat hand.

MR. ORSINGER: Chip, can I say one thing

before we break?

CHAIRMAN BABCOCK: Although, the chair of the subcommittee --

HONORABLE TOM GRAY: Can we take a vote on that, whether or not he can say anything?

CHAIRMAN BABCOCK: Say one thing before we break for lunch.

MR. ORSINGER: We need to recognize that under House Bill 906 there will be a continuing presumption of indigency, and so we are going to have situation where there's presumptively going to be a free record and a court clerk or a court reporter saying, "I haven't been paid" doesn't work unless they file a contest that's sustained. So the process with the presumption of continuing indigency is going to put, if you will, constructive notice on the court reporter and the clerk that they're not entitled to be paid. So let's just remember that that excuse that no one has made arrangements to pay me isn't going to work if they had a court-appointed lawyer in the trial.

CHAIRMAN BABCOCK: Good point. Good final point before lunch.

MR. ORSINGER: Thank you.

CHAIRMAN BABCOCK: We'll chew on that over lunch.

(Recess from 12:39 p.m. to 1:31 p.m.)

CHAIRMAN BABCOCK: As fascinating, Richard, as you've been, we're going to shift gears for just a minute and take up item four on our agenda, which is cases requiring additional resources. The reason we're breaking away from the parental rights termination bill is because we have the distinguished Dickie Hile with us, who was the chair of the State Bar task force on additional resources for complex cases. There is a report, really well done, as would be expected, by that task force and then an Appendix A, which has a proposed rule; and, Dickie, if you wouldn't mind, give us some background about how your task force approached the problem, what you thought your mandate was, and then take us through the rule. I don't think you've ever been in front of this group before, but they will rip the rule to shreds, and don't take it personally.

MR. HILE: I think in order to understand where we went and how we got there you need to have a little background history about this particular legislation because it does influence the rule drafting significantly. In 2007 Senator Duncan filed SB 1204, which was a comprehensive court revision bill, which included part 7 or article 7 which was the complex court provision. As originally presented and filed, that bill basically tracked I guess it was either the Georgia or the California complex courts provision, which essentially had a specialized court

setup with a panel that would determine whether or not a case met the complex needs and then it was referred from the originating court to the specialized court; and as you might expect that gained a lot of notoriety and a lot of controversy; and so midway through the session there was a working group that was established that was TADC, TTLA, ABOTA, some of the tort reform groups; and they went through and completely revisited that particular section; and as a result of that a committee substitute was filed in the first part of May which eliminated that process in its entirety and replaced it with this new concept of additional judicial resources; and the underlying concept being that the present judiciary could handle the case provided that they had the resources necessary to do so; and so that bill made it through the Senate, failed in the House.

That summer the State Bar president appointed a task force to look at that bill in its entirety; and, again, there was a subcommittee appointed that addressed this particular section, the complex court, spent a lot of time, went back and revisited in part the issue of whether or not we should have a specialized court that cases would be referred to and would only handle complex cases. At the end of the day the task force came back with its opinion and recommendations in 2008 that says, no, we believe that

the judiciary is capable of handling the cases provided they have the adequate resources, looked at 1204, the committee substitute, tweaked with some of the language and made some suggested changes.

'09 the bill came back up. You went through as far as this particular article was concerned. It passed the Senate, and I think it got through the House, but it did not pass the legislation that particular year. In 2011 we came up again. Senator Duncan filed a bill. Jim Jackson filed a companion in the House. The bill got through both houses with a differing version and, of course, was sent to a conference committee. They worked out the language differences, but the committee report was never adopted, so it failed at that point. At that point we went into the first special session and then you had Tryon Lewis pick up the bill, change the caption so it would meet the call requirements, and on the last day of the session, the special session, it passed and was signed by the Governor.

Now, the one thing you need to know right off the bat is, of course, there's no funding for this particular bill. The original version of the bill as filed in '11 and as filed -- not in the special, but in '11. It had a 250,000-dollar fiscal note, and of course, once it became apparent that anything with fiscal note was dead,

that was removed from the bill and was never inserted again. So we're talking about rules that have nothing -- no funding to be supported at this particular time.

The task force, you know, the first issue the task force really addressed was the question of philosophically how do you approach this. You know, you've got HB 274 that came through with the expedited trial process, what I call the 12(b)(6) motions to dismiss, those kind of procedurals and where you were given basically a broad generic instruction to the Supreme Court, "Develop rules consistent with these principles." HB 79 is totally different in the -- there was extensive writing and drafting during the 2007 session. There was a little tweaking of the bill, as I recall, in '09, and this article has basically remained the same in the '11 version, 2011 version. It's quite specific. It's very instructive as far as the particular manner in which things are to be addressed, and so the committee as it looked at this particular bill and began its drafting process philosophically had said the Legislature has not really mandated an adoption of particular rules. It has been very specific and instructive, and to the extent that those are proper, we're going to follow those. And so from the get-go, you're going to find that if you were to compare the rules and the legislation there's going to be a number

of parts that are going to be identical. I mean, the text has not changed in one iota, so it was just that that particular language was so instructive we felt that it was important that it be followed.

Now, and the same thing, for example, to give you two examples of that, the considerations that are to be utilized in deciding whether a case, in fact, deemed or is -- justifies additional resources, that's a verbatim language from the bill. Same thing as regard to the resources that may be provided. It's the same thing that was provided in the bill. Now, once you get into the process and the procedures, you get a little variation because that's when the discretion kind of kicked in and the committee then had to basically decide how we were going to proceed.

Now, the first issue I think we kind of addressed philosophically was what kind of process do we want, and at the end of the day, recognizing the limited funds that would probably always be available, that we didn't want a complex process. We wanted a lot of flexibility for the presiding judges as they acted in their capacity as members of this judicial committee rather a very formalized process, and so in that regard flexibility probably was kind of the overriding concept that is utilized in the drafting and in the rules that were

actually adopted and are proposed to you today. I can just go through basically -- we talked about, for example, there were six or seven issues we addressed that were not really taken care of in the bill, the first one being where are these rules going to be. You know, you read the legislation, it doesn't say these are going to be Rules of Administration; but you look at them in the language; and it's clear these are not Rules of Civil Procedure; and the appropriate process was to go and look at the inclusion of those in section 16, which in the Rules of Judicial Administration, so that was not a very difficult decision.

The second decision was from a procedural standpoint how do you want this flow of orders or whatever you may mandate requesting judicial resources; and we said, well, we don't want to bog down the Supreme Court clerk with additional set of docket filings, because we don't think it warrants that, but we do need some process there where you have a filing clerk who will be accepting all filings, maintaining records, will have some process for archiving documents going forward and basically will have a process for developing some type of budgetary proposals with the Legislature in the following years, and so after looking at I think it's Rule 12, which is the rule dealing with judicial records and access to that, we noted that the Office of the Court Administration basically operates as

the clerk or the director of the Office of Court Administration. And we had in our task force 14 members, and I added in the working group Carl Reynolds from the Office of Court Administration; Cory Pomeroy, who was general counsel to Senator Duncan; Ryan Fisher, who was the chief of staff to Senator Jackson; and Kari King, who was the -- now the general counsel to the judiciary committee in the House. So we had those people involved and from the standpoint of trying to decide what was the appropriate way of going forward.

So at that point in time began we decided that let's take an informal process. The judicial -- the OCCA will not only provide support to the committee, it will also act as the filing clerk, and that way the informal process will go forward. What you will see from a procedural standpoint, there's very specific language about the process that's to be followed and kind of the gatekeeper function, but basically this is what is in the rules. You may implement or you may seek implementation of the judicial resources by either the parties filing a motion with the trial court or the trial court on its own motion deciding to take this issue up.

There is no requirement that there be an evidentiary hearing. It may simply be by conference. All that is necessary is that the court determines that

additional resources are necessary, that it enter an order basically describing the nature of the case, the considerations that warrant this case being deemed necessary for judicial additional resources, and to state what resources are actually being sought. Once that order is signed, it's forwarded to the JCAR clerk, who, again, is the OCA director. A copy is sent to the presiding regional judge for that particular trial court, and the process is implemented. The JCAR clerk sends it to the JCAR committee. The presiding judge actually acts as a gatekeeper.

If you look at the legislation, the JCAR is the initial gatekeeper. He looks at the bill, he or she looks at the bill or the order and decides first whether or not it has within his resources the ability to address the concerns that have been raised. He may already have the ability to request the appointment of a visiting judge, if that's what's asked, but within his allotted resources he first makes a determination of whether he can basically address the needs of that particular trial court. If he can, he does so, and that's the end of the day. Nothing goes farther.

If he thinks additional resources are necessary and it's not within his allotted resources then the case is forwarded to the JCAR committee, which is

headed by the Chief Justice of the Supreme Court and the nine presiding judges. They then would evaluate the request. Whether the presiding judge or JCAR enters or decides to act and makes a decision one way or the other, an order is entered either denying the request or granting the request and stating forth what resources would be provided. That's then sent back to the JCAR clerk and then OCA will assist in the implementation of those provisions as well as any other groups that might be of any benefit to the process.

Now, a couple of issues, any action taken by the trial court, by the presiding judge, or by JCAR is not subject to appeal. It's not subject to mandamus. That's specifically set forth in the statute, and it's basically reiterated in the rules that are proposed. We did put a time limit -- not a time limit, that's not a correct statement. We did provide that after 15 days the JCAR clerk is going to notify if no action has been taken, and so at least the trial court would know if no action has been taken, or if an order has been entered it would immediately send a copy of the order to the trial court in question so that they would know what's happening, and that's basically the process that goes forward at that point in time.

And the reason why, again, we looked at

making this informal, you know, we didn't -- you look at some of those administrative rules and you see that there's language about the quorum necessary for the committee, there's language about the specific nature of the pleadings that must be filed. When you've got legislation that you can't even get $250,000 to support, to infuse within that process a lengthy structured process we thought just was not beneficial. It just doesn't -- at the end of the day it doesn't advance the ball down the court; and so that was the reason, overriding reason, we said let's keep it simple, let's keep it flexible, and the presiding judge already has that relationship; and, you know, the question is in the legislation it provides specifically the language which is in the bill about the presiding judge being the gatekeeper; and of course, I think the reason for that is, A, he is or she is most knowledgeable about the needs of the courts within his district; B, you're going to be prioritizing. Assuming you get some type of funding at some point in time you're going to have to prioritize those funds, and he's going to have to make decisions within his own district and within the other districts in which the requests are being made for additional resources about how you're going to try to fund those. And so we said, you know, at that process you just want it simple where he enters an order, and to the extent he can address it with

his allotted resources, he does so. To the extent he can't, he forwards it onto the committee.

A couple of other issues that it might give you some insight into it, in regard to the right of appeal as they indicated, there is no right of appeal. There was a discussion about did that preclude -- the legislative language that said there is no right to appeal by mandamus or otherwise a decision by these three entities, does that mean that if the presiding judge were to say, "No, I'm not going to give you any additional resources," should there be an appeal of that decision, and the committee discussed it at length and concluded that, no, you shouldn't. Two reasons: A, the lack of funding; B, the fact that you're going to be prioritizing those fundings and to somehow say, you know, you didn't give me this particular resource and, therefore, I ought to be able to go to JCAR and overrule you, it brought in an additional level of tension we thought that didn't really justify the situation in light of the funding abilities that we're going to be facing.

A second role that we discussed, there was so much controversy when 1204 was filed about complex cases that everybody got away from the complex case, and they just started talking about certain cases with these particular type of criteria. You know, it was just -- it was almost toxic. You know, you say, well, it's the

complex case, you know, panel or something like that, you know. So you'll see in the legislation they talk about certain cases needing additional resources. We went back to complex cases because that's really what you're talking about, but when you get into the factors or the considerations, there was a discussion about should we expand this to include catastrophic events.

As the bill was drafted it basically was talking about single shot cases, and there was discussion because, you know, we've gone through two catastrophic hurricanes on the Gulf Coast. We've seen how they've shut down courthouses; and is there a need to have some type of formalized process for getting resources to those areas; and at the end of the day, as you will note in the report, the agreement was, yes, you should seek and we should try to formalize that process so that we don't have to reinvent the wheel every time a hurricane blows up in the Gulf and hits one of these counties. But at the end of the day that issue really was never vetted by any of the legislative processes. It wasn't a part of the discussion during the task force in '07, '08, and so the committee just felt that that was something that really should be left for another date. We did, as reflected in our report, note that, you know, I think it was '09, Justice Hecht, that the Legislature gave the Supreme Court and the Chief Justice

certain powers to modify procedures in the event that you have those kind of catastrophic disasters.

HONORABLE NATHAN HECHT: Right.

MR. HILE: And so that is in place or in part. It might be helpful if somebody took that ball and advanced it down the court and developed more formalized processes similar to what we have here, but again, the committee decided that that wasn't within the mandate that we were given, and therefore, we decided not to act on that particular issue.

Funding and the lack thereof, as you'll note in the rules, it specifically states in the legislation and in the rules that the state is to provide these fundings. You cannot tax these as costs for the parties, and there's also language in the particular statute to the effect that you can only -- if there's no appropriations then JCAR cannot commit funds. Of course, it doesn't have anything, but it cannot commit any funds in that process. What concerned the committee -- and you'll see that the language is tweaked with in the end, and that would be somewhere around 16 -- the last two sections. 16.11, provisions for additional resources. It talks about (a), the cost and the fact that that must be paid by the state and may not be taxed. (b) is the appropriation for additional resources, and as I indicated, the legislation says, you know, "Unless

funds are appropriated you can take no action by JCAR."

The concern that the committee has is if you go back to the FLDS case back in '07, '08, you know, at that point in time there was a confluence of groups that joined together between the Supreme Court and between OCA and between the Governor's office and others. There were grants that were obtained to assist the court down in Schleicher County as it processed those claims. There was funding from another -- from a myriad of sources, and if something was to develop to date, an event that caused a particular case to need additional resources, we wanted to track the language in the legislation that you had to have appropriations, but we added in and we modified that section to the extent that there are funding available through other sources it should not preclude JCAR from acting. You may have it via grants, you may have the Governor's office assisted in that FLDS case.

So, again, we kind of modified that to the extent -- and that language comes from the gurus over in budget in OCA because I certainly don't have that ability, but basically says, "Additional resources are subject to availability of appropriations made by the Legislature or as provided through budget execution, authority, or other budget adjustment methods." So there's, as I understand it, a myriad of ways that funds may be transferred within

particular situations, and we wanted to leave those avenues open in the event that something developed, and even though we didn't have an exact appropriations like in this particular session that there would be means where JCAR could proceed and maybe assist a court in that particular situation.

We did add one final deal that at the conclusion of a case that had JCAR additional resources added that there be a final report submitted and maintained, and that's more for budgetary processes. One of the discussions after the FLDS case was, is that really we had no consolidated method of determining what the actual costs were in that process and if we had something going forward then we would have a basis to go to the Legislature and say, "Look, we know it costs X, Y, Z, for this particular implemental resources provided in a case and if you provide us these then we will have that available." So, Chip, that's just kind of a brief overview.

CHAIRMAN BABCOCK: Thank you.

MR. HILE: If that's sufficient, I --

CHAIRMAN BABCOCK: That is sufficient for now until the barracudas start swarming. A couple of questions, though. First of all, unless I missed it, I don't think "additional judicial resources" is defined in

either the rule or the statute, but maybe I missed it, and if it's not defined, what is an additional judicial resource?

MR. HILE: Well, if you'll look at -- I guess to the extent that it's defined it's in 16.5, which is the additional resources. That section which tracks the language from the bill basically sets forth what resources may be provided. You know, it gives you (a) through (g), which are specific in nature, and (h) which is more of a kind of a catch-all phrase.

CHAIRMAN BABCOCK: Okay.

MR. HILE: That's as close to I think what you're asking that we did.

CHAIRMAN BABCOCK: Yeah. That's good. Second question, tell us a little bit about the task force members. It looks -- I know many of them, but it looks like -- specifically it looks like both the plaintiffs bar or the defense bar and judges at various levels from the trial to appellate were represented.

MR. HILE: Right. You know, the bill required that there be a diverse group, and so Bob Black is the one who appointed the particular committee. It was 14 in number. We had sitting court of appeal judges. We had sitting district judges. We had retired district judges, retired court of appeal judges, and then we had plaintiffs

bar -- members of the plaintiffs bar and the defendants bar.

CHAIRMAN BABCOCK: Okay.

MR. HILE: I did -- like I say, I expanded the working group to include Senator Duncan's general counsel and also representatives from -- I mean, Representative Jackson and Representative Tryon Lewis, simply because if you're speaking of legislative history and there were issues and there were some discussions in which we asked them, "Was this particular issue discussed, and if so, is this an appropriate function for us to involve ourselves," specifically the catastrophic events.

CHAIRMAN BABCOCK: Right. Richard, hang on for one second. In the past task forces have come before us and there have been -- the history of the task force is there have been sharp divides between plaintiffs lawyers, defense lawyers, and in some cases the court -- the judges are mad about things. We found that when we took up the complex case thing. A lot of judges were irritated by that. Was there any -- was there any of that dysfunction in your task force?

MR. HILE: There really was not, and I think that is reflective of the long legislative process that had caused the evolution of this particular bill, and having sat through most of those hearings, most of that had been

ferreted out and between that and the task force, you know, had been fairly well narrowed the issues that we were going to be confronted with, so you did have that degree of comfort. The one thing I did do was to include the presiding judges. I mean, there was no presiding judge on our particular committee, so Judge Ables, I did send him a copy and circulated our proposed drafts through that group so they would have some insight, and then with Dean Rucker, I visited with him on a number of occasions, and he proposed some changes in language.

So I did want to at least have them since they were the group that was going to have to operate under these procedures, and that's the reason why we didn't go into the more operational aspects of the committee. I mean, you've got a working committee that's got a chair appointed. You know, rather than micromanage their processes, they operate now, and we just said let's stay away from trying to figure out how they should actually handle these issues.

CHAIRMAN BABCOCK: Did you have any dissenters? Were there any of these provisions in Rule 16 controversial at all?

MR. HILE: To be truthful, no.

CHAIRMAN BABCOCK: Okay. Well, and truthful is always best.

MR. HILE: Yeah, and there were no dissents to the final report or to the rules that were recommended.

CHAIRMAN BABCOCK: All right. I hadn't heard any, but that's terrific. That's great. Buddy, anything out there in the weeds? Is this controversial that you've heard? You're the one with the ear to the ground.

MR. LOW: Everything he's said is right. I've known him from for a long time. He's from East Texas, so it's gospel. Let's go on.

CHAIRMAN BABCOCK: Okay. That's good. Anybody else picked up on any controversy with respect to this? Okay. One final question, on 16.11(a) where you say, "The additional resources provided shall be paid by the state, may not be taxed against any party in the case," what about the situation where the parties agreed to be taxed or charged in some way? Justice Hecht many years ago had an experience with a nuclear power case with Roy Minton and former Chief Justice Hill where the parties actually built a facility to try this massive case.

MS. BARON: I worked on that.

CHAIRMAN BABCOCK: But they paid for it. Yeah, Pam.

MS. BARON: I worked on that at Graves Dougherty.

CHAIRMAN BABCOCK: It didn't come out of your

pocket, did it?

MS. BARON: No, fortunately not.

CHAIRMAN BABCOCK: Money was going into your pocket, not out of it. But would this preclude that?

MR. HILE: Yes, and that comes specifically from the statute. There was a short discussion about that, but, you know, when the -- that language is from the statute, so --

HONORABLE STEPHEN YELENOSKY: But, Chip, it wouldn't preclude them from doing that again, just outside of this process.

CHAIRMAN BABCOCK: Just outside of the process --

MR. HILE: That's right.

CHAIRMAN BABCOCK: -- go to the trial court and say we need to --

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: -- an airplane hangar for a courtroom.

HONORABLE STEPHEN YELENOSKY: Yeah, we're just not going to use -- we're not going to JCAR.

CHAIRMAN BABCOCK: Okay.

MR. HILE: And with no funding I find it -- why would you go to JCAR when you have funding, I mean, unless you're in dire straits, the process is going to

probably revert back to the mean, which is going to be the presiding judge can provide something.

CHAIRMAN BABCOCK: Orsinger had his hand up first, Frank, and then you. Richard.

MR. ORSINGER: I just wanted to note that one of the task force members was Judge Barbara Walther, who was the trial court judge presiding over the Latter Day Saints provision where they had hundreds of children that were removed from home and put in temporary foster care, and so I would assume that that's the kind of situation that might -- this might be suited for --

MR. HILE: True.

MR. ORSINGER: -- and that her experience with that might have been a valuable resource.

MR. HILE: In fact, the very first meeting I asked Barbara to lay out what happened in that case and what the needs were in that case so we could kind of get a grasp of what you actually may be talking about, and I think the most instructive thing she talked about was the first meeting that they had they asked the district clerk to come to Midland and sit down and bring all your computers and let's figure out the docketing, and they walked in with three typewriters, and she said, "I knew right then that we had some problems." They didn't have a single computer in the courthouse. But, yes, she did. I

think, you know, the use of -- you're talking about what resources, it may be a case that involves a mineral dispute in a small county. If you can have access to a computerized electronic docket filing, that can significantly advance the process, so, I mean, we considered those kind of situations.

CHAIRMAN BABCOCK: Great. Great. Frank.

MR. GILSTRAP: 16.11(b) talks about funding -- additional funding. It talks about the possibility of getting funds from grants or donations. Are we talking it could be private individuals or businesses or nongovernmental organizations? Could they be funding this thing?

MR. HILE: Frank, in the past they have. Now, I will let Carl -- because he was involved in the process with the FLDS, that was a discussion that you could have that scenario develop. We were really talking more about the grants coming through the Governor's office and everything, but, Carl, you can --

MR. REYNOLDS: Yeah, the Governor's office was one thing that happened in the FLDS case, was some money flowing through there, but I have the independent statutory authority to accept grants and donations to advance the purposes of my office, and this would be one of those. The restriction is that I can't get donations from

lawyers or law firms, so --

MR. GILSTRAP: But if XYZ corporation felt that prosecuting or not prosecuting these cases was in its interest, they could come with some money?

MR. REYNOLDS: Well, conceivably. I think we would have to be careful not to create a stinky situation, but there is at least the potential for getting donations to do this or other things that my office does.

MR. HILE: Frank, that was an issue that was, you know, discussed at length. There were concerns that private money could influence the process, and I think at the end of the day we said, well, you know, OCA has got to exercise discretion in this process of not taking funds that may be used for that purpose.

MR. GILSTRAP: Or particularly maybe, you know, it might be easier to take funds if it's an unpopular thing.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: The statute says, "The costs shall be paid by the state." Section 74.235, page 101 of the handout, "The cost of additional resources provided for a case under this subchapter shall be paid for by the state."

MR. REYNOLDS: Once I get funds it's the state's money at that point.

MR. GILSTRAP: Doesn't it say it, "It shall be paid by appropriations"?

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah. I mean, so donate it to the state and flag it for JCAR. The only concern I would have is if they could flag it for a particular case.

CHAIRMAN BABCOCK: Right.

HONORABLE STEPHEN YELENOSKY: If they give it to JCAR and JCAR committee is making the decision, I'm not so concerned. They can't say, "Here's a bunch of money that we want you to put into this particular case."

The second question or point is we all just heard there's no money there, but lest some judge out there who is religiously reading the new rules thinks it's Christmas might we not put a comment that somewhat euphemistically allows them to check for to see if at least any money before they go through this process.

MR. HILE: We probably should. And that should be with a directive. Once you have an implementation through y'all's process, I would think that then we need to do that so you don't go through a process for nothing.

HONORABLE STEPHEN YELENOSKY: Right. And is there any -- is there somebody you can check with now that

you can identify in the comment? If not, could you make a comment that says it's subject to appropriations or something? The best would be if there's a way for judges to first find out if there's even any money there before they go through it.

CHAIRMAN BABCOCK: Good point.

MR. HILE: And I think that's the reason for using the presiding judge as a gatekeeper in that process --

HONORABLE STEPHEN YELENOSKY: Well, that's true.

MR. HILE: -- is that he is going to be most knowledgeable about the access to funding and the level. I mean, if you're coming -- even if you get $250,000, I don't know whether that would have been sufficient to really address all the needs in the FLDS cases.

MR. REYNOLDS: It would have, actually.

MR. HILE: Okay.

MR. REYNOLDS: At least from the court's standpoint. The Family and Protective Services sank millions into that case, but it was not our problem.

CHAIRMAN BABCOCK: Okay. Any other general comments? Yeah, Professor Carlson.

PROFESSOR CARLSON: Are there any other states that are using this type of vehicle for funding

cases?

MR. HILE: I'm not aware of a formalized process like this, no.

CHAIRMAN BABCOCK: Okay. Any other general comments? Okay. Let's quickly go through Rule 16 here. Anybody have any comments on 16.1? This, I believe you said, Dickie, comes pretty much straight out of the statute?

MR. HILE: It does, and the only exception being in (c), little (2), grants for local court improvement under section 72.029 of Texas Government Code. Carl has situations where he may have grants that would not be within the JCAR, and that was just simply to say that they wouldn't be subject to the rule. That's the only change.

CHAIRMAN BABCOCK: Okay. All right. Any comments about 16.2? Again, did this come out of the statute or was --

MR. HILE: No, the JCAR clerk, of course, is something we developed. The presiding officer is straight from the statute as well as the presiding judge. Trial court, we had a little question about that. If you look, it says in (e), "Trial court means the judge of the court in which a case is filed or assigned." We talked about filing and then, of course, you always come back to Travis

and to Bexar and to Tom Green, those counties that have that docket where it's really not assigned or it's not filed in a particular court; and we discussed, well, should we actually set the process here of saying how that's going to be decided; and at the end of the day we said, look, let them decide under their local rules how they're going to decide who makes that request rather than us trying to decide it on their behalf.

CHAIRMAN BABCOCK: So that's why you have "filed or assigned"?

MR. HILE: "Or assigned," right, hopefully to address that issue.

CHAIRMAN BABCOCK: Okay. Gene.

MR. STORIE: Sorry to back up, but I was going to suggest in 16.1(c) that the statutory references be consistent in form.

CHAIRMAN BABCOCK: Say that again, Gene. I'm sorry.

MR. STORIE: That in 16.1(c) --

CHAIRMAN BABCOCK: Right.

MR. STORIE: That the statutory references be consistent in form. Texas Government Code in one. In (2) and sub (3) there is not a code reference. In sub (4) it just says "Government Code."

CHAIRMAN BABCOCK: Great point, thanks. All

right. Anything else on those two subdivisions? How about 16.3? Oh, I'm sorry. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I'm sorry, I missed the comment on 16.2. I don't see "presiding officer" used anywhere else in the rule, 16.2(c). It's just a minor comment, and then on 16.3, is the JCAR clerk actually filing or just accepting these things?

MR. HILE: Accepting.

HONORABLE TRACY CHRISTOPHER: All right. Because you have "filed" there in (b), and I would put 16.12 under here rather than as a standalone provision because those are all the duties of OCA.

CHAIRMAN BABCOCK: Great. Thank you. Anything else on 16.3? All right. 16.4. Any comments on 16.4? Considerations?

MR. HILE: That is a verbatim restatement of the statute.

CHAIRMAN BABCOCK: Verbatim from the statute. So even if there were comments, we would have to reject them.

MR. HILE: I think you've got the latitude somewhere, but I don't know.

CHAIRMAN BABCOCK: 16.5.

MR. HILE: That, again, is a verbatim restatement.

MR. BOYD: That -- I'm sorry.
CHAIRMAN BABCOCK: Yeah, Jeff.
MR. BOYD: Just formatwise, 16.4 has a sub (a) but no sub (b). Is that --
MR. HILE: We eliminated a (b). Okay. Thank you, Jeff.
CHAIRMAN BABCOCK: Yeah, that should be reformatted. Good point. Okay. Anything in 16.5? 16.6? Yeah, Sarah.
HONORABLE SARAH DUNCAN: Use of the word "retired judge," I'm very sensitive to this these days.
CHAIRMAN BABCOCK: Why would that be?
HONORABLE SARAH DUNCAN: That it's not used consistently in the statutes, and I don't know the sense in which it's used here.
CHAIRMAN BABCOCK: We're talking about 16.5(a) that uses the phrase "the assignment of an active or retired judge." And I guess there are judges who --
HONORABLE SARAH DUNCAN: There are judges who are former judges who have not retired.
CHAIRMAN BABCOCK: Right. Richard.
MR. MUNZINGER: Is 16.5(a) an exact quote from the statute?
MR. HILE: I believe so.
MR. MUNZINGER: I was looking quickly, and I

couldn't find it quickly.

CHAIRMAN BABCOCK: Sarah, how would you fix or how would you supplement?

HONORABLE SARAH DUNCAN: I'd have to look at the statute.

MR. PERDUE: The problem is the "former" and "retired."

HONORABLE SARAH DUNCAN: Right. Because the statutes aren't consistent.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: And there's a lot of confusion about it.

HONORABLE STEPHEN YELENOSKY: Couldn't we just say "another qualifying judge"?

MR. PERDUE: Couldn't you add "former"?

HONORABLE SARAH DUNCAN: You could add "former," but I'm not sure the Legislature intended that.

MR. ORSINGER: Former is someone that was voted out of office; is that right, Sarah?

HONORABLE SARAH DUNCAN: No.

MR. ORSINGER: No. What is the judge who was voted out of office?

MR. REYNOLDS: There's no special term.

HONORABLE SARAH DUNCAN: There's no special term. They're just not eligible to do certain things, or

they are subject to strikes; isn't that right?

HONORABLE DAVID PEEPLES: It's someone who's got enough years to sit as an assigned judge, but has not chosen to be on retirement yet.

MR. HILE: It's on page -- well, and the statute would be 74.254 --

MR. MUNZINGER: I found it.

MR. HILE: Okay.

CHAIRMAN BABCOCK: 74 point what?

MR. HILE: 74.254(d).

MR. ORSINGER: And this is verbatim?

MR. HILE: Yes.

HONORABLE SARAH DUNCAN: My hunch is that the Legislature did intend for former judges who are not drawing retirement to be eligible, just because they're eligible to be assigned in a case generally, but I think that needs to be made clear in here. The only way the Legislature can use it inconsistently and it still have meaning, which is what they've done, is they define it in the chapter or subchapter in which it's used.

CHAIRMAN BABCOCK: Great point.

MR. HILE: So it might include as a definition.

CHAIRMAN BABCOCK: Well, either a definition or a comment. Sarah, would a comment suffice?

HONORABLE SARAH DUNCAN: I think a definition would be --

CHAIRMAN BABCOCK: The definition would be preferable.

HONORABLE SARAH DUNCAN: -- preferable. Just me.

CHAIRMAN BABCOCK: Yeah. Good point. Yeah, Justice Bland.

HONORABLE JANE BLAND: I think since the statute says "active or retired," they didn't intend to include former, and we should just leave it the way that the task force has it, which tracks the language of the statute.

MR. HILE: The Legislature has been known to be very -- you know, this has been an issue that's been over there a number of times, and I don't remember during the debate whether that issue was brought up, to be truthful.

HONORABLE SARAH DUNCAN: I'm assuming, but I may be assuming incorrectly, that "retired" is not defined anywhere in this chapter or subchapter.

CHAIRMAN BABCOCK: I don't see it, unless somebody else does.

HONORABLE SARAH DUNCAN: I'm talking about the chapter or subchapter, not just the section.

CHAIRMAN BABCOCK: Not the bill.

HONORABLE SARAH DUNCAN: It makes me no difference. I just think it should be clarified.

CHAIRMAN BABCOCK: Okay. Noted. Anything else about 16.5? Okay. 16.6? Where did this language come from, Dickie?

MR. HILE: Part of it I think came from the statute. Let me just -- this is not verbatim from the statute, though, as I recall.

CHAIRMAN BABCOCK: Okay. Any comments about 16.6? Yes, Sarah.

HONORABLE SARAH DUNCAN: Is there a noun missing from subpart (1)?

MR. GILSTRAP: Yes.

HONORABLE SARAH DUNCAN: (a)(1).

MR. GILSTRAP: Subpart (1) could be written better.

HONORABLE SARAH DUNCAN: "Involve," noun, "that justify additional judicial resources." There just is a noun missing.

CHAIRMAN BABCOCK: Noun missing.

MR. BOYD: "Considerations" is the noun.

MR. GILSTRAP: "Considerations" is the noun, but certainly (1) could be written better. I don't know what that means.

HONORABLE SARAH DUNCAN: I don't either.

MR. BOYD: "Considerations that justify additional judicial resources."

MR. HILE: Again, I think that was to refer back to 16.4, which is the considerations that are set forth in the statute.

CHAIRMAN BABCOCK: Okay. Other comments about 16.6? Frank, did you have your hand up for the same thing?

MR. GILSTRAP: No, that was same thing, yeah.

CHAIRMAN BABCOCK: Yeah. Sarah.

HONORABLE SARAH DUNCAN: I'm a little uncomfortable with the use of the "will" in (a)(2). I would not be comfortable as an attorney basically guaranteeing that additional resources will promote the just and efficient conduct of a case. I would like to say "are likely to," "would tend to," but "will" is definitive.

CHAIRMAN BABCOCK: Okay. Other comments about 16.6? Yeah, Sarah.

HONORABLE SARAH DUNCAN: Same concern with the use of "should" in (a)(3).

CHAIRMAN BABCOCK: And what would you substitute for "should"?

HONORABLE SARAH DUNCAN: Giving a court a deadline is foreign to me.

CHAIRMAN BABCOCK: It shouldn't be anymore.

HONORABLE TOM GRAY: "Are needed."

HONORABLE SARAH DUNCAN: "Are needed."

CHAIRMAN BABCOCK: Okay. Yeah. All right. Carl.

MR. HAMILTON: Just the terminology in 16.6(c), "on the trial court's own motion," courts don't make motions. "Court's own initiative" or something like that.

HONORABLE SARAH DUNCAN: That's the new modern Brian Garner phrase.

PROFESSOR DORSANEO: Actually, it's just to say "own" now.

HONORABLE SARAH DUNCAN: Oh, we don't even say "On its own initiative"?

PROFESSOR DORSANEO: No, we just say "own."

HONORABLE SARAH DUNCAN: Own it.

CHAIRMAN BABCOCK: Okay. What else about 16.6? Sarah.

HONORABLE SARAH DUNCAN: Sorry.

CHAIRMAN BABCOCK: No, no, no.

HONORABLE SARAH DUNCAN: It's probably just me, but (b), "may request that a case be designated as requiring additional resources," is there not some way to define that? It's just a little awkward. You know, like

in Bexar County if you get certified as a complex case then you can have a judge assigned to your case. Could we think of a shorthand way of saying an additional resource case, maybe without -- maybe it's just me.

HONORABLE STEPHEN YELENOSKY: Well, not complex case, because that raises the whole -- that raises our --

HONORABLE SARAH DUNCAN: I'm not suggesting --

HONORABLE STEPHEN YELENOSKY: -- because it suggests that all the other cases aren't.

HONORABLE SARAH DUNCAN: I'm not suggesting complex case. It's just that "designated" usually has a noun after it.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE STEPHEN YELENOSKY: "A resource intensive."

CHAIRMAN BABCOCK: Orsinger, do you have an answer to this?

MR. ORSINGER: No, I have a different one.

CHAIRMAN BABCOCK: Okay. Well, that's a good point. What's yours, Richard?

MR. ORSINGER: On subdivision (d) I'm curious about the concept of the court issuing an order rather than a finding or something, because the trial judge really, of

course, has no authority to order anything about this. Really, it's just a request, and so I don't know whether we're asking the court to issue an order or whether we're asking the court to issue a request or a finding. To me I think it's more appropriate to call it a finding and not an order because you're not really ordering anybody.

MR. HILE: And at one time we did use the term -- at one time it was "request," and then but you're probably finding, issue findings.

MR. ORSINGER: Well, I mean, the question that occurs to me is who are they ordering to do what if it's an order?

CHAIRMAN BABCOCK: Yeah. They don't have the authority to order anybody to do anything.

MR. ORSINGER: That's why I think either "a request" or "a finding" would be a better way to say it.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: In (c), second line, "shall," I don't know where we are now with "shall" and "must" and "may," but we're somewhere and --

HONORABLE STEPHEN YELENOSKY: Well --

CHAIRMAN BABCOCK: Okay. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: And we don't really mean "shall," do we? Somebody files a motion

saying, "Judge, we think you need additional resources," and the judge sits on it because he thinks it's -- or she thinks it's ridiculous, why should I have to rule on it? I mean, right?

HONORABLE JANE BLAND: If I don't want to beg.

HONORABLE STEPHEN YELENOSKY: If I don't want to beg, why should I have to sign an order saying "denied"?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I would suggest that the requester is entitled to an answer one way or the other, but --

CHAIRMAN BABCOCK: Yeah, you're ridiculous.

HONORABLE SARAH DUNCAN: I know.

CHAIRMAN BABCOCK: That's what Judge Yelenosky would tell you.

HONORABLE STEPHEN YELENOSKY: No.

HONORABLE SARAH DUNCAN: In the third line, discomfort similar to what I previously stated with "will." "The trial court guaranteeing that will require additional resources" when actually it could settle tomorrow and it won't require any resources.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE STEPHEN YELENOSKY: The reason I think it's different from any other request is because it's

not an adjudication of anything between the parties. It's a suggestion to the court you might need additional resources, and so maybe it ties back in with what Richard's saying, which is this doesn't end up in an order at all, so I'm asking the judge to enter a finding or I'm asking the judge to ask, you know, is a little different from saying, "I filed a motion to which I'm entitled to an order."

CHAIRMAN BABCOCK: Well, the way this sentence reads, it says, "The trial court shall" -- it could be "must" -- "determine whether the case will require additional resources to ensure efficient judicial management." So that leaves it open, I guess, for you to say, Sarah, "No, we're not going to do that because it doesn't need it." Right?

HONORABLE SARAH DUNCAN: Yeah. I don't -- I don't understand -- whether it adjudicates an issue between the parties to me is irrelevant. A party has made a request, and I guess to me it's just common courtesy that --

CHAIRMAN BABCOCK: Pursuant to a statute.

HONORABLE SARAH DUNCAN: Pursuant to a statute that was enacted by the Legislature that we answer. Whether it's "yes" or "no," just answer.

CHAIRMAN BABCOCK: That makes sense. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: You know, I think we should answer it, and we might want to think about -- even though I know we're going to put a comment in here about we have no money, we might want to think about letting a judge issue such a request even before we have money so that we get a body of knowledge that we could then present to the Legislature and say, "We would sure like funding." Just an idea.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: The last sentence in part (c), I mean, I know what it says, but there's got to be a simpler way to say it. I mean, you could say, "In making this determination the trial court may direct the attorneys and parties to appear for a conference and in its discretion conduct an evidentiary hearing."

CHAIRMAN BABCOCK: I'm trying to think of why the trial court would not believe it had authority to do that.

MR. GILSTRAP: Yeah. Yeah. I mean, without saying it.

CHAIRMAN BABCOCK: Without saying it. Okay. Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: Just before we leave (a)(2), I think that it's fair to ask the parties to state that it will promote the just and efficient conduct.

We're not -- I think "promote" is the correct word. We're not saying "will achieve," but that there should be some representation as to the efficacy of the reason behind the motion, so I think that's a fair statement.

CHAIRMAN BABCOCK: Okay. What else? 16.6 going once. Justice Gray.

HONORABLE TOM GRAY: Well, I don't know exactly where y'all came out on (d)(1), whether or not y'all were going to do something with a finding or something instead of an order, but historically I thought courts rendered, clerks enter, and in this context if you're going to do a finding, I would prefer "make a finding" instead of "enter a finding."

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: I'm not sure it's wise under (d)(2) to put an address in there which may change. We don't usually do that on filing with the clerk and give the clerk's address or something.

MR. HILE: That came from Rule 12, I think. I think that's the language which is in the --

CHAIRMAN BABCOCK: That's in Rule 12?

MR. HILE: -- Rule 12 about the judicial records.

CHAIRMAN BABCOCK: But we didn't do it.

MR. ORSINGER: This is Administrative Rule

12, you're talking about?

HONORABLE STEPHEN YELENOSKY: You could find it.

CHAIRMAN BABCOCK: Maybe we did do it. Who knows. Okay. What else?

MR. ORSINGER: Maybe you should refer to that administrative rule in case the address changes.

HONORABLE SARAH DUNCAN: I'm sorry, what did you say?

CHAIRMAN BABCOCK: He's just babbling.

HONORABLE SARAH DUNCAN: Richard, doesn't ever just babble. He frequently makes very good points. What were you saying, Richard?

MR. ORSINGER: Maybe they should cross-refer to the administrative rule so that if there is a change the administrative rule could be changed and everything else that refers to it will automatically follow through.

HONORABLE SARAH DUNCAN: Just a point of grammar, in (d)(1) describing the nature of -- I'm assuming what is meant is "Describe the nature of the case and identify the conditions that justify the additional resources and the specific additional resources that are needed."

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: One could say the court

should -- "The judge should describe the nature of the case and state what additional resources are needed and why."

CHAIRMAN BABCOCK: Right. Yeah. Okay. What else? 16.6 going twice. Professor Carlson.

PROFESSOR CARLSON: I guess just 16.6(e) needs to be changed however we change (d), to "request" or "order" or whatever.

CHAIRMAN BABCOCK: Good point.

HONORABLE TOM GRAY: (d)(3) has the word "order" in it, too.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: And --

MR. GILSTRAP: So does 16.7 has "order" in it.

MR. LOW: We're not there yet.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: It's just me and grammar. "Notification," what we're really talking about is a notice. Notice to trial court of action. I'm not trying to say what it should be exactly, but it's notice to the trial court of action on the request.

CHAIRMAN BABCOCK: Right. Yeah, the caption, if that's what it is, is a little misleading. Okay. Yeah, Carl.

MR. HAMILTON: The notice, "JCAR clerk or the

presiding judge of the district," is that -- that would be the local presiding judge of that district, and how does that judge get that information? From the clerk or --

MS. SECCO: In (d)(3).

HONORABLE SARAH DUNCAN: (d)(3).

MS. SECCO: In (d)(3), the previous provision.

MR. ORSINGER: But I think Carl's talking about a local presiding judge as opposed from a regional presiding judge, aren't you, Carl?

MR. HAMILTON: No, it says "administrative judicial region." "Submit a copy of the order."

CHAIRMAN BABCOCK: Where are you, Carl?

MR. HAMILTON: I'm on (e).

MR. HILE: On the bottom.

MR. HAMILTON: The order in (d) comes from the trial judge, and he submits a copy of that to the presiding judge. It goes to JCAR and then within 15 days JCAR clerk or the presiding judge provides notice to the trial court. Where does the presiding judge get the information from?

MR. HILE: The presiding judge is the gatekeeper. If he has allotted resources he can act initially under the rules and say -- he may provide the visiting judge. If it's not something that he has within

his power then he refers to the JCAR committee.

MR. HAMILTON: Okay. So that means that if he makes the decision he tells the trial court, but if JCAR makes it, they tell the trial court.

MR. HILE: Right. Right.

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

HONORABLE TRACY CHRISTOPHER: I just think (e) is unnecessary and kind of overcomplicated, that JCAR is going to give a 15-day, you know, status report on your motion, you know, even to tell you, "Well, no one's met yet." I mean, you send it to them, you hope to hear from them. If you don't hear from them, you call. I mean, we just don't have to put in this artificial time deadline.

CHAIRMAN BABCOCK: Okay. We could put in a rule that just says "call me or I can call you."

HONORABLE TRACY CHRISTOPHER: Call. Call.

CHAIRMAN BABCOCK: Yeah, Justice Peeples.

HONORABLE DAVID PEEPLES: I realize it may come straight out of the statute, but it seems kind of weird to -- the only resource the presiding judge has is the ability to assign a visiting judge. There's no money to help fund this kind of stuff, but there's already a procedure for the trial judge to ask for that, and so to have -- I mean, that exists even without this, and so to

add that in here it just seems strange to me.

MR. HILE: Well, and there was some discussion about that, because if the request is made today -- or if the rules are implemented and the request is made, is it made under JCAR or is it made under his inherent powers to appoint the -- a visiting judge, and we -- at the end of the day I think we went with the statutory language, but I do think we discussed that, you know, right now if I was going to make a request, I would say, "I'm not asking this under JCAR, just would you send me a visiting judge?" Because he would have the authority in one and he may not have the authority in the other.

CHAIRMAN BABCOCK: Okay. Justice Peeples.

HONORABLE DAVID PEEPLES: If you've got to start with the trial court, it's got to go through the trial court, if all the trial court wants is a visiting judge, she is going to make a phone call to the presiding judge and say, "I need one." Nobody will do all of this. If you want resources, by definition you want more than the presiding judge can give you, and you'll use this, and so I just see no reason to have the "I need a visiting judge" procedure, which already exists, put into this where it doesn't advance the ball.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And sort of related

to that, I don't understand why 16.6(e) talks about the presiding judge of the effective administrative judicial region providing notice when we don't get to the presiding judge being able to decide this request until 16.7. You see what I mean? That -- that "or" clause in the, one, two, three, fourth, and fifth lines doesn't yet have a context to which it would relate.

CHAIRMAN BABCOCK: How would you fix that?

HONORABLE SARAH DUNCAN: Well, I think part of this will become more clear when we get the order part out of it, because I think that's kind of confusing, but we got a request, and that request is going to go to the trial judge, and the trial judge is going to give a copy of the request to the presiding judge. At that point either the trial judge or the presiding judge can make a request for additional resources; is that correct?

MR. HILE: Well, the trial judge has already -- when he sends the request to the presiding judge then that also encompasses the request to the -- that would be going to JCAR, and the presiding judge would make the determination, and it is inconsistent with, you know, he already has the power to send that visiting judge, but that's -- and I'm not -- that was the only power that I could determine that exists, but -- or then he makes the decision and sends it to the full committee.

HONORABLE SARAH DUNCAN: Right, but I'm just talking about the sequence.

MR. HILE: Okay.

HONORABLE SARAH DUNCAN: What would fix this for me is if we stayed -- if we're going to have a chronological sequence to this rule, let's stay in the chronology, and what the last three lines of (e) does is jump ahead of section 16.7(a).

MR. REYNOLDS: Could I clarify that, Dickie? I think it's not meant to. I think this was sort of a courtesy provision that was put in to say somebody should answer this judge within 15 days even if the answer is "We got it and we're working on it," "We don't have any money," or whatever it is, but before -- possibly before a decision has actually been made someone should get back to the trial judge and let him know what's going on, and that was the idea. It's not really as out of sequence as it appears.

HONORABLE SARAH DUNCAN: But we're talking about action.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Why do we call this an order under (d)? It's really just a request, isn't it?

CHAIRMAN BABCOCK: Yeah, that's -- findings, request, whatever.

MR. HAMILTON: Sort of confusing to call it

an "order."

CHAIRMAN BABCOCK: Yeah, I think we have concluded that maybe that ought to be changed.

CHAIRMAN BABCOCK: Anything else? Justice Peeples.

HONORABLE DAVID PEEPLES: Dickie, as I understand this, you've got two gatekeepers. If the trial court says "no," it ends, right?

MR. HILE: That's the end. Right.

HONORABLE DAVID PEEPLES: And the presiding judge, if the trial court says "yes" and the presiding judge says "no," it ends right there?

MR. HILE: Right.

HONORABLE DAVID PEEPLES: And so before it gets to the JCAR, the trial court and the presiding judge both have to say "yes." Now, I'm just wondering why -- I can understand why the trial judge would have to be consulted, but if the presiding judge is part of the JCAR why should the individual have that veto power before it can get to the JCAR? I mean, is there a reason?

MR. HILE: It was really looking at the statute and trying to discern from the statute. The statute basically keeps that gatekeeper function in there, and we debated that, you know. At one time we discussed a different proposal that would have not allowed that. He

would have gone basically through the full committee.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, sort of the converse of what Sarah was saying, understanding that, then under (d), why do we send it -- or why does the trial judge send it to JCAR at the same time he or she sends it to the presiding judge if JCAR can't do anything until the presiding judge and if the presiding judge blesses it, so why doesn't (d) just say -- (d) not say, part (2), (d)(2), "Forward it to the JCAR clerk," because it may be a nullity, and just leave in "send it to the presiding judge" and go in stairstep fashion and then if he or she approves it then it goes to JCAR because that's the only circumstance --

MR. HILE: Well, I wanted it to go to the JCAR clerk, so you had some type of -- you know, at one time the discussion was do it exactly that, send it to the presiding judge, and then you've got nine presiding judges who are basically the filing clerk for those processes, and I wanted a unified process for at least filing. Now, your question could be the JCAR clerk could sit on it until the presiding judge --

HONORABLE STEPHEN YELENOSKY: Well, they have to.

MR. HILE: Yeah.

HONORABLE STEPHEN YELENOSKY: And, I mean, it seems to me we're creating a paper trail. I understand what Tracy said about maybe it's good to create a paper trail to show demand, but other than that we're creating all this procedure which is essentially at the discretion, complete discretion, of the trial judge or the presiding judge, and to me why create a procedure when there's no review?

MR. LOW: Was the idea to give them notice that it may be coming?

MR. HILE: Well, and it was to give them notice of what type of request for -- I mean, if you have a committee, the thought was the committee needs to know generically what type of requests are being filed. Now, the presiding judge may have said, "No, I don't think this particular court needs that," but we were wanting to say that at least within JCAR they should have some global understanding of what requests are being filed and what types of resources are being sought.

HONORABLE STEPHEN YELENOSKY: And maybe for that purpose, but essentially what's been created is the Legislature has said we might put some money in some day, we're creating a board that will decide how that money's to get spent, and the only other thing that seems to need to be done is to tell trial judges who they're supposed to ask

and tell presiding judges who they're supposed to ask, and you know, the rest of it sounds like it would be created if you had an adversarial question, but you don't.

CHAIRMAN BABCOCK: Pam.

MS. BARON: From what I'm hearing it seems like the point of stopping at the presiding judge level is that it's possible the presiding judge could dispense the remedy that the trial court wants, but what I'm hearing from Judge Peeples and from others is that the trial court -- the presiding judge can only appoint a visiting judge, which that administrative judge can do already, has no other resources to dispense, so if you want a visiting judge, you can ask for it now. You don't need to go through this process, so I don't think that the presiding judge really has anything to dispense, so you might as well skip that step.

MR. HILE: There is one benefit I think, though, in that process. I think that presiding judge is the most knowledgeable about that court and probably its needs, and that was the discussion. You still by going through that gatekeeper fashion he may say, you know, "I've got two requests. This court is in need of it, and this one's not," so, I mean --

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: I agree with Judge Yelenosky

about subsection (e). You have a situation where the trial judge says, okay, I think I need additional resources, and he sends it to the presiding administrative judge. The way this is drafted the JCAR has to respond within 15 days, but the administrative judge may not have approved it yet. You're imposing an obligation, it seems to me, on the JCAR where the administrative judge has to act. It takes two to make the -- to get the resources, and that's the trial judge and the administrative presiding judge, but here you've got a duty for the clerk to do things, even though the presiding judge hasn't acted. I think there's a break in the sequence there. I agree with Judge Yelenosky.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But did they mean order of the presiding judge? In other words, 15 days after order of the presiding judge, and --

MR. MUNZINGER: Well, but it comes right after subsection (d), which talks about the trial court. It's --

MR. LOW: I understand.

MR. MUNZINGER: -- confusing.

MR. LOW: But that would be corrected if it's order of the trial judge, and back to another point that's raised, a presiding judge is additional judicial resource, and if you didn't include it here, they might not even

think of that as that. I mean, you can do it otherwise, but if it's not included, I mean, that is an additional judicial resource.

HONORABLE DAVID PEEPLES: You know, Chip --

CHAIRMAN BABCOCK: Hang on. Eduardo.

MR. RODRIGUEZ: Well, it just seems to me like the filing with the clerk could be held to the presiding judge to spur him on to make a decision about whether or not to continue, and to me all the clerk has to do is say, "We received your request, it's in the hands of the presiding judge, and we'll notify you when the decision is made." That letter will go to -- a copy to the presiding judge, and he'll know that it's on the front burner or back burner or somebody's burner, and he needs to do something.

CHAIRMAN BABCOCK: It's on a burner. Justice Peeples.

HONORABLE DAVID PEEPLES: The more I think about it, in light of this discussion, there are 450 some odd trial judges -- district judges with the authority, if we don't have the PJ in the middle, the authority to go straight to the JCAR, and I think it probably is a good thing to have someone who can say, "Slow down, let's talk about this. Let's see if there's some other way to get what you want" rather than having 450 people with the right

to go straight to this. That would probably be a good idea.

HONORABLE NATHAN HECHT: 454.

CHAIRMAN BABCOCK: 454, to be precise. Not to put too fine a point on it.

HONORABLE SARAH DUNCAN: I think Carl has just answered my question about the former judges. 74.253(e) on page 101. That is the statutory reference to former judges who were defeated being subject to an objection if they were assigned to sit, so by saying they are not eligible I think the Legislature has used "retired" to mean -- to include former judges who were not defeated at their last election. You see what I mean?

MR. HILE: Uh-huh. Uh-huh.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: It reminds me of something Justice Scalia told me. He said if they don't say it then it doesn't mean anything else. It means what it says. That's what -- they didn't include that, whatever they -- you don't try to reach their intent when they say something plainly.

MR. HILE: Chip?

CHAIRMAN BABCOCK: Yeah, Dickie.

MR. HILE: We discussed having a deadline that the presiding judge had to take action by, the

committee had to take action by, and at the end of the day we said knowing the limited resources, you don't want to deny this. It may very well be we're going to sit on it. We've got three competing deals in front of us, and we're going to have to figure out which one of those is the most needy and which one of those should get the money, and that was the reason, but at the same time we wanted the trial court to at least get some idea, somebody to respond and say, "It's still under consideration."

CHAIRMAN BABCOCK: Okay. Let's go to 16.8. I'm sorry, 16.7. We haven't finished with that yet. Any comments on 16.7?

MR. ORSINGER: Chip?

CHAIRMAN BABCOCK: Yes, Richard.

MR. ORSINGER: Is there a possibility that there may be more additional resources made available to the presiding judge than presently exists, and if that is true then perhaps we should use a general term, but if it's never expected that the presiding judges will have any resources beyond appointing a substitute judge then maybe we should mention appointing substitute judge rather than this vague concept.

MR. HILE: I don't know what the legislative thought processes were on that, to be truthful, Richard, whether they envisioned that this might be something we're

going to expand on.

CHAIRMAN BABCOCK: Well, and I don't think it is limited, Richard, to --

MR. ORSINGER: It isn't? Well, I thought that it was discussed that it was. Are there any open appropriations that would give OCA the authority to selectively provide resources to presiding judges or --

MR. REYNOLDS: No. We don't even handle the visiting judge money. It goes through the comptroller's office.

CHAIRMAN BABCOCK: That wasn't the point. At least maybe I misunderstood your question.

MR. ORSINGER: Right.

CHAIRMAN BABCOCK: But the statute and the implementing rule here has a whole bunch of things that can be done if there's funding.

MR. ORSINGER: By the presiding judge or only by the JCAR?

MS. SECCO: By the presiding judge. That language is directly from the statute.

CHAIRMAN BABCOCK: It says the presiding judge and the JCAR.

MR. ORSINGER: So, for example, name one thing besides appointing a substitute judge that a presiding judge can do without the assistance of the JCAR.

CHAIRMAN BABCOCK: I'm not sure.

MR. HILE: I think the only thing right now is what Judge Peeples says, that he can send a visiting judge. That's the only thing I'm aware of.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I'm looking at the statute on page 100. It's 74.254(d), as in dog. It only references the committee making additional resources available.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: So what my suggestion is, rather than use this oblique phrase "resources previously allotted to the presiding judge" when we mean appointing a substitute judge. Maybe we should say that the presiding judge can appoint a substitute judge or if he feels like more is required then he can go to JCAR.

HONORABLE SARAH DUNCAN: I guess that then is something we should talk about. I don't think you should have to go through this process to get a visiting judge appointed by your presiding judge. As Judge Peeples was saying, that's just a phone call.

MR. REYNOLDS: That's not the intent. That's not the intent that they would have to go through this.

CHAIRMAN BABCOCK: Marisa.

HONORABLE SARAH DUNCAN: Then I think we

ought to --

MS. SECCO: Page 99 --

HONORABLE SARAH DUNCAN: -- say that.

MS. SECCO: -- of the statute specifically says that "If a presiding judge of the administrative judicial region agrees that, in accordance with the rules adopted by the Supreme Court, the case will require additional resources, the presiding judge shall use resources previously allotted to the presiding judge or submit a request for specific additional resources to JCAR."

MR. HILE: Yeah, we were pretty well locked in.

MS. SECCO: Right. So it's not --

HONORABLE SARAH DUNCAN: It's not a joint thing, though. It's --

MR. REYNOLDS: Could I chime in? There might be a reason why that's so oddly worded. There used to be in this bill a provision that would have allowed the presiding judges to employ staff attorneys with the express idea that occasionally a trial court judge out there in the hinterland needs a staff attorney, so we would have a covey of staff attorneys like we have visiting judges that the presiding judges could dispatch when needed. So those provisions were side by side in this bill for a long time.

The Governor's office asked us to take that part of the bill out and -- but nothing ever changed in this part, and it just now occurred to me that maybe that's what that's about.

MR. ORSINGER: So in the next session they may have more resources.

MR. REYNOLDS: They may. I really think that's a promising idea for our court system that so far we're not getting.

CHAIRMAN BABCOCK: That's a great point.

MR. LOW: Richard, if they did --

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: I mean, is there anything in the statute that prohibits the court, the Supreme Court, for instance, to try and seek some public funding through some foundation that might fund as, you know, lawyers that can -- staff attorneys that can then be sent to assist in trials such as you may have like in -- when a hurricane comes or as a result of a catastrophe? I mean, is that prohibited in the statute from going to a foundation -- a public foundation to seek funds to assist the justice system?

CHAIRMAN BABCOCK: I wouldn't think so, no.

MR. RODRIGUEZ: Well, then, I mean, those are extra resources that could possibly be used by this

committee should that occur.

CHAIRMAN BABCOCK: Yeah. Great. Good point, Eduardo. Anything more on 16.7? Yeah, Professor Carlson.

PROFESSOR CARLSON: I had two things I wanted to raise. One, Justice Peeples, you were talking about district courts, but I see this also applies to statutory county courts and probate courts.

MR. HILE: Yes.

PROFESSOR CARLSON: And was that part of the statute, or where did that come from, if you know?

MR. REYNOLDS: It's not part -- may I help with that? It's not part of the statute, but the statute says what it applies to, and it applies to cases that come up before county court at law judges.

PROFESSOR CARLSON: Okay. And the second thing, I noticed looking at the statute that, again, responding to Judge Peeples, it does require that the presiding judge sign off as the gatekeeper before it goes further.

MR. HILE: Yeah, we debated that.

HONORABLE SARAH DUNCAN: Where is that?

PROFESSOR CARLSON: Page 99, halfway down the page after (c)(1).

CHAIRMAN BABCOCK: Do you have anything else, Elaine?

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: After listening to everybody about that 16.7(a)(1), "use resources previously allotted," I mean, it wasn't -- I wasn't convinced that that language ought to stay in here because if it meant something before the legislation got modified that it no longer means then people are going to try to figure out what it means, and it doesn't really mean anything at this point. It may mean something eventually.

CHAIRMAN BABCOCK: But it is in the statute.

PROFESSOR DORSANEO: So what? It doesn't mean anything in the statute either.

CHAIRMAN BABCOCK: Well, not necessarily.

PROFESSOR CARLSON: You could put "if any."

MR. HILE: The staff attorney was a big issue, and that -- you know, in the discussions, and I've forgot how many we requested. Was it three for each?

MR. REYNOLDS: Way back it was three for each. We whittled it down to one apiece and then got rid of it altogether.

MR. HILE: Yeah, but that was one of the things that in the discussion with Judge Walther was the fact that the greatest need she had was a staff attorney to assist her in that FLDS case.

PROFESSOR DORSANEO: It clearly doesn't mean appoint a visiting judge, that you have to do that. It's not about that.

HONORABLE SARAH DUNCAN: I'm not sure that's right. Look at 74.253(d), as in Dogatopia, on page 100.

PROFESSOR DORSANEO: What is Dogatopia?

HONORABLE SARAH DUNCAN: That's where my dogs are today. "Additional resources the committee may make available include the assignment of an active or retired judge."

PROFESSOR DORSANEO: Huh. Wrong again.

HONORABLE SARAH DUNCAN: I'm not saying that -- it sounds like an onerous procedure to get a visiting judge to me.

MR. REYNOLDS: I think one reason for that is in the FLDS case, which is the one thing that all of us had in mind, that was one of the things that Judge Rucker was helping Judge Walther with, was Judge Specia coming in as a visiting judge. I think there were some others at one point, so that was one of a sort of arsenal of things that was in play.

CHAIRMAN BABCOCK: Yeah. Okay. Well, that mystery's solved. Richard, and then Justice Gray.

MR. ORSINGER: The fact that probate judges are included in this, if I understood under the statute, is

that right? Probate judges are included? Our definition of trial court doesn't make it clear to me that probate judges are included, but --

CHAIRMAN BABCOCK: 18 probate judges, by the way.

MR. ORSINGER: But the probate judges have their own presiding judge system that are not part of the administrative judge system, so what are we going to do about a probate judge who makes his request to the emperor of probate judges, and it's not one of the -- I think they're very defensive about that.

HONORABLE SARAH DUNCAN: Who would agree with your classification.

CHAIRMAN BABCOCK: I want to take a vote on how many people other than you knew that they have their own emperor.

MR. ORSINGER: Let me tell you something, the probate judges and particularly the emperor of probate judges, they are very sensitive about this issue. I mean, if anyone around here knows better than I do, so I think that their administrative protocols are to the presiding judge over all of the probate judges, which wouldn't fit with our geographical structure, and do we -- do we want to do something about that before the probate judges get this delivered to them as a rule?

CHAIRMAN BABCOCK: Great point. Thanks. Justice Gray.

HONORABLE TOM GRAY: Assuming this order becomes a request and to be consistent with the JCAR, I would suggest that RFAR would then be the appropriate acronym, request for additional resources. Thank you, I'm glad somebody got it.

CHAIRMAN BABCOCK: I got it anyway.

HONORABLE TOM GRAY: I appreciate it. The 16.7 reiterates what the additional resources needs to be for, so I think that just needs to be dropped, so this is starting at the top of page five, "determination that a case needs additional resources, the presiding judge shall," and then you've got subsection (1); and then subsection (2), if I'm reading this correctly, that refers to a potential request made by the presiding judge, not the trial court judge, and -- if I'm understanding that right. Am I reading that correctly?

MR. HILE: I think that's correct.

HONORABLE TOM GRAY: And so I think that a better way to express that is if the presiding judge believes that the additional resources are needed they can either submit the request, the RFAR, or the modified request, which would be their own request that they think is needed for that specific case to JCAR.

MR. HAMILTON: That would be a MARLAR.
CHAIRMAN BABCOCK: This is getting out of control. Buddy.
MR. LOW: But wouldn't the initial request be a request, and wouldn't his request be a request? Either one of them would be a request.
CHAIRMAN BABCOCK: They're both requests.
MR. LOW: That's all they say.
CHAIRMAN BABCOCK: Justice Christopher.
HONORABLE TRACY CHRISTOPHER: With respect to (c), we have the "filing" word in there instead, and I'm not sure who's filing what since this is not really -- belongs in a file and then we have the problem of the ruling by JCAR being an order now, and I'm not really sure that that would be appropriate either.
CHAIRMAN BABCOCK: Okay. Richard.
MR. ORSINGER: Are we on 16.8 yet or --
CHAIRMAN BABCOCK: No.
MR. ORSINGER: Okay. I'm going to hold back.
CHAIRMAN BABCOCK: Sarah.
HONORABLE SARAH DUNCAN: Speaking of filing, shouldn't these things have to be public records?
MR. HILE: Well, I think they are public records when they go with --
HONORABLE TRACY CHRISTOPHER: When they go

to JCAR.

MR. HILE: Yeah.

HONORABLE SARAH DUNCAN: So they are actually filed in the case, and a copy goes to --

MR. HILE: I mean, I envisioned that a docket would be there, and there would be a filing that would list all of the pertinent actions in regard to a case or request, what we would now call a request.

HONORABLE SARAH DUNCAN: So really just a copy would go to the presiding judge or to the committee? Because we're not going to send the record that's with the clerk, that was filed with the clerk.

CHAIRMAN BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: Right? The motion.

CHAIRMAN BABCOCK: Yeah, great point.

HONORABLE SARAH DUNCAN: Just a picky point.

CHAIRMAN BABCOCK: Okay. Anything else on 16.7? All right. Richard, go, with 16.8.

MR. ORSINGER: All right. I'm a little concerned that 16.8 puts the duty to cooperate without saying that it requires first the determination from JCAR that additional resources are required, so I would propose something along the lines of if the JCAR -- "If the JCAR determined that additional resources are required then the presiding judge and the Office of Court Administration

shall cooperate."

CHAIRMAN BABCOCK: Okay. Anything more on 16.8? 16.9? Is this statute language or is this --

MR. HILE: Yes, pretty much so.

CHAIRMAN BABCOCK: Any comments on 16.9? 16.10.

HONORABLE DAVID PEEPLES: Back to 8.

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: Dickie, does that mean the original trial court still has jurisdiction? If the original trial judge disagrees with something that this new judge does, does he have jurisdiction to countermand?

MR. HILE: I don't think that we discussed that, to be truthful. Let me see.

HONORABLE DAVID PEEPLES: And if -- the filing of a motion certainly shouldn't take away jurisdiction, but once another judge is on the case, if that happens, that's a different matter. But this is just a motion itself, it's not --

CHAIRMAN BABCOCK: Okay. Yeah, Richard Munzinger.

MR. MUNZINGER: I was looking for the 16.9(b), as in boy. Did you say that was part of the statute?

MR. HILE: I thought it was. I will have to

go back and look.

HONORABLE SARAH DUNCAN: Yes. 74.256 on page 101.

MR. HILE: Yes.

HONORABLE SARAH DUNCAN: "No stay or continuance pending determination."

CHAIRMAN BABCOCK: Okay. All right. 16.10.

HONORABLE SARAH DUNCAN: Wait a minute. I'm sorry. I'm belated here. I understand this is the statutory language. I do understand that.

CHAIRMAN BABCOCK: But?

HONORABLE SARAH DUNCAN: But if a motion for additional resources is being considered seriously by the committee and part of the consideration is bringing in an additional judge or bringing in law clerks or -- my mind's not creative enough to think about all the things it could possibly be, but the fact that that request hasn't yet been acted upon might be a very good reason to stay the case pending its resolution because otherwise you could have somebody proceeding in a manner that would be inconsistent with or preclude the additional resource being considered. So even though it's statutory language, can we just leave it in the statute and not put it in the rule?

CHAIRMAN BABCOCK: Well, you're only going to have two situations. The judge is in favor of this, and

he's requesting it, in which case he'll just reset the case. I mean, he's not going to put it to trial if that's being -- if he's in favor of it. Now, the other side is he's not in favor of it, but he felt like he had to pass it along anyway, and in that instance I think the Legislature would get to make a decision about whether or not it's going to be stayed or not. And they say "no."

HONORABLE SARAH DUNCAN: Well, I understand there's -- it's not the stay I'm concerned about. It's the grounds. I should be able to file something that's -- if we're in Harris County and a judge has any number of cases on his or her docket and is not -- it's not all about me and my case there, I should be able to say, "Judge, you might want to consider staying this case because you've agreed with us it's going to require additional resources, the presiding judge has agreed with us, and it's gone to the committee, and we actually got some funding so this actually might happen." I mean, it's kind of a First Amendment thing.

MR. GILSTRAP: It's a First Amendment thing? You have free speech.

HONORABLE SARAH DUNCAN: Why can't I say that something is a ground for a stay?

CHAIRMAN BABCOCK: Well, you can say it. It's just that the other side says, "Wait a minute, look at

what the Legislature said." Their speech outweighs yours. Maybe.

MR. GILSTRAP: Free speech in the courtroom.

CHAIRMAN BABCOCK: Yeah. Buddy.

MR. LOW: But just the filing is not the ground, and if I'm the trial judge and the gatekeeper and I want it continued, I'll find some other basis for it.

CHAIRMAN BABCOCK: Continue it on your own.

MR. LOW: I'm not going to be stupid enough to say, "Well, this is then filed," so --

CHAIRMAN BABCOCK: Gene.

MR. STORIE: I thought that was kind of an odd provision, too, but I wonder if the trial judge's agreement that this is an appropriate case for additional resources could be a ground, even though just the filing of a motion wouldn't be.

HONORABLE SARAH DUNCAN: That's what I was just working out in my mind.

CHAIRMAN BABCOCK: Good point. Okay. 16.10.

MR. GILSTRAP: Chip.

CHAIRMAN BABCOCK: Yeah, Justice Gray, and then Frank.

HONORABLE TOM GRAY: I don't know that I would have thought about this if there hadn't been all the discussion from Judge Peeples about do we want to do this

for the routine assignment of judges, but if active and retired and former creates all of this problem, we certainly have a procedure now where if a judge gets appointed that the parties don't think should be appointed they can attack that by mandamus, and according to this, if they went under this procedure to get that appointment from the presiding judge, presumably based on 16.10 that's been removed. I don't think that's what was intended, but that would be my concern.

CHAIRMAN BABCOCK: This is the statutory language, isn't it, Dickie?

MR. HILE: Yes.

CHAIRMAN BABCOCK: Precisely.

MR. HILE: Pretty sure.

CHAIRMAN BABCOCK: Okay, Sarah.

HONORABLE SARAH DUNCAN: I would just suggest that's an internal conflict within the statute which must be harmonized to give meaning to all parts.

HONORABLE TOM GRAY: Well, I mean, it comes right back to what Judge Peeples was talking about. You know, are we going to force all this -- what's otherwise a phone call up under Administrative Rule 16, is sort of the question. But -- and I obviously don't think it should be because I think they still need the ability to do it freely, quickly, by phone, but if it does fall out of this

process under 16 then it looks like they would be barred.

CHAIRMAN BABCOCK: Well, if they do it by phone call, who's going to complain?

HONORABLE TOM GRAY: That's what I mean. It's --

HONORABLE SARAH DUNCAN: If they do it by phone call and they assign someone as a visiting judge who was defeated in her last election, I have the right to object to that under the objection to assigned judge statute --

CHAIRMAN BABCOCK: Right.

HONORABLE SARAH DUNCAN: -- and under this statute, and that's reviewable by mandamus, and that's why I'm saying this is internal conflict that to give all parts meaning I think you would have to say, well, right, in the usual case it's not subject to mandamus, but given that there is another statute or court decision specifically saying that this is reviewable by a mandamus, you've got to harmonize them.

HONORABLE BOB PEMBERTON: That might be a specific controls over the general on that one.

CHAIRMAN BABCOCK: I think he's ruling against you, but purely in an advisory way.

HONORABLE BOB PEMBERTON: For what it's worth.

CHAIRMAN BABCOCK: Okay. 16.11.

MR. GILSTRAP: Did we skip over 16.10?

CHAIRMAN BABCOCK: Well, we didn't. We had a comment on it, but it's right out of the statute.

MR. GILSTRAP: It's in the statute, 74.257 on page 101 and 102.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: I just -- you know, our job is to be picky, and I guess is the Legislature implying that it is reviewable by writ of prohibition or injunction? Prohibition would be proper.

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: I bet you can find that in the legislative history.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: And I'm sorry I'm going back, but, you know, this statute and these administrative rules do give the parties the opportunity to seek additional resources that they -- we may not have now by just asking the court, and the courts may feel that with this now they have some ability to request additional resources when they may not feel as comfortable for whatever reason in asking right now. I think this gives the court some opportunity that may be overwhelmed for whatever reason to request additional resources that they may not feel comfortable

seeking otherwise. I think it's beneficial to the parties also who may -- who may be involved in a case that's sitting in a court without any discovery going forward or whatever because the resources aren't there because the court is, you know, in a capital murder trial, for instance, that's taking two or three months.

CHAIRMAN BABCOCK: Yeah. Yeah. Justice Peeples.

HONORABLE DAVID PEEPLES: Dickie?

MR. HILE: Yes, sir.

HONORABLE DAVID PEEPLES: As I think about this, is it possible that it would work this way? The trial court says, "I need additional resources, and I'd like, you know, technology and staff attorney." Is the -- and it goes through -- the PJ says "yes." The JCAR, is it limited to granting the items that the trial judge asks for, or can it go further? And not -- you know, if the trial judge doesn't ask for a visiting judge, can one be granted if he asks for other things, and if he says, "I'd like for Judge Jones to come in," but they get him somebody else, and he hasn't consented to that?

MR. HILE: Right.

HONORABLE DAVID PEEPLES: He's said, "I need help."

MR. HILE: Well, you know, what we envisioned

is that JCAR would be limited to those activities or resources that were requested.

HONORABLE DAVID PEEPLES: And if that were not the case then the trial judge is going to be thinking, "I don't want to open Pandora's box and ask for a couple of little things and get removed from the case and" --

MR. HILE: That was the other reason -- excuse me -- that we didn't want to put a 15-day rule that they've got to rule within because we said a lot of this is going to be fluid, what their demands -- they may be submitting up an amended request, saying that, you know, "I only requested A, B, and C, but conditions have changed. I now need D and E," so we viewed it as kind of a fluid deal, and we didn't want to have -- I know res judicata is not the word, but a final ruling out of them that would foreclose something necessarily, if it was still available.

HONORABLE DAVID PEEPLES: And just to follow up, I can foresee this happening maybe, if it's ever funded. Trial judge is willing to take judge A or judge B, but judge A and judge B are not judges of excellence, they're not really right for a complex case, and the JCAR is thinking, you know what, this case does need help, but we're not willing to put our names on the line for judge A or judge B. Then you have to negotiate with the trial judge. I mean --

MR. HILE: But, Judge, wouldn't that -- because that's coming under the presiding judge, what's allotted to him, I mean, that's almost foreclosed. He's made that decision. He's not going to reference that to JCAR, as I kind of view it.

CHAIRMAN BABCOCK: Doesn't it say in here that the trial judge has to consent?

MR. MUNZINGER: Yes.

HONORABLE DAVID PEEPLES: Well, where does it say that? And he certainly has to ask for resources.

HONORABLE STEPHEN YELENOSKY: It's in the statute. It's in the statute.

MR. MUNZINGER: Page 100, subject to subsection so-and-so, "The assignment of an active or retired judge under this chapter subject to the consent of the judge of the court in which the case for which the resources are provided is pending." If that's not explained by the rule further, it seems to me that the judge can say, A, "I don't need a judge," or, B, "I need a judge and I want Judge Orsinger, and I won't accept anybody but Judge Orsinger." That's presuming he's psychologically imbalanced, but --

CHAIRMAN BABCOCK: You mean the requesting judge?

MR. MUNZINGER: I don't think anybody has the

authority to change that the way this is written.

MR. HAMILTON: Emperor Orsinger.

HONORABLE DAVID PEEPLES: That's in the statute. Is it in the rule?

MR. HILE: It's not.

HONORABLE TRACY CHRISTOPHER: Yeah, it is. 16.5(a).

HONORABLE DAVID PEEPLES: Yeah. That's right. It is.

CHAIRMAN BABCOCK: Okay. All right. 16.11. Any comments? We've got to move on, so we've got four minutes to talk about 16.11. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I was just trying to follow-up on that, so if you're off of that and going on to 16.11 --

CHAIRMAN BABCOCK: We're on to a frolic of our own. 16.11. If anybody has any comments other than what's been discussed, just talk to Marisa about it, and she'll get it straight. 16.11.

Who does? Carl. Angie called on you, Carl.

MR. HAMILTON: Changed my mind.

CHAIRMAN BABCOCK: She just wanted to hear your voice again, I think.

CHAIRMAN BABCOCK: Okay. Anything on 16.11? Yeah, Professor Carlson.

PROFESSOR CARLSON: 16.11(b) is limited to other budget -- I mean, funds made available by grant or donations to the OCA. Is that what that means? Or made available by grants or donations to whom?

MR. HILE: That was the only discussion, was OCA, but the grants could actually be to the Governor's office.

PROFESSOR DORSANEO: Could be the state, could be anybody.

PROFESSOR CARLSON: Anything to the state, any office.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: You may want to put something in the rule that will allow the parties to be the donors of the grants or donations. For example, in a case, let's pretend Chevron is one of the parties, and they know it would help them, and they want to make a donation. Are they precluded by doing so because they're a party to the case? That could raise questions about favoritism. It could raise questions about whatever. There may be a need here to say that the parties could make a donation if all parties to the suit consented or otherwise, but that was the question that I raised earlier, and he said, "No, we can accept donations." If the parties to the case may realize it would save us a lot of money and a lot of time

in the long run and be a whole heck of a lot cheaper if we ourselves made the contribution because the state doesn't have the money. But could they do that as parties to the litigation? Does it raise questions of the propriety of a litigant making a donation when other litigants don't make a donation or don't consent to the litigation?

CHAIRMAN BABCOCK: Well, and I raised that earlier --

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: -- and because there's another example, where it's a lengthy trial, the jurors are getting creamed because their employers aren't paying them, and so the judge, trial judge, goes to the parties and says, "Hey, you've got to supplement the jurors' pay."

MR. GILSTRAP: You want to pay the jurors? You want to pay the jurors?

CHAIRMAN BABCOCK: Yeah. That happened.

HONORABLE TRACY CHRISTOPHER: There's a statute that allows that.

MR. GILSTRAP: That really happened?

CHAIRMAN BABCOCK: That happened. Absolutely it happens. David.

MR. JACKSON: There was a case early on in Dallas when realtime was just getting started where the parties came in and paid to set up a courtroom in Dallas

with realtime with computers and screens, and both sides were involved in it, so I mean, it couldn't be prejudicial to any one side. They all kind of agreed to that.

MR. MUNZINGER: Well, but this rule is silent on the parties agreeing to donations by the parties themselves, and when I raised the question earlier I was told, "Don't worry about it because we can accept donations and what have you," but that doesn't address the parties to the litigation be the donors, sources of the extra resources, and they are a very likely source for that, it would seem to me.

CHAIRMAN BABCOCK: Sure.

MR. HILE: The only prohibition is in regard to you can't do it as taxable costs.

MR. MUNZINGER: I agree with that. It cannot be taxed against them, which is another reason why I raised the question. It didn't say they couldn't donate them, but you still have the appearance of impropriety there and whether all parties have to consent, and the rule is silent on that issue.

CHAIRMAN BABCOCK: Richard Orsinger, and then Professor Dorsaneo.

MR. ORSINGER: Yeah, I wanted to confirm that. I had a five-week jury trial in a rural county where the parties agreed to pay the jurors better than minimum

wage, and the judge paid them at the end of the week. It was a five-week trial. Secondly, in Dallas a number of litigants on the plaintiffs and the defense side raised money to computerize some of the district courtrooms up there so that they would have Power Point capability and computer capability at the counsel table, and that was privately raised funds that were just donated to the county for use in all cases. So it's not unprecedented that the parties might subsidize their particular case or even subsidize cases generally.

And then the third thing that occurs to me is that there may be Federal money in disaster situations that might provide supplementation for what the state is capable of doing, and I don't know whether those monies go only to the state or whether they're administered through a Federal agency to individual recipients, but I don't think we should foreclose ourselves from the possibility that the Federal government might subsidize some costs of litigation, and this appears to require that everything go through the budgetary process, and, you know, if I was the least bit inclined to help some particular disaster, the last thing I would do is just give the money to the Texas Legislature to spend. So I think we have to have a -- I think a flexibility there to allow outsiders to provide an infrastructure that adds onto what the court can afford,

the state can afford, I mean.

CHAIRMAN BABCOCK: All righty. Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: Maybe it's just me, but I'm still a little bit unclear about who -- who makes the pivotal decisions. You've got a request to the presiding judge, and then in 16.5 the presiding judge makes findings about one or more of the following resources should be available, so the presiding judge actually decides and not only are additional resources would be a good idea but it would be good to do this. Then when I get over to JCAR I'm not altogether clear to me from the administrative rule what JCAR's role is. In 16.7(b) and (c) we have "if additional resources requested by the trial court include resources not previously allotted, JCAR shall determine whether additional resources are required." I don't know whether that's talking about money or about doing particular things with that money, and then (c) is also a little bit vague to me. So I guess my question is, is JCAR making the decisions about what needs to be done, or is it -- or is it just ruling on what the presiding judge thinks is appropriate?

MR. HILE: I think it's ruling on what the presiding judge thinks is appropriate.

PROFESSOR DORSANEO: Well, I think that -- if

it's no clearer than it is in this rule in the statute then I think the rule needs -- for me at least, maybe it's just me -- needs to kind of indicate, you know, who's deciding what. Is JCAR just deciding, "Yeah, we think that's a good idea, go for it," or would JCAR decide, "Well, we think part of what you want is a good idea, but we're not going to do some of the other things that you want"?

MR. HILE: Well, I think that's clearly within -- you may grant A, B, that's all we have the funds for, and while we would like to do C and D, we can't.

PROFESSOR DORSANEO: Well, that's different. I want to know whether JCAR can say, "We have plenty of money, but we think some of your ideas are stupid."

MR. HILE: I think that was -- yeah. That may need to be fleshed out there, because that's my understanding, is that JCAR is not bound to say, "If you request A, B, C, and D, I've got to give you all four, I can't give you two of them."

PROFESSOR DORSANEO: I suggest a little more work on 16.7 to make that clear.

CHAIRMAN BABCOCK: Richard.

PROFESSOR DORSANEO: I think now we're thinking there is no money so we don't have to worry what it's going to be spent on.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: See, when I read the statute that if the administrative -- presiding administrative judge and the trial court ask for A, B, JCAR may not send A, B, C, D. They are restricted to what the two other judges have asked for. That's the converse of what you just said. It would seem to me they must have the authority to say, "We're not going to A, B, C, and D, but we'll give you A, B," but I don't see the converse of that under the statute.

CHAIRMAN BABCOCK: If anybody has any more comments about this, direct them to Marisa in a timely fashion, and in the meantime, Dickie, thanks so much for being here today and reacting to the questions and comments, all of which are in the spirit of trying to make this better --

MR. HILE: I understand.

CHAIRMAN BABCOCK: -- and clearer and of more use to everyone. And please, if you would, tell your task force that we so much appreciate what they've done. Terrific work product. We'll be in afternoon recess.

(Recess from 3:19 p.m. to 3:41 p.m.)

CHAIRMAN BABCOCK: Richard, I understand that we're now onto 28.4(d), appellate briefs.

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: If you and Katie will quit

collaborating there.

MR. ORSINGER: Come on up here. She's going to sit at the table here.

CHAIRMAN BABCOCK: She's going to sit at the table.

MR. ORSINGER: Okay.

HONORABLE TOM GRAY: Chip, may I before he begins explain where we all got this concept of findings within termination orders? May I read a passage in from a case?

CHAIRMAN BABCOCK: Yes, you may.

HONORABLE TOM GRAY: It comes from case authority. This particular one is from *Vasquez vs. TDFPS* at 221 SW 3d 244. The court stated, "Of course, any number of implied findings of fact may support a trial court's parental termination order. However, as noted above, the order must state the ground or grounds upon which the trial court relies in terminating parental rights," and it cites Family Code 161.206. "For example, evidence that a child is born with narcotics in his system may support an implied finding of ongoing parental narcotic use that is germane to more than one statutory ground for termination, but pursuant to the statute, the trial court must articulate the statutory grounds for supporting its termination of parental rights," and when you look over at the statute, in

fact, it doesn't -- it doesn't say what this case says it does, but that's why I think so many of us had that thought in our mind that there was a requirement that the termination order actually specify the grounds for the termination to be granted.

CHAIRMAN BABCOCK: Was that a Waco court of appeals case?

HONORABLE TOM GRAY: It was not.

MR. LOW: It was written by him.

HONORABLE TOM GRAY: Actually, it was from one of the Houston courts, and it's on another e-mail here. First Court.

HONORABLE STEPHEN YELENOSKY: Well, it may have been legally incorrect, but it was morally correct.

HONORABLE TOM GRAY: There are a lot of courts that have said it. I'm sure we probably have said it, but it's kind of one of those things that gets started in the case law, and --

CHAIRMAN BABCOCK: Yeah. And has a life of its own, and Justice Bland is not even here to defend the --

HONORABLE JANE BLAND: I'm here.

CHAIRMAN BABCOCK: Oh, no, you are hiding.

HONORABLE JANE BLAND: And Judge Jennings and I were on that panel, if I remember, and Judge Taft wrote

the opinion.

CHAIRMAN BABCOCK: And you were what?

HONORABLE JANE BLAND: Judge Jennings dissented, but not about that.

HONORABLE TOM GRAY: I did not look that deeply into it.

CHAIRMAN BABCOCK: Justice Christopher. Would you like to spring to defense of your sister court?

HONORABLE TRACY CHRISTOPHER: No, no, no. I had something else that I wanted to add before we move on.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: If that's okay.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: So we were talking during one of the breaks about part of the problems with the records is getting notice to the reporter and trying to impress upon anyone that this is a free record and so not to wait for money getting paid. So my suggestion was to put in 25.1, in the notice of appeal, to state, "If the appeal is a parental termination or child protection case as defined in 28.4, state the following: 'This is an appeal of a parental termination or child protection case as defined in 28.4. The party appealing has been/has not been declared indigent. The clerk's record and the reporter's record are due at the court of

appeals in 10 days. These records have priority over other records in progress. If the party has been declared indigent, these records are to be prepared at no cost to the party.'"

And, I mean, if the purpose behind our working on these rules is to really tell everybody, "We really, really, really want you to put this at the top of the line," we have to tell them that. Then I would add to 28.4(b), "A copy of the notice of appeal must also be delivered to the court reporter and the trial court judge," and then I would say, "If a party has not been declared indigent, the party must make immediate arrangements to pay filing fee for the appeal, the fee for the clerk's record, and the fee for the court's record. Failure to pay for all of these items will result in the dismissal of the appeal."

Just so that, you know, that's way out there right at the beginning. Especially, I mean, we do get pro ses trying to make an appeal, and they might get the notice of appeal filed and then all of the sudden they're hit with all of these costs associated with their appeal, and sometimes it gets to the point where they'll pay one of them and then they just can't pay the next one, and six months later they give up, and the case gets dismissed. I just think we need to, you know, let them know what they're in for right at the beginning in terms of making immediate

arrangements, especially if we keep this 90-day deadline in here that's further on in the rule.

CHAIRMAN BABCOCK: Mr. Munzinger.

MR. MUNZINGER: Rule 35.3(b) as presently written says that the court reporter is not required to do anything about the transcript until the decision or fact of payment is determined. Those are -- that's my paraphrase, but it's all in the conjunctive, "The official or deputy reporter is responsible for preparing, certifying, and timely filing the reporter's record if," subdivision (3), "the party responsible for paying for the preparation of reporter's record has paid the reporter's fee or has made satisfactory arrangements with the reporter to pay the fee or is entitled to appeal without paying the fee." So there has to be a determination of the indigency before the court reporter is required to prepare the record.

CHAIRMAN BABCOCK: What rule are you talking about?

MR. MUNZINGER: Rule 35(b)(3), Texas Rules of Appellate Procedure.

MR. ORSINGER: Let me follow that up that during the break Katie Fillmore that's assisting us here actually made the suggestion, broad-based suggestion, that all of these appellate timetables need to be held in abeyance until we have a decision by the appellate court on

the appeal -- the Arroyo appeal on the entitlement to a free record, because we can't be having the court reporter furiously preparing within 10 days the reporter's record when there's been an adjudication that they're not indigent and are not entitled to a free record, and we can't have the appellant's lawyer preparing a brief before there's an -- a reporter's record. So we haven't covered that in here, but I think that it's a legitimate complaint or suggestion, which includes yours, Richard, which is that all of these briefing deadlines probably need to be held in abeyance until after the conclusion of the appeal on the Arroyo -- the Arroyo appeal on the denial of indigency.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: The Arroyo appeal is the problem. Is there anything we can do about that problem?

MR. ORSINGER: We can shorten it. We can't avoid it, because you need -- contrary to the suggestions that were done before, you can't just carry it along with the case because if you carry it along with the case, somebody is preparing a free record, so you really need to know in advance whether the record is going to be free or not because if it's not then the court reporter says, "I'm not going to give you my record until I'm paid or necessary arrangement, satisfactory arrangements have been made," so the court reporter needs to know before the record is

prepared whether they're entitled to require payment or not. So we have to have a decision about indigency made by the trial judge before the record is due or even started, before the record is started, and if that's appealed we need an adjudication by the appellate court whether that determination is affirmed or reversed before the record is started. And so in my view all we can do is accelerate the process. Does that make sense?

PROFESSOR DORSANEO: Once -- during one point in our history we required the court reporter to work on the record when the request for it was made, with the idea being that there would be payment or not later. At one point we said, "Okay, you get started and worry about payment later" instead of making arrangements for payment being a prerequisite to starting, and I don't know -- I suppose we changed that idea under the influence of somebody, but I wonder if -- you know, what would be wrong with going back to that? Just a bad idea?

MR. ORSINGER: Gosh, Bill, I've been here for 15 years or something. I don't remember when you didn't have to arrange to pay for the record.

PROFESSOR DORSANEO: It was a while back.

MR. ORSINGER: Yeah. I don't think --

CHAIRMAN BABCOCK: 1938.

PROFESSOR DORSANEO: I'm not that old.

MR. MUNZINGER: Wait a second, that's the year of my birth.

CHAIRMAN BABCOCK: Let David have a say.

MR. JACKSON: And it was before 18 years ago when I came on, too. One suggestion, too, might be if the provision that allows the court to order the county to pay it, in that instance where the county is going to pay it the court reporter should be obliged to go ahead and start on it regardless of payment if the county is going to be good for it.

MR. ORSINGER: So the Family Code says "may."

MR. JACKSON: "May."

MR. ORSINGER: But if the trial court says "will," "shall"?

MR. JACKSON: If the trial court orders it then, yeah, the court reporter starts to work on it.

MR. ORSINGER: Okay. So in the case where the judge does choose to require the county to pay then there's no reason to delay the preparation of the underlying reporter's record.

MR. JACKSON: Right.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Does the district judge have the power to order the county to pay?

MR. ORSINGER: Under the Family Code I

believe he does. We established earlier it says, "The court may require."

MR. HAMILTON: What if the commissioner's court says, "We don't want to. We don't have any money?"

MR. ORSINGER: You know, that sometimes happens in those rural counties, and I don't remember if they solve that out behind the courthouse with guns or what. They have the same problem with appointing visiting judges. There are some county judges -- county -- district court judges in rural counties that tell me there's no money in the budget for them to appoint a visiting judge, and yet -- and yet there's authority for the administrative judge to do that. So what happens if you do that, David, and then the county won't pay for it?

HONORABLE DAVID PEEPLES: Well, there's state funding for the salary of the -- in a district court, the salary of a visiting judge, but if they've got to travel somewhere that's paid by the county, and that may be what you're referring to that they don't appropriate money for.

MR. ORSINGER: And have you ever had a situation where you ordered it and the county wouldn't pay, and then who pays the bill?

HONORABLE DAVID PEEPLES: I have not had that myself.

CHAIRMAN BABCOCK: Okay. How about

subparagraph (d), appellate brief? Any comments?

MR. ORSINGER: Well, we can't skip that fast. We're back on (c)(2) and moving to (c)(3).

CHAIRMAN BABCOCK: Well, you can't blame me for trying.

MR. ORSINGER: Unless you're telling us you know something we don't.

CHAIRMAN BABCOCK: No, I'm not telling you that at all.

MR. HAMILTON: What rule are we on?

MR. ORSINGER: We're on 28.4(c)(3), and for those of you who, like Buddy, are counting the numbers, even though there's no (c) -- even though there's no 24.3 in the rule book, the Supreme Court has recently adopted a Rule 28.3, which makes this a 4, and so this is a correct number. You just can't tell by looking in any books you have or even at the integrated rules on the Supreme Court website. You just have to know the rules attorney.

MR. LOW: You couldn't read between the lines.

MR. ORSINGER: Okay, so --

CHAIRMAN BABCOCK: 28.3 is a double secret rule.

MR. ORSINGER: 28.4(c)(3) is extensions of time. Now, all of you appellate lawyers and judges listen

closely because I'm sure that I'm not going to get this a hundred percent right. I believe that we decided to abandon the process of requesting an extension of time when we took the responsibility away from the appellant to deliver the record to the appellate court. The extensions were kind of out. There was a deadline. The reporter misses the deadline. The rules require them to send them a nice letter that gives them an extra 30 days. If they miss that 30 days then they get another letter that's not so nice and then that deadline is not prescribed, and if they miss that then they start getting threatening letters, but there's no extension, nobody files a -- or do they?

HONORABLE JANE BLAND: They do.

MR. GILSTRAP: Yes.

MR. ORSINGER: They do? Okay. Well, I don't think there's a procedure for --

PROFESSOR DORSANEO: No, and they're not supposed to.

MR. ORSINGER: Yes, okay. So this is another one of those situations where the rules we passed are not being observed, and that creates a problem for us because we're amending rules that no one is following.

PROFESSOR DORSANEO: They're supposed to send a nasty letter, right, say you have -- not to start the deadline over again, not to say, "Oh, we didn't mean that

first deadline. Here's the real deadline."

MR. ORSINGER: It's not a nasty letter. I see them all the time. They say, "We notice that you didn't get it in. You've got another till X day to do it." I've got one case where they didn't send the letter until the record was 90 days overdue, and now it's been ignored for another 60 days, but I represent the appellee so I'm okay with all that. But I don't know what to do about the fact that we don't have an extension of time anymore, but what we're trying to do -- what the task force was trying to do was to tell the appellate courts, "Don't extend the deadline for filing," but I don't know if we call it in the granting of an extension, because there's no rules for -- if you see what I'm saying, no rules for extension.

PROFESSOR DORSANEO: What you're saying is your research indicates there is an automatic extension of time built into the interpretation of the rule that was never meant to --

MR. ORSINGER: No, it doesn't. The Rule actually says --

MS. SECCO: 37.3(a)(1)

MR. ORSINGER: All right. 37.3(a)(1). I have it on the authority of the rules attorney. 37.3(a)(1), "If the clerk's record or reporter's record has not been timely filed the appellate clerk must send notice

to the official responsible for filing it, stating that the record is late and requesting that the record be filed within 30 days in an ordinary restricted appeal or 10 days in an accelerated appeal." And then "If the clerk doesn't receive the record within the stated period, the clerk must refer the matter to the appellate court, and the court must make whatever order is appropriate to avoid further delay and preserve the parties' rights."

CHAIRMAN BABCOCK: So are you advocating that we accept the language in (c)(3) as the task force wrote it, or are you saying that it should be something different?

MR. ORSINGER: I'm here to advocate the task force recommendation, but I have been having private conversations as well as listening to all of this debate, and so I'm just calling everyone's attention to the fact that we are talking about a term "extension of time" that really doesn't exist under the rule, and what does exist under the rule is that some kind of notice is supposed to issue giving them 10 more days. What the task force said is, you know, they're already 30 days -- well, let's see. They're 10 days out, because assuming we hold to the 10-day requirement, because we didn't have a 10-day requirement we suggested a 30-day requirement, but assuming we're to the 10-day requirement, then this rule over here, 37.3(a)(1),

then if it's not on time, they have to send a letter saying it's due on the 10th day after the day it was originally due. Filed within 10 days. No, 10 days after the letter is issued.

MS. SECCO: Yeah.

MR. ORSINGER: So anyway, the idea here is, is that no matter how polite or tolerant the court of appeals wishes to be, they should never allow this process to be extended out more than 60 days.

PROFESSOR DORSANEO: 60 more days. You said 60 more days there.

CHAIRMAN BABCOCK: Absent extraordinary circumstances.

MR. ORSINGER: That would be 10 days plus 60 days the way I guess I see that.

CHAIRMAN BABCOCK: Okay. Hang on. So are you or anybody else advocating that (c)(3) be changed from this language here? Start with you.

MR. ORSINGER: I'm not going to advocate any changes. I want to simplify this and get this all out and approved. I'm advocating that we put in (3), but there's already been an unopposed consensus to return under (2) to make the appellate record due in 10 days, so already we're off track or at least off of the original track.

CHAIRMAN BABCOCK: Okay. Justice Jennings.

HONORABLE TERRY JENNINGS: The statute says 10 days, right?

MR. ORSINGER: No, the Rules of Procedure say 10 days. The statute doesn't say. It just says accelerated rules apply.

PROFESSOR DORSANEO: Which means 10 days.

MR. ORSINGER: Which means 10 days.

HONORABLE TERRY JENNINGS: Which means 10 days.

MR. ORSINGER: Yes.

HONORABLE TERRY JENNINGS: Why don't we just say, (2), change "30" to "10 days," and eliminate (3) altogether?

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Because if we're going to do -- if we're going to do something like that then why not just use the language that we used in 28 point -- 28.1 at the end of records and briefs, "The deadlines and procedures for filing the record and briefs in an accelerated appeal are provided in Rules 35.1 and 38.6." With the one being -- we're only talking about the records, so it's just -- just cross-reference to the appropriate rule, unless we want to create just an alternative system altogether for these kinds of cases.

MR. ORSINGER: Well, the task force wanted a

limit that is firm and doesn't exist right now, because all we know right now is that if you miss your deadline you get some kind of letter giving you another X number of days, and it should have been 10 days plus 10 days, but it's really 10 days plus the delay associated with getting the letter out plus 10 days.

CHAIRMAN BABCOCK: What are the consequences if there's not compliances with this task force deadline?

MR. ORSINGER: It's a progressive thing. The letters become more and more firm until they become threatening and then ultimately, ultimately they -- and this is probably some, you know, mother, who's --

PROFESSOR DORSANEO: Right. It's like my wife dealing with the children.

MR. ORSINGER: Ultimately they threaten to put them in jail, and, I mean, you know, there's a legend around about the court reporter that was sent to jail with her machine and a typewriter, you know, not to be released until she finished the record. I don't know if that's true or not.

HONORABLE TRACY CHRISTOPHER: It's not a legend.

CHAIRMAN BABCOCK: David Jackson says it's true, and he would know.

MR. LOW: It happened in Beaumont, a girl

named Barbara Marshall.

MR. ORSINGER: Okay. We even have a name in the record, Barbara Marshall.

MR. LOW: She's dead.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Some people, court reporters, still file what they classify as motions, or at least they did five years ago, but regardless, the court simply extends. It doesn't grant an extension. It extends the time to file a record, and I'm not going to say what the number should be because I'm sure that would be very controversial, but (3) could just say, "The appellate court may extend the time to file a record upon a showing of good cause for no more than X number of days," but if we want to ensure, with an E, that these cases are processed like interlocutory appeals are supposed to be but not all courts are processing, then I do think we should say, "No more than X number of days," and if it's 10 days, it's 10 days, if it's 15 days, if it's 30 days, if it's five days.

MR. ORSINGER: And what happens, by the way, if it's not filed at the ends of that time? We don't say. We just at some point --

HONORABLE SARAH DUNCAN: I think we have to assume that courts of appeals know they have the authority to hold a court reporter in contempt.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: What happens in the real world is the court reporter starts getting these letters, and the court reporter sends a motion or letter to the court and says, "Look, I can't get it out within that time. Here's why. Give me more time." That's what really happens. Now, you know, but I think Sarah's approach is -- that makes sense.

MR. ORSINGER: The task force, if you don't mind me interrupting, we've allowed extraordinary circumstances because what if the -- what if there's a capital murder case going on and the court reporter can't be substituted for? I mean, there should be an out, I think, before we just drop into the zone of the death penalty on the court reporters, so we put one in there for there should be a showing of good cause to get extensions, there should be a time limit on the total number of extensions, and there should be an extraordinary circumstance exception for those situations that we just can't anticipate and can't really blame on anyone.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Are these the only kinds of cases that are causing a problem, or is it just the whole system is not working?

HONORABLE TRACY CHRISTOPHER: The whole

system.

HONORABLE DAVID GAULTNEY: What do you mean not working?

PROFESSOR DORSANEO: Not working as designed.

HONORABLE TRACY CHRISTOPHER: The whole system is slow.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: The most success that I've had across the board with this problem, whether it's the elected judge, an assigned judge, one of the cluster judges, whether it's the official reporter or the visiting reporter, is to communicate with the trial judge; and I think this could be in the form of a rule where there would be something like this: "The trial court working with the court reporter must notify the appellate court the date the record will be filed, which date cannot be more than," blank, whatever the committee chooses, whatever the Court chooses; and when the trial court and the reporter come up with a date and the schedule, they're looking at the things that are impacting their calendar; and if you can -- obviously you would have to follow this up with, "and the trial court or the reporter will notify the appellate court of that date"; and what we do when we are successful in getting that date, we then turn around and order the record filed by that date; and I will say that probably 95 percent

of them meet that date when they have established it; and that's the best mechanism we have found to get the cooperation of the court reporter and the trial judge. You tell us when you can get it done. Here's -- you know, in this case we would want a maximum out there, but mechanically it works for us.

CHAIRMAN BABCOCK: David.

MR. JACKSON: There's an issue that we haven't really talked about here today, if we could figure out a way to address, would probably resolve a whole lot of the problems that court reporters face right now, and that's the Wage and Hour Commission won't allow a court reporter to work on a transcript during the day. When their judge is not on the bench and nothing is happening, they're still not allowed to work on transcripts because they count that as they're being paid by the county to be a court reporter in the courtroom; and if the judge isn't working on the bench, it doesn't matter, you can't be working on a case that you're billing somebody else for at the same time. So we need to work out a mechanism, and I wouldn't have a problem, especially on an indigent case where you're working for free, if it does fall back on the court reporter and the county is not going to pay for it, that the court reporter be allowed to work on it during business hours, so that at least they're getting their

salary from the county for doing their court reporting services and working on that transcript during those times when the judge doesn't require them to be on the bench. But it's sort of a juggling act that court reporters have to play, and they do have to do transcripts at night and they do have to do transcripts on the weekend because that's the way the Wage and Hour Commission looks at our job.

PROFESSOR DORSANEO: State Wage and Hour Commission?

MR. JACKSON: Well, it's Federal or state. They just came around and said we're not allowed to be doing that.

HONORABLE JAN PATTERSON: So even where the county is paying for a transcript and they're paying the salary of that person, that person cannot work on that transcript?

MR. JACKSON: They're not supposed to be.

MR. ORSINGER: So that increases the cost to the county.

HONORABLE JAN PATTERSON: How can that be?

HONORABLE SARAH DUNCAN: Why isn't that a part of the job description?

MR. JACKSON: Our job description is to make a record of everything that happens in the courtroom. The

transcript is a byproduct of that, if somebody needs it transcribed and on paper so they can take it up on appeal, but our job that we're hired for is to make a record of every word that's said in the courtroom. So that's what we get paid for as a court reporter, is making that record, and that's why some judges are trying cases all day everyday and in court all day everyday and if somebody needs an appeal it's up to that court reporter to work on those appeals at night and on weekends if they're going to bill the parties for that separately. They're not supposed to be working on those transcripts during the day, you know, any time during the day that they're being paid by the county to be a court reporter.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: Bill, I do think this is a problem in lots of cases, but the reason it's a particular problem here is because the district courts generally do such a fine job of scheduling these cases, and they are on a tight time frame until they get to appeal, and then they tend to lag on appeal, and I suspect that all the clerks offices handle these differently and that there are certain extensions that are granted by clerks before they even get to the judges, and this is a -- an important time and an important rule because this is where a lot of the slippage occurs, and here, you know, we have sort of

two levels. We have a good cause and extraordinary circumstances, and kind of a possibility of 90 days here. So there's a great deal of slippage that occurs here, which in and of itself might not be bad if we didn't have a lot of slippage through the appellate system. So it tends to slow down and there tends to be unaccounted for time before it even gets to the judges and the clerk's office and certain extensions that are given then. So this is a particularly important area, and I agree with Sarah that perhaps some specific time limitation and maybe just one standard might be appropriate, but this is a critical part of this rule I think.

CHAIRMAN BABCOCK: Okay. Any other comments about this? Yeah, Justice Jennings.

HONORABLE TERRY JENNINGS: After hearing some of these comments I'm thinking maybe the better practice would be for the courts to have flexibility to handle this on a case by case basis where they know certain court reporters and they know certain court reporters have certain habits or trial judges that the court reporters work for have certain habits, because once you say 60 days, they're going to say, "I want my 60 days." And someone at the appellate court may know that court reporter or they may know that trial court judge, and they may know they don't really need the 60 days, and so, again, I would

recommend just not even addressing it and eliminating (3) and giving -- leaving that flexibility to the appellate court or the clerk at the appellate court who may know who they're dealing with.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: It appears that if you just look at the -- in kind of the normal course of business, the clerk record and the reporter's records, at least in the last two years I've looked at, are being filed three to four months after the date of filing. There's no Arroyo appeal, nothing complicated, people are paying, it's three to four months. That's doing nothing. It's three or four months. So the question is do we want to do something to make it shorter than three or four months, and it's currently an accelerated appeal. It's currently subject to the 10-day time frame, and the, you know, just kind of, oh, extension here, extension here, sort of thing because it's an accelerated appeal right now. A third of our cases are accelerated appeals or mandamuses, so a third of our cases are supposed to be coming in on this 10-day time limit, and they're not. They're coming in on the three to four-month, you know, time frame.

So the question is if we want to cut that number down in these type of cases in particular we have to shake up the system. The thing that Justice Gray was

talking about where you get the trial judge involved and the court reporter, that happens generally when the three months is gone and we start saying, "Where's the record? Where's the record?" We're sending the nasty letters now. "Where's the record? Where's the record?" Then you finally have to drag the trial judge into it. I don't really know how to make the system change to get this class of cases bumped to the top, but that's what we're aiming for presumably, and I don't think putting in this 60 days is going to do it.

HONORABLE JAN PATTERSON: And isn't that the question, though, that perhaps this ought to be a class of cases that should be bumped to the top?

HONORABLE TRACY CHRISTOPHER: Well, I thought that was the purpose of the statute was to --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- do something different.

CHAIRMAN BABCOCK: So the objective is to make this thing sing.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: The question is what tune are we going to call it. Justice Hecht.

HONORABLE NATHAN HECHT: But the statute, until it was repealed, called for the record to be filed

within 60 days. Even though it said it was accelerated, the 263.405(g) or (h), one of the provisions that's gone, called for 60 days, so that even though it said accelerated, it was kind of protracted. I mean, the Legislature gave and the Legislature took away, and they had this file these expedited motions for new trial and statement of points on appeal, but then they had this record that's stuck way out there. But, of course, one of the reasons for the record to be delayed, as we'll come to when we get to (6) here, because there's another statute that affects that, too, but the question -- one question in my mind is, you know, 60 -- if 60 was getting extended, 10 will look preposterous, but is that something we should do anyway because the statute says "accelerated" and accelerated is 10? But I think as a practical matter if it's a two-day trial, it's going to be very difficult for the court reporter to file the reporter's record in 10 days.

HONORABLE TERRY JENNINGS: A lot of these aren't really that long.

HONORABLE NATHAN HECHT: Well, if they had trouble with 60, surely they're going to have trouble with 10.

MR. JACKSON: If they were allowed time to do it, it would be very possible. You know, I edit 200 pages

a day. In the freelance business you've got to have a completely different mindset. You know, if I take a job Monday, it's out by Friday, and that's bad delivery for me if it takes that long, but if you give these reporters time to work on it without leaving them in court day after day after day on other matters, and you get one of these cases and you say, okay, we finish this case and get the record out, if it's 10 pages they can do it an hour. There's no reason why they can't, unless their judge says, "No, you can't work on it during court hours," and they have to work on it at night. Well, that's a little different. If they were allowed to stop what they're doing, get that record out, you could have turn around in a week, no problem.

HONORABLE TERRY JENNINGS: Is it -- is the problem more the trial courts not allowing them that time?

PROFESSOR DORSANEO: I think some trial courts -- I know there are courts that allow their reporters to work on records when they're not on the bench. I mean, they do it anyway, and those court reporters stay up a lot better than the ones --

HONORABLE TERRY JENNINGS: But there are obviously some judges who are in trial all the time.

MR. JACKSON: Right.

HONORABLE TERRY JENNINGS: And there are some judges who are rarely in trial.

MR. JACKSON: Right.

HONORABLE TERRY JENNINGS: If you're in trial all the time that's obviously very problematic. Is there any way to craft a rule or a remedy directed to the trial court to give the court reporter that time off they need to get it done so that they're not perpetually building in a further backlog?

MR. JACKSON: That would be a way to solve it.

CHAIRMAN BABCOCK: But how does that work? If I'm a trial judge, I've got my own reporter, and I know that he's got to get a record out, but I've got a trial going on, so what do I say, "Hey, go over there and do it," and what do I do for a court reporter then?

HONORABLE STEPHEN YELENOSKY: Get a substitute court reporter.

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: Here's some thinking outside the box. If someone were to come to me and say, "I'll give you $5,000 if you'll" -- "if you'll get this record filed on time," the last thing I would do would be to draft a bunch of rules and deadlines. The first thing I would do would be to come up with somebody to bird-dog that case, that record. Maybe what we need to do is to figure out some actor in the legal system and give

them some powers and say, "Your job when there's going to be an appeal is to get the record filed quickly" and give them some powers. You know, Sarah Duncan mentioned that Chief Justice Lopez, when she was the chief in San Antonio, got these done on time because she made phone calls. She was the chief justice. I don't know if she called judges or the court reporters, but Sarah said that they got filed on time.

HONORABLE SARAH DUNCAN: She frequently had one of the clerks doing it, but same thing.

HONORABLE DAVID PEEPLES: If you were to put out some money saying come up with something that works, nobody would say, "Here's what will work, 10 days, 60 days, file the motion." I mean, I think you get some actor to be responsible for this, and you need to give the person some powers and tell them to get it done.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, maybe, but what if the problem is, as they said, the judge says you've got to work. I don't understand why you can't get a substitute court reporter. My court reporter, if he has a deadline coming up, will get a substitute court reporter at his expense and take that time to finish the record. I don't know why that can't be done.

CHAIRMAN BABCOCK: Yeah. Justice Bland.

HONORABLE JANE BLAND: I think records of this nature can be filed in 10 days. They are usually not jury trials. They're usually a few witnesses, and we get records -- I think Richard pointed out temporary injunction hearings, all kinds of cases, some mandamus type things where there's been hearings, and we get records in those cases expeditiously. I know that 10 days is not going to be possible for every parental termination record, but it would then trigger that mindset of you've got to get this one done first ahead of other things, and we do have -- in answer to Judge Peeples suggestion, we do have -- we have somebody in our clerk's office, and I'm sure other appellate courts do, too, who do nothing but bird-dog these records. We have somebody who makes -- everyday is calling court reporters about where are records, and the problem with that is it starts much further out because we give them a bunch of time on the front end and then we start bird-dogging. If we could start that process sooner, I think we could get these records filed sooner.

HONORABLE JAN PATTERSON: How about a 10-10-10 plan?

HONORABLE JANE BLAND: But the reality is the reporters know that our only real power is contempt power.

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE JANE BLAND: The reporters know

that we're very, very reluctant to exercise that power, and so it's kind of a dance to ask them nicely, as Richard pointed out. We try to ask them nicely to please put our work ahead of all the other work that they have going on until it becomes such a problem that we don't ask them so nicely anymore, but that's really the -- that's really what we're facing, and unless we say these records are special records that need to be done quickly, they just fall into the same hole as every other 39 percent of our docket that's accelerated falls into.

CHAIRMAN BABCOCK: Professor Dorsaneo, then Sarah.

HONORABLE JANE BLAND: But these involve children and they need to be done faster.

CHAIRMAN BABCOCK: Professor Dorsaneo, then Sarah.

PROFESSOR DORSANEO: If the time frame is going to be different from a regular accelerated appeal and if -- because what's happened, the accelerated appeals, the numbers of interlocutory orders that -- and types that can be appealed has increased dramatically. The ones, you know, just were talking about orders granting or denying temporary injunctions, orders establishing receiverships, and then class action determinations that got added, and now we have whole bunch of things including -- including

some final judgments, and the 10 days probably doesn't work anymore at all. It probably was principally driven by thinking about the need to get on with it if we have a temporary injunction or we don't have one. Huh?

Probably can't fix everything, but I would be inclined to have the appellate rules subcommittee at least look at the idea of extending the time in the -- in the -- in both appellate Rule 35.1 and in -- and the doubling up time in 37.3 from 10 to something else. So maybe that won't work for temporary injunction orders, but it probably will work better for most things, and for these -- for these types of orders that you're talking about parental termination -- termination of parental rights orders, would 60 days be too much? 30 and 30? Would that be too much? Would it not be enough? If we're going to have to pick numbers, I would rather pick numbers than just say let it happen on a case by case basis, and I don't like the idea of a motion for extension of time request because you might as well just -- you might as well, just as 37.3 does, just add -- add 30 more days, or however many more days, but what with the reporter being told we don't mean to add it so that you can ask for more time after that time expires.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Well, one, I don't see -- I would be the first to agree that these are among

the most important cases on a court of appeals docket. They involve children, human lives, but so do a lot of other cases on the court's docket, and I don't really see anything in the statute that says we're now -- we, the Supreme Court, we're supposed to recommend to the Supreme Court, that it start distinguishing between and among various types of interlocutory appeals. I mean, I think that can be done and the Court may want to do that, but I don't see anything in this statute that says these are the number one priority on a court of appeals docket ahead -- you know, above sovereign immunity, above media defendant, above injunctions, above receiverships, above all these other things. I don't see it in there. Maybe it should be. Maybe the Legislature ought to prioritize. You know, criminal cases have statutory precedence. My understanding is that most of the courts of appeals don't treat accelerated appeals in an accelerated fashion. So I'm not sure we're gaining anything by any of these rules. If the courts of appeals aren't treating accelerated appeals as accelerated, what the hay?

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: I couldn't disagree more. This -- the importance of these cases I think is implied by the very nature of them. Yes, we're dealing with children in limbo, but not only are you

dealing with children in limbo, you're dealing with a parent who's claiming "My parental rights to my child were wrongfully terminated. I cannot see my child," and under those circumstances, being a parent, you know, every day I'm away from my child and I think my child has been wrongfully taken from me is an eternity. So, yes, I think there is a very valid reason for putting these cases A-1 priority, and to me the problem is a matter of will power, are we willing -- are the courts willing to bird-dog them and keep them moving, and part of the problem has been a mindset within the courts themselves of treating these just like any other cases when they're not. They're just not.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: We do accelerate accelerated appeals. I just want to -- and so does the Fourteenth Court, and to my knowledge so does every appellate court now.

HONORABLE SARAH DUNCAN: Now.

HONORABLE JANE BLAND: Right. I can't talk about years ago, but I think right now I think everybody puts those cases first, but as you've pointed out and Judge Christopher just checked with her clerk, 39 percent of the Fourteenth Court's docket is accelerated, and I'm not asking that we give these -- that we change the time for filing record in this case to anything more than what the

Legislature intended, and if we want to enforce the 10-day rule on every accelerated appeal, fine, but in particular we're focusing on these sorts of appeals today, and this is the -- this is the time line that was suggested, and I don't think it's unworkable as a starting point for a record being due in what is generally a short bench trial, and the real issue is how do we make people prioritize these cases when they are not financially lucrative to get the record to the court of appeals, and the only way we can do that is put something in the rules that will allow our clerks when they call to say, "Hey, by the way, this record is really one that has to go to the top. It's got a quick due date on it. It's got a quick trigger."

CHAIRMAN BABCOCK: Richard, in a second, but we're going to have to move along a little bit. I think we've talked about this issue pretty completely, and this rule has got to get out in this meeting, and we have some important things to do yet, including tomorrow. So, Richard, make whatever comment you want, but then let's move on to (c)(4) and (5) and talk about those to the extent we need to, but hopefully not overtalk them and then get to the rest of the rule.

MR. ORSINGER: House Bill 906, section 3 talks about termination appeals, and section 4 talks about the managing conservatorships, and what they say about the

termination appeals in subdivision (a) of section 3, "An appeal in a suit in which termination of the parent-child relationship is an issue shall be given precedence over other civil cases and shall be accelerated by the appellate court." So in termination cases this is the most important civil case that they've got. On the managing conservatorship cases, they don't say that. The Legislature says that "They shall be governed by procedures for accelerated appeals in civil cases under the Texas Rules of Civil Procedure." So there is no statement that the managing conservatorship cases have priority over all other civil, but there is for the termination cases.

HONORABLE STEPHEN YELENOSKY: Well, lots of statutes say that.

MR. STORIE: They do.

MR. ORSINGER: Well, they all say "over all other civil cases"?

HONORABLE STEPHEN YELENOSKY: Not all, but lots. I mean, you accelerate everything, you accelerate nothing.

HONORABLE SARAH DUNCAN: That's what the problem is.

HONORABLE TRACY CHRISTOPHER: That's the language.

MR. ORSINGER: Okay. So there are too many

things that have given precedence over other civil cases so you can't really assign priority to those, so then it's I guess up to the Supreme Court to decide if we have a separate track for these kind of appeals, whether we're going to stick with the 10 days, because the Legislature thought an accelerated appeal was 10 days. They didn't say 10 days. They said the Rules for Appellate Procedure for accelerated appeals, and we can change those rules even after the statute was enacted and still be in compliance with it, but I think Justice Bland is correct that they anticipated that it's a really, really accelerated timetables that are in the current rules, which is 10 days plus short extensions.

CHAIRMAN BABCOCK: Yeah, Pete.

MR. SCHENKKAN: Is it generally the case in these other appeals that are accelerated by statute, you know, ahead of other civil cases generally that we don't have the practical problem we have here, that the parties are in a position to pay the court reporter to speed up the transcript to get it done? That this is -- if what's special about this case is there's a problem paying for the reporter's record? Is that relatively distinct? I mean, I assume that's not the media cases that pay for it, the sovereign immunity cases can pay for it, the receiver cases somebody can pay for it. I don't know what else is in this

category, but is that what's distinctive about this, is just getting it paid for?

MR. ORSINGER: I don't know, and I think the rates of the court reporters are the same. David's having a private conversation over there. David, do you know if -- are the court reporters allowed or is it a practice that they will give somebody a more accelerated delivery for a higher fee? Can you get an expedited record for a higher fee?

MR. JACKSON: I'm sure they can. I mean, when it gets outside that job description of making a record, yeah, I mean, I know we do, in our side of it, the freelance side. If somebody wants the transcript tomorrow, I'll stay up all night and get it out, but I'm going to charge them more for that.

MR. ORSINGER: Well, Pete, that may suggest that if you have a really big injunction appeal and lots of money that can you get a priority on that by paying for an accelerated delivery of it.

MR. SCHENKKAN: That's my impression, and that's what I'm saying, is maybe that's what we need to focus on here. If that's the problem, let's solve the problem.

HONORABLE STEPHEN YELENOSKY: Just pay.

CHAIRMAN BABCOCK: David.

MR. JACKSON: At the same time you're talking about an accelerated transcript, you're also talking about doing it for free, so you're going the other way with the incentive.

HONORABLE TRACY CHRISTOPHER: That's the problem.

MR. SCHENKKAN: That's the problem.

CHAIRMAN BABCOCK: Any other comments?

MR. ORSINGER: Okay. Then we move on. (4) and (5) can be discussed in tandem because they both have to do with what the appellate court does when all the deadlines are busted, and basically the concept is the same as it is under current Rules 35.3(c) and 37.3, which is that if it's not the appellant's fault then you don't dismiss the appeal, but if it is the appellant's fault that this record has not been put in by whatever ultimate deadline is set, then if it's the clerk's record that doesn't get timely filed under existing rules for all appeals, the appellate court may dismiss, but they have to give notice and an opportunity to cure first. That's if the clerk's record is not filed. They may dismiss, but they have to give notice and an opportunity to cure. If it's the reporter's record and the clerk's record has been filed but the reporter's record has not been filed, and it's the appellant's fault, then they can submit the case

on the clerk's record. They don't dismiss because they've got the clerk's record. They just don't have any evidence to review, so they review only error you can tell from the clerk's record, which is tantamount to an affirmance, and again, the existing rules say it's after notice and an opportunity to cure.

So after going back and forth quite a bit, the task force was of the view that we should have some deadline. We picked 90 days. That sounds like that may be way too long for our discussion today, but if the record -- if the clerk's record under subdivision (4) was not filed by the 90th day after the notice of appeal because the appellant failed to pay or arrange to pay and wasn't entitled to appeal for free then the appellate court must dismiss after notice and an opportunity to cure. So there's yet more delay after the 90 days, but it's notice and you've got another 10 days, 15 days or whatever. If you don't make it you must dismiss, not may dismiss, absent ordinary circumstances.

So it's an effort to move the appellate court may dismiss to must dismiss, but it preserves the notice and an opportunity to cure, and the penalty is only visited on someone who's at fault for not getting it filed on time, and so to me the core issues in light of the waning hour is do we like the 90th day or was the task force being way too

generous to do that? Do we want notice and an opportunity to cure before we put somebody's appeal in the trash can, and do we give -- do we move the appellate court from a "must" to a "may," and do we still allow exceptional circumstance exception from all of these timetables? Those are the debatable issues.

CHAIRMAN BABCOCK: Any other comments? Justice Hecht, or was that just a --

HONORABLE NATHAN HECHT: No.

CHAIRMAN BABCOCK: -- involuntary spasm?

HONORABLE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If the record is not paid for, reporter's record, would an extraordinary -- extraordinary circumstance be the appellant says, "I don't have any money to pay for it," and then is he entitled to proceed at that point to declare himself indigent so that he doesn't have to pay for it at that point?

MR. ORSINGER: Well, now, understand that there's a presumption of indigency in some of these cases, so if they had an appointed lawyer at trial, there's a presumption of indigency. If it's not challenged, it continues, and they'll get the free record.

MR. HAMILTON: So he wouldn't have to pay.

MR. ORSINGER: Right.

MR. HAMILTON: So it wouldn't be a problem.

MR. ORSINGER: So your question will come up when somebody either never originally established indigency or their presumed continued indigency was challenged and overruled.

MR. HAMILTON: Right.

MR. ORSINGER: And if their presumed continued indigency was challenged and overruled then your question is can you come in after the challenge is overruled and make another indigency plea based on changed circumstances since the last hearing? That's kind of what you're asking.

MR. HAMILTON: Not necessarily changed, but suppose there hadn't been any determination of indigency at all up to that point and then they say, "Now I can't pay for the record. That's why it's late."

MR. ORSINGER: Well, they should have done that by the deadline. Now, Marisa, help me here. When you don't have a presumption of indigency isn't there a deadline for requesting indigent status for purposes of the appeal?

HONORABLE TOM GRAY: The affidavit of indigence is supposed to be filed at or before, but the Wal-Mart case and --

MS. SECCO: "With or before the notice of

appeal."

HONORABLE TOM GRAY: -- the Hood case from the Supreme Court have determined that because it's a nonjurisdictional issue the deadline is not jurisdictional, and whenever the affidavit is filed it has to be considered.

MR. ORSINGER: So the answer to your question is if you don't already have a negative adjudication on your indigency you can wait until your notice period after all the deadlines have been busted and file your affidavit of indigency and then you're entitled to a hearing on it, constitutionally, right?

HONORABLE TOM GRAY: That's the way I understand it to work from the cases that have been decided.

CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.

PROFESSOR DORSANEO: I don't see that these -- that (4) and (5), other than the 90-day requirement or the 90-day standard, that they differ materially from 37.3(b) and (c). They look pretty close, except you have this extraordinary circumstances conditional matter.

MR. ORSINGER: You change "may" to "must," the appellate court must rather than may dismiss. After notice and an opportunity to cure under 37(b)(3) the

appellate court may dismiss. Under this rule they must dismiss.

PROFESSOR DORSANEO: Okay.

MR. ORSINGER: Or they must submit -- if it's the reporter's record, they must submit on the clerk's record only, which means no evidentiary review. So that's the real distinction here, 90 days, "must" versus "may," and if you're going to "must" it, if you're going to put the "must" in there, there needs to be the safety valve for the extraordinary situation like the court reporter is in the hospital or something. You see what I'm saying?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Those are the differences.

PROFESSOR DORSANEO: See, 90 is way too long.

MR. ORSINGER: I agree in light of today's discussion with Judge Bland over there on 10 days is too long. I think that 90 days is way too long.

HONORABLE JANE BLAND: I'm okay with it.

MR. SCHENKKAN: These are people who are not entitled to proceed without payment of costs. This is a different category from the rest of what we've been worried about.

MR. ORSINGER: You're right.

MR. SCHENKKAN: And to me that's what's driving this whole thing, and we do not have that problem

here. If -- I don't even see why it's important that the court must dismiss instead of "may" when you don't really mean "must." We mean "must" absent extraordinary circumstances, which we don't define, when we're talking about people who can pay. It seems to me that this set of (4) and (5) is not where our problem is.

MR. ORSINGER: If I could follow-up, Sandra Hachem, who was the government attorney on our task force said that many, many, many of her cases are cases with people that have been adjudicated nonindigent, and they keep saying they're going to pay, and they never arrange and they never arrange and time goes on, and you're out there months and months and months, and they never do end up paying, so they eventually get dismissed anyway.

MR. SCHENKKAN: And my point is why don't we leave that to each individual appellate court to decide how hard they want to press those?

MR. ORSINGER: Because it's taking too long to get to the point where they dismiss the case or submit it on the clerk's record.

MR. SCHENKKAN: But your standard of too long is what? Too long for --

MR. ORSINGER: Well, I mean, months.

MR. SCHENKKAN: -- the appellate court having to decide it? It's not too long if the appellate court

doesn't think it's too long.

CHAIRMAN BABCOCK: Justice Bland, and then Justice Christopher.

HONORABLE JANE BLAND: I think that 90 days is reasonable because presumably by this point you have ferreted out that there's a problem with either making arrangements to pay the record or with the court reporter providing for a record that there has been an arrangement made to pay for it, and at this point we're talking about the finality of the parent's termination of their right to see their child, and it seems to me like 90 days is about the time to say, "Okay, we've tried. There were record problems. They've never been resolved. We've given the opportunity to cure. Now it's time to dismiss." I don't have a problem with 90 days.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I actually think it's longer than what we're doing right now. I'm looking at our dismissals and how long it takes us to normally dismiss. Most of our dismissals are for not paying the filing fee, and that will happen within 30 to 40 -- three months to four months after the filing date, and that's with giving them several notices before we finally dismiss them for not paying. With this you've got 90 days plus notice and opportunity to cure. You're at

least at four months here, when the first thing that they don't pay is the actual filing fee. I just don't think we need this in here. I think we get rid of it at the filing fee stage.

HONORABLE TERRY JENNINGS: Well, theoretically there's the possibility that somebody has paid their filing fee and then they've had a car accident or something like that.

HONORABLE TRACY CHRISTOPHER: Then the regular rules will kick in to dismiss if we want to.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TERRY JENNINGS: They may not make court reporter arrangements.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: I would argue in favor of retaining the "may" and not the "must." This is really dealing with someone, as Pete said, who has the ability to pay, and if they haven't paid at this stage, it's indicative of an abandonment of the appeal. That's the type of thing that you're looking at. If, in fact, there are other circumstances then I think the appellate court should have some discretion. I guess "must" seems a little arbitrary since you're dealing with someone who at this stage the court has probably concluded is not going to make arrangements to file the record, but there might be

other circumstances that don't amount to extraordinary, but, you know, the court of appeals ought to have some discretion.

CHAIRMAN BABCOCK: Okay. Any other comments about (4) and (5)? Okay, let's move on to (6).

HONORABLE SARAH DUNCAN: I'd like to say one thing.

CHAIRMAN BABCOCK: Yeah, Sarah.

HONORABLE SARAH DUNCAN: It seems to me that part of what the Legislature may be looking for is more uniform treatment around the state of these types of cases by saying that they're to be treated as an accelerated appeal, and I don't doubt that the First and Fourteenth, the Fourth, quite a few courts, are accelerating them, but if what we're looking for is more uniform treatment around the state then maybe we should look, Richard, at their procedures.

HONORABLE TOM GRAY: Well, just so it doesn't go --

HONORABLE SARAH DUNCAN: And Waco. I'm sorry.

HONORABLE TOM GRAY: -- without being on the record --

HONORABLE SARAH DUNCAN: Of course, the Tenth Court is accelerating.

CHAIRMAN BABCOCK: It's that Eastland court. Just kidding about that, by the way.

MR. ORSINGER: We'll go on to subsection (d). In the letter of assignment to the task force from Justice Hecht to the rules committee, look at Chapter 13 of the Civil Practice & Remedies Code. We did, and there's a problem. Chapter 13 of the Civil Practice & Remedies Code says that a court reporter shall provide without cost the statement of facts and the clerk a transcript, which really means reporter's record, only if there's an affidavit of inability to pay and the trial judge finds that the appeal is not frivolous and the statements of facts and the clerk's transcript is needed for the appeal, and in determining if it's frivolous the judge can consider whether the appellant has presented substantial questions for appellate review.

So that, if you will, it requires a trial judges determination that it's not a frivolous appeal or maybe even is a meritorious appeal. However, the directives on this statute don't have any kind of merits test to the availability of indigency, so that it's the task force view that we need to override this provision that the trial judge be convinced that the appeal is meritorious, and, therefore, we're suggesting that in subsection (6). However, I think that that requires a

special notice, but I think that the Legislature has empowered the Supreme Court to override specific statutes as long as they give notice of the statutes that are overridden, and I don't know if there's a time delay for that or not, Marisa, or --

MS. SECCO: No, it's just in section 22.004 of the Government Code that the Court has to specifically list any statute that is modified or repealed by rule.

MR. ORSINGER: So that's perhaps not controversial. I mean, the idea is, is that we're getting rid of the merits-based analysis of whether someone should get a free record and also, by the way, a free lawyer in compliance with this directive from Rule 906. Okay. There's nothing on that, then it moves us to the --

HONORABLE SARAH DUNCAN: There is.

CHAIRMAN BABCOCK: Sarah.

MR. ORSINGER: There is.

HONORABLE SARAH DUNCAN: I don't think we can do that. The two can exist side by side.

MR. ORSINGER: Okay. Then argue why, if you believe that that's true, then what's the policy in leaving --

HONORABLE SARAH DUNCAN: It's a question of what record do they get, and what we held is that they are entitled to a record of the hearing at which the court made

the merits-based determination of the -- of the merits of the appeal or frivolity, but not necessarily a record of the trial at which parental rights were terminated.

MR. ORSINGER: Okay. So it's your view that it's a practice -- do you think it's a good practice that we should continue or that it's just a legislative practice that we don't have the authority to override?

HONORABLE SARAH DUNCAN: I'm sorry, "it" refers to?

MR. ORSINGER: The idea that you have to have a merits test in front of the trial judge before you find out whether you get a free record or not.

HONORABLE SARAH DUNCAN: Well, I would never defend that statute. Ever. But I would follow it if it were the law, and I would make a, I hope, rational determination of whether it could coexist with this statute.

MR. ORSINGER: Well, if we're going to have that merits determination, which is somewhat akin to the old requirement that you state your appellate points within 10 days of the trial that -- you know, as a predicate for your appeal, we haven't built in a timetable for the hearing on the merits.

HONORABLE SARAH DUNCAN: I know.

MR. ORSINGER: We have to have a period of

time for the appellate lawyer to decide what the appellate points are going to be and then they have to be filed and then there has to be a hearing and then there has to be a ruling on the hearing and then we have to have an Arroyo-type free appeal of that determination, and in a sense I think we've destroyed the at least -- at least the goal behind eliminating the preliminary requirement that you set your appellate points out as a condition to a free appeal. Actually, to any appeal. Now we've substituted a hearing on the merits of your appeal for a listing of your appellate points. We've introduced at least another 20 days.

HONORABLE SARAH DUNCAN: Well, there has been a hearing. There has been a --

MR. ORSINGER: Plus there has to be an appeal of the denial.

HONORABLE SARAH DUNCAN: There has been a hearing before on the existing statute of whether the appeal was frivolous, and what --

MR. ORSINGER: But, now, the hearing is going to be a hearing after the judgment is signed. Would you agree?

HONORABLE SARAH DUNCAN: It could be before or after.

MR. ORSINGER: All right. Well, there's

nothing built into the timetable we discussed today for there to be this hearing with the trial judge and an Arroyo-type appeal of the decision that your appeal is frivolous so you get no record.

HONORABLE SARAH DUNCAN: I know. That's what I was just looking up on my phone. I was looking for provisions that incorporated that procedure, and I -- I would not defend the statute, but I --

MR. ORSINGER: Okay. Let me say that Katie --

HONORABLE SARAH DUNCAN: -- I have a hard time attributing to this Legislature --

MS. FILLMORE: Do you want me to --

MR. ORSINGER: Yeah, would you, please?

MS. FILLMORE: If you look at House Bill 906, the changes to Family Code 263.405, they struck out the language in the Family Code that said that "the trial court shall hold a hearing and determine whether the appeal is frivolous as provided by section 13.003." They also struck the requirement that appellant file a statement of points if he intend -- if the parties --

HONORABLE SARAH DUNCAN: Okay, so that whole procedure is gone.

MS. FILLMORE: Correct. But just to make it clear for the purposes of this rule, we wanted to

specifically reference the Civil Practice & Remedies Code because that is still there, and it -- I guess it still applies in other cases, but it was the Legislature's intent to make it not apply to this, which is why we made the specific reference that it doesn't apply in the draft.

HONORABLE SARAH DUNCAN: Wait. I'm hearing two different things. They struck the merits -- listing your points and the merits --

MR. ORSINGER: From the Family Code. They struck it from the Family Code, but there's still a general provision in the Civil Practice & Remedies Code that hasn't been struck.

HONORABLE SARAH DUNCAN: I understand that. But there's nothing in this statute that says this type of appeal isn't subject to Chapter 13; is that right?

MR. ORSINGER: That's correct. That's just an inference you could draw from the fact that they struck it that maybe they didn't want it to apply, but they didn't specifically say it.

HONORABLE SARAH DUNCAN: I wouldn't draw that inference.

MR. ORSINGER: You wouldn't?

HONORABLE SARAH DUNCAN: I'm not sure I wouldn't get rid of that --

CHAIRMAN BABCOCK: Sarah's point is somebody

could have easily said, "Why do we need to put this in the statute? It's already in Chapter 13 of the Civil Practice & Remedies Code."

HONORABLE SARAH DUNCAN: No, that's not my point. My point is what they got rid of is having to list your points and get a determination, a hearing and a determination, on whether your appeal was frivolous before going forward.

MS. FILLMORE: Well, they got rid of several things, including the hearing to determine indigence for a second time for the purposes of appeal and appointing a new attorney. They wanted to get rid of all of those procedures that take up time between the trial and the appeal, and this was one of them that they -- I mean, I think the Legislature's intent was to get rid of these things because they took up a lot of time, and the testimony at the hearings on this bill specifically spoke about how long this takes.

HONORABLE SARAH DUNCAN: But you can have a Chapter 13 hearing on frivolity, and the appeal still be decided in an expeditious manner. The two aren't mutually exclusive is my point.

CHAIRMAN BABCOCK: Okay. Well, the Court is going to have to sort this out.

HONORABLE NATHAN HECHT: Could we have a vote

on that?

CHAIRMAN BABCOCK: You want a vote on that?

HONORABLE NATHAN HECHT: Yeah, please.

CHAIRMAN BABCOCK: We need a vote on this, and the vote is going to be whether to leave subparagraph (c)(6) in the rule or to strike it. Will that be the vote? All in favor of leaving (c)(6) in the rule, raise your hand.

All those opposed? It is unanimous with the Chair and others not voting. 19 people voted in favor of leaving it in the rule, so a fairly strong expression of support.

HONORABLE NATHAN HECHT: Well, the Court doesn't do this very often, and we haven't done it in years, and it is an important power, but one that is carefully exercised. I just want to be sure that the committee thinks it's a good idea.

CHAIRMAN BABCOCK: You've got plenty of cover from this committee, I tell you.

HONORABLE NATHAN HECHT: For now.

CHAIRMAN BABCOCK: But only for now.

HONORABLE NATHAN HECHT: I wasn't there.

MR. ORSINGER: Well, the bill has a sponsor in the House and the Senate, and they might concur that --

HONORABLE NATHAN HECHT: Yeah.

MR. ORSINGER: -- this is the appropriate time to exercise that power.

CHAIRMAN BABCOCK: Let's go to (d) quickly.

MR. ORSINGER: Okay. (d) has to do with appellate brief deadlines, and the deadline in ordinary appeal I want to say the brief is due in 20 days. Yes. Appellant's brief is due 20 days after the clerk's record is filed or after the appellate record is filed, and the appellee's brief is due 20 days thereafter, and what this is proposing is not to change that, but to curtail the idea that a party can extend their deadline more than 40 days. It's a 20-day deadline. It's not changed, but there's an effort here to say, oh, two things really. This task force report suggests that we require good cause rather than just a reasonable explanation for the need for an extension to file the brief.

PROFESSOR DORSANEO: And you don't want to refer to 10.5(b) which has -- that's where the reasonable explanation standard is.

MR. ORSINGER: But there are a lot of other parts of 10.5(b) that we like procedurally about what -- you know, motion and the communication obligation, certificate of communication, all of that.

PROFESSOR DORSANEO: It's still contradictory.

MR. ORSINGER: I don't think it is, but perhaps the words could be written so that it isn't, but the important issue to grasp here in the remaining five minutes is that the difference between the existing rule and this rule is that this requires good cause, not just a reasonable explanation, and that this limits cumulative extensions to 40 days after the record is filed. So those are the issues for us to decide.

MR. HAMILTON: 40 days maximum or 40 plus the original 20?

MR. ORSINGER: 40 total cumulatively, meaning including the first 20.

MR. HAMILTON: I don't think it says that.

MR. ORSINGER: You don't?

MR. HAMILTON: It says "extensions of 40 days," so that would be 20 plus 40.

MR. ORSINGER: The extensions may not exceed 40 days cumulatively is intended in the briefing rule as well as in the appellate record rule to mean that by the time everything is added up, the normal stuff plus all the extensions, it cannot exceed X. That's what that's meant to say. If it doesn't, we need different words, but it's meant to mean that no matter how you get there it can't be any more than 40 days after the record was filed.

HONORABLE TERRY JENNINGS: I have a question.

So if I'm a parent and I have a court-appointed lawyer and my court-appointed lawyer can't get the brief done in 40 days, where am I?

MR. ORSINGER: You're in trouble. You better have extraordinary circumstances or else --

CHAIRMAN BABCOCK: Or else.

MR. ORSINGER: Or else you have no brief. I mean, basically that means that you've given a notice of appeal, you've got your appellate record, you got no brief, that means you get dismissed. Don't y'all dismiss for failing to file a brief?

HONORABLE TERRY JENNINGS: No.

MR. ORSINGER: You don't affirm, do you? Do you affirm or do you dismiss?

HONORABLE TERRY JENNINGS: Well, in a criminal case if this were a court-appointed lawyer and they kept asking for extensions and they didn't get it done, I would abate the appeal and for the appointment of new counsel.

MR. ORSINGER: Okay.

HONORABLE TERRY JENNINGS: You know, you have to remember this is a case with constitutional implications.

MR. ORSINGER: Well, this wouldn't preclude that if what you're going to do is bail out of the whole

process.

HONORABLE TERRY JENNINGS: Yeah, but the understanding -- I mean, the understanding is, you know, after 40 days if my court-appointed lawyer doesn't get a brief filed for me, my case is dismissed. I think that has some serious constitutional implications there because your lawyer is basically per se ineffective for not getting the brief timely filed.

CHAIRMAN BABCOCK: Sarah.

HONORABLE TERRY JENNINGS: But you've lost your parental rights forever.

MR. ORSINGER: This proposed rule does not require a dismissal. It does not comment on what happens after the 40 days has run. It just means you can't extend it out beyond 40, and so if you're going to pull the plug on the lawyer and replace him maybe then you do that at the end of 40 days.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: The other purpose of the hearing is to determine if the appellant wants to continue to pursue the appeal, and those records are frequently, in my view, very helpful.

HONORABLE TERRY JENNINGS: Right.

HONORABLE SARAH DUNCAN: Because you do find out if someone really does want to appeal, and you find out

what efforts the lawyer has made to get the brief filed and what efforts haven't been made. I, frankly, think 40 days is too long. You know, you add up all these time periods, and we're talking about a child who has been in limbo, we're getting pretty close to a year, but can we just start with a number of how long we want these appeals to last and then work backwards? I'm serious.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I think Carl is right. If -- Richard, didn't you say that everything running shouldn't exceed 40 days? The original time plus extensions.

MR. ORSINGER: On briefs, yeah.

MR. LOW: Well, you don't say that. You don't say the total time.

MR. HAMILTON: It says "accumulated."

MR. LOW: You say "the extensions may not," so that tells me I've got the time over here, but I've got then an extension of up to 40 days, so you don't say that.

MR. ORSINGER: Let me ask Marisa. Do you believe this was supposed to be 60 days total or 40 days total?

MS. SECCO: The way I read it is 60 days, and I wasn't aware that the task force was trying to --

MR. ORSINGER: All right. Well, then that was just one little task force person's perspective on the

discussion.

PROFESSOR DORSANEO: Because that's what it says.

MR. LOW: If you meant 60, you've said it, but if you meant 40, you didn't.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I agree with Justice Jennings that you're taking somebody's child potentially away from them, and these cases do have constitutional implications. I don't find any solace in the fact that the rule does not say you can't abate the appeal and appoint a new lawyer. The rule says you've got 40 days, or whatever it says here, and can't be extended except under extraordinary circumstances. That concerns me a lot in a situation where you have a fellow who, for whatever reason, can't afford a lawyer and may lose his child or her child. Serious business. Serious, serious business.

CHAIRMAN BABCOCK: Can't say it any better than that. Any other comments before we quit for the day? Yes, Justice Gaultney.

HONORABLE DAVID GAULTNEY: I would be in favor of one 20-day extension. As far as the not getting the brief filed, I think it's probably the practice around the state to abate and remand for appointment of new counsel if they don't file a brief for someone who has a

statutory right to counsel. So we can put that procedure in here pretty easily, but in my experience the -- if it's an accelerated case, and we accelerate our cases, you accelerate the number of -- or you shorten the number of extensions as well that you might be willing to give, and one extension of 20 days should be sufficient.

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Here's the plan. We've got to finish this rule at this meeting, and we also have the security details -- we have two other matters on our agenda. My proposal is to get the security details talked about first thing because of Professor Dorsaneo's schedule, and then go back to this, to this rule, and take it -- and finish it, and we're not going to get to constitutional challenges tomorrow, although we have another month to do that. So that's not as critical as this one. Justice Patterson was here all day, but I don't see her here now. Angie, if you could shoot her an e-mail and just let her know we're not going to get to her topic tomorrow, in case that means anything to her. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: If it helps, we've talked about it, and I think we'll probably propose no rule at all, but I know you'll still want to discuss that.

CHAIRMAN BABCOCK: Judge Patterson's?

HONORABLE STEPHEN YELENOSKY: Yeah, that committee.

CHAIRMAN BABCOCK: Yeah, and I need to talk to Justice Hecht about it because the Court may want a discussion about it anyway. So we'll get to that.

Well, if there's nothing else, thank you so much for all your hard work. I know this is frustrating, but we'll -- wait for the handouts. Angie's got handouts.

(Adjourned at 5:02 p.m.)

* * * * * * * * * * * * * * * * * * * *

REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* * * * * * * * * * * * * * * * * * * *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 21st day of October, 2011, and the same was thereafter reduced to computer transcription by me.

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

Charged to: The Supreme Court of Texas.

Given under my hand and seal of office on this the _____ day of _____, 2011.

_____
D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2012
3215 F.M. 1339
Kingsbury, Texas 78638
(512) 751-2618

#DJ-316