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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

October 22, 2011

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 22nd day of October, 2011, between the hours of 9:00 a.m. and 11:54 a.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

No votes were taken by the Supreme Court Advisory Committee during this session.

Documents referenced in this session

11-19 HB 906

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

11-23 SB 1

11-24 Memorandum from Bill Dorsaneo re: SB 1 (10-12-11)

11-25 SB 1, Proposed amendment to Rule 52a

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CHAIRMAN BABCOCK: We're going to detour briefly from parental termination rules to security details. We're all about security here, but it's all the devil's in the details, so Bill Dorsaneo.

PROFESSOR DORSANEO: Ready?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: Well, Justice Hecht's assignment letter identifies the subject of security details. At the very end of Senate Bill 1 there's a provision for the adoption of Government Code section 660.2035, and as the letter says, it gives the Supreme Court, quote, "Original and exclusive mandamus jurisdiction over any dispute regarding the construction, applicability, or constitutionality of a provision in the section," subsection (a), which makes confidential under the Chapter 552 of the Government Code, the Public Information Act, for a period of 18 months following the date of travel, travel and expense vouchers, and I'm going to ask Jeff Boyd to talk about this a little bit because it's pretty obvious, but maybe there's -- maybe I'm making things up, that this legislation was generated by request for travel vouchers from the Department of Public Safety by media involving trips taken by Governor Perry over various periods of times. So I would expect the Governor's office was keenly

interested in this, and I want to make sure I understand what it is we're dealing with.

MR. BOYD: Okay. You kind of have to go to the *DPS V. Cox* case to really understand where this comes from. Setting aside the procedural issue we have to address about the mandamus, original exclusive mandamus jurisdiction, setting that aside for the moment this is just an open records issue, and currently under the Public Information Act, Chapter 552, a party requests -- submits a request for public information. The governmental body has to produce it or else they go to the Attorney General's office and request a ruling as to whether an exception, either mandatory or discretionary exception, applies.

That occurred when Cox Newspapers submitted a request for travel vouchers related to the Department of Public Safety security detail officers who had traveled with the Governor, the Attorney General, the Lieutenant Governor. There are a number of elected officials for whom DPS provides security detail. DPS director did not want to produce that information, essentially on the ground that by identifying the number of officers who are assigned for particular types of trips and where they stay in particular locations, that it was undermining security and creating a much more difficult job for them and a security risk for the elected officials.

It raised -- under the common law it basically raised the Public Information Act allows an exception under the common law. 552.101 says it is excepted or confidential "if by other law," and so the -- and the courts have recognized that includes the common law, and so it raised essentially the question of whether the common law right to privacy -- the element of the common law right to privacy that incorporates the right to be free from unreasonable security risks caused by the release of your personal information is a recognized right in Texas, and that's what the litigation was all about. The Supreme Court in essence ruled that, yes, that is a recognized right in Texas and then remanded the case back to the trial court for the trial court to determine in the first instance what, if any, information in these travel vouchers creates that security risk or the release of which would create that infringement on that particular privacy right. I wasn't prepared for this, by the way, so I may be misstating a little bit.

PROFESSOR DORSANEO: You're doing wonderfully well.

MR. BOYD: But that's essentially how the issue came up, and the Legislature -- and then came the proposal for this legislation that basically said, okay, instead of having to fight over these common law right to

privacy, lets' just compromise and find a way that balance the policy issues. Now, whether it balances it the way that this side wants it, or is it too far balanced to this side, who knows, but this is the way it came down, which is basically, okay, look, everything in those vouchers for the first 18 months after the travel occurs, everything in the vouchers is just protected and, remind me, there's a laundry list of detail information. Okay. So --

PROFESSOR DORSANEO: After the 18 months.

MR. BOYD: The vouchers, for 18 months the vouchers are completely protected; however, on at least a quarterly basis DPS shall issue -- this is subsection (c) -- a quarterly summary of the amounts paid or reimbursed by the comptroller based on these vouchers, and each such quarterly summary has to include separate for each elected official, a list of the amounts paid or reimbursed, itemized for travel, fuel, food, lodging, rent, other, and so forth. So the idea is the real public interest is how are my tax dollars being spent, and so I think the balancing and policy that was intended was to say, all right, so quarterly, even through those 18 months quarterly DPS has to issue a listing of how much money was spent on these kinds of expenditures in each category, but you don't have to give out the actual vouchers, and you don't have to say how many DPS security officers went on which trip and

what did they do in advance and how far in advance do they get there and all of that.

Once those 18 months are done -- so the vouchers themselves are confidential by law for 18 months, and once the 18 months have finished then they're just absolutely public and, in fact, are not excepted from disclosure under -- and then there's a laundry list. This is under sub (b), I think, "At the expiration of the period provided" -- "at the expiration of the 18 months the voucher or other expense reimbursement form and any supporting documents become subject to disclosure under Chapter 552 and are not excepted, except for the following limited exceptions," and then there's this laundry list of limited exceptions that apply. So all of these other exceptions no longer apply, so they are less protected after 18 months than they otherwise would be under the law before this changed. So that's the substantive element of what this law is intended to do, protected for 18 months, but you have the quarterly summary that must be provided. After 18 months they go free.

PROFESSOR DORSANEO: And the statute -- the part (g) or subsection (g), which I had trouble understanding, and maybe I don't understand it, limits the Supreme Court's original and exclusive mandamus jurisdiction to the construction, applicability, or

constitutionality of subsection (a), not (b), (c), (d), (e), and (f). Only (a). Now, so I was wondering, you know, well, what's -- what are these cases going to be about, these original exclusive mandamus jurisdiction cases in the Supreme Court, and it's still pretty unclear to me what -- whether there will be any of these cases and what they will be about, because (a) seems pretty straightforward, at least in the abstract, so that was the first -- my first memo to our subcommittee, which was circulated to everybody, asks, hey, what kind of a proceeding is contemplated before the Texas Supreme Court, and one comment I got back from Pete Schenkkan -- Pete, what did you say? You don't remember?

MR. SCHENKKAN: I think the question -- I think I maybe misunderstood your question, but I think the question was, is that -- is there a possibility that the -- there's still a role for the trial court in connection with these proceedings, and I think Justice Hecht answered that fairly clearly. That was not what was intended. Also, that does not seem to be the way it's worded. The Supreme Court's jurisdiction really is exclusive for the purposes of subsection (a) and these -- anything related to subsection (a).

MR. BOYD: I think I can try and give some clarity to what led to this. So under Chapter 552, a

governmental body that receives a request for information cannot -- and this is what makes Texas PIA uniquely strong in the country, certainly over FOIA, the Federal law. The governmental body cannot unilaterally decide, "Oh, this information is excepted from disclosure, I'm just going to withhold it." If they want to do that they have to ask the Attorney General to issue an open records letter or open records decision, and the AG's open records division has to make that determination in the first instance, and then once that's been done you can go to -- either party can go to court and challenge the AG's decision.

PROFESSOR DORSANEO: District court.

MR. BOYD: Yeah, to district court and challenge the decision. There are limited circumstances where a governmental body does not have to go to the AG's office and ask for a ruling, and the primary one of which is what's called a previous determination. If the exact same document has been previously requested and the Attorney General's office has previously already ruled on that exact same document, the governmental body does not have to go back and ask for another ruling. There are some others, like is it Social Security numbers or personal e-mail addresses or some personal information that last session the Legislature said you can just withhold that without asking for an AG ruling.

This is -- so the idea here in (g) is, okay, during that 18-month period, if a governmental body gets a request for the vouchers or the underlying documents, the documents underlying the vouchers, the governmental body can just withhold that information and not even ask for an AG ruling. You can just withhold it. I think, now --

MR. SCHENKKAN: And the Court has -- the Supreme Court has exclusive original jurisdiction over any dispute over the construction, application, or constitutionality of (a).

MR. BOYD: Of that provision.

MR. SCHENKKAN: And (a), application of (a) would mean any dispute over whether we get the documents during this 18-month period.

MR. BOYD: That's right. So you're not going to have the normal procedure that you have under the PIA where the governmental body asks for a ruling from the AG's office and then the AG's office issues the ruling within 45 days and then the party that doesn't like it can seek a declaratory judgment under the PIA, not under Chapter 37, but under the PIA there gives you those civil remedies. That's not ever going to apply because you don't have to go to the AG's office, so it's a completely different animal if a dispute arises. The DPS just gets to withhold it. So, Chip, one of your clients submits a PIR, a public

information request, and says, "Give me these vouchers or the underlying documents," and DPS is going to write back and say, "Pursuant to this section the answer is 'no.'"

Now, if for any reason the client thinks, "Wait a minute, what I've asked for is not a voucher" or "what I've asked for is not a document -- supporting documentation for a voucher," or, "Well, wait a minute, that's unconstitutional," or any dispute, it didn't make sense to keep going through the normal declaratory judgment stuff under the PIA because you haven't gone through the normal AG ruling process under the PIA, so instead there ought to be a different procedure.

Now, having said all of that, I will say this subsection -- the portion of subsection (g) that has the Supreme Court of Texas original exclusive mandamus jurisdiction was added late in the game of the special session in conversations that I was not a part of, and it came back at the last minute saying that. So I can't argue -- I can't fully describe for you the legislative intent for that. I was not part of that. I will tell you what I heard later is the idea that, look, there shouldn't be any of these cases. I mean, that was the question you asked earlier, should there be any such -- the intent is there won't be because it ought to be pretty clear under subsection (a), you get 18 months, you don't have to

produce this stuff, period.

PROFESSOR DORSANEO: That's what I wanted to get to, that what we're working on may not be --

MR. BOYD: Hopefully, ideally --

PROFESSOR DORSANEO: -- that big of a subject.

MR. BOYD: -- shouldn't be happening, but if it does, how can we make sure it just gets resolved quickly and doesn't become a big issue, and I think that was the intent, was, okay, fine, go to the Supreme Court immediately. Let the Supreme Court -- and if the Supreme Court needs a master to take evidence or something, fine, but just get it over with instead of going through the normal process. That's how I understand --

PROFESSOR DORSANEO: Let's look at the last sentence of (g). "The Supreme Court may appoint a master to assist in the resolution of any such dispute," a so-called misnamed "master in chancery," which we never had under civil procedure Rule 171, which suggests that there will be some sort of a factual determination that will need to be made.

MR. BOYD: That there can be. Not necessarily, if it's a --

PROFESSOR DORSANEO: Right.

MR. BOYD: You know, it may be that it's an

easy argument and there's no evidence needed. It's -- someone challenges the constitutionality, and the Court says "no."

PROFESSOR DORSANEO: Right. So you may need a master or you may not, or you may just want to resolve any fact questions in some other way, and may adopt -- and may adopt additional rules as necessary to govern the procedures for the resolution of any such dispute. So now that everybody kind of understands what we're talking about, the first issue is do we need -- do we need any additional rules to facilitate the resolution of any such dispute, whether it's only legal or whether it's legal in part and factual in part.

So I read this several times, trying to understand what it's about. I think we've probably -- Jeff's explanation I thought was excellent, and probably insofar as we know what kind of cases it will be, it will be the kinds of cases that he's talking about where somebody says, "No, what I want is not one of those" or "This is unconstitutional," or, you know, something like that, which may not happen very often. Okay. What do we have available now in the rule book for original mandamus jurisdiction cases? And we have appellate Rule 52, which is primarily thought of by appellate lawyers or at least by this one as involving the review of decisions made by

judges and courts below in circumstances where an appeal is not available because we don't have a final judgment and we don't have statutory authorization for an interlocutory appeal, and I think that's how the rule is actually crafted. It really thinks primarily about those kinds of cases, and those will probably -- Pam, would it be fair to say that those are certainly the vast majority of Rule 52 cases?

MS. BARON: Yes, of course.

PROFESSOR DORSANEO: But Rule 52 goes farther than that, and it authorizes relief to be sought by mandamus from an officer or other person, and the statutes that go hand-in-hand, the general statutes that go hand-in-hand with original mandamus jurisdiction exercised under Rule 52 talk about, you know, I guess the principal one is Government Code 22.002, which talks about the Supreme Court's mandamus jurisdiction over not only judicial officers but other officers, boards, agencies. And then another part of 22.002(c) says the Supreme Court -- "Only the Supreme Court has authority to issue a writ of mandamus or injunction or any other mandatory or compulsory writ against any of the officers of the executive departments of the government of this state," et cetera, in order to compel performance of a duty. Okay?

So this Rule 52 is kind of about this, you

know, will cover this, but it doesn't have any provision in it for a master because it really doesn't contemplate that there will be any factual disputes resolved. It doesn't contemplate that. And that's consistent, I think, it's just my opinion -- that's consistent with prudential limitations on the exercise of original mandamus jurisdiction in the appellate courts, where the idea was that you have to show a clear right to relief if you want a governmental official to do something, and if there's a factual dispute you can't. You can't show that. It's not clear enough.

So we get this, and it says, well, you need or you might want to have a rule that allows for the appointment of a master or that does some other things, and the first issue is, is Rule 52 in combination with this statute enough? Okay, is it enough? Is it unnecessary to do an addition to Rule 52 or, you know, a companion rule to deal with cases under this -- that would arise under this new voucher statute, and then we pretty soon got to the idea, in addition to Pam pointing out, well, there are these other statutes including 22.002 that I just mentioned; and, Marisa, what about -- what about the other statute that involves cases that are pending before the Court now?

MS. SECCO: Oh, the Franchise Tax Act.

PROFESSOR DORSANEO: And what does it say comparable to this? Do you remember?

MS. SECCO: It says that the Court has exclusive jurisdiction, but does not say mandamus jurisdiction over the constitutionality of the Franchise Tax Act and gives the Court 120 days to rule on any challenge.

PROFESSOR DORSANEO: So if we made a list we could probably make a list that wouldn't get to 10, but maybe it would get close to 10. We could have various kinds of statutes that give the Supreme Court original exclusive jurisdiction or at least original jurisdiction to get after governmental officials in one way or another, and those -- those maybe mostly fit under Rule 52, but maybe they don't fit all that well. Huh? Because of the factual -- the possibility of making a factual determination. Now, I was concerned that maybe there's a constitutional problem with the Supreme Court making a factual determination through a deputized person or otherwise, and I think this is an issue, but just from reading the Constitution and not doing a lot of work, I pretty much concluded that there wasn't.

CHAIRMAN BABCOCK: Was or was not?

PROFESSOR DORSANEO: Wasn't, was not. Because the factual conclusivity clause seems related to

appeals only, to me --

MS. BARON: Appeals through the court of appeals.

PROFESSOR DORSANEO: -- and otherwise jurisdiction seemed to be provided by law, but I don't know if I'm right. I only looked at it for a short time.

CHAIRMAN BABCOCK: Bill and Jeff, is there a threshold problem -- not problem, but issue, just thinking about it, if absent this statute, if a requesting party doesn't like what the governmental body has to say, whether it goes through the Attorney General or not, they can go to court and get a resolution, and the trial court must resolve the controversy? There's no discretion not to resolve the controversy. In mandamus jurisprudence, the Court has a great deal more discretion, doesn't it, to just say, "We're not going to be bothered. We don't want to decide this." They don't decide it. In fact, Rule 52 you don't even have to answer it unless the Court wants you to answer it, and then if you answer it then they can decide it if they want to.

Was it -- is it your view that the Legislature was trying to create a situation where there's just very limited access to the Court, or were they trying to create a situation where the Supreme Court has to take it? If there's a factual dispute, they have to appoint a

master and then they have to resolve that dispute at the end of the day, which is very different than our normal mandamus proceedings, and if the latter, if the Legislature is intending to substitute the Supreme Court for the trial courts, then the rules, it seems to me, have to be quite a bit more extensive than they would be otherwise, but I don't know. Gene's got the answer.

MR. STORIE: I have more questions, at least. I was involved somewhat in the franchise tax, and like Jeff, nobody talked to me about putting exclusive jurisdiction with the Supreme Court, and what is most troublesome to me is that the statute does not specify whether it's only constitutionality on the face of the statute or as applied. Because in tax cases I promise you it is very common to have constitutional issues on equal protection or the commerce clause, maybe due process, a whole lot of things where you would need fact finding. I'm pretty sure that the motivation for the provision was that everyone expected some kind of challenge under what's called the Bullock amendment, which forbids a personal income tax in Texas without popular approval, but it wasn't limited to those circumstances.

PROFESSOR DORSANEO: So --

MR. BOYD: Well, and let me say this, on the question of whether it's constitutional for the Legislature

to pass a law that says the Supreme Court has original and/or exclusive jurisdiction, my understanding is in the Margins tax case that's being held this week the Court has sua sponte raised that issue and asked the parties to brief it, and so it seems to me we should not be trying to resolve that problem as a committee. We ought to just assume it's constitutional and do whatever rule-making needs to be done under this statute --

CHAIRMAN BABCOCK: Yeah.

MR. BOYD: -- and let the Court and parties resolve that issue. On the question of mandamus, as I say, I was not -- I came in at the very tail end of the -- the negotiations that had occurred that led to the addition of this language, and so I couldn't tell you why they included the word "mandamus" as opposed to just "jurisdiction."

PROFESSOR DORSANEO: Yeah, that's --

MS. BARON: I can guess. I mean, I think the way the Open Records Act works is after you get the AG ruling you proceed to the district court using a vehicle of mandamus.

MR. BOYD: Well, but you -- actually, you use declaratory judgment as an alternative, because --

MS. BARON: Okay.

MR. BOYD: -- most suits, particularly by third parties, are requested. That's true. The requester

normally sues for mandamus under the PIA. The third party normally sues for declaratory judgment under the PIA. So that's probably --

PROFESSOR DORSANEO: But I think the mandamus -- I think Chip was right, when you were saying the mandamus in the trial court is not "Get out of here, we're not interested in this case."

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: It's more about a remedy than it is about the discretion of the court to take the case or not.

MS. BARON: And I think that's what this statute intends to do. I don't think it's discretionary. I don't think the Supreme Court can say --

PROFESSOR DORSANEO: So it's more like the franchise --

MS. BARON: It's more like a district court mandamus, would be how I would view it, instead of an appellate court discretionary writ of mandamus.

PROFESSOR DORSANEO: Well, let me talk a little bit more and then ask the committee members what they think about doing nothing, but before I say that, the statute says, "The Supreme Court may appoint a master," so it authorizes the appointment of a master.

CHAIRMAN BABCOCK: Sure.

PROFESSOR DORSANEO: We don't need a rule or we don't need to change Rule 52 to say you may appoint a master because it already is in the statute, and then the statute says, "Do whatever else you think is necessary to govern the procedures." Huh? Now, I started -- I went and looked around to see if I could find a rule that would be a model that I could use, and I found the memo that was handed out yesterday, the October 14th memo, I found a Supreme Court of the United States rule, Rule 17, which you may want to look at; and it is a procedure and applies to procedures in original actions; and, you know, I remember *Marberry vs. Madison*, that commission that was not issued by the executive department to Marberry, so he brings an original action in the Supreme Court to get his commission. Okay.

Now, this -- and I think that would be this kind of a case, the Rule 17 case. But the Supreme Court takes a trial court approach to this in their rule. "The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed," so it wouldn't look a bit like -- if we took that approach, it wouldn't look a bit like appellate mandamuses under appellate Rule 52, okay, where the pleadings would just be like trial court pleadings. Then the Supreme Court rule says, "In other respects, those rules and the Federal Rules of Evidence may

be taken as guides," so that's's kind of like the trial court approach to the exercise of original jurisdiction by the highest court, and we -- and once you head in that direction then basically you're engineering a whole new procedural regime for high court practice or putting it all on the order, and the case law and the commentators say the Supreme Court of the United States uses masters in these kinds of cases and pretty much does what they recommend, but they don't have to, okay, but they don't have to.

So I start -- I drafted something like Federal Rule 17 in my initial draft, and that's attached to the October 14th memo, and I don't know whether we want to go through that now. I don't recommend that we do. There's several alternative ways. I've put discretion in there like the Supreme Court rule has discretion in it, and then we had a conference call, and in our conference call the appellate rules subcommittee examined the idea as to whether we need a whole new rule like the ones that I drafted or like something, and by that time Pam had drafted an alternative proposal that evolved into 52a that we have drafted here; and I was told, well, maybe we need to draft something to stick into Rule -- stick into Rule 52 to talk about masters, to talk about masters. Maybe we need a 57 point -- where would it be, 57 point --

MS. BARON: 52 point.

PROFESSOR DORSANEO: 52.7(d) or something. No, I got something from Judge Gaultney where he actually drafted a little item.

MS. BARON: Yeah, I think 52.7(d) or something.

PROFESSOR DORSANEO: Well, we can make -- I'll find it here in a minute. We could make a minor adjustment to Rule 52 without doing a whole -- if we didn't want to do nothing.

CHAIRMAN BABCOCK: If we didn't want to do nothing?

PROFESSOR DORSANEO: Yeah, right, double negative meaning if we wanted to do nothing.

MS. BARON: Can I explain what my concern was?

PROFESSOR DORSANEO: Sure. I found it. Go ahead.

MS. BARON: Once you stick a special master in the mandamus rule then people mess up mandamus proceedings all the time anyway, so you're going to have the ordinary relators in mandamus proceedings then demanding that they get a special master for some reason, and it doesn't matter how clearly you write it, I think if it's in that rule we're going to see that kind of thing happening.

PROFESSOR DORSANEO: Well, here's the suggestion, and this is just a draft, you know, a stab at it. 57.2(d), "In any proceeding invoking the Supreme Court's original exclusive mandamus jurisdiction the Supreme Court may when authorized by statute appoint a master to assist in the resolution of a dispute concerning the record. The master will have the authority specified in the appointment order. The Supreme Court may accept or reject any part."

MS. BARON: That's actually very good, now that I hear it. I think it's very good.

PROFESSOR DORSANEO: Yeah. The difficulty with it is knowing when it's authorized by statute. We know it's authorized by this statute. We know it's not authorized specifically by the franchise tax statute, and we know that other statutes don't talk about special masters at all, so how much have we accomplished by adding that if it's just this? Huh?

MS. BARON: Right.

PROFESSOR DORSANEO: If it's just this, we might as well say "as provided in the statute."

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: And the appellate courts have been appointing masters from time to time over the years. We almost always do it in habeas cases if

there's some -- if something else needs to be done, particularly if the contempt happened in the appellate court, but we've done it -- our Court's done it a couple of times, and we just ask the trial judge to make a record of something that had happened post-judgment in the case, so -- but there's nothing to authorize that. The appellate courts just do it when they need to, but, query, should there be something? It's not a pressing problem, but the statute just raises the issue.

PROFESSOR DORSANEO: And then the last -- go ahead, Richard.

MR. MUNZINGER: Is there not a statute that says that all Texas courts have the authority to issue such writs and orders as necessary in aid of their jurisdiction?

HONORABLE NATHAN HECHT: The Constitution --

MR. MUNZINGER: The all writ statute in the Federal system, don't we have a state analog to that?

PROFESSOR DORSANEO: Yeah, there is one for the Supreme Court. It's court by court.

MR. MUNZINGER: But that's my point. Why would you need to write a rule if the Court has the authority to appoint a master under that statute? That is an order that the Court enters saying, "Hey, we need your help. This is in aid of our jurisdiction. We want a master." Why do you need to have a rule that says that, if

that statute is in existence? I don't see the need for the rule.

CHAIRMAN BABCOCK: Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: Bill, was there any appetite for seeing how this plays out? Because I would have a greater concern if it required an interpretation of (b), but (a) is so narrow and specific, it will be interesting to see what, if any, disputes arise out of that, and it's hard to imagine the type of factual determination that could be made.

PROFESSOR DORSANEO: Well, we're mindful of these other cases, too. Our specific assignment was this statute, but then Marisa said, "Well, you know, there's this other new statute," and maybe the Legislature is -- thinks this is a good idea to give the Supreme Court more work.

MS. SECCO: It's not new. It's old. It's years old. It just took a long time for anyone to --

MS. BARON: 2006.

PROFESSOR DORSANEO: Oh, okay.

MR. STORIE: Yeah, I expected it to come out in my tenure, but it did not.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: I'm curious, just a brief discussion on what the Supreme Court's review power is of a

master's report. Is the Supreme Court bound by factual determinations, or does it have appellate review in the sense of factual sufficiency or legal sufficiency, or does it have the ability to substitute its own fact findings based on the evidence that's forwarded? Has that ever been crossed, Justice Hecht?

HONORABLE NATHAN HECHT: Not to my knowledge.

MR. ORSINGER: Well, Bill, did you say earlier that you felt like the constitutional restriction of Supreme Court review of the evidence being limited to legal sufficiency is only their appellate jurisdiction?

PROFESSOR DORSANEO: That's the way I read it.

MR. ORSINGER: And it's been traditional, would you agree, that mandamus jurisdiction has had zero factual review also?

PROFESSOR DORSANEO: Well, I didn't find a Supreme Court case, but I found a *Walters vs. Wright*, Justice Spears' opinion saying that the courts of appeals routinely need to decide fact questions in mandamus proceedings and sometimes they've done it on their own and sometimes they've appointed a district judge, just one little paragraph in there that seems to be out of step with the idea that you don't resolve factual matters in mandamus cases. It seems like that idea hasn't -- it was in the

back of my head that you don't resolve factual matters in mandamus proceedings in courts of appeals or in the Supreme Court, and I went looking for it, and it took a while to find a case that said it, and the cases seemed old. Not really old, but not recent.

CHAIRMAN BABCOCK: Pam.

MS. BARON: I found an older case, remember?

PROFESSOR DORSANEO: Right.

MS. BARON: Like an 1896 case from the Texas Supreme Court that was looking at their jurisdiction in a original mandamus action against an executive officer, and they explained why they couldn't decide fact issues, and it basically said -- let me read it. "Court is not provided with the means of ascertaining the facts in any controversy. It has none of the powers conferred by law upon the district court to take depositions, issue subpoenas, writs of attachment, or other process necessary and so on and so forth, so we, therefore, conclude that it was not the intent of the framers of the Constitution or the Legislature to empower this Court to issue writs of mandamus, except where the facts were undisputed."

MR. ORSINGER: See, and that concerns me because I'm worried that the constitutional restriction against Supreme Court review of the evidence is premised on the fact that the mandamus remedy didn't permit it in the

first place, so there's no reason to prohibit it, and I'm worried that this -- I wish the Legislature had just created new jurisdiction for the Supreme Court rather than labeling it as mandamus jurisdiction.

CHAIRMAN BABCOCK: Justice Hecht.

HONORABLE NATHAN HECHT: Well, it's not clear to me that mandamus doesn't involve fact issues ever. It typically doesn't in the context in which we use it 99 percent of the time. I mean, we're thinking about appellate use of mandamus to correct an action by the trial judge or something, then, yes, we say we can't resolve fact issues, but you can bring an action for mandamus in a trial court over which the courts of appeals don't have original jurisdiction and then you just try it like any other case.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: But, Justice Hecht, you have ordinary appellate review of that determination --

HONORABLE NATHAN HECHT: Yes.

MR. ORSINGER: -- rather than original mandamus review by the court of appeals and the Supreme Court.

HONORABLE NATHAN HECHT: Right, but all I'm saying is there's nothing about the remedy itself that doesn't -- that prohibits or precludes the resolution of fact issues. Sometimes you have to resolve fact issues to

determine whether you're entitled to the remedy or not. It's just in the appellate context when we're thinking of reviewing the decisions of other people in the process that we think of no fact resolution.

CHAIRMAN BABCOCK: Marisa.

MS. SECCO: I think the Constitution also restricts what the Legislature -- what sort of original jurisdiction the Legislature can confer on the Supreme Court to writs of quo warranto or mandamus. That's section 3, article 5 -- article 5, section 3 of the Constitution specifically says, "The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus," which is another reason why they probably use mandamus in the statute, although it is unclear because mandamus is a term used under the Public Information Act, too, so those are two possible reasons why they used mandamus.

CHAIRMAN BABCOCK: And it seems to me there's nothing that would prohibit the Court by rule, by implementing rule, to say, for example, "In the event we appoint a special master to make factual determinations, we're going to look at those findings de novo" or "we're going to give them deference," or, you know, anywhere up and down the spectrum. They could do that by rule. I think other agencies have rules like that when there's a

special master appointed. I had an experience recently with one where the agency seemed to ignore their rules, but nevertheless, they were there.

MR. BOYD: I have -- I'm sorry, I had a question about the draft that you read to us a minute ago that said the Court can appoint a special master when the legislation authorizes it to do so, and I wonder what the thinking is behind including that as if the Court were choosing to limit its power to whatever the Legislature tells it it can do. Could the Court -- instead of doing that could the Court say, "And we'll appoint a master whenever we think we need to"? In other words, do they have to defer to whether the Legislature has expressly authorized them to do so in a given kind of case?

PROFESSOR DORSANEO: That's the tough part of writing this exception. Right? Because you don't want to -- as Pam says, we don't want to suggest that there's going to need to be a part of every mandamus original proceeding petition, you know, a request for the appointment of a special master to determine things. Huh? We don't want that. And once you put it in there, it's going to look attractive to some people, but we may need to put it in there -- so there needs to be some limit on it, so maybe it is, you know, not when required by statute. Maybe there's some other limit.

HONORABLE JAN PATTERSON: Well, there is definitely a possibility of a creep factor here, that's -- we need to keep in mind.

PROFESSOR DORSANEO: And even that *Walters vs. Wright* case kind of suggested it's normal, and I think it may be -- may, in fact, be even likely that in these cases against governmental officials that don't involve a proceeding that there really will be, you know, some kinds of fact questions and that people kind of in order to get mandamus relief either downplay that or don't raise it. I don't know how you do that in an as-applied challenge to the franchise tax statute. You know, it seems to me -- and I don't know --

CHAIRMAN BABCOCK: We'll solve that in a minute.

PROFESSOR DORSANEO: -- how those cases are handled, but I read the petition in the latest franchise tax statute case, and it looks like the petitioner doesn't want to mention that there might be a fact question because that might -- I don't know why, but one of the reasons might be that maybe that means you don't get any relief, because you can't do that in the Supreme Court.

CHAIRMAN BABCOCK: Why don't we think about what kind of dispute would arise under this statute, and I think Jeff -- and I'm just thinking in terms of my

experience with these open records issues. I think Jeff hit one that I could see happening where a newspaper, say, submits a request to DPS, and DPS comes back and says, "No, we deny this. The documents you're requesting are voucher or other expense reimbursement forms, even though you haven't couched it that way, that's what it really is, and so we're not going to give it to you. We're not going to give it to the AG, so go pound sand," and the newspaper says "No, no, no, we're not asking for a voucher or other expense reimbursement form. We're asking for something else," and the DPS says, "No, no, no, very sorry, that's what effect you're in," and so we said "no," and that's how the fight gets started.

MR. BOYD: Or even more likely, DPS doesn't say, "This is a voucher or other expense reimbursement form," but they say, "This is supporting documentation to a voucher or other expense reimbursement form."

CHAIRMAN BABCOCK: Right.

MR. BOYD: So it's a receipt from something, or it's a memo that was prepared describing the expenditures from the trip or whatever, but I think you're right.

CHAIRMAN BABCOCK: So the newspaper says, "We don't accept that," and now they go look at the statute and they say, "Okay, here's what we've got to do." We don't do

it the normal way we would do it, which would be go down to Travis County district court and fight about it. Now we're going to file something in the Supreme Court, so what do we want that case to look like? How do we want that to proceed? Do we want the Supreme Court to be able to say, you know, "Don't bothers us, not interested," or do we want to require the DPS to have to file a response, or as your rule here says, proceed that it's an ex parte proceeding if they don't file a response? How do we want that to look?

MR. LOW: Chip, when we vote --

PROFESSOR DORSANEO: I tell you, your partner would like it to look like you're going to file suit and then we're going to do some discovery and follow something like the Rules of Civil Procedure to tee it up, just like we would have done in the trial court.

CHAIRMAN BABCOCK: That doesn't surprise me, and I would guess that most requesting parties would want that, they don't want, you know, to be jammed into a box that they don't -- you know, they have less rights than they would under the old system. And the question is, what did the Legislature intend here? Did they intend to jam them into a small box; or did they just say, hey, you know, we want the Supreme Court to act just like the trial court would if we hadn't passed this statute? Frank.

MR. GILSTRAP: Well, it's not just that. If

it were just that, I would say it's not worth burdening the rule-making process with dealing with that. Let the people read the statute and file suit in the Supreme Court and see how it turns out. The problem is this isn't the only statute. There's a number -- apparently a number of statutes in which the Texas Supreme Court has been given original jurisdiction over suits involving state officials. Pam listed -- in her Chutes and Ladders paper several years ago she listed five or six kinds. Marisa has talked about the franchise tax cases. I think there was one other on the conference call, so there's a whole litany of these kind of cases that we've got to deal with. I think it would be helpful to actually see a list of them so we could figure out, one, whether it's worth making a rule and, two, what that rule says.

I think it's very clear that we shouldn't -- we shouldn't garbage up Rule 52. Rule 52 has to do with mandamus proceedings in which there is no fact finding and which the Court has discretion to act, and we ought to leave it alone and not put anything in there. The question is do we need some new rule to deal with this whole oddball set of cases that the Legislature has dumped on the Supreme Court.

CHAIRMAN BABCOCK: Well, in fairness to us, if not to the Court, we've been asked to recommend or to

advise the Court about this part of the statute that says, "The Court may adopt additional rules as necessary to govern the procedures for resolution of any such dispute," referring to that one. You're right, there may be a broader issue here, but that's our charge to --

MR. GILSTRAP: Well, the answer to that, the answer to that is, that, you know, if it's just the statute I think the answer ought to be "no."

CHAIRMAN BABCOCK: No rules?

MR. GILSTRAP: No rule, but if you can't -- if you are going to craft a new rule, you've got to consider these other type statutes, and I think to answer the first question you've got to consider the other type statutes because, you know, they're out there, too. This is just -- you know, this is just apparently the first time it's been pitched to the Court as a rule-making problem.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Gaultney and then Justice Gray and then Richard.

HONORABLE DAVID GAULTNEY: Well, I think if there's no rule it's going to be filed as a Rule 52 petition for mandamus. I mean, that's what the statute says, and so Rule 52 is going to govern these types of actions, and it has apparently governed actions in the past. This is the rule that they've used with respect to these types of issues. When I was looking at it, the first

question was, well, should we have a separate rule that deals just with this statute and that -- because that's the task, and I think Pam in one of her e-mails responded that maybe it's not a good idea to have a statutory specific rule and that there are other statutes that apply.

So to me, rather than create a whole new process that envisions other statutes being drafted that create original fact finding jurisdiction in the Supreme Court -- a whole new rule, I'm sorry, a whole new rule, 65.8 that applies to all statutes, you know, where a statute could be passed that says, you know, we now give the Supreme Court fact finding jurisdiction, that the better way to do it would be to simply accommodate the action in Rule 52, as it's currently being done, and that the best place to put it would be in the records section. I mean, it's hard to find a good place to put it. I agree with that. But the best place to put it is in 52(d) dealing with the record, 52.7(d), because that's the thing that really distinguishes this type of original exclusive jurisdiction from other types of mandamus proceedings generally.

You don't have a -- well, you do have a record. I understand that they treat the letters and the correspondence as the underlying proceeding. You know, just like in an Election Code mandamus the underlying

proceeding may be the city council meeting in which they declined to follow whatever recall action or something like that, so you do have an underlying proceeding, but it just struck me that perhaps the best place to put it would be in connection with creating a record for the Supreme Court to act on it.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I was not on the committee or the subcommittee that looked at this and had just jotted out in the margin a rule that was very close to what David had proposed. The only thing that I really modified is that I limited it to the Senate Bill 1; and if it simply said that "In a proceeding under Senate Bill 1 the Supreme Court may appoint a master to develop a record on any issue as directed by the Court" and then the limitation about what they can do with the findings, ignore or follow them, that was in David's proposal, I think that's a clean fix for a specific problem; and then if other statutes, to meet Frank's concern, are brought to us later that need to be, that's a place to start working it into the rules. It gives the litigant a framework. It protects the courts from having this procedure thrown into anywhere -- any other mandamus proceeding on the thought that, well, maybe this is one of those times I'm entitled to a master and so they ask for it. It's very specific,

very limited, and then if it needs to be expanded it can be at a later date.

CHAIRMAN BABCOCK: Yeah. Orsinger, and then Munzinger.

MR. ORSINGER: I'm changing my mind constantly about whether we ought to have a rule or not, but assuming for a second that we do have a rule, it's apparent from the subcommittee's proposal that there is alternate suggestions that we ought to treat this like an appellate proceeding or we ought to treat it like a trial court proceeding, and the idea of issuing a citation that has an answer day of Monday following the 20th day after service and all of that, I'm wondering if we're going to issue a rule if maybe we ought to issue a rule in the Rules of Civil Procedure rather than the Rules of Appellate Procedure that's specific to this kind of proceeding and then hand it off somehow at the end rather than at the beginning, because having a Rule of Appellate Procedure that has all of this stuff about issuing citation and pleadings and Rules of Evidence and whatnot just seems like a very peculiar place to put all of that stuff.

PROFESSOR DORSANEO: Well, I think we all -- this is just the subcommittee. I think we got past that point and concluded it ought to look -- it ought to look like a Rule 52 appellate mandamus -- appellate court

mandamus proceeding rather than like a trial court mandamus proceeding, and so we rejected -- we rejected the Supreme Court of the United States' approach to it along the way and then what we were trying to -- then what we were trying to do was to figure out if we should say something, should it be stuck into current Rule 52, and the problem is, you know, what's it going to be limited to if it's in -- you know, if there are going to be limits expressed inside Rule 52 then what are the limits going to be and one way to do it is to do it statute by statute.

Another way would be to do it more generally with an exception. We thought about -- you know, we thought about all of these things and really didn't reach a conclusion, and the same issue is involved if you have a separate rule because you say -- if you have two rules then which one are we in? You know, are we in Rule 52 or in Rule 52a? You know, which one is applicable? And it's very hard to write the subdivision that says "application of rule." I mean, like this rule applies. Right now we have a rule that's not well-designed to apply to everything, and it applies to everything, huh? But if we have two rules and you're supposed to use this one or that one then we're going to need to make it clear, you know, which one you should use or we're just making more trouble than providing a benefit.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I disagree with Justice Gray's suggestion because if you articulate that a master may be appointed in this proceeding, you imply that you don't have the authority to appoint a master in other proceedings. If the Court has the power to appoint a master in any proceeding because the Court has the power to issue such orders as are necessary in aid of its own jurisdiction, there's no need to have a provision in any rule regarding the appointment of a master, because we have the power to appoint a master and take that a step further. If I have the power to appoint a master in an order appointing the master I can tell you what he can do and what he can't do. Take it a step further. I'm the constitutional authority of the judiciary of this state. I, the Supreme Court, will determine whether I am bound or not bound by the master's findings, obviously I'm not going to be. He's in aid of me, not in control of me. I think it's a mistake to bring a master into this rule.

CHAIRMAN BABCOCK: Well, in fairness to Justice Gray's proposal, he did say, which I think makes sense, is that whatever rule the Court promulgates pursuant to this statute ought to say that these rules are pursuant to Senate Bill 1, and they govern proceedings under Senate Bill 1 without trying to tackle the franchise tax problem,

which is not our charge and we don't have time for, but anyway. Pete Schenkkan, and then Justice Christopher, and then Sarah, and then you, Bill.

MR. SCHENKKAN: Yeah, I want to follow up on Richard's comment and urge that we not -- that the Court not adopt a rule for this purpose and the purpose of this specific statute. This is an extraordinarily narrow and focused statute. There's a good chance there will never be a case under it. If there is a case under it, we will have to wait and see what it looks like. We, the we not being we, we, but Justice Hecht and his colleagues, and using their power and applying it sensibly when they see what the first one that comes in the door looks like. That seems to me the time to issue an order in this case we want you to respond by X days or we want to appoint a special master, and we want to tell the special master, "This is what she is to do or not do" or whatever, and we don't really need to cross any other bridges. It does seem to me that there is harm to getting out there and trying to make a rule that governs the use of mandamus in a sense that is not conventional to the Texas understanding, and I think the entire Anglo-American understanding of what a mandamus is and to get into the question of what do we do with special masters, how do they work in the Texas Supreme Court if we don't have to.

I mean, you know, we're all fighting the last wars. The last time I had anything to do with an original mandamus in the Texas Supreme Court it was representing the seven state legislators who were challenging the Attorney General's decision that he could allow Judge Folsom, a Federal district judge, to set the compensation of state agents, the fees in the tobacco case. We filed an original mandamus action under Government Code 2000.002 in the Texas Supreme Court. We never reached the question of what we would do if we had a fact dispute in that case because the tobacco lawyers removed that proceeding from the Texas Supreme Court to Judge Folsom's court, a somewhat novel application of removal and venue procedures under Federal law; but had we gotten there, had we been in a proceeding before the Texas Supreme Court, over what is the authority of the Attorney General of Texas in his role as the chief litigator of the state to, in our view, undermine this other constitutional limit on compensation of state agents, there might well have been fact issues, might well have been at least allegations on the other side that there were fact issues.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: And you might have had to cross this question of what do we do about special masters. Again, we're not smart enough here to figure out all of

those scenarios under which that could arise, so if we don't need it for this statute then we don't need it now, and we should wait and decide later if we do need it.

CHAIRMAN BABCOCK: The only thing I disagree with is that we are plenty smart.

MR. SCHENKKAN: We are plenty smart, just not smart enough for that, because nobody is.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, really, I was going to say the same thing. I don't think that we need any procedural rules to govern this statute. We don't know exactly what's going to happen. The one scenario that we can think of where the -- they say this is a voucher and you think it's not, can easily be handled by the Supreme Court by reviewing the documents in camera along with affidavits like we do with privileged documents all the time.

CHAIRMAN BABCOCK: You have a fact dispute there?

HONORABLE TRACY CHRISTOPHER: Pardon me?

CHAIRMAN BABCOCK: Is there a fact dispute there?

HONORABLE TRACY CHRISTOPHER: Well, we review, you know, a trial court's decision with respect to whether something's privileged de novo, by again, looking

at the affidavit and looking at the documents. So, you know, is that a fact dispute? It's a de novo review, so --

CHAIRMAN BABCOCK: Okay. Sarah.

HONORABLE SARAH DUNCAN: I agree. We held Judge Reed in contempt in '95. We -- there aren't any rules telling us what to do, but it was fairly clear that we had fact issues. We appointed Judge Onion as -- we abated the case, appointed Judge Onion as our master. He held an evidentiary hearing, and if someone had wanted to request a jury trial, they could have, and they could have litigated that. He held the hearing, he made the findings, he sent them up to us. We agreed with his findings on the record, held in contempt and sent him to jail, so I just -- I don't see -- I don't see that the Court has demonstrated it's not capable of handling these types of proceedings without a rule, and I think the Court has to --

CHAIRMAN BABCOCK: You said the Court has or has not demonstrated?

HONORABLE SARAH DUNCAN: I'm sorry?

CHAIRMAN BABCOCK: The Court has demonstrated, not --

PROFESSOR DORSANEO: Has not demonstrated, and I would think the Court would want to maintain maximum flexibility to handle each proceeding as it comes up depending on what type of proceeding it is, who's involved,

whether there are fact issues or not, whether anybody is requesting a jury trial, and if they start -- if the court starts hemming itself in in a rule at this early stage, I think it would be a mistake.

CHAIRMAN BABCOCK: Bill, did you have another comment?

PROFESSOR DORSANEO: Yeah, it's a small point. If we wanted to put it in, I think it would go just as well in 52.8, maybe even better, which is the part of the -- part of the rule that talks about the action on the petition rather than talking about a record. If we wanted to stick it in here, that's probably where I would put it, and also it troubled me when I first read 52 that it begins in 52.1 by talking about an original appellate proceeding, because I don't really think -- I think that they're only appellate in the sense that they're in the appellate courts, and I would just take that word out.

CHAIRMAN BABCOCK: Yeah. Just we're going to go back to parental termination here in a second, but just, Sarah, hearing you say what you said and what Pete said, Judge Christopher said, I can see -- I can envision a requesting -- a client who wants to request these documents has done so and then gets stiffed by the DPS unfairly in their view, coming to the lawyer, me or somebody like me, and saying, "Well, what are our chances in the Supreme

Court?" And I would say, "Well, I happen to know a lot about -- or as much as can be known about that, but there's no rule, and, you know, Rule 52 may apply, and so it may be discretionary. The Court may not even hear it. We don't know. They may appoint a master, they may not. We don't know what the standard of review of the master's findings are going to be, so with all that ambiguity, you know, you may be spending a whole bunch of money with very little likelihood that the Court would even hear you." So consider that, whereas if there were rules it might be clearer, but anyway.

Let's go on to parental termination, and this, as with many instances like this, it seems to me the consensus here is no rule. Does anybody disagree or want to be on the record about the contrary view? This may be a situation, I don't know, where the Court would say, okay, we understand the committee says no rule, but if there was a rule we would like to see what it would look like. If that's the case, it will be on the agenda for next time, and we'll do work between now and then. If that's not the case then we'll have other agenda items for next time because we've got plenty to do. Sarah.

HONORABLE SARAH DUNCAN: In that respect, what would help me is the legislative history.

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE SARAH DUNCAN: How the Legislature intends -- whether they intend this to be like a trial court mandamus, which I can only assume, but I don't know.

CHAIRMAN BABCOCK: Yeah, and I think that's huge, because if the Legislature was intending to squeeze it into a very small box then so be it, but if they weren't then that's something else again. Justice Patterson.

HONORABLE JAN PATTERSON: I would also be more concerned if the statute were more narrow, if it just said "vouchers," but I think we have to take into account its breadth, which includes all supporting documents and expense material.

CHAIRMAN BABCOCK: Right.

HONORABLE JAN PATTERSON: So it's hard to imagine -- I'm sure that someone could construct a factual dispute, but it's hard to imagine what would come up where there would be a factual dispute, so I think if there's any that, I think that would be helpful, too.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: If the Supreme Court wants us to go down that road I think we need to contemplate these other statutes. Apparently when the clerk was on the phone the other day, apparently they get a lot of inquiries about a lot of these statutes and people don't know what to do. So, you know, that's one purpose of the rules is to guide

the practitioners, and if we're going to tackle that I think we ought to tackle the other statutes.

CHAIRMAN BABCOCK: I'll talk to the Court to see if they want to broaden our --

PROFESSOR DORSANEO: Yes, we need to know that.

CHAIRMAN BABCOCK: We'll find that out. Okay. Richard Orsinger, let's go back to parental terminations and see if we can get maybe 20 minutes in on that.

MR. ORSINGER: We'll take up where we left off on page 18 of the task force report. This is proposed Rule of Appellate Procedure 28.4, subdivision (d), appellate briefs. The ordinary rule for accelerated appeals is that the appellant's brief is due 20 days after the appellate record is filed, and the appellee's brief is due 20 days after the appellant's brief is filed, and then existing Rule 38.6(d) permits appellate courts to shorten or extend the time for filing a brief, and for an extension of it, Rule 10(b)(5), 10.5(b), excuse me, requires that the request for the extension to the briefing deadline include facts relied on to reasonably explain the need for an extension.

The task force report doesn't change the 20 days plus 20 days, but it does suggest that good cause be

required for an extension rather than just facts reasonably explaining the need, and it asks for the total amount of extensions to be 40 days cumulatively, so for the appellant that might be too much, 60 days, and for the appellee that could be 60 days. And we discussed this at the very end of the meeting yesterday, but I don't think we had much of an opportunity for anyone to hold forth on these issues. Do we really need 60 days to file a brief when we have an appellate record prepared in 10 days? Are these -- should we have no cap? Should we have an elevated standard of good cause over just a reasonable explanation?

Note that the task force proposed total of 40 days cap on the extensions permits an exception for extraordinary circumstances. For example, if the appellate lawyer were hospitalized, had a car accident, or something of that nature, so we need some comment on that. Bill.

CHAIRMAN BABCOCK: Justice Gray.

MR. ORSINGER: Sorry.

HONORABLE TOM GRAY: I don't mean to be blunt, but it doesn't matter what you put in the rule, other than it makes a statement of priority to the attorneys. I think that accomplishes its objective. I would probably make it more shorter, like 30 days cumulative, but because there is no teeth in what we can do to the attorney who fails to meet the deadline other than

say, "Oh, please give us the brief quickly," or abate it, appoint a new attorney, start the process of trying to get the brief over again. There's just nothing to be accomplished by the deadline other than the message it sends, and that's -- the message is worth it, but don't expect that to actually expedite the process.

CHAIRMAN BABCOCK: Okay. Bill, I'm sorry, did you have your hand up?

PROFESSOR DORSANEO: Yeah, I wondered if -- it seems that these extensions and all of this hurrying up at the beginning, you know, only really makes sense if we're going to have submission at some, you know -- at some point that's related to these timetables. I think that if the -- if the case isn't submitted to the court of appeals for a decision until sometime down the road then -- and these requirements just seem to be like being in the Army, we kind of hurry up and wait.

CHAIRMAN BABCOCK: Okay. Any other comments on (d)?

MR. ORSINGER: I might point out, Chip, that that comment relates also to the celerity of filing the appellate record. If we get this appellate record in 10 days, we get briefs 90 or 120 days later, and submission six months later, then why are we killing the court reporter to get this all filed in 10 days? I mean, that's

the problem, and we're going to get down to where the rubber meets the road when we address the question of whether the appellate rules are an appropriate place to put deadlines on the court of appeals to schedule for submission and to resolve it and especially in the last analysis on the Supreme Court to take care of its business on a petition for review and its ultimate disposition.

CHAIRMAN BABCOCK: Yeah, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I absolutely agree that if -- you know, if we're holding everyone else to tight timetables then we have to hold the appellate judges to a tight timetable also because, I mean, it's wrong for us to say, "No, no, no" on an extension, and the briefing is done, and we don't even submit it for, you know, months after that. Then they're like why did we kill ourselves to get these briefs done?

CHAIRMAN BABCOCK: So you would add a subsection to this rule that would impose deadlines on the disposition of the case by the appellate judges?

HONORABLE TRACY CHRISTOPHER: I don't know if I would put it here. I don't know where you would put such a deadline, but I think that you should have a deadline.

CHAIRMAN BABCOCK: It should go somewhere?

HONORABLE TRACY CHRISTOPHER: Yes, whether it's in a judicial administration rule instead of an

appellate procedure rule.

CHAIRMAN BABCOCK: Justice Gaultney, you would favor that?

HONORABLE DAVID GAULTNEY: No. There is a statute that does impose a deadline for a specific type of case. I don't remember what it is, and the issue then becomes, well, what happens if you blow that deadline?

CHAIRMAN BABCOCK: What happens what?

HONORABLE DAVID GAULTNEY: If you miss the deadline, and I think it's like a four-month deadline, or it's a very short deadline. You know, I think that the appellate courts are going to accelerate these cases. They are going to give them tight attention with these tight deadlines. They are going to be very strict on granting enforcements because the rule, the way it's being written, emphasizes that. I mean, it's replacing a statute which has very Draconian measures to it, so I think that the appellate court is going to be well aware of the need to decide these cases quickly.

CHAIRMAN BABCOCK: Justice Gray, any views on that?

HONORABLE TOM GRAY: Well, the Jane Doe statute has a deadline as well, and the result of missing the deadline is an affirmance of the trial court's determination, and the -- no, I'm sorry, it's a reversal of

the trial court's determination in the Jane Doe cases, but this is just something that as a state we're taking a priority on, giving it priority. It is a educational process. That's why I said in response to this, the message is sent, "This is important because you can't extend it more than X," and what happens in the case where it is really, really complicated and you've got differing views on a panel and it just simply takes more than whatever the date you've set for the deadline to get it done. And so it --

CHAIRMAN BABCOCK: Justice -- oh, I'm sorry.

HONORABLE TOM GRAY: We can deal with these. We understand their priorities, and I'll get to the opinion aspect of it in a minute, but --

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Well, the message was sent by the Legislature years ago when they enacted the statute that said, you know, these cases have to be handled first. Well, they're not always handled first. You know, there are different courts handle them differently. It takes longer to get through different courts. Within courts it takes different judges a longer amount of time to get cases to submission, submitted. I would be in favor of setting a time frame for the appellate court to submit the case, once it becomes an issue, once the appellee's brief

is filed, of 20 days or something like that. I would be against a deadline for disposition, because then you get into a complicated area there because you may get into a situation where you have a dissent or a concurring opinion and the case may be more difficult, but I certainly wouldn't oppose setting a time frame for submission for the court, and that would help with some of the things that Sarah was talking about yesterday as far as uniformity goes.

The message was sent years ago, and the problem has been that some judges in some courts have just been treating these like ordinary accelerated appeals, and Mary Comino on our court used to say that the easiest way to slow down a case is to label it an accelerated appeal, and they do take -- oftentimes they take just as long or longer than a normal appeal. So the message was sent. It just hasn't been received, and I do think we need to have a mind -- a change of mindset on this, and the best way to get an appellate court's attention or certain judges' attention who aren't submitting these cases timely is to say, "Hey, look, you've got to submit it 20 days after the appellee's brief is filed."

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I would be interested in hearing from the appellate judges, thinking back on your

experience with cases that fall in the subset of these parental termination and affecting parent-child relationship cases, are they different in any way in terms of the frequency of requests for more time for the filing of the briefs or the nature of the request? Because I'm kind of tempted to adopt a rule that in effect says the -- you know, the appellant wants more time and the appellant is the one who's -- who we're concerned about, that's okay, but appellees in this case don't get any extensions. That's sort of what it comes with, your having gotten an order in the court below taking the child away. You've got 20 days to respond to this brief, period, and I'm wondering why that wouldn't be a good rule for this particular section.

HONORABLE SARAH DUNCAN: Can I suggest that it's not just the appellant we're concerned about? We're concerned about the child who needs a permanent placement.

MR. SCHENKKAN: But --

HONORABLE SARAH DUNCAN: And we want to hasten that permanent placement and not delay it.

MR. SCHENKKAN: I see, so that goes to the appellant.

HONORABLE SARAH DUNCAN: Consistent with the constitutional rights of the parents to their parental rights.

MR. SCHENKKAN: You're clearly right. You're clearly right.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I have some statistics on our cases that got briefed, and for the most part appellee files their brief within 20 to 40 days after the appellant, and appellant's brief -- you can't really -- you know, is usually three months after the record is complete.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: Just looking at a couple of years' worth of data.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Well, I think Justice Jennings' idea is a good one, that you have a -- I don't oppose or don't disagree with, if this is what Justice Christopher was talking about, if she was thinking about a time for submitting the case, and my concern is about setting a deadline on deciding it. I think you'll get a decision within a very short period of time normally, and if you don't you've got a problem, and the problem with setting an end date is what's the effect of not making it? But I do agree. I think Justice Jennings has a good idea of saying a case will be submitted, you know, so many days after the briefs are submitted or --

HONORABLE TERRY JENNINGS: If you can get your brief in in 20 days, why can't we get it submitted within 20 days?

HONORABLE DAVID GAULTNEY: Right. I agree with that.

HONORABLE TOM GRAY: Well, so that nobody is misled, I mean, submission can be nothing more than it gets submitted, and then it doesn't -- I mean, that doesn't in my view advance the ball at all. I mean, other than it does start a clock on a report somewhere that it was submitted on a certain day, and we actually submit every mandamus proceeding on the date that it's filed, and it hasn't affected our disposition time in mandamuses, you know, at all, but, you know, the -- it's a date that has to happen before it can go out, yes, but at the same time there's nothing magic about that date.

CHAIRMAN BABCOCK: Katie, what did you have to say?

MS. FILLMORE: One of the things that the task force considered was changing in TRAP Rule 39.8 the requirement of 21 days' notice before the case is set for submission when oral argument is not going to be heard, but ultimately the task force decided not to include that in the recommendation because they felt like it was important to get notice of who the panel was going to be 21 days out

so they could let the court know if there was a recusal situation involved, but I wanted to mention that because it's kind of along the same lines as what we've been talking about with the deadline to get the case set.

CHAIRMAN BABCOCK: Jane. Justice Bland.

HONORABLE JANE BLAND: And that goes to Justice Gray's -- that's the answer to Justice Gray's comment, that if you set a deadline for the submission of the case, you start the clock on that 21-day notice, so you move that process up, because you can't consider the case until 21 days after the notice is sent, or you can't release an opinion in the case.

HONORABLE TOM GRAY: Well, you can, but if somebody is affected by it, they get to challenge it.

HONORABLE JANE BLAND: Right.

HONORABLE TOM GRAY: But that aspect of it, I mean, you could submit it and still comply with that rule by simply saying that it's submitted on the date that it is -- the appellee's brief is filed and that the notice of the panel has to be done within 10 days of the notice of appeal being filed. I mean, because we can create the panel at any time. Of course, on a three judge court it's created absent recusal.

HONORABLE JANE BLAND: Exactly. Exactly. On a three judge court that submission date may not --

HONORABLE TOM GRAY: It's a waste of time.

HONORABLE JANE BLAND: -- be any kind of a trigger, but on a nine judge court the case gets to a panel upon submission, so it does make a difference. It moves from one set of calendaring to another, where a panel is in and out shepherding the case.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE JANE BLAND: So it would be helpful to submit it soon.

HONORABLE TERRY JENNINGS: Yeah, there is a difference on submission. You don't have to make it 20 days. It could be 30 days and then you could comply with the 21-day rule or you could make it 25 days, but on our court when a case is submitted -- and I guess different courts handle submission differently, but on our court when a case is submitted it's actually set on a docket, and a panel will meet and discuss the case. They may discuss the case for five minutes. They may discuss the case for an hour. We may or may not have oral argument on it, but on our court typically a panel will meet. The three judges will meet and discuss the case, so submission means something on our court. It means that the judges are going to docket it, and they're going to sit down and talk about it, and it usually means that a lawyer has worked up a presubmission memorandum with recommendation on how to

handle the case as well, but that is a good point, different courts handle submission differently.

CHAIRMAN BABCOCK: Richard, let's move to subpart (e).

MR. ORSINGER: Subpart (e) then is after the court of appeals has handed down its decision and you have your rehearing issues, and they come up in two areas, so maybe we should discuss (e) and (f) integrated. There's a motion for rehearing to the panel if you're on a court that is more than three judges and then there's such a thing as motion for en banc reconsideration for courts that have more than three judges, and the rules don't, I think, explicitly say this, but I think it's commonly understood that you can have a rehearing to the panel and have that denied and then you can file for consideration en banc, so you can do them in series rather than in parallel, and so we have to understand if we allow that or admit that practice that really you have two rehearing periods that you're dealing with here and not just one, and I think that the deadline is 15 days, is it not, to file your motion for rehearing?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: And so that would be 15 days that the motion for rehearing must be filed, then an undetermined amount of time for the court of appeals to

dispose of it, and then another 15 days for the reconsideration en banc and an undetermined amount of time to dispose of it, and then after that's disposed of then 45 days deadline to file a petition for review at the Supreme Court level. We discussed the possibility of requiring that the reconsideration en banc be filed simultaneously with the panel motion just to save that extra cycle, but Kin Spain, who is the senior staff attorney on the First Court of Appeals, was strongly against that because he felt like that would actually slow cases down rather than speed them up. He didn't feel like reconsideration en banc was necessarily going to go in all the cases and that if we required them to be filed simultaneously people would file them simultaneously, and so in his view it would slow things down if we required them simultaneously.

So what the task force ended up doing was just simply to try to put a cap on extensions for the filing of motions for rehearing, and then here's the first time that we suggest any kind of real limit on an appellate court, is that if a timely motion for rehearing is filed the appellate court must grant or deny such motion within 60 days after it's filed, and that's subdivision (e) and then the same 60 days you'll see in subdivision after a motion for reconsideration en banc, and then there's a proviso in both of these proposed subsections that if the

appellate court fails to grant or deny then it's considered overruled by operation of law on the 61st day. I jokingly suggested that maybe we ought to say that it is considered granted on the 61st day so that we could force the court of appeals judges to actually address it on the merits, but -- and there was some view that maybe that would operate as an incentive to get a ruling on the merits, but we didn't have the temerity to do that, so --

CHAIRMAN BABCOCK: That's not going to speed up the process either, I might add.

MR. ORSINGER: What we then have here is some effort to cap the extensions on the filing and then our first effort to really put a terminating period on the appellate courts and if they just don't do it then the rehearing is overruled and we have not solved the problem of adding the reconsideration time starting that timetable at the end of the rehearing process, so those are the task force proposals then.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I don't have a problem with the 60 days, but I'm wondering, are you envisioning a new opinion issued in 60 days or just a decision to withdraw the old opinion?

MR. ORSINGER: A very, very important question. We discussed that a lot and felt like that it

would be unrealistic to require a replacement opinion to be done by that time but not unrealistic for the panel to decide that they had done it wrong the first time and so they were going to set it aside, and so if the panel feels like somebody wants to go from a dissent or a dissent becomes a majority and there's just not time enough to get the opinion, what we want is an indication that the rehearing has been granted and then the court of appeals is free to take whatever time it wishes to get its new opinion out, but if you're just going to deny it, then deny it and let's go on. That was the idea, so that's a very important point you made, and I'm glad you made it.

CHAIRMAN BABCOCK: Justice Christopher again, and Justice Gaultney.

HONORABLE TRACY CHRISTOPHER: Well, just another point of clarification, sometimes on a motion for rehearing the, you know, parties will point out that we've made a minor error somewhere in the opinion, and we withdraw the old opinion and fix the minor error, but it's the same result, you know, and some people call that granting the motion for rehearing and some people don't. I mean, it's kind of a weird issue, so if -- I just would want to understand if I granted a motion for rehearing under this would the parties be expecting the decision to change versus a granting a rehearing because we've got to

tinker with the opinion and maybe address a new argument that we didn't address before. So that is a question to me.

MR. ORSINGER: Well, you know, we didn't discuss that at the task force level, but in my personal view, if you grant a rehearing then it's up to you what you do after you grant it. You could have new briefing, you could have new oral argument, you could change one word or one date in your opinion and reissue it. I mean, it's your decision what to do once you grant it, and I suppose if you granted a rehearing and then issued the same identical opinion, there's nothing wrong with that. It's the court's decision. We just -- in the vast amount of these cases the rehearings are going to be denied, maybe not in all and in some really difficult cases, but in most of them they will be denied just like they are in most appeals, I think, and we need to try to have a quick decision in that so we can move on to the Supreme Court.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Did someone on the task force express that this was a problem? Because I would be surprised that motions for rehearing in these cases are being held that long unless there's a real problem, and if there is a real problem, why do we want to indicate that the default is overruling the motion when the

reason it's being held is the court is considering granting it, is considering doing something different? So I don't -- first of all, I guess my question was, is there a problem with courts holding motions for rehearing and not overruling them? I don't think that there is, but if there is, is this really a good idea to say, you know, you've got concerns about whether this is correct or not, you know, if you miss this 60 days it's overruled and too bad, you know, even though you've got concerns that there's a problem with the dates.

CHAIRMAN BABCOCK: Justice Jennings.

HONORABLE TERRY JENNINGS: Yeah, on our court I can only say this, sometimes it depends on the judge. A motion for rehearing can -- you know, depends who the authoring judge is. The motion for rehearing will usually go to the authoring judge first for the lawyer to look at it to see if the motion has any merit and so forth and so on, so it can go to a chambers and it can be acted upon fairly quickly and distributed to the other judges for their input or it could land in another chambers that may be bogged down and it might sit there for a couple -- a motion for rehearing might sit there for a couple of months before it's distributed to the other panel members, and that's just within a court, I mean, so statewide I'm sure different courts handle things differently again.

I think 60 days is generous, and frankly, I would find it helpful as far as dealing with my colleagues if we had a 30-day deadline for a ruling on a motion for rehearing, because that would definitely get the attention of any particular chambers that may be having problems where they have to get it done and get it distributed to the -- I mean, that would give me a reason to go to my colleagues and say, "Hey, look, you really need to get this distributed because we've got to rule on it, otherwise it's denied by operation of law." So I do think 60 days is generous. I would say maybe 30, to get a motion for rehearing done and then another 30 for the en banc.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I agree with that, particularly if it contemplates a possible grant and not the release of the opinion. I think that's very generous.

CHAIRMAN BABCOCK: Any other comments? Bill.

PROFESSOR DORSANEO: Well, I'm sitting here listening to this and going through it, and if you wanted to make this go faster, you would probably not do as many things as you would normally do. In this, like -- just looking back at the accelerated appeal rule, 28.1, you know, the trial court need not file findings of fact and conclusions of law but may do so within 30 days. Now, that's for appeals of interlocutory orders, but why isn't

that a good idea? Huh? Why get into all of that complexity?

Another -- you know, another part of the general accelerated appeal rule, "Filing a motion for new trial, any other post-trial motion or request for findings will not extend the time to perfect an accelerated appeal." Now, I suppose that's still the case in this draft, although it's not in there, Richard. That sentence is not in your standalone rule. It seems to me if you want to make it go fast, don't do as many things, and that would make it go faster.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: That's -- that's only one of the things we're interested in in these type of cases and all other cases. You want to protect constitutional rights and do it as expeditiously as possible. You want to get it right. So if the panel has made some egregious factual error that is material, ideally that should be corrected, which is the reason we have the motion for rehearing procedure, but, you know, listening to all of this, I really think we have to decide -- the Court is going to have to decide what really do you want? If you want these cases decided within a six-month period, let's figure out how to do that. If we want Chief Justice Gaultney to retain all of his discretion and not have a

deadline, and, yeah, it may --

CHAIRMAN BABCOCK: Not to name names.

HONORABLE SARAH DUNCAN: It may come at the expense of some children to have that discretion, that's okay, but we're all talking about this as though it's a regular commercial case, and I think we've got to get our priorities straight, and --

CHAIRMAN BABCOCK: Yeah, Justice Hecht.

HONORABLE NATHAN HECHT: I didn't want to lose Justice Christopher's comment earlier about the idea of putting something in Rule 6 of the Rules of Judicial Administration. I think it's 6.

PROFESSOR DORSANEO: It is.

HONORABLE NATHAN HECHT: About time limits. We don't -- we've never done that before, but, you know, maybe one sort of overarching way to move the thing along, instead of setting a bunch of deadlines that, as several have observed, can't really be enforced because that gives grounds to another set of appeals, "You shouldn't have enforced a deadline against me because I had a bad lawyer," so that's going to go to the Supreme Court. I mean, we're not really doing any good, but it might be helpful at least in part to say in Rule 6 or somewhere the court of appeals needs to dispose of this case 180 days after the notice of appeal was filed, and then if there's problems with the

record, they can worry about that, if there's problems with the briefing schedule, so on, and maybe the case is hard and it just takes longer than that, and then it's not mandatory. There's not going to be a default, but there will be consequences. It maybe has to be reported or somebody looks at it or says, you know, this is not going as fast as it should and make sure that at the end of the day we get a decision on the merits, because that's what we've got to have within a certain period of time.

CHAIRMAN BABCOCK: Yeah. Okay. Let's take our morning recess.

(Recess from 10:39 a.m. to 10:56 a.m.)

CHAIRMAN BABCOCK: All right, Richard, let's go back on the record. Let's knock this thing out. What do you think?

MR. ORSINGER: All right. We're going to go back on the record.

CHAIRMAN BABCOCK: On subpart (g).

MR. ORSINGER: Well, actually, before we do that, let me just say I've been doing a little informal talking here during the recess, and it appears that the different courts of appeals that have more than three judges have different procedures regarding en banc, and it is possible on some courts apparently that a 61st day would go by and a motion for reconsideration en banc might be

overruled by operation of law without any judges outside the three judge panel knowing it was even filed.

HONORABLE SARAH DUNCAN: Right.

MR. ORSINGER: So depending on the internal procedures, I think that there's an unintended possible consequence of the 61st day on the reconsideration en banc that if you're a court that it goes to the panel first before it goes to the rest of the judges and you don't have independent docketing software that alerts you to the filing, the other members of the court may never even see the motion for reconsideration en banc before it's denied.

HONORABLE JAN PATTERSON: But, Richard, if you had this rule don't you think that would change that procedure within the court?

MR. ORSINGER: I don't know. If it did, I guess that would eliminate the problem, but I wouldn't want one of the unintended consequences on any important court that has a volume of these to be that the reconsiderations en banc get pocket vetoed by either a drafting judge or a panel that doesn't get it out in time for the rest of the judges to find out about it, because then we've deprived the appealing party of an important safeguard, which is bringing additional eyes on that court of appeals.

HONORABLE JAN PATTERSON: That would probably not be lawful for them not to be able to rule on it.

MR. ORSINGER: Gosh, I don't know. I don't work on a court of appeals. Does anybody that works on a court of appeals want to talk about that? Because it appears to me --

HONORABLE SARAH DUNCAN: I don't work on a court of appeals.

HONORABLE JAN PATTERSON: I would be shocked to learn that they're not ruling on en banc motions.

HONORABLE SARAH DUNCAN: Yeah, I don't currently work on a court of appeals, but I can explain why the Fourth Court adopted a local rule on this. Until the panel has denied the motion for rehearing, it is wasteful for the other members of the court to look at a motion for reconsideration en banc because it may be that the panel will grant the motion for rehearing and fix the problem, change its disposition, whatever. So until a panel has ruled on a motion for rehearing, there's no point really in giving the motion for reconsideration en banc to the other judges on the court. Once that motion for rehearing is denied, it gets to the -- the motion for reconsideration en banc goes to the remainder of the court.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yeah, I think if you passed the rule we would fix our procedures so it wouldn't happen, but a lot of time when a lawyer's -- the

lawyers will file rehearing and en banc at the same time, and so you want the panel to look at the rehearing motion first and make that decision, but what we could easily do, and I think we do this in our orders, if we -- well, maybe like 30 days for the rehearing and 60 days for the en banc would work, but if we deny the rehearing then it immediately -- the en banc will go to everyone, but if we grant the rehearing then what we normally do is we grant the motion for rehearing, we deny the motion -- we withdraw our previous opinion, we deny the motion for en banc as premature and issue a new opinion. So you couldn't do the same time limit for (c) -- or for (e) and (f) for a motion that got filed at the same time just because we do want the panel to look at the motion first.

MR. RODRIGUEZ: May I ask a question?

HONORABLE TRACY CHRISTOPHER: But I think other than that we could work around it.

CHAIRMAN BABCOCK: Eduardo.

MR. RODRIGUEZ: Like, say, you're on a panel, do you-all -- and let's say you were withdrawing your opinion, granting a motion for rehearing. Would you give all of the judges in the court those orders or just the three member?

HONORABLE TRACY CHRISTOPHER: No, just to the three of us, because once we issue a new opinion the

lawyers file a new en banc motion, okay, so they haven't lost the opportunity to get an en banc ruling once we've got that new opinion out.

MR. RODRIGUEZ: No, I'm just curious as to the internal workings. Do y'all distribute your opinions within your -- all of the chambers or just the three members of --

HONORABLE TRACY CHRISTOPHER: The Fourteenth does not, but I think the First does.

MR. ORSINGER: Okay. So my suggestion in light of that is, is that we move up the deadline on the rehearing to the panel to either 45 days or 30 days and have the rehearing en banc overruling by operation of law occur at least 15 to 30 days later so that the court's internal procedures for simultaneously filed motions will kick in that when the -- either the 30th or 45th day comes the panel opinion is rejected by operation of law and then that triggers the mechanism to circulate to the rest of the court. What about that as a solution?

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: On the first part of that, I think the 30 days to do the motion for rehearing before it's overruled by operation of law is too long. If we -- as long as we don't have to get out the new opinion I think that can be on the 31st day. Do any of the other

appellate justices think that it really needs to be 60 days before you grant or deny?

HONORABLE JAN PATTERSON: No.

HONORABLE TOM GRAY: I assume by your silence you do not.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: The only concern I have about the -- this process and the operation of law effect is that occasionally -- and not occasionally, frequently, the decision about granting or denying the motion for rehearing is really very tentative until everybody reads draft opinions that are circulated that set forth the arguments that one judge or another has that concern a problem in the case or a problem with the panel's opinion, whether you are on the panel or not, and so -- and that takes more time than just voting up or down; and the problem with voting up or down initially is you don't have that kind of information available yet, because you haven't seen the dissent from the denial of en banc rehearing or someone else's concurring opinion that they are writing to explain more about the panel decision or the panel dissent; and all of that happens in tandem with hearing this vote.

In addition, there's the problem of the cases where there is a -- there is debate about what to do on rehearing. We don't really ask for a response to a motion

for rehearing until we understand that there's a problem. So a lot of -- and so the response doesn't even come from the opposing -- from the prevailing party at the panel level until much later in the process. So those are the concerns I have. 99 percent of the cases it's absolutely doable to overrule these things within 30 days, and that goes for panel rehearing and en banc rehearing, but in the one percent of the cases that present really significant legal issues where you have multiple judges weighing in it's a little more difficult to shepherd that process in 30 days.

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: If the motion for rehearing and motion en banc are filed at the same time and you grant the motion for rehearing, does that automatically moot the other motion, or is it going to be a problem that that becomes overruled by operation of law later on?

HONORABLE JANE BLAND: Well, our court precedent is that it moots it, but you're right. I don't know if the rule -- that's a good point -- if the rule would kick in and trump that precedent. But it's denied as moot on our court if the panel grants.

HONORABLE TRACY CHRISTOPHER: Well, we do say denied as moot, so that would be a ruling in the time frame.

HONORABLE SARAH DUNCAN: But if the ground in the motion for reconsideration en banc is not addressed in the panel's substituted opinion, the motion for reconsideration en banc wouldn't be moot.

HONORABLE TRACY CHRISTOPHER: Well, then they file a new motion for en banc reconsideration.

HONORABLE SARAH DUNCAN: Why should I have to do that if my ground is included in my original motion and it's not moot?

HONORABLE TRACY CHRISTOPHER: That's just our practice.

HONORABLE SARAH DUNCAN: It's wrong.

HONORABLE TRACY CHRISTOPHER: You can file the same motion, but it's a new opinion.

HONORABLE SARAH DUNCAN: But it hasn't addressed the ground upon which I think reconsideration en banc --

HONORABLE TRACY CHRISTOPHER: You're making a good point. That's just the way we do it. I can't argue it.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN PATTERSON: I think the advantage of keeping it at 45 days is that you will hope that you could conclude the whole process with opinion by that time. If you have the shorter time -- because I do

agree with Jane that sometimes as you go through the process you have to see the final product, and the 45 days would allow you probably to do that. 30 days might be a little short to get that whole process done if it's complicated, so 30 days might be sending a signal that you're getting the ruling, but it might automatically extend it because of the necessity of drafting the opinion. 45 days might get the whole thing done.

CHAIRMAN BABCOCK: Yes, Justice Gray.

HONORABLE TOM GRAY: This kind of shifts it to a different area, and I'm not sure that this is where it belongs, but two things I need -- one I need to know or get confirmation of. Are we of the view that rule TRAP 49.4, which says in an accelerated appeal we can -- we have the right -- we can deny the right to file a motion for rehearing. Is that still in place with regard to this, notwithstanding the rule that applies to motions for rehearing in this new rule?

MR. ORSINGER: Yes. This task force rule wouldn't change that.

HONORABLE TOM GRAY: Okay. The second is a proposal for -- I think that would really significantly speed up the process in termination cases. I've advocated the use of such a procedure in all cases, but this would at least give us a microcosm of a particular type of case in

which to try this idea. I think between subsection (d) and (e) we need to add a section that says, "Opinions," and where in our current rules we have Rule 47.1 that says, "The court of appeals must hand down a written opinion that is as brief as practicable but addresses every issue raised and necessary to final disposition," I would like to see us have the authority to issue a summary affirmance. In probably -- and I'm speaking for what we see in Waco -- 80 percent of these cases there is nothing new, there is nothing that is fundamentally going to need a decision, but it takes substantially more time to write an opinion, even if it's the classic memorandum opinion that Justice Hecht came to the chiefs' meeting one time and said, "This is how you do it, here's three issues or four issue case, decide it in four paragraphs." It takes time to write an opinion that short.

If we had the authority -- it's like I think it was Lincoln said, "I would have written a shorter letter if I had had more time," but it -- to do that it takes time to distill it down. We can look at these, we can read the briefs, we can read the record, and if we had a procedure other than 47.1 that said, "The court has reviewed the briefs, has reviewed the issues, and is of the opinion that there is going to be no issue on which we're -- relief will be granted," summarily affirm it. Then if they file a

petition for review with the Supreme Court and the Supreme Court wants a 47.1 opinion, then they can abate it, not -- not reverse it, not set it aside, but abate it for us to write the full opinion and give us a time frame. I think you would substantially increase the ultimate result in these cases in about 80 percent of these cases.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Justice Jennings has headed back, but I know that on our court at least there would be a lot of resistance to that sort of procedure in a case that involves such high stakes rights of parents and children.

HONORABLE TOM GRAY: Then write all you want. I'm serious. They can write those opinions. I'm telling you that we get these that are just barely more than an Anders case, and -- but it takes time to write those. I mean, if you go through the Holly -- if you go through the Holly factors to support a clear and convincing termination and you talk about it, it's going to just take time to do that.

CHAIRMAN BABCOCK: Justice Bland, then Sarah.

HONORABLE JANE BLAND: My point is that we haven't used summary affirmances in any other sorts of cases yet, and I don't think these are the cases that we want to experiment with on that -- for that.

CHAIRMAN BABCOCK: I feel like I'm watching celebrity death match here. Sarah.

HONORABLE SARAH DUNCAN: With all due respect for Chief Justice Gray, and I mean that sincerely --

CHAIRMAN BABCOCK: Uh-oh. Duck.

HONORABLE SARAH DUNCAN: I really do.

HONORABLE TRACY CHRISTOPHER: We don't know what that means.

HONORABLE SARAH DUNCAN: I think a summary affirmance, particularly in these types of cases, would miss one of the reasons for a written opinion, which is to tell the parties why they lost, and that was actually my opinion that was the model opinion.

HONORABLE TOM GRAY: I gave you credit on the record for that.

HONORABLE SARAH DUNCAN: Did you?

HONORABLE TOM GRAY: Yes, I did.

HONORABLE SARAH DUNCAN: Oh. And it does take time, but I think part of the function of an opinion is to explain to the party that loses, "Here is why you lost," and I would not want to see that requirement ended really in any case, but particularly in these cases.

HONORABLE TOM GRAY: And, see, I think these cases are a particularly good reason to implement that

because in setting out why you lost, we frequently -- I won't say indict the child, but we give a litany of things that have happened to these children in a very public format that it's just laid out there for everybody to see, and I think the summary affirmance has the countervailing benefit of you got your review, you got your answer, but the child is not drug through the mud in a public opinion.

HONORABLE SARAH DUNCAN: Well, that's --

HONORABLE TOM GRAY: But I understand we can balance that by writing less, but it's still you're going to explain why they lost, but the benefit overall to the system is that the child gets resolved more quickly. I mean, I just think there's a huge benefit there in most of these cases. Not in all. We still need to write in some. Maybe, like I say, I think it's probably going to be 20 percent. I throw that out as a prospect. It's on the record. I understand and see the push back from some of the other judges, but --

CHAIRMAN BABCOCK: It will be considered. Richard, let's go to (g), petition for review.

MR. ORSINGER: Okay. The petition for review process is 45 days after the court of appeals has -- let me get the exact language I had here, and I apologize. 45 days after normally when the motion for rehearing is due but not filed or the last ruling by the court of appeals on

the motion for hearing, most for rehearing, whether that's to the panel or en banc. So your petition is due in 45 days and then you have your ordinary rules for requesting extensions, which are based on a reasonable explanation and not good cause. This doesn't change the 45-day time table, but it does direct the Supreme Court -- or should I say it says a party may not file. It doesn't say the Supreme Court can't grant, which is an oddity that I've always been uncomfortable with, but it's stated here that a party cannot file a motion to extend at all absent extraordinary circumstances, so the 45 days is left alone, but the extension process is denied to the litigant rather than denied to the Supreme Court.

If the petition for review is timely filed then there's a rule that the Supreme Court must act on it within 120 days or it will be deemed denied by operation of law. And so I know -- and for those of you who don't know the Supreme Court practice, I think that it's described as kind of an assembly line where the petitions come in, and there's a 30-day period where they're evaluated, and if somebody doesn't pluck it off of the assembly line it's kind of automatically dismissed at the end of 30 days. I've never worked on that court, but I've heard that description, and so if there's nothing that stands out since this is a discretionary review court then if someone

doesn't pull you off of the production line, you're out. But if it is pulled off, it can be pulled off at the vote of one judge, and I don't know the internal proceedings very well, but I think memorandums can be drafted. I think people can -- it takes the vote of three judges to get briefing, doesn't it?

HONORABLE NATHAN HECHT: Uh-huh.

MR. ORSINGER: But a reply only requires one judge.

MS. SECCO: Response does.

MR. ORSINGER: I mean a response to the petition. So if you're not out in approximately 30 days after you file then somebody has taken interest in your case, but at that point there's a variable amount of time that it may float while the decision is made to go on to the next step that require an additional judge. You know, it's one to get a response, it's three to get a brief, it's four to get a grant, it's five to get a reversal, and so this is an effort to resolve it, that if it -- if the Supreme Court doesn't have a ruling on the petition within 120 days, it's overruled by operation of law.

The troubling thing about that suggestion is that suggests that there's some judges up there that feel like there's something important to the jurisprudence of the state or some error that needs to be corrected, and

maybe -- maybe they should have all the time they need to be sure that this last chance in our judicial process before you lose your parental rights, that it's a sober decision. If you have at least one judge that thinks you've got something there, maybe we shouldn't put a deadline on it. But then on the other hand, the deadline gets the Supreme Court to act, so the panel felt like we should put a restriction on it, but some of us had concerns about the fact that the role of the Supreme Court is to monitor the jurisprudence of the state as well as to occasionally fix error in individual cases. So those are our proposals.

CHAIRMAN BABCOCK: Comments? Other than laughter, Jane? You look like you were laughing at it.

HONORABLE JANE BLAND: No.

CHAIRMAN BABCOCK: Do you have any comment?

HONORABLE JANE BLAND: No.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Is anyone else uncomfortable with the Supreme Court making a rule that says the Supreme Court must do something within its own amount of time? I think this is -- to me that just strikes my ear as odd.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, that was my laughter. Why would this committee advise the Texas

Supreme Court about their docket management? They can look at the proposed rule and decide if they want it or not.

MR. ORSINGER: Well, they appointed a task force for recommendations --

HONORABLE JANE BLAND: Right. No, no. I'm happy with the recommendation.

MR. ORSINGER: -- for the speedy disposition, and so we're not the Supreme Court, and we don't presume to tell the Supreme Court how to run its own docket, but we --

CHAIRMAN BABCOCK: Unless we're asked to.

MR. ORSINGER: We were asked to raise suggestions.

HONORABLE JANE BLAND: No, absolutely, and I'm just saying let's forward it and let them look at it.

MR. ORSINGER: Well, I think we should discuss it, because I know that the Supreme Court will have the final prerogative, but, I mean, there doesn't appear to be much interest in having the debate. I, for one, am concerned about the fact that the Supreme Court is the ultimate guard of the jurisprudence of Texas, and I hate for the jurisprudence of Texas to be influenced by automatic deadlines that act when two or three Supreme Court judges are trying to decide whether they have a vote of three to get a brief or not, and it may take just a little bit more research or a little bit more persuasion in

order to change the jurisprudence of Texas, and, oops, sorry, it's gone. Wait for the next one.

HONORABLE JANE BLAND: Can I note for the record that this is the third time that Richard has presented a proposal, only then to argue to this committee against it?

MR. ORSINGER: No, I was -- I'm not arguing against it. I'm pointing out considerations that other --

CHAIRMAN BABCOCK: Duly noted, Jane. Thank you.

MR. ORSINGER: I'm here to support this task force report all the way.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: Well, let me then rephrase my comment and divide it into two. One is I think you can have the same substance without the sentence that really strikes my -- phrase that really strikes my ear as funny. I think if you just said, "If a petition for review is timely filed it will be considered denied by operation of law on the 120th day after it's filed unless it's been granted or some order is rendered." I also think that would be better because I don't know what the phrase "the Supreme Court must enter" -- "must issue an order on the petition as provided under Rule 56.1" means, since 56.1 just describes the considerations that go into granting one

and has the -- that's an odd phrase to start with. That's the procedural comment.

The substantive comment is it seems to me if the concern is that the Court wants to send a signal in its own rule that these cases are going to go faster, as it's been trying to do with everybody else at the earlier stages, trial judge, the court reporter, the lawyers, the parties, the court of appeals, if that's the notion, then I think the substance, not the Supreme Court must do this, but just if nothing else happens it's denied by operation of law in 120 days, that's good. That's an action forcing way. That means -- I'm like Richard. I didn't clerk for the Court either. I just have my understanding of it, but that means you've got to get to -- I can't remember, is it four or five votes within that 120 days to do something other than let it be denied, and knowing that this is -- this case is in this category where we're feeling like we need to speed it up, that might be a healthy thing to do.

CHAIRMAN BABCOCK: Pam.

MS. BARON: My understanding, and I'm not sure, Justice Hecht might speak to this, but I think the Court does expedite parental termination cases at the Court, and I'm not sure if they are referred to the mandamus staff attorney to --

HONORABLE NATHAN HECHT: They are.

MS. BARON: -- shepherd them through the Court to make sure they're done on an expedited basis. Is that right?

HONORABLE NATHAN HECHT: Yes.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Yeah, I guess I would like to see sort of what the statistics are for how long it's taking at the Supreme Court now to rule on these petitions; and I mean, if the vast -- again, it's kind of like if the vast majority of them are getting, you know, denied in 30 or 60 days, you know, sometimes when you have 120-day time limit, they're all going to get denied in 120 days rather than under the normal procedures they would be denied in 30 or 60, and then you might have the extraordinary case that sits there for six months or so because they're really wrestling on whether they want to take it or not. So, I mean, when you have deadlines like that you're going to default to the length of the deadline.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, in defense of Richard, it does promote finality, and we like finality. It promotes that.

CHAIRMAN BABCOCK: Right.

MR. LOW: It doesn't prevent the Supreme Court from extending it, and you could even say "unless

further extended by the Court." It doesn't prevent that, and you might want to say that, but it does promote finality.

CHAIRMAN BABCOCK: Yeah. Okay. Let's go to (h), Richard.

MR. ORSINGER: Okay. We had discussed (h) briefly at the outset. There are various deadlines that relate to the issuance of a mandate, and that was covered initially on Page 14, and all this says is that the clerk of the court that rendered the judgment must accelerate the issuance pursuant to Rule 18.6, and 18.6 refers to Rule 18.1, and 18.1 requires the issuance of a mandate in an accelerated appeal -- oh, let's see.

MS. SECCO: No, 18 -- I'll just step in. 18.6 refers to 18.1, which lays out the three potential dates that the mandate could issue. Kin Spain weighed in on this issue, and he said that in the court where he works the -- that typically the clerks view that as the first possible day that the mandate could issue, so we've reversed that to be the last possible day that the mandate can issue in these cases. Essentially the clerk has to render the mandate or issue the mandate on those dates. That's not the first date that the mandate could issue, but it uses the same dates that are in 18.1, and this is just a cross-reference just to, I guess, emphasize the

acceleration of the mandate.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just want to put it on the record that my clerk doesn't particularly like that rule, but if it passes he will comply with it.

MR. ORSINGER: Doesn't like this proposed rule you mean?

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: Or doesn't like the existing mandate rule?

HONORABLE TRACY CHRISTOPHER: Well, no, the way this proposed rule -- his understanding of this proposed rule is after the deadlines mandate must issue that day, okay, and generally in our normal course of procedure we will look at mandate, issuing mandates, about once a week or so. All right. So we'll have to track this particular case, this type of case, a little differently to make sure it's done on the first day it can be done, but he will comply. He just wanted you to know that he didn't like it.

MR. ORSINGER: Well, if your court is getting your mandates out within 10 days it's doing better than some of the other courts, at least according to the reports we have.

HONORABLE TRACY CHRISTOPHER: I didn't get that statistic.

CHAIRMAN BABCOCK: Okay. Let's do (i), remand for trial.

MR. ORSINGER: Okay. This has no real precedent in the rules anywhere. This occurs when there's a reversal and remand for a new trial, and this puts a deadline on the trial judge to commence the trial within 180 days. There were some people that wanted it faster, but remember, if it's sent back down for a new trial that we'll probably be at least a year out from the last fact finding and the child will have been in foster care, may or may not have had access to the parents, the parents may have been released from prison, somebody may have been acquitted on a murder charge, who knows, and so you're going to probably have a completely new fact finding process in front of a jury, and there will be possibly be some need for investigation or depositions or written discovery. So the task force ultimately compromised to recognize the fact that there may be a gap in knowledge that has to be plugged by discovery on remand that six months is a balance between getting the case over with and giving people adequate time to prepare for the case.

CHAIRMAN BABCOCK: Justice Gaultney.

HONORABLE DAVID GAULTNEY: What was the task

force's view of the consequences for failure to meet that?

MR. ORSINGER: Well, we don't have a sanction here, but you hate to say that the consequence is that the child was turned back over to the parent because that may not be the best thing for the child, so we have no consequence.

HONORABLE DAVID GAULTNEY: It might be that, like Justice Hecht said, maybe Rule 6 of the judicial -- Rules of Judicial Administration might be a place for that, in terms of what the trial court looks to in terms of how quickly they need to get it done.

MR. ORSINGER: Well, admittedly this is an awkward thing to stick in the Rules of Appellate Procedure, which is how long you take to go to trial after a remand.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: 180 days is the -- for those of y'all that aren't familiar with these termination proceedings, they have to be disposed of in the trial court or actually the trial has to commence within one year from the date that the child is removed. The -- and there's some fluff in that, but anyway, one year. The 180 days is the most extension you can get. I would suggest -- and the consequence of failure to start that trial by that date is that the child has to be returned or removed from CPS custody. There's some provisions that they can go

somewhere else to protect them, but essentially it means that the child goes back to the parent. I would suggest that instead of just saying 180 days that it return the proceeding to the point under the Family Code as if that 180-day extension had been granted, and then that way there is a consequence for the failure to meet the 180-day deadline.

CHAIRMAN BABCOCK: Okay. Justice Bland.

HONORABLE JANE BLAND: I think we've noted throughout this that a lot of these deadlines are aspirational in that they have no real teeth to enforce them, like briefing deadlines and the court reporter record, but it seems like on the things that really matter most, which is the decision on the merits, whether to grant or deny rehearing, and then a new trial, we want to put pretty serious repercussions for not complying with those, and I think maybe we're starting to elevate speed a little bit more over getting it right more than we should. I'd be in favor of this rule the way it is without consequence because it would then allow for some sort of escape valve if there was some case that didn't go to trial. I think if we want to have real strong consequences to this it ought to be the Legislature that tells us that.

HONORABLE TOM GRAY: This is an exception to the Legislature. The Legislature has said a --

HONORABLE JANE BLAND: I understand. I understand all of that.

HONORABLE TOM GRAY: I was explaining it --

HONORABLE JANE BLAND: I'm just saying I don't think that -- well, right, because it's an exception because now we've granted a new trial at the appellate level.

HONORABLE TOM GRAY: And so we are way past the 18-month that the Legislature set by this time. The Legislature has said an 18-month hard deadline from entry into the system to termination and --

HONORABLE JANE BLAND: To entry of a judgment, but then obviously the appellate process that you have to pull that out and if the new trial is granted you're back to square one. That's the difficulty with granting a new trial. That's why trial judges don't like them, so but to try to -- to try to craft some kind of enforcement mechanism in the Rules of Appellate Procedure I think just steps beyond where we want to be in terms of rules.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I'm okay with the, you know, having a deadline in here for when the trial should start, but I think it probably should be a little more aspirational rather than punitive, but I would like to

talk just sort of in general about what we've done by these rules, and I could be wrong, but I have added up the time frame for each and every one of these extensions that we all think are really tough and really tight, and we are at six months, complete briefing, if everybody takes the only -- only the extension we've allowed them to do from the date of filing, record, and briefing. Then 21 days to submit it, if we adopt that, and then I'm giving myself 60 days, just I'm giving myself an internal 60 days to get an opinion out after that, and we're at nine months at that point. Then we are at a three-month rehearing process, assuming everything got overruled by operation of law and I didn't withdraw an opinion to give myself some more time.

So, you know, maybe that's good. Maybe that's what we want, but these rules as written in their hardest form, only giving me 60 days, we're at a -- we're at a year process for the case before it gets out of the court of appeals. I just wanted to point that out.

CHAIRMAN BABCOCK: You think that's too slow or too fast?

HONORABLE TRACY CHRISTOPHER: And that's only giving me 60 days to do my job. So, you know, which is the --

MR. FULLER: Well, that means if you go back to the 180 days for the new trial, then 18 months, then I

guess three years after we started this process we've now maybe found a home for the child.

MR. ORSINGER: Well, and that's ignoring the Supreme Court's --

HONORABLE TRACY CHRISTOPHER: That's ignoring Supreme Court. I was just talking about the -- I didn't add in another four months at the Supreme Court.

CHAIRMAN BABCOCK: Okay. Richard, there's some just kind of miscellaneous things.

MR. ORSINGER: Well, let's move on to Rule 32, docketing statement. Justice Christopher had wanted information in the notice of appeal that alerted everyone, trial courts, court reporters, and everything, that this is one of these special cases, you have to make it a priority, that you have -- were you satisfied with your articulation of that yesterday, Judge?

HONORABLE TRACY CHRISTOPHER: Yeah. I have it written down, but I think I dictated it into the record, too. Either way.

MR. ORSINGER: Okay. So would you now also feel like that should be repeated here, or do you think it's unnecessary to put it into the docketing statement?

HONORABLE TRACY CHRISTOPHER: I think it's unnecessary.

MR. ORSINGER: Well, on the task force we

felt like we should put in the docketing statement as well as in the notice of appeal that this is an accelerated parental termination or child protection case so they would know and be reminded at the outset that they've got to get on the stick. Yeah.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, one problem with this and with the provision back in 25.1, the way it's written, if I file a notice of appeal for a temporary injunction I have to say this is an accelerated appeal and it's not a parental termination or child protection case. Is that what you want?

MR. ORSINGER: No.

MR. GILSTRAP: It says "state whether."

MR. ORSINGER: Well, I don't know how you would go about saying that. I don't think we ought to expect people who know nothing about these appeals to advise us that it's not one of these special appeals that's covered by a rule they never read, but how do you say --

MR. GILSTRAP: Well, the way they did it before was they say -- they say, "In an accelerated appeal state whether the appeal is accelerated." Maybe you say, "In an appeal involving a parental termination or a child protection case, state that it's an appeal involving the

parental termination or child protection."

CHAIRMAN BABCOCK: Do you have any comment on that?

MR. ORSINGER: Marisa might. I see her --

MS. SECCO: The way that it's written now would require any person filing any docketing statement to state whether or not it's an accelerated appeal. I don't know if that's the current practice or not, but this would be a problem that would -- it already exists if it is a problem because it already says "whether the appeal submission should be given priority or whether the appeal is an accelerated one," so I would already have to state, "This is not an accelerated appeal."

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: The way the docketing statement at the Waco court is, and I'm assuming the rest of them, it's a yes/no checklist, "Is this an accelerated appeal," yes/no, and the docketing statement, is this -- "Does this appeal relate to the termination of parental rights?" You know, you would add an additional line. Fairly easy.

MR. GILSTRAP: Well, it's a bigger problem with the notice of appeal because the way I read the current -- the way you've changed the rule is if I file a temporary injunction I have to say, "This is an accelerated

appeal and it is not a parental termination or child protection case." That's the way you've written it, and, you know, if people don't do it, probably will not affect the validity of the notice of appeal, but it's still kind of a chore.

CHAIRMAN BABCOCK: Okay. Anything else on that, Richard?

MR. ORSINGER: No. Then the rest of these, probably not worth individual discussion. They just state exceptions where there are global statements that have been altered by our proposed rule. We've put in "except as provided in" or "unless provided in" and that's just to create -- avoid the creation of an apparent conflict.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: That's it.

CHAIRMAN BABCOCK: Great. Okay. Anything else? Justice Gray.

HONORABLE TOM GRAY: Well, I was wondering if Richard was going to go on to the Anders procedures or other comments.

MR. ORSINGER: I will do that just to give you an opening, Judge. At the end of the September proceeding Justice Christopher, I believe, expressed a concern about the Anders process and the fact that we might -- I think I have that right. Did I do that wrong?

HONORABLE TRACY CHRISTOPHER: I wasn't here in September.

MR. ORSINGER: You weren't there? Well, it came up. I'll withdraw who it was.

MS. SECCO: It was in August.

MR. ORSINGER: It was the August meeting.

HONORABLE TRACY CHRISTOPHER: Oh, okay.

MR. ORSINGER: Yes. I think I have your words here, but --

HONORABLE TRACY CHRISTOPHER: Okay.

MR. ORSINGER: We made an effort to try to write an Anders procedure, and for those to catch you up, Anders is the United States Supreme Court decision that says that indigent people even if their case is frivolous have a right to appeal and to have their appeal presented, and so following a procedure that was available in a certain state they -- loosely I'm going to describe it because Justice Gray is going to come back and describe it with more precision, that if you're an appointed lawyer and you can't in good faith argue reversible error you file a brief pointing out what comes closest to a decent argument and then give a copy to your client, file a motion to withdraw, and then the client is free to either try to get a new lawyer or try to go pro se following up on the potential arguments that the lawyer lists.

That's a crude oversimplification of Anders. We tried to draft it and maybe didn't do such a good job. We'll find out in a minute, but decided that after all this is not the only situation to which an Anders problem occurs and that probably the Anders rule if it's going to be written should be written to cover all situations where a lawyer is in the box of needing to file a brief but not being able to ethically reconcile with the idea that all the complaints are frivolous, and so maybe it should require a more elaborate and more extended process of analysis than what time permitted for us to do, so we took out -- but it's been passed out in this meeting, the language we wrote on what Anders language would look like, but we decided not to include it because it's hasty and because this is just one area where Anders briefs might occur and then there's something on the criminal side. Do you remember?

MS. SECCO: Well, this happens in criminal -- this is usually a criminal issue and it --

MR. ORSINGER: It never has been, I don't think, made the subject of a statute or a rule on the criminal side either, and perhaps if it's going to be put anywhere, whether it's a rule or a statute, that we ought to involve some criminal practitioners or maybe even the Court of Criminal Appeals in exactly how we go about

setting out what these constitutional standards are, so I'll pass it on then to Justice Gray.

HONORABLE TOM GRAY: And my comments basically are actually -- Richard, are that I don't think we should attempt to codify Anders as the procedure when an appointed attorney is required to file a brief in an appellate court on behalf of a client. The problem any time you attempt to codify a United States Supreme Court opinion that's based upon some due process right, as was the Anders case, is that it then terminates more expeditious proceedings later if you've codified it. In fact, it was *Anders vs. California*. California came back and adopted a new procedure.

The thing that really would slow us down on these cases, and this is the only area I'm aware of that we use Anders in the civil arena and many of the termination proceedings have been likened to criminal cases in a number of respects, effective assistance of counsel, and other issues; but in particular with regard to this process, if the counsel files an Anders brief and then we determine that there is an arguable issue, that counsel still has to be removed. They've already briefed -- they've looked at the case, they've reviewed the record, and they didn't see anything, and they file this motion to withdraw. We have to grant that motion, abate it to the new trial, have a new

lawyer appointed, and the process of briefing starts all over.

I think that is unnecessary, and, in fact, California thought it was unnecessary. They adopted a new procedure. It's called a Windy letter. The letter simply says, "I've looked at this, I don't see any arguable issues." It does the same thing. It invokes our duty then to review the entire record that is required in an Anders case, and we determine whether or not that the -- based on the entire record it is frivolous. If we identify an issue, however, we can send it back or in California they can send it back to the same lawyer that's already been through it and tell them to brief that issue and any others they see along the way. Much more expeditious than having to abate it to the trial court and get it over. That's why I don't think we should attempt to codify the Anders procedures. If we do, at least the way I read the Court of Criminal Appeals cases, this gets the procedure out of order because you do not have to have an appellee's -- actually, you're not even entitled, the appellee, to file a response unless the party files a response, and so this is slightly out of order and gives the appellee time to file something that they're not entitled to under the Anders procedures as determined by the CCA.

CHAIRMAN BABCOCK: Okay. Got it. Okay.

Justice Bland.

HONORABLE JANE BLAND: I agree with Judge Gray. I don't agree with everything about Anders, but I agree with him that we don't need to craft a rule to try to manage this process because there is a established body of case law to look at both in the criminal side and in these parental termination cases. I don't know that the Texas Supreme Court has spent any time on it, because I don't know if there has been a case that's gone -- I think you've -- so but there's plenty of intermediate appellate court cases about how to apply Anders in the parental termination context, and I think for us to try to draft a rule would just -- it wouldn't work. There's too many different nuances to these things.

CHAIRMAN BABCOCK: Any other comments about that? Okay. We've got 15 minutes left, and rather than let everybody go home early let's just talk briefly about, Justice Patterson, the rule requiring notice to the Texas Attorney General.

HONORABLE JAN PATTERSON: Okay. All right.

CHAIRMAN BABCOCK: I know we told you we weren't going to take it up today, but surprise.

HONORABLE JAN PATTERSON: Yeah. Yeah. Well, this committee has been tasked with the review of the committee's prior work in light of the statute that was

passed -- let's see, let me pull out -- the statute that was passed is 2425, and just to kind of give you a brief history, you have also in your materials the prior work of this committee, and we're fortunate to have both Frank and Richard here who expended a lot of time and effort on this prior rule. In a nutshell what changed is that the Legislature chose to give the obligation to file -- to notify the Attorney General of the -- to serve notice of the constitutional question to the Attorney General, instead of giving that to the parties it gave it to the Court.

So this committee had previously adopted a rule patterned on Federal Rule 5.1 that will ensure that the Attorney General is notified whenever in a case the constitutionality of the statute is questioned, so you have in your materials Federal Rule 5.1 and a rule that is modeled on that. In the spring and summer of 2010 the subcommittee and then this full committee drafted a rule requiring notice, and the two rules are in your materials. The last two pages of the materials there's a proposed rule and then there's another proposed rule and what this committee did was adopt the proposed rule at page 17.

The subcommittee in preparation of the rule that was discussed in I think three meetings communicated with the Attorney General's office and received feedback

from the Attorney General office concerning its preferences on this rule. It was presented, and what is at page 17 was adopted by the full committee in June of 2010, portions of which were approved unanimously, other portions were discussed in a lengthy manner.

So then in 2011 the Legislature passed the new statute, and it prompted a letter from the Attorney General to the Office of Court Administration that was sent to this full committee asking whether there needed to be any further examination and so we have reviewed this proposed rule as adopted by the committee. The only change between the statute and the proposed rule is that it does put the obligation on the district court to notify. We've discussed this with Office of Court Administration and with some district judges, and it's thought that at this time the notification seems to be working. There is a mechanism of notification by electronic address designated by the Attorney General, and really the simple conclusion is at this time it's thought that there's no necessity for any further rules because it is -- the statute speaks to the judge, not to the litigants. The judges seem to be doing it. It seems to be working.

There is a question of education of the clerks, and there is a question of whether there should be something on the docketing sheet as to whether this is one

of those cases, but -- and Stephen is not here today, but he's -- the Travis County court is one that does deal with this. It's not even that common in Travis County, but the notification seems to have worked, as provided by the statute, and the -- I have not gotten any feedback from anybody thinking that we need a proposed rule or that we need to do further work on this rule. It was not proposed that we did necessarily need a rule, but the question was whether we needed to re-examine our prior work and determine whether a rule is necessary, and the thought is at this time it seems to be working by statute. The direction is to the court to notify, and at this point it's working satisfactorily.

CHAIRMAN BABCOCK: Any what comments on what Justice Patterson has talked about? Justice Hecht.

HONORABLE NATHAN HECHT: One other consideration is, you know, we try to keep procedure in the book so that people know where it is instead of having to dig through statutes and try to find things that they may not know are there, and as the Legislature passes procedural statutes from time to time we need to consider whether we want to just incorporate it into the rules of procedure or whether we want to reference it or whether we just want to leave it alone. I don't think there's a -- I don't know of a good clear answer that fits all the

circumstances, and I agree this does seem to be working so far. It is a principal responsibility of the Court to do it, to comply with it, so perhaps that's good enough, but as time passes we may want to consider any of these procedures that are statutory being moved into the rule book, at least referenced.

HONORABLE JAN PATTERSON: We are seeking feedback from various people, because it seems as though most of the time the Attorney General is actually a party, so this does not speak to that, so it's that rare circumstance when they need notice but haven't been included. So there is -- there may be something that might be necessary at some point.

CHAIRMAN BABCOCK: Justice Hecht, do you think we should draft a rule that just says what the statute says and figure out where it goes in the rules?

HONORABLE NATHAN HECHT: I don't know if you should or not, but I think --

CHAIRMAN BABCOCK: Do you want us to?

HONORABLE NATHAN HECHT: Not -- not yet.

CHAIRMAN BABCOCK: Okay.

HONORABLE SARAH DUNCAN: Chip?

HONORABLE NATHAN HECHT: But I think each time -- I think that's an issue each time one of these comes up.

CHAIRMAN BABCOCK: Gene.

MR. STORIE: It's possible also that eventually you could have some question as to what the constitutional question is. I've seen pleadings where it's a sort of affirmative defense statutory construction argument where one party will say, "You've got to construe it this way, otherwise it will be unconstitutional." I don't know if those things are going to get swept up under this statute, but we'll find out.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: It's one thing for the Legislature to impose the duty to notify the Attorney General on the court, but it seems to me it's another question completely to charge the court with knowing every constitutional challenge in every pleading filed in the court, and what the Federal rule does is impose a duty on the party raising a constitutional challenge to tell the trial court, "We're doing this. We're raising this constitutional challenge," and it might be that the two could work hand-in-hand, but the Supreme Court imposes a duty on the party raising the constitutional challenge to bring it to the trial court's attention so that the trial court can then notify the Attorney General.

CHAIRMAN BABCOCK: Pete, and -- I'm sorry, Justice Christopher had her hand up first.

HONORABLE TRACY CHRISTOPHER: Because I haven't -- I'm sorry, I haven't really looked at this, but does this apply in criminal cases where they allege things are unconstitutional all the time, and are you saying that the district criminal courts are notifying the Attorney General every time those things are filed?

HONORABLE JAN PATTERSON: I don't think -- I think they argue that the practice -- I don't think it comes up that often in criminal cases. They might say that something that happened to them was unconstitutional, but not necessarily challenging a statute that often, but, yes, they would.

HONORABLE TRACY CHRISTOPHER: They do challenge the statutes themselves as unconstitutional in criminal cases.

HONORABLE JAN PATTERSON: Sometimes.

MR. SCHENKKAN: The statute here provides -- the operative effect of this statute is in (b). "A court may not enter a final judgment holding a statute of the state unconstitutional before the 45th day after which the notice has been given." There are no other consequences, and the other consequences are expressly disclaimed in the next subsection.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: And so I'm thinking, Justice

Duncan, that by the time the court gets ready to enter a judgment holding a statute of the state unconstitutional it's not unfair that the court should say, "Whoops, somebody needs to give the Attorney General notice and 45 days to show up," and if I'm the party who wants that final judgment I should anticipate this a little earlier so I can get my judgment entered timely, and I should say, "We're heading toward your declaring this unconstitutional, Judge. We need to give the Attorney General notice," and that's enough. That's good enough.

HONORABLE JAN PATTERSON: It does have that self-executing --

MR. SCHENKKAN: Yeah. Yeah.

HONORABLE JAN PATTERSON: -- paragraph.

CHAIRMAN BABCOCK: Well, thank you-all for being here. Our next meeting is November 18th, right back here at the TAB, and Angie tells me the elevator is going to lock in five minutes, so don't dawdle.

(Adjourned at 11:54 AM.)

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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 22nd 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 $_____.

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