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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

February 16, 2007

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 16th day of February,
2006, between the hours of 8:59 a.m. and 3:35 p.m., at the
Texas Association of Broadcasters, 502 East 11th Street,
2nd Floor, Austin, Texas 78701.

INDEX OF VOTES

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

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Documents referenced in this session

- 07-1 Letter from Justice Hecht (9-22-06)
- 07-2 Memorandum from Professor Dorsaneo (1-8-07)
- 07-3 Proposed Amendment to TRAP 39.1
- 07-4 Letter from David Beck and proposed amendment to Rule 226a (1-22-07)

1 *-*-*-*

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

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

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

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

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

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

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

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

2 HONORABLE TOM LAWRENCE: Something like
3 that.

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

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

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

20 CHAIRMAN BABCOCK: Where is that paper
21 available again?

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

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

7 HONORABLE TOM GRAY: Chip?

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

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

1 do you remember offhand?

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

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

6 MR. HUGHES: Recently?

7 HONORABLE TOM GRAY: About two weeks ago.

8 HONORABLE NATHAN HECHT: It's 135 pages with
9 945 footnotes, so it will take you a while to get through
10 it, but it's well worth looking at. It's a great -- it's
11 going to be a great resource.

12 That's all I have.

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

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

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

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

7 Now, in Justice Hecht's letter of September
8 22nd, 2006, he directed us to take a look at a particular
9 issue with respect to 20.1, and we dealt with -- dealt
10 with that. The particular issue was whether something
11 needed to be said about the prior filing of an affidavit
12 of indigence in the trial court pursuant to Rule 145 not
13 meeting the requirements of the appellate rule, 20.1.
14 That's been voted on, discussed and voted on, and it's
15 located in (d)(1) on page three of the memorandum if you
16 want to look at it.

17 When we started working on 20.1, however, we
18 noted that Rule 145, the companion trial court rule, had
19 been amended in 2005 adding, among other things, a
20 provision for an IOLTA certificate that didn't appear in
21 the appellate rule. So we began working on that, and
22 that's really what I'm going to talk about right now, and
23 20.1(a) and (c), we did further work after the October
24 meeting on the drafting of the change required by
25 conforming Rule 145, or actually conforming Rule 20,

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

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

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

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

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

1 of?

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

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

7 HONORABLE STEPHEN YELENOSKY: Well --

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

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

14 CHAIRMAN BABCOCK: Okay. Any other comments
15 about that?

16 Judge Patterson.

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

23 CHAIRMAN BABCOCK: Okay. Judge Gray.

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

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

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

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

14 HONORABLE SARAH DUNCAN: Yeah.

15 HONORABLE TOM GRAY: Something of that
16 nature.

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

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

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

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

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

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

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

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

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

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

19 CHAIRMAN BABCOCK: Okay. Any other
20 comments?

21 MR. LOW: Chip?

22 CHAIRMAN BABCOCK: Buddy.

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

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

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

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

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

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

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

24 CHAIRMAN BABCOCK: Justice Jennings.

25 HONORABLE TERRY JENNINGS: The version I'm

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

3 MR. LOW: Yeah.

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

6 HONORABLE TERRY JENNINGS: Oh, just in this
7 circumstance?

8 HONORABLE STEPHEN YELENOSKY: Yeah. Yeah.

9 CHAIRMAN BABCOCK: Okay. Any other
10 comments?

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

16 CHAIRMAN BABCOCK: Yeah.

17 PROFESSOR DORSANEO: Just what do you like?

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

22 CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 PROFESSOR DORSANEO: Right, because of the
11 IOLTA certificate.

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

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

18 HONORABLE STEPHEN YELENOSKY: "And."

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

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

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

1 PROFESSOR DORSANEO: Yeah.

2 HONORABLE SARAH DUNCAN: One, two, three.

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

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

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

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

13 HONORABLE STEPHEN YELENOSKY: That does
14 bring to mind, though, another potential incongruity. If,
15 in fact, if you're using an IOLTA certificate that's all
16 you're using. You don't have to combine that with an
17 affidavit of indigence. Isn't that right? And if that's
18 right then (1) needs to say, "The party files an affidavit
19 of indigence or an IOLTA certificate." Does somebody have
20 145 in front of them? I don't think you file an affidavit
21 of indigence if there's no certificate, but it may be that
22 you file both.

23 CHAIRMAN BABCOCK: Any other comments about
24 this?

25 PROFESSOR DORSANEO: I think that's right.

1 CHAIRMAN BABCOCK: Is that right, Bill?
2 Steve.

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

7 HONORABLE SARAH DUNCAN: Right. Me, too.

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

12 HONORABLE STEPHEN YELENOSKY: That makes
13 sense.

14 CHAIRMAN BABCOCK: Okay. What else?

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

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

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

1 CHAIRMAN BABCOCK: It appears that we did
2 vote on (d) last time, but it wouldn't hurt to look at it
3 one more time. Anybody have any other comments about (d)?
4 20.1(d)? Stephen, you -- Judge Yelenosky, you were
5 charged with making a call to Legal Aid the night of our
6 vote to see if there's any problem.

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

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

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

15 CHAIRMAN BABCOCK: To (b)?

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

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

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

3 HONORABLE STEPHEN YELENOSKY: Why?

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

6 HONORABLE STEPHEN YELENOSKY: If you look at
7 the --

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

12 HONORABLE STEPHEN YELENOSKY: Right.

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

16 HONORABLE STEPHEN YELENOSKY: In 20.1(1)?

17 PROFESSOR DORSANEO: Yes.

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

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

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

4 PROFESSOR DORSANEO: All right.

5 HONORABLE STEPHEN YELENOSKY: -- filing
6 both.

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

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

25 PROFESSOR DORSANEO: We have this long

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

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

12 PROFESSOR DORSANEO: Okay.

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

15 CHAIRMAN BABCOCK: Carl.

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

17 PROFESSOR DORSANEO: Yes.

18 MR. HAMILTON: To me that's a very
19 cumbersome sentence, "must allow the appellant a
20 reasonable time to correct the appellant's failure to
21 file." Does that just mean reasonable time to file? How
22 do you correct the failure to file other than by filing?
23 And then the next sentence says, "or the
24 appellant's failure to file a sufficient affidavit."
25 Can't we just say that "must allow an appellant a

1 reasonable time to file a sufficient affidavit"?

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

5 HONORABLE NATHAN HECHT: Of course.

6 CHAIRMAN BABCOCK: Who decided that?

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

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

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

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

16 HONORABLE NATHAN HECHT: I don't remember.

17 PROFESSOR DORSANEO: Yeah.

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

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

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

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

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

16 HONORABLE STEPHEN YELENOSKY: Right.

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

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

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

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

4 PROFESSOR DORSANEO: Uh-huh.

5 CHAIRMAN BABCOCK: Stephen, will you --

6 HONORABLE TRACY CHRISTOPHER: I think that
7 raises an ambiguity.

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

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

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

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

19 CHAIRMAN BABCOCK: Sure.

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

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

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

3 CHAIRMAN BABCOCK: Right. Right.

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

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

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

18 CHAIRMAN BABCOCK: Justice Gray, then Judge
19 Christopher.

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

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

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

14 CHAIRMAN BABCOCK: Judge Christopher and
15 then Justice Duncan.

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

23 PROFESSOR DORSANEO: Well, Higgins refers to
24 44.3, which the Court relied on, which says "a court of
25 appeals must not affirm or reverse a judgment or dismiss

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

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

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

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

25 HONORABLE SARAH DUNCAN: That's what the San

1 Antonio court does. I assume others do it.

2 HONORABLE STEPHEN YELENOSKY: So why --

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

12 CHAIRMAN BABCOCK: You have to recodify the
13 TRAP rules.

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

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

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

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

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

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

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

8 CHAIRMAN BABCOCK: Yeah.

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

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

24 HONORABLE SARAH DUNCAN: Because they
25 were --

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

7 CHAIRMAN BABCOCK: Right.

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

10 CHAIRMAN BABCOCK: And that's what got
11 reversed.

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

14 CHAIRMAN BABCOCK: Okay. Sarah, anything
15 else?

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

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

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

1 CHAIRMAN BABCOCK: Judge Patterson.

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

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

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

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

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

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

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

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

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

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

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

18 CHAIRMAN BABCOCK: Yeah.

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

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

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

25 HONORABLE STEPHEN YELENOSKY: But doesn't

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

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

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

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

19 PROFESSOR DORSANEO: Yeah.

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

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

1 and just don't -- will be governed by this, and that will
2 be the application of 44.3. I mean, instead of -- if we
3 say, okay, Higgins means you can't do this and it cites
4 44.3 and we say in here you can't do this and don't -- no
5 longer talk about 44.3 we end up at the same place, don't
6 we?

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

14 CHAIRMAN BABCOCK: Sarah.

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

20 CHAIRMAN BABCOCK: Sarah.

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

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

8 So, you know, I certainly agreed with
9 Higgins when it came out, but it's not an opinion I would
10 have written as an intermediate appellate court judge
11 probably -- well, I'm not going to say that because I
12 might have, but it takes an analytical step to get from
13 44.3 to the problem that was presented in Higgins, so I
14 guess I don't really understand why -- why wouldn't we --
15 you know, we codify Supreme Court decisions in the
16 procedural rules not infrequently. Why wouldn't we codify
17 Higgins in the appellate rules so that this mistake
18 doesn't get made again? I mean, it's a substantial
19 mistake. We're talking about dismissing somebody's appeal
20 because they didn't do what (1) says you have to do.

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

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

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

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

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

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

23 PROFESSOR DORSANEO: Okay.

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

1 PROFESSOR DORSANEO: But it's not a
2 requirement.

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

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

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

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

25 HONORABLE TOM GRAY: To follow up with a

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

14 CHAIRMAN BABCOCK: Justice Jennings.

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

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

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

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

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

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

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

13 HONORABLE TERRY JENNINGS: Right.

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

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

1 HONORABLE STEPHEN YELENOSKY: Right.

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

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

7 HONORABLE TERRY JENNINGS: Right.

8 HONORABLE STEPHEN YELENOSKY: But, I mean,
9 you're suggesting that if you didn't say "before you
10 dispose of the appeal" the court of appeals could say,
11 "You have 30 days to file an affidavit" and then on the
12 20th day they dispose of the appeal. I mean, they can't.

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

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

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

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

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

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

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

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

1 44.3 would apply, and so if we hadn't had Higgins would we
2 be suggesting to the Supreme Court that it write a rule
3 that says if you don't file your affidavit of indigence
4 you need to get notice before it's dismissed, and so with
5 or without Higgins you're suggesting there should be a
6 rule that allows this correction.

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

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

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

22 PROFESSOR DORSANEO: Yes.

23 CHAIRMAN BABCOCK: Carl, then Buddy.

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

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

5 CHAIRMAN BABCOCK: Right.

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

9 CHAIRMAN BABCOCK: I would think so. Buddy.

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

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

18 MR. LOW: Pardon?

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

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

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

3 HONORABLE STEPHEN YELENOSKY: Well --

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

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

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

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

17 CHAIRMAN BABCOCK: Bill.

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

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

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

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

25 But to make matters more complicated, the

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

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

24 So I think -- or the Court thinks that
25 44.3 -- this is from our discussions years ago when we

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

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

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

15 PROFESSOR DORSANEO: Actually file a motion.

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

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

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

25 PROFESSOR DORSANEO: You wouldn't regard

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

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

5 PROFESSOR DORSANEO: But everything else you
6 would?

7 HONORABLE NATHAN HECHT: Probably.

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

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

16 CHAIRMAN BABCOCK: 44.3 with breakfast
17 everyday.

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

20 CHAIRMAN BABCOCK: Justice Jennings.

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

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

8 PROFESSOR DORSANEO: I like that, but I also
9 think it needs to say this motion for extension of time
10 15-day requirement, but say that's --

11 HONORABLE TERRY JENNINGS: Tack that on
12 after that?

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

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

1 cure."

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

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

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

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

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

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

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

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

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

25 CHAIRMAN BABCOCK: I don't know that there

1 is a definitive answer to that, is there?

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

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

7 PROFESSOR DORSANEO: I think it's implicit.

8 CHAIRMAN BABCOCK: It said they did give
9 notice.

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

13 CHAIRMAN BABCOCK: Yeah.

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

18 CHAIRMAN BABCOCK: Okay.

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

21 CHAIRMAN BABCOCK: Right.

22 PROFESSOR DORSANEO: -- either.

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

25 Three. And I assume -- three people agree

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

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

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

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

9 HONORABLE BOB PEMBERTON: I agree with that.

10 CHAIRMAN BABCOCK: You just added a fourth
11 vote.

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

14 CHAIRMAN BABCOCK: Okay. Fair enough.

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

20 CHAIRMAN BABCOCK: Yeah.

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

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

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

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

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

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

1 HONORABLE NATHAN HECHT: Sure.

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

4 PROFESSOR DORSANEO: The next one is Rule
5 24, and this also started out in the September 22nd, 2006,
6 letter, and we've talked about this a pretty good bit.
7 Professor Carlson did a lengthy memorandum that we went
8 over, and this particular version of 24.2 is my attempt
9 based on everything that went before to capture what we,
10 you know, agreed on or almost voted on or perhaps what we
11 voted on. I would ask Professor Carlson to help here.
12 I'm perfectly willing to work through this or to defer to
13 her.

14 PROFESSOR CARLSON: Your call.

15 PROFESSOR DORSANEO: Huh?

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

20 CHAIRMAN BABCOCK: I don't think we did.

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

23 PROFESSOR DORSANEO: Okay.

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

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

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

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

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

1 September 22nd letter asked us to look at.

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

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

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

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

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

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

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

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

5 PROFESSOR CARLSON: Oh.

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

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

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

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

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

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

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

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

19 PROFESSOR CARLSON: If I could respond.

20 CHAIRMAN BABCOCK: Yes.

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

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

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

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

10 PROFESSOR DORSANEO: Yes.

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

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

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

24 PROFESSOR CARLSON: Right.

25 PROFESSOR DORSANEO: -- because you didn't

1 do a sufficient affidavit.

2 CHAIRMAN BABCOCK: Justice Bland.

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

14 PROFESSOR CARLSON: That was not the thought
15 at all.

16 HONORABLE JANE BLAND: Okay.

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

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

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

1 CHAIRMAN BABCOCK: Okay. Who else? Judge
2 Christopher.

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

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

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

19 HONORABLE TRACY CHRISTOPHER: Right.

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

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

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

8 CHAIRMAN BABCOCK: Hugh, then Sarah.

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

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

25 CHAIRMAN BABCOCK: Sarah, then Frank.

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

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

17 CHAIRMAN BABCOCK: Okay. Frank.

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

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

3 CHAIRMAN BABCOCK: Yeah, Elaine.

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

7 MR. WATSON: Yeah.

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

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

25 CHAIRMAN BABCOCK: But before we go there --

1 Hugh.

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

14 PROFESSOR CARLSON: I think that's what
15 happens.

16 MR. KELLY: Why would that be hard?

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

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

21 PROFESSOR ALBRIGHT: I have a question.

22 CHAIRMAN BABCOCK: Yeah.

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

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

5 PROFESSOR DORSANEO: Negative net worth.

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

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

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

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

21 PROFESSOR ALBRIGHT: Not detailed.

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

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

1 setting this for a hearing." Right?

2 PROFESSOR CARLSON: Sure.

3 PROFESSOR ALBRIGHT: Yeah.

4 PROFESSOR CARLSON: You can waive the
5 defect.

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

11 PROFESSOR CARLSON: Uh-huh.

12 PROFESSOR ALBRIGHT: Is that --

13 PROFESSOR CARLSON: That's right.

14 CHAIRMAN BABCOCK: Skip.

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

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

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

14 PROFESSOR DORSANEO: Yeah.

15 CHAIRMAN BABCOCK: Elaine.

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

20 MR. WATSON: Yeah.

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

1 determine current net worth.

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

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

11 CHAIRMAN BABCOCK: Lonny.

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

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

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

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

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

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

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

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

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

9 CHAIRMAN BABCOCK: Yeah.

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

13 CHAIRMAN BABCOCK: Justice Bland.

14 PROFESSOR DORSANEO: You didn't meet your
15 burden.

16 PROFESSOR CARLSON: I'm sorry, Chip.

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

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

25 HONORABLE TRACY CHRISTOPHER: Here you go,

1 Jane.

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

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

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

18 CHAIRMAN BABCOCK: Judge Yelenosky.

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

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

6 CHAIRMAN BABCOCK: Justice Jennings.

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

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

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

22 PROFESSOR CARLSON: Yeah.

23 CHAIRMAN BABCOCK: Justice Bland.

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

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

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

14 CHAIRMAN BABCOCK: Richard Munzinger.

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

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

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

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

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

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

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

16 CHAIRMAN BABCOCK: Judge Christopher. Judge
17 Christopher.

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

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

7 CHAIRMAN BABCOCK: Justice Bland.

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

17 HONORABLE STEPHEN YELENOSKY: Net worth is
18 high.

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

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

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

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

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

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

14 CHAIRMAN BABCOCK: Right.

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

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

23 CHAIRMAN BABCOCK: Judge Patterson.

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

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

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

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

11 CHAIRMAN BABCOCK: Professor Carlson.

12 HONORABLE JAN PATTERSON: But none of the
13 practitioners.

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

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

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

24 How many opposed? There are 9 in favor and
25 15 opposed. So there is an answer for you, Elaine.

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

5 CHAIRMAN BABCOCK: Okay.

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

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

20 CHAIRMAN BABCOCK: Hugh Rice.

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

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

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

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

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

4 MR. KELLY: I don't know.

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

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

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

12 MR. KELLY: You do discovery during the
13 case.

14 PROFESSOR CARLSON: It's irrelevant.

15 MR. KELLY: You can certainly find out
16 insurances.

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

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

1 would necessarily be irrelevant.

2 CHAIRMAN BABCOCK: Justice Bland.

3 PROFESSOR DORSANEO: Maybe now.

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

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

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

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

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

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

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

16 HONORABLE SARAH DUNCAN: But --

17 CHAIRMAN BABCOCK: Judge Christopher, and
18 then Judge Duncan.

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

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

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

25 HONORABLE STEPHEN YELENOSKY: Do you want to

1 take a different seat?

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

14 CHAIRMAN BABCOCK: Judge Duncan, and then
15 Justice Bland.

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

1 To follow up on what Richard was saying,
2 there is a judgment. There are rules about how you
3 supersede a judgment. The judgment debtor wants relief
4 from those rules; and we say, "If you want relief from
5 those rules, here's what you have to do." If the debtor
6 fails to do what we tell him he has to do to get relief
7 from the supersedeas rules, why isn't the trial court able
8 to just say, "Here's the debtor's net worth" or
9 alternatively, "I can't find net worth based on the
10 evidence the debtor has given me, so it can't be more than
11 50 percent of the debtor's net worth because I can't find
12 net worth based on the evidence the debtor has given me."
13 Does that fulfill the purpose of the statute if we give
14 the trial judge that out?

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

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

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

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

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

1 statute?

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

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

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

7 CHAIRMAN BABCOCK: Justice Bland.

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

22 CHAIRMAN BABCOCK: Sarah, then Judge
23 Yelenosky.

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

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

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

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

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

18 HONORABLE TRACY CHRISTOPHER: Yeah, there
19 is.

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

24 CHAIRMAN BABCOCK: Judge Yelenosky, and then
25 Tom Riney.

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

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

23 CHAIRMAN BABCOCK: Justice Bland.

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

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

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

6 HONORABLE TRACY CHRISTOPHER: That I don't
7 know.

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

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

15 HONORABLE STEPHEN YELENOSKY: But this --

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

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

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

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

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

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

9 HONORABLE SARAH DUNCAN: For the relief.

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

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

19 PROFESSOR CARLSON: I think so.

20 CHAIRMAN BABCOCK: Okay.

21 PROFESSOR CARLSON: I think so.

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

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

7 CHAIRMAN BABCOCK: Which -- okay. Which
8 sentence?

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

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

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

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

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

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

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

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

21 PROFESSOR DORSANEO: Yes.

22 CHAIRMAN BABCOCK: -- didn't we insert it in
23 2003?

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

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

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

6 PROFESSOR CARLSON: May I respond?

7 CHAIRMAN BABCOCK: Yes.

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

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

1 from.

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

5 PROFESSOR CARLSON: It appears so.

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

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

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

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

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

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

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

20 CHAIRMAN BABCOCK: Yeah. Justice Bland.

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

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

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

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

14 HONORABLE TRACY CHRISTOPHER: Right.

15 PROFESSOR CARLSON: Then you put on your
16 real evidence.

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

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

22 PROFESSOR CARLSON: Then it is a no
23 evidence.

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

1 CHAIRMAN BABCOCK: Frank.

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

8 CHAIRMAN BABCOCK: Frank.

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

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

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

11 CHAIRMAN BABCOCK: Elaine.

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

16 CHAIRMAN BABCOCK: Uh-huh.

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

20 MR. GILSTRAP: What's that?

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

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

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

4 CHAIRMAN BABCOCK: Sarah, and then Elaine.

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

12 MR. GILSTRAP: My boat.

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

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

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

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

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

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

1 PROFESSOR CARLSON: She nuked my subsection
2 (2).

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

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

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

15 HONORABLE JANE BLAND: And that may not be
16 what?

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

19 CHAIRMAN BABCOCK: We can only fix so much.

20 HONORABLE SARAH DUNCAN: -- provide for so
21 much.

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

24 PROFESSOR CARLSON: I do.

25 CHAIRMAN BABCOCK: Okay. That's enough of

1 that.

2 MR. HAMILTON: Chip?

3 CHAIRMAN BABCOCK: Yeah, Carl.

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

10 PROFESSOR DORSANEO: Uh-huh.

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

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

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

25 HONORABLE SARAH DUNCAN: It could take

1 different forms. The additional security.

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

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

10 MR. HAMILTON: Right.

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

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

19 PROFESSOR CARLSON: Why not?

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

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

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

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

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

8 CHAIRMAN BABCOCK: Justice Bland.

9 PROFESSOR CARLSON: Okay.

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

21 HONORABLE SARAH DUNCAN: They can.

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

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

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

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

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

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

15 CHAIRMAN BABCOCK: Transmogrified. Hugh.

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

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

3 CHAIRMAN BABCOCK: Tom.

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

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

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

5 CHAIRMAN BABCOCK: Yeah. Okay. Rule 34.

6 PROFESSOR DORSANEO: We did that one.

7 CHAIRMAN BABCOCK: All right.

8 PROFESSOR DORSANEO: We're all the way up to
9 41.

10 CHAIRMAN BABCOCK: 41.

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

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

15 HONORABLE NATHAN HECHT: Have we done
16 24.4(d)?

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

19 HONORABLE NATHAN HECHT: Why did we skip it?

20 CHAIRMAN BABCOCK: Oversight.

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

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

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

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

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

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

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

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

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

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

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

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

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

20 So those are the two questions I think we
21 answered in the amendments -- proposed amendments to 24.4.
22 Now, subsection (a)(1), I'm on page four of Bill's memo,
23 24.4(a)(1) is out the door because we just decided we're
24 not going to have a motion to strike. We're going to deal
25 with that in some other way, but looking over on page five

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

8 CHAIRMAN BABCOCK: Simple, elegant, and --

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

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

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

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

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

20 PROFESSOR CARLSON: Thanks a lot.

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

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

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

9 PROFESSOR CARLSON: Purist principle.

10 HONORABLE SARAH DUNCAN: -- purist problem.

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

17 HONORABLE SARAH DUNCAN: I made that motion.

18 PROFESSOR DORSANEO: Okay.

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

22 CHAIRMAN BABCOCK: Gene.

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

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

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

6 PROFESSOR CARLSON: "We understand that
7 52.006 confers jurisdiction upon us to review appellate
8 security orders, but we have no authority to conduct a
9 factual sufficiency review, limited to legal sufficiency
10 review of the evidence to support the net worth finding."

11 CHAIRMAN BABCOCK: Justice Bland.

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

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

19 HONORABLE JANE BLAND: What is the
20 problem --

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

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

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

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

6 PROFESSOR CARLSON: Turnover.

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

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

18 PROFESSOR CARLSON: Well, sure.

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

22 PROFESSOR CARLSON: Yeah.

23 CHAIRMAN BABCOCK: Yeah, Bill.

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

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

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

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

20 PROFESSOR DORSANEO: I didn't think so.

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

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

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

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

24 CHAIRMAN BABCOCK: Frank.

25 MR. GILSTRAP: Just the problem with

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

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

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

24 CHAIRMAN BABCOCK: Justice Hecht.

25 HONORABLE NATHAN HECHT: The -- in our Court

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

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

19 PROFESSOR DORSANEO: Yes.

20 CHAIRMAN BABCOCK: Justice Pemberton.

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

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

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

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

25 CHAIRMAN BABCOCK: Justice Gray.

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

12 HONORABLE BOB PEMBERTON: No.

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

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

19 PROFESSOR CARLSON: Yeah.

20 HONORABLE SARAH DUNCAN: Notices are deemed
21 premature.

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

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

5 HONORABLE STEPHEN YELENOSKY: You have to
6 sever it.

7 CHAIRMAN BABCOCK: Huh?

8 HONORABLE STEPHEN YELENOSKY: You have to
9 sever it out.

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

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

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

18 CHAIRMAN BABCOCK: Bill.

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

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

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

11 PROFESSOR DORSANEO: Uh-huh.

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

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

25 PROFESSOR DORSANEO: Not so hard to file a

1 notice of appeal.

2 HONORABLE SARAH DUNCAN: With one word.

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

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

7 PROFESSOR CARLSON: Denied?

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

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

25 CHAIRMAN BABCOCK: Yeah, did that not get

1 fixed?

2 HONORABLE TOM GRAY: That is not fixed.

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

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

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

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

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

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

25 HONORABLE SARAH DUNCAN: The only question I

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

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

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

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

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

18 HONORABLE SARAH DUNCAN: Was that the MDL
19 rules?

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

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

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

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

3 CHAIRMAN BABCOCK: Statute.

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

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

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

19 HONORABLE SARAH DUNCAN: Until the transfer.

20 HONORABLE TOM GRAY: Under the statute --
21 the way the rule is written it would appear that it would
22 be okay to go to any court and file it, but that court is
23 going to look back and say, "Sorry, we don't have
24 jurisdiction of that motion because you are not within our
25 18 counties."

1 HONORABLE SARAH DUNCAN: Right.

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

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

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

10 PROFESSOR CARLSON: Yes.

11 HONORABLE SARAH DUNCAN: Uh-huh.

12 CHAIRMAN BABCOCK: Yeah, Carl.

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

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

5 CHAIRMAN BABCOCK: Pam.

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

8 CHAIRMAN BABCOCK: Oh, another purist.

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

11 CHAIRMAN BABCOCK: Another purist.

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

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

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

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

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

25 HONORABLE SARAH DUNCAN: I'm in full

1 agreement with that.

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

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

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

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

12 CHAIRMAN BABCOCK: Well --

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

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

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

19 CHAIRMAN BABCOCK: Huh?

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

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

25 HONORABLE SARAH DUNCAN: Well, the other

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

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

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

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

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

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

1 shot may or may not have an appeal for it.

2 CHAIRMAN BABCOCK: Justice Hecht.

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

13 CHAIRMAN BABCOCK: Justice Bland.

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

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

4 CHAIRMAN BABCOCK: Okay. Justice Gray.

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

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

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

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

16 MR. LOW: Cases appealed from that county.

17 HONORABLE SARAH DUNCAN: Over judgments
18 rendered.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

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

24 CHAIRMAN BABCOCK: Justice Bland.

25 HONORABLE STEPHEN YELENOSKY: Which seems to

1 me to be an evil the other way.

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

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

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

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

4 HONORABLE JANE BLAND: Yeah, that's right.

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

7 CHAIRMAN BABCOCK: Justice Duncan.

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

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

22 CHAIRMAN BABCOCK: Justice Jennings.

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

25 HONORABLE SARAH DUNCAN: That's right.

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

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

5 CHAIRMAN BABCOCK: Justice Jennings.

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

13 MS. BARON: "Appropriate."

14 HONORABLE SARAH DUNCAN: Specificity.

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

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

20 HONORABLE TERRY JENNINGS: Yeah.

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

25 MR. TIPPS: Which version?

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

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

7 CHAIRMAN BABCOCK: And how many opposed?

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

14 PROFESSOR CARLSON: No.

15 HONORABLE SARAH DUNCAN: You wish.

16 PROFESSOR CARLSON: I want to be exacting
17 here. The question reads exactly "Should appellate Rule
18 24 be amended to state 'a judgment is not superseded when
19 the judgment debtor fails to obtain a net worth finding in
20 line with his net worth affidavit.'"

21 HONORABLE TOM GRAY: Maybe you could read
22 that again.

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

25 CHAIRMAN BABCOCK: Yeah, there it is. Okay.

1 PROFESSOR CARLSON: "Should appellate Rule
2 24 be amended to state that 'a judgment is not superseded
3 when the judgment debtor fails to obtain a net finding in
4 line with his net worth affidavit'?"

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

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

11 CHAIRMAN BABCOCK: Okay.

12 PROFESSOR CARLSON: So I'm done.

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

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

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

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

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

24 PROFESSOR DORSANEO: Good. Thank you.

25 HONORABLE SARAH DUNCAN: Thank you.

1 MR. KELLY: You're welcome.

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

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

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

1 problem?

2 MR. JACKSON: All right. Bring it on.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 CHAIRMAN BABCOCK: Okay. Anything else,
7 David?

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

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

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

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

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

23 So that takes us to --

24 MR. TIPPS: Chip?

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

1 PROFESSOR DORSANEO: Yes, try to keep up
2 with this blistering pace here. 41. Now, this goes back
3 to October of last year, and what we were asked to look at
4 in the September 22, 2006, letter is an issue about adding
5 another person, an active district court judge, to the
6 list of persons who could be appointed by the Chief
7 Justice of the Supreme Court to an appellate panel under
8 41.1 and in the en banc context under 41.2.

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

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

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

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

25 Same change in -- essentially the same

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

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

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

21 PROFESSOR DORSANEO: Where are you?

22 HONORABLE SARAH DUNCAN: In all three.

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

1 HONORABLE SARAH DUNCAN: Oh, okay.

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

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

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

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

13 PROFESSOR DORSANEO: Yes.

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

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

21 MR. TIPPS: In either place?

22 PROFESSOR DORSANEO: Uh-huh.

23 MR. TIPPS: Okay.

24 CHAIRMAN BABCOCK: Okay. Pam.

25 MS. BARON: Steve made the points that I

1 would have made.

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

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

12 MR. HUGHES: I think it's quarterly.

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

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

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

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

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

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

25 HONORABLE TOM GRAY: Yes.

1 HONORABLE SARAH DUNCAN: But in that --

2 CHAIRMAN BABCOCK: Justice Pemberton had his
3 hand up first.

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

8 PROFESSOR DORSANEO: It is.

9 HONORABLE BOB PEMBERTON: It is.

10 PROFESSOR DORSANEO: Maybe we should --

11 HONORABLE BOB PEMBERTON: I was thinking it
12 should reference to 74 and 75 because it almost suggests
13 either that they don't have a different statutory
14 authorization or not at all, so all this is independent of
15 that. So I would just say bring it under Chapter 74 and
16 75 to make that connection clear. Because you refer to
17 all these appellate types of appellate judges, current and
18 former and active and all that, "whose appointment is
19 authorized under Chapter 74 and 75." Then there's the
20 reference to district judges. That's all.

21 CHAIRMAN BABCOCK: Sarah.

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

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

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

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

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

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

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

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

19 CHAIRMAN BABCOCK: Yeah.

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

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

1 Bill? Come on.

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

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

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

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

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

4 CHAIRMAN BABCOCK: Sarah has got an answer
5 to that.

6 PROFESSOR DORSANEO: Huh?

7 CHAIRMAN BABCOCK: Sarah knows the answer to
8 that.

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

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

20 HONORABLE SARAH DUNCAN: Because under this
21 rule you --

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

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

3 PROFESSOR DORSANEO: Well --

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

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

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

17 PROFESSOR DORSANEO: Three?

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

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

23 HONORABLE NATHAN HECHT: It has to be three.

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

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

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

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

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

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

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

1 two judges.

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

8 CHAIRMAN BABCOCK: Tracy.

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

15 CHAIRMAN BABCOCK: Yeah.

16 HONORABLE STEPHEN YELENOSKY: Take that.

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

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

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

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

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

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

4 HONORABLE NATHAN HECHT: Right.

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

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

1 litigants' time.

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

4 CHAIRMAN BABCOCK: Justice Pemberton.

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

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

18 HONORABLE SARAH DUNCAN: How does it do
19 that?

20 PROFESSOR DORSANEO: Huh?

21 HONORABLE SARAH DUNCAN: How does it do
22 that?

23 PROFESSOR DORSANEO: Well --

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

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

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

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

22 PROFESSOR DORSANEO: Yeah.

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

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

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

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

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

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

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

19 CHAIRMAN BABCOCK: Okay.

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

22 CHAIRMAN BABCOCK: Okay. Do you accept that
23 challenge?

24 PROFESSOR DORSANEO: Yes, with the idea
25 being that the rule does not seem to say clearly that you

1 need to start out with three.

2 CHAIRMAN BABCOCK: Okay.

3 HONORABLE TERRY JENNINGS: May I make one
4 last comment? In regard to, you know, what the rule says
5 and doesn't say, I think the courts of appeals understand
6 what it means and we've been following it fairly well. I
7 don't think anybody on a court of appeals has had a
8 problem utilizing the rule.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE TOM GRAY: With one noted
11 exception.

12 HONORABLE TERRY JENNINGS: Well --

13 HONORABLE STEPHEN YELENOSKY: But Bill's
14 right. The way it literally reads, I mean, you can assign
15 three judges, two go to argument, and then those two write
16 the decision.

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: Well, and there's
19 also the issue that came up when I was a practitioner of a
20 judge that's going to be leaving a court who is in the
21 majority and the dissenting judge, you know, for whatever
22 reason, holding up the decision knowing that judge is
23 leaving December 31st. So in that case the two judges in
24 the majority just issued the opinion December 31st and
25 said "dissent to follow," but you want to be sure that you

1 don't have that issue either, that, oh, okay, the
2 dissenting judge thinks there's a shot at another panel
3 deciding it later that might flip it, so it can go both
4 ways.

5 CHAIRMAN BABCOCK: Sarah.

6 HONORABLE SARAH DUNCAN: But it can always
7 be flipped on a motion for rehearing anyway. I guess my
8 overall point here is, again, that of a purist or an
9 extremist, whichever one you want to call me. Nobody, and
10 I do mean nobody, regulates how any given court of appeals
11 operates. We don't tell courts of appeals how to select
12 their panels, whether they're supposed to be random or
13 not. This seems an odd place to me to start. I mean, we
14 don't -- courts can have internal operating procedures
15 that deal with precisely the problem that Justice Bland
16 raised.

17 We have -- you know, the San Antonio court
18 has a 10-day rule. When the opinion would hit my desk I
19 had 10 days to decide what I was going to do. We have --
20 they have a rule that if a member of a panel hasn't gotten
21 around to an opinion for 30 days, the remaining two
22 members of the panel can issue without the third judge.
23 This just seems -- you know, I mean, either let's regulate
24 all the courts of appeals on all of these possibilities,
25 because they're numerous, or if it's not broken, don't fix

1 it, don't try to fix it, and I don't personally think this
2 is broken, but --

3 PROFESSOR DORSANEO: What you said sounded
4 broken to me. The internal operating rule sounded like
5 one that I wouldn't find to be a good rule, but that's
6 just me.

7 HONORABLE SARAH DUNCAN: Well, and that's I
8 think why no Chief Justice in Texas's history has tried to
9 regulate how the courts of appeals do their business, is
10 because there are probably as many different opinions of
11 that as there are people sitting around this table.

12 CHAIRMAN BABCOCK: There you have it. What
13 about 41.2? It looks to me that goes right along with
14 what we just discussed in 41.1.

15 PROFESSOR DORSANEO: Yes. Yes.

16 CHAIRMAN BABCOCK: And 49.7, have we done
17 that?

18 PROFESSOR DORSANEO: We've done -- we've
19 voted on that already, haven't we, Jody?

20 MR. HUGHES: We did, but that was on October
21 20th.

22 PROFESSOR DORSANEO: Yeah. We've done all
23 the 49 things.

24 CHAIRMAN BABCOCK: Okay.

25 PROFESSOR DORSANEO: And we've actually done

1 everything that's here, but there's something more to be
2 said about 52.3.

3 CHAIRMAN BABCOCK: Okay.

4 PROFESSOR DORSANEO: 52.3 was dealt with in
5 October, and this language was approved by the committee,
6 affirmative vote, I don't remember the number, but at the
7 end of the meeting some people who voted for the language
8 on page eight for 52.3 changed their minds and suggested
9 on the record at the meeting that this, change
10 subsection -- is that right?

11 I'll just read what it says, "Change
12 subsection (j) to subsection (k) and add a new (j)
13 entitled 'Verification,' saying this: 'The person filing
14 the petition must verify that he or she has reviewed the
15 petition and concluded that every factual statement in the
16 petition is supported by competent evidence including'" --
17 "'included in the appendix or record,'" and I gather the
18 difference is that this certification says that it's
19 supported by sworn testimony, affidavit, or other
20 competent evidence, rather than saying that things that
21 are not otherwise supported by sworn testimony, affidavit
22 or competent evidence, factual statements not supported
23 must be verified by an affidavit. The affidavit is more
24 of an affidavit in the context of the -- of the proposed
25 changed language. I wasn't here when that was done, so --

1 but I'm sure the record speaks the truth, because there's
2 a court reporter's certification. Okay. And that would
3 be added in in 52.3, 52.3(j).

4 MR. HUGHES: I think it just bumps the other
5 one down one.

6 PROFESSOR DORSANEO: Yeah, and that probably
7 should be -- that engineering should have been indicated
8 on this page to begin with.

9 CHAIRMAN BABCOCK: Okay. Justice Bland.

10 HONORABLE JANE BLAND: This was the Sarah
11 Duncan solution to the issue that was discussed at the
12 last meeting about lawyers having to say they had personal
13 knowledge about facts in a record versus -- you know, when
14 they weren't a witness to them versus lawyers representing
15 that the statements in the mandamus position are supported
16 by the record, and I think it was the solution suggested
17 by concerns raised by Judge Christopher and Pam Baron, and
18 it's a good one. It's a really good one, so we should
19 adopt it.

20 PROFESSOR DORSANEO: I'm not speaking
21 against it.

22 CHAIRMAN BABCOCK: Okay. What else? All
23 right. So you two carry the day on this, aye?

24 PROFESSOR DORSANEO: Well, if they want to
25 have a little more of a certification than the one that we

1 voted on, I'm fine.

2 CHAIRMAN BABCOCK: Okay.

3 HONORABLE TOM GRAY: Well, for
4 clarification, does that mean that the Bland alternative
5 carries the day or the one that's on the paper on page
6 eight carries the day?

7 HONORABLE JANE BLAND: It's actually the
8 Duncan alternative.

9 HONORABLE SARAH DUNCAN: I think it's the
10 Justices Bland, Judge Christopher, Judge Baron, Judge
11 Duncan proposal. It took all four of us.

12 CHAIRMAN BABCOCK: And but that's what's on
13 page eight or not?

14 HONORABLE SARAH DUNCAN: That's not what's
15 on page eight.

16 CHAIRMAN BABCOCK: That's not what's on page
17 eight. I'm sorry, I misunderstood.

18 HONORABLE JANE BLAND: No.

19 HONORABLE SARAH DUNCAN: That's what I read
20 into the record. I changed my vote. It took me -- I
21 mean, I'm a little slow, and it took me quite a while to
22 understand what Judge Christopher and Judge Bland and
23 Judge Baron were saying were the problems from the
24 practitioner's standpoint, the problems from the trial
25 judges' standpoint, and the problems from the appellate

1 court judges' standpoint. Once I finally got it, that was
2 my proposed fix. I went down to the other end of the
3 table, ran it by the three judges down there, and the four
4 of us agreed that this resolved all of their problems.

5 CHAIRMAN BABCOCK: And how does that resolve
6 it where the language on page eight does not?

7 HONORABLE TRACY CHRISTOPHER: I don't think
8 this is what we voted on on page eight.

9 HONORABLE SARAH DUNCAN: It's not.

10 HONORABLE TRACY CHRISTOPHER: I don't think
11 this is an accurate -- because what we originally voted on
12 was to get rid of that "verified by affidavit," and then I
13 was like, no, you can't do that, and that's why we put it
14 back in as a (k).

15 HONORABLE SARAH DUNCAN: Yeah. It was an
16 evolving evolution of this.

17 HONORABLE TRACY CHRISTOPHER: I don't think
18 what's written here on page eight is what we voted on.

19 PROFESSOR DORSANEO: I think it is. Because
20 I think that's what I had in my original memo, that --

21 HONORABLE TRACY CHRISTOPHER: It is what was
22 in your original memo, but that was not supported.

23 CHAIRMAN BABCOCK: I'm sorry, what did you
24 say?

25 MR. GILSTRAP: Regardless, as opposed to,

1 you know, deciding how it evolved and who had the idea,
2 somebody say it and let's talk about it. What is it,
3 Bill?

4 PROFESSOR DORSANEO: Well, I just read it,
5 and we just talked about it. I'm not going to read it
6 again, no. The difference -- the draft that I had says
7 you only have to verify things that aren't otherwise
8 verified by evidence in the record, okay, which seems to
9 me to be a sensible rule.

10 Now, what the naysayers want that I'm so
11 agreeable I'm willing to adopt is that you need to say,
12 quote, "The person filing the petition must verify that he
13 or she has reviewed the petition," okay, and this is the
14 person -- you know, I think that's good that they would
15 review it before they verify it, "and concluded that every
16 factual statement in the petition is supported by
17 competent evidence included in the appendix or record."

18 So, you know, that's a special rule for
19 mandamus that I don't need to put in. I mean, everything
20 is supposed to be supported by something, right, that I
21 file with an appellate court since I'm certifying it?

22 CHAIRMAN BABCOCK: So you're okay with that?

23 PROFESSOR DORSANEO: I'm fine with it,
24 because it doesn't make that much difference to me what
25 the certification said.

1 CHAIRMAN BABCOCK: Justice Bland.

2 HONORABLE JANE BLAND: Bill, we were
3 defending your need for a verification. It got shot down.

4 PROFESSOR DORSANEO: Oh, I left before that
5 happened.

6 HONORABLE JANE BLAND: Mostly because of
7 Justice Duncan's eloquent arguments about why it was
8 unnecessary, and so then this was the --

9 PROFESSOR DORSANEO: When I left, this
10 language was voted up. You voted to change it.

11 HONORABLE TRACY CHRISTOPHER: It failed.

12 HONORABLE JANE BLAND: It failed, and there
13 was going to be no verification, and then --

14 HONORABLE TRACY CHRISTOPHER: Right.

15 HONORABLE JANE BLAND: We were defending
16 you.

17 PROFESSOR DORSANEO: Well --

18 MR. DAWSON: So you're no longer a naysayer.

19 HONORABLE JANE BLAND: We're not naysayers.

20 CHAIRMAN BABCOCK: Is everybody in agreement
21 with the language that Bill just read?

22 HONORABLE STEPHEN YELENOSKY: Well, is that
23 to replace this or in addition to it?

24 CHAIRMAN BABCOCK: To replace it.

25 PROFESSOR DORSANEO: To replace it.

1 CHAIRMAN BABCOCK: To replace it.

2 HONORABLE STEPHEN YELENOSKY: Well, in an
3 original proceeding couldn't you have things outside the
4 record that you need to put in affidavit form?

5 PROFESSOR DORSANEO: Well, what this is
6 saying is that everything, every factual statement is -- I
7 have looked at everything that I'm filing.

8 HONORABLE STEPHEN YELENOSKY: Yes.

9 PROFESSOR DORSANEO: And every factual
10 statement in the petition has evidentiary support.

11 HONORABLE STEPHEN YELENOSKY: Oh, which
12 could include evidentiary support that was added after the
13 proceeding.

14 CHAIRMAN BABCOCK: Yeah.

15 HONORABLE STEPHEN YELENOSKY: Well, because
16 there could be an affidavit --

17 PROFESSOR DORSANEO: Yeah.

18 HONORABLE STEPHEN YELENOSKY: -- in an
19 original proceeding that wasn't --

20 PROFESSOR DORSANEO: That would be the
21 affidavit.

22 CHAIRMAN BABCOCK: So now the naysayers are
23 in the unanimous majority.

24 PROFESSOR DORSANEO: No, they're different
25 naysayers. The nay sayers are people I didn't even know

1 about.

2 CHAIRMAN BABCOCK: Well, now nobody is a
3 naysayer. We all agree, and we're going to have the
4 language -- we're going to recommend the language that was
5 just read into the record a minute ago.

6 What's the next rule? Do we have to talk
7 about 53.7, Bill?

8 PROFESSOR DORSANEO: No.

9 HONORABLE TRACY CHRISTOPHER: No, no, no.
10 I'm sorry, Chip. What is on page eight does not need the
11 addition.

12 CHAIRMAN BABCOCK: It needs to be replaced
13 with the addition, right?

14 HONORABLE TRACY CHRISTOPHER: No. It could
15 stay as what's here on page eight, but that's not what we
16 voted on last time. This is okay and doesn't need the
17 extra verification.

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

20 HONORABLE TRACY CHRISTOPHER: Okay. What's
21 written on the January 6th -- January 8th, 2007, memo on
22 page eight meets the concerns that we had the last time,
23 in my opinion.

24 CHAIRMAN BABCOCK: Okay.

25 HONORABLE TRACY CHRISTOPHER: And is

1 sufficient as it is. It is not what we voted on at the
2 last meeting.

3 CHAIRMAN BABCOCK: Okay. Well --

4 HONORABLE TRACY CHRISTOPHER: Because people
5 didn't want to sign based on personal knowledge.

6 CHAIRMAN BABCOCK: I understand, but which
7 language do we all want? Do we want what Bill read, which
8 was something you guys wrote up on the side, or do we want
9 what's on page eight? Sarah, which do you choose?

10 HONORABLE SARAH DUNCAN: Well, at the end of
11 the meeting I came up with what Bill read.

12 CHAIRMAN BABCOCK: So do you prefer that or
13 what's on page eight?

14 HONORABLE SARAH DUNCAN: I would have to go
15 back and read all of the words in that meeting to
16 understand and remember precisely why I came up with that
17 because it was not just that people didn't want --

18 CHAIRMAN BABCOCK: Let me put it a different
19 way. Do you like what's on page eight?

20 HONORABLE SARAH DUNCAN: I don't know.

21 CHAIRMAN BABCOCK: Okay. Justice Bland, do
22 you like what's on page eight?

23 HONORABLE JANE BLAND: The problem with page
24 eight I think Pam Baron and others spoke about was that
25 they did not like the fact that a lawyer would be

1 verifying statements based on their personal knowledge.

2 MR. TIPPS: Why?

3 HONORABLE SARAH DUNCAN: It was a long,
4 complicated discussion.

5 CHAIRMAN BABCOCK: Yeah, and what Bill read
6 strikes me as way different than what's on page eight.

7 HONORABLE JANE BLAND: The trial lawyer has
8 personal knowledge but not the appellate lawyer. I don't
9 have a dog in the hunt, I'm just -- that was the argument,
10 and that's why we came up with this other solution.

11 CHAIRMAN BABCOCK: Yeah. The other
12 solution, which Bill read a minute ago but refuses to read
13 again, sounds to me different from what is on page eight
14 here.

15 MS. BARON: Can we have it read again?

16 PROFESSOR DORSANEO: All right. I'll read
17 it again, and I'll tell you the difference.

18 CHAIRMAN BABCOCK: But listen up.

19 PROFESSOR DORSANEO: "The person filing the
20 petition," okay, "must verify that he or she has reviewed
21 the petition and concluded that every factual statement in
22 the petition is supported by competent evidence included
23 in the appendix or record." Whoa. So I need to --

24 HONORABLE SARAH DUNCAN: That was to address
25 Judge Christopher's concern, if I'm remembering correctly,

1 Tracy, that people come in and file these petitions --
2 help me here.

3 HONORABLE JANE BLAND: That's right. And
4 they weren't there, and they represent that things
5 happened in the trial court that didn't happen, and this
6 way they would have to get an affidavit from the trial
7 lawyer who was there saying this is what happened instead
8 of the appellate lawyer saying what was happening even
9 though the appellate lawyer wasn't there.

10 CHAIRMAN BABCOCK: Kent Sullivan.

11 HONORABLE KENT SULLIVAN: My recollection
12 was, is you were substituting a verification when someone
13 had to swear to something that we were concerned about --
14 that is, that they didn't actually have personal knowledge
15 of -- with a different process that was called sort of a
16 certification process that I as the lawyer had confirmed
17 that, in fact, the representations made in this are
18 supported by evidence, which is different, I think, than
19 what's on page eight --

20 CHAIRMAN BABCOCK: Yeah.

21 HONORABLE KENT SULLIVAN: -- because as I
22 read page eight, it contemplates individual and perhaps
23 multiple affidavits from people --

24 CHAIRMAN BABCOCK: Right.

25 HONORABLE KENT SULLIVAN: -- with personal

1 knowledge. So it seems to me that is the array of choices
2 that I see being offered.

3 PROFESSOR DORSANEO: All -- I'm sorry. All
4 page eight contemplates, one difference that I see, is
5 that you don't need any affidavits if you have sworn
6 testimony or you don't need any additional affidavits from
7 trial lawyers, appellate lawyers, or whatever, if you have
8 in the record already sworn testimony, an affidavit, or
9 other competent evidence, but if you're going to add any
10 factual statements --

11 HONORABLE STEPHEN YELENOSKY: Yeah.

12 PROFESSOR DORSANEO: -- then you need more
13 affidavits. Maybe that's not worded all that well either.
14 It's hard to not make it turn in on itself.

15 CHAIRMAN BABCOCK: Frank.

16 MR. GILSTRAP: What would be wrong with just
17 saying that "All factual statements of the petition must
18 be supported by sworn testimony, affidavit, or other
19 competent evidence," period?

20 PROFESSOR DORSANEO: Nothing.

21 HONORABLE SARAH DUNCAN: Because what --
22 Judge Christopher, help me out here, because I believe
23 this was your concern, that somebody needs to be on the
24 line when signing and filing this petition; and the way
25 it's written now, the way it is in 52.3, there's no actor

1 in any of this. There's nobody that is certifying to the
2 court, "I've read all this evidence, this testimony, these
3 affidavits, this petition, they all mesh, everything is
4 supported" and there ought to be.

5 MR. GILSTRAP: Well, you don't don't need
6 that for a summary judgment proceeding.

7 HONORABLE SARAH DUNCAN: This is an
8 extraordinary proceeding.

9 MR. GILSTRAP: Oh, so what.

10 HONORABLE SARAH DUNCAN: Well, some of us
11 take that word seriously.

12 CHAIRMAN BABCOCK: Kent.

13 HONORABLE KENT SULLIVAN: I think you kind
14 of do for a summary judgment proceeding in that a judge is
15 in a posture of confirming independently that everything
16 is proven up by competent evidence. I think that what
17 Justice Duncan is talking about is there's a choice here,
18 sort of administratively. Do you want the lawyer to say
19 "I certified that is, in fact, the case" to allow this to
20 go forward as a threshold matter, or do you want to
21 require the record to be such that the judge or the
22 justices independently by looking at this can verify and
23 you must verify for them that, in fact, it is all
24 supported by competent evidence?

25 To me that's the choice that's being made

1 here, and it's an administrative policy choice. Is that
2 fair, do you think, Justice Duncan?

3 HONORABLE SARAH DUNCAN: Well, I thought
4 Judge Christopher made a very good point that somebody
5 ought to have to say this is true, "I've looked at it, and
6 this to the best of my knowledge is true," before we go
7 forward with looking at an extraordinary writ against a
8 trial judge.

9 HONORABLE KENT SULLIVAN: And the question
10 is do you want that to be the lawyer or do you want it to
11 be more or less witness by witness --

12 MR. GILSTRAP: The evidence.

13 HONORABLE KENT SULLIVAN: -- so to speak.

14 MR. GILSTRAP: The evidence.

15 HONORABLE KENT SULLIVAN: Yeah.

16 CHAIRMAN BABCOCK: Pam.

17 MS. BARON: Well, let me just give a little
18 history here because the way this debate started is we
19 took a sentence out of current Rule 52 that says, "All
20 factual statements have to be verified." Period, okay.
21 So we went from the person who is signing that affidavit
22 was saying everything in there is true, without the fudge
23 of saying, "or supported by the record," now, what we're
24 doing under what's on page eight is going to the opposite
25 extreme where you may not have any affidavit at all

1 supporting this extraordinary proceeding, and you have to
2 remember that the court of appeals when they get this have
3 to take a lot on faith from the party that's filing it.

4 They don't have a chain of record, a chain
5 of custody on the record. The only facts they have are
6 the facts that relator puts in their mandamus petition, so
7 this is a compromised position. What we offered at the
8 end of the last meeting was that you don't have to verify
9 that everything is true because you don't know that, you
10 don't know if the witness is really telling the truth, but
11 you do have to say, "I've looked at this and I feel
12 comfortable filing it."

13 HONORABLE SARAH DUNCAN: And there's
14 evidence.

15 MS. BARON: Yes.

16 HONORABLE SARAH DUNCAN: Whether it's true
17 or not true, there's evidence.

18 MS. BARON: Right. And ordinarily, you
19 know, sometimes there are extra pieces of information in
20 there about the proceedings that aren't exactly supported
21 by the record, and those do need to be supported by
22 somebody, so it's a compromise. I don't think it's
23 onerous, but I do think it gives a little more security to
24 the appellate court that's being asked to give
25 extraordinary relief to a party.

1 HONORABLE SARAH DUNCAN: And frequently to
2 do it --

3 MS. BARON: Yeah.

4 HONORABLE SARAH DUNCAN: To do something
5 quickly.

6 MS. BARON: In a matter of hours, right.

7 CHAIRMAN BABCOCK: Yeah, Jody.

8 MR. HUGHES: I just -- I wanted to bring
9 something up to clarify, and I guess maybe Bill wasn't
10 here at the time. This was actually back in the October
11 21 meeting, but I think the original version of what
12 appears on page eight was voted on and was approved 15 to
13 7, which is not at all to say don't reconsider it. The
14 additional language that was suggested by Justice Duncan
15 that was just added at the end of the meeting and sort of
16 left hanging there, I think it's a great idea to
17 reconsider it, but I think somebody suggested early on
18 that Professor Dorsaneo's original version, what appears
19 at page eight, did not pass, and it did. It passed 15 to
20 7.

21 HONORABLE SARAH DUNCAN: It did.

22 MR. HUGHES: And I'm only saying that out
23 there to clarify the record on this.

24 HONORABLE SARAH DUNCAN: That was why -- and
25 I changed my vote.

1 MR. HUGHES: And that is included in the 15
2 to 7.

3 HONORABLE SARAH DUNCAN: Right. Because
4 Chip allowed me to change it --

5 MR. HUGHES: Right. Right.

6 HONORABLE SARAH DUNCAN: -- for some odd
7 reason that I didn't understand then and don't understand
8 now.

9 CHAIRMAN BABCOCK: Maybe because you hadn't
10 dipped your finger in purple ink yet.

11 HONORABLE JANE BLAND: I misled everybody,
12 and I'm sorry about that, but Judge Duncan led the charge
13 on this, and it was an issue about whether or not there
14 would have to be any sort of verification, so I'm -- and
15 this one has verification.

16 HONORABLE SARAH DUNCAN: Well, and that's
17 why I say if I can't go back and read the record I can't
18 explain all this, but I know --

19 CHAIRMAN BABCOCK: Okay. And that's the
20 problem we're having. Frank.

21 HONORABLE SARAH DUNCAN: -- that solved all
22 of our concerns.

23 MR. GILSTRAP: I think we have accurately
24 reconstructed what happened. I really do. I think that's
25 what I recall, and I think the judges' proposal is better

1 than what we adopted, and I think we ought to vote on it.

2 PROFESSOR CARLSON: I do, too.

3 CHAIRMAN BABCOCK: Okay. What do you think,
4 Bill?

5 PROFESSOR DORSANEO: I think Frank's
6 proposal was better than either one. I don't like -- I
7 don't see why I need to -- I see why things need to be --
8 that are in papers filed with the court need to be -- need
9 to have factual support, not just be made up, okay. I can
10 see that. I don't see why a verification is some sort of
11 special verification of a brief filed in appellate court
12 needs to be verified. I don't see the reason for that.

13 MR. GILSTRAP: Why isn't the attorney's
14 signature enough?

15 PROFESSOR DORSANEO: I think if the rule had
16 said that everything needs to be supported by competent
17 evidence, that would be adequate, but I don't feel
18 strongly enough about it one way or the other as to
19 exactly what the procedure ought to be, but I --

20 CHAIRMAN BABCOCK: Okay. Well, why don't we
21 have a vote, page eight versus Justice Duncan's proposal
22 or language?

23 HONORABLE SARAH DUNCAN: Gang of four's
24 proposal. It's not just me.

25 CHAIRMAN BABCOCK: Okay. Gang of four's

1 versus page eight.

2 HONORABLE SARAH DUNCAN: I was responding to
3 other points made by more competent people.

4 CHAIRMAN BABCOCK: Justice Jennings.

5 HONORABLE TERRY JENNINGS: Well, what about
6 the idea of keeping the rule as it is right now?

7 CHAIRMAN BABCOCK: That would always be an
8 option, but the Court asked us to look at it, so if we're
9 going to change it then we've got two alternatives, and
10 which one does everybody prefer? Carl.

11 MR. HAMILTON: On Justice Duncan's it says
12 "the person filing the petition." "Person" means the
13 lawyer or the party?

14 HONORABLE TRACY CHRISTOPHER: Party.

15 HONORABLE SARAH DUNCAN: Whichever one is
16 filing the petition.

17 MR. HAMILTON: Well, the lawyer is signing
18 it. Are you talking about whoever signs the petition, or
19 are you talking about the party for whom the petition is
20 being signed?

21 HONORABLE SARAH DUNCAN: Or "person signing
22 it" is fine with me.

23 MR. HAMILTON: Which would be the lawyer.

24 HONORABLE SARAH DUNCAN: Well, in some cases
25 it would be the lawyer. In other cases it would be the

1 party.

2 MR. HAMILTON: Well, if there's no lawyer,
3 okay.

4 CHAIRMAN BABCOCK: Okay. Yeah, Bill.

5 PROFESSOR DORSANEO: In answer to the last
6 point about leaving it the way it is, I think the problem
7 is the personal knowledge requirement, okay, but we don't
8 need to have a personal knowledge requirement. We could
9 have probably accomplished the same thing -- I guess Texas
10 lawyers don't believe if somebody verifies it on
11 information and belief that that's -- that they aren't
12 lying.

13 HONORABLE SARAH DUNCAN: But that's not an
14 affidavit under the terms of the statute.

15 PROFESSOR DORSANEO: We do have some of
16 those affidavits recognized in our procedure. That's not
17 our normal rule. That's the New York rule.

18 HONORABLE TERRY JENNINGS: Most of these are
19 going to be addressed on like a mandamus situation where
20 basically the facts being verified are basically that on
21 such-and-such a date the trial court did X or whatever and
22 so forth and so on, to basically tell the appellate court
23 what happened below, right?

24 PROFESSOR DORSANEO: Uh-huh.

25 HONORABLE TERRY JENNINGS: And that

1 doesn't -- the way the rule reads now, that doesn't have
2 to be the actual appellate lawyer filing the petition.
3 They could have the trial counsel testify to what the
4 trial court did below or how the proceedings -- you know,
5 on such-and-such date there was a hearing and yadda,
6 yadda, yadda. So I'm having a hard time understanding
7 what all the fuss is about. The rule as it reads seems to
8 take care of that. It doesn't require that any particular
9 person sign the affidavit, but you do need someone with
10 personal knowledge to tell the appellate court what
11 happened below, don't you?

12 HONORABLE TRACY CHRISTOPHER: That's my
13 point. I mean, that -- the change seemed to take away the
14 requirement of personal knowledge. I liked the rule as it
15 was and then we have the alternative verification as a
16 fix.

17 CHAIRMAN BABCOCK: Okay. We're going to
18 vote. The choices are page eight versus gang of four.
19 Everybody who's in favor of page eight raise your hand.

20 Everybody in favor of the gang of four
21 proposal?

22 PROFESSOR DORSANEO: What one?

23 MR. HAMILTON: Which one?

24 CHAIRMAN BABCOCK: All right. Interestingly
25 enough, the page eight proposal garnered four votes and

1 the gang of four proposal garnered 18 votes, so gang of
2 four wins, and let's go onto the next one.

3 HONORABLE DAVID PEEPLES: Chip, we weren't
4 given a choice to keep it the way it is.

5 CHAIRMAN BABCOCK: Well, this is a
6 recommendation to the Court --

7 HONORABLE DAVID PEEPLES: Okay.

8 CHAIRMAN BABCOCK: -- and they can always
9 keep it as it is.

10 HONORABLE DAVID PEEPLES: Are they
11 interested in knowing how this body feels about that?

12 CHAIRMAN BABCOCK: About keeping it as it
13 is?

14 HONORABLE SARAH DUNCAN: Why not just have a
15 vote on that?

16 CHAIRMAN BABCOCK: Well, if you're
17 interested in telling them, why not. How many are in
18 favor of keeping it as it is?

19 HONORABLE NATHAN HECHT: Both sides voting
20 one.

21 HONORABLE STEPHEN YELENOSKY: Now the gang
22 of two and a half.

23 CHAIRMAN BABCOCK: Eleven people want to
24 keep it as it is, and how many people want some form of
25 change?

1 MR. DAWSON: The other half of the gang of
2 four.

3 HONORABLE STEPHEN YELENOSKY: Or the gang
4 that couldn't shoot straight.

5 CHAIRMAN BABCOCK: Okay. Eleven want to
6 keep it as it is, eight want to change it.

7 HONORABLE SARAH DUNCAN: That would be the
8 two members of the gang of four who actually have to sign
9 these petitions and know that they do not have personal
10 knowledge of everything in the petition.

11 CHAIRMAN BABCOCK: So noted. All right.
12 Rule 53.7, is that something we have to talk about or not?

13 PROFESSOR DORSANEO: We're done.

14 CHAIRMAN BABCOCK: We're done with that?
15 Okay, good.

16 All right. Now, we are onto the letter from
17 Justice Bland behind Tab 5.

18 PROFESSOR DORSANEO: With my name on it, but
19 I respectfully defer.

20 CHAIRMAN BABCOCK: Justice Bland, do you
21 want to --

22 HONORABLE JANE BLAND: That's because I
23 mailed it to you.

24 CHAIRMAN BABCOCK: You want to tell us what
25 you're thinking?

1 HONORABLE JANE BLAND: Well, you know, I
2 guess it used to be that oral argument was of right in the
3 intermediate courts of appeals, and now the intermediate
4 courts of appeals can determine whether or not argument
5 would be helpful, and this would be an addition to the
6 rule governing the right to oral argument that would allow
7 parties like they do on the Federal side of the circuit to
8 file a statement regarding oral argument, because although
9 the courts of appeals handle their oral argument calendar
10 differently all across the state, everybody has to make
11 the decision about whether or not to grant argument, and
12 many of them make the decision at the time of docketing,
13 which is well before the case is submitted.

14 So if you had a statement regarding oral
15 argument, I think it would help appellate courts match
16 cases that are suited to argument with argument and would
17 help practitioners who are really interested in getting
18 oral argument to have a place where they could explain why
19 it would be helpful, because although it used to be that
20 if you asked for oral argument on the front cover of your
21 brief, you had a right to it; and I think even for a while
22 after there if you asked for oral argument on the cover of
23 your brief, you would automatically get it; and some
24 courts of appeals still, you know, routinely grant it if
25 you ask for it. Others grant it much less frequently, and

1 the trend in terms of overall numbers of arguments among
2 all the courts of appeals has declined in the last five
3 years, so this is an effort to allow counsel a place to
4 educate the intermediate appellate court about the reason
5 argument would or would not be helpful in the decision of
6 this case, and the language is just similar to what the
7 Federal rule states.

8 HONORABLE BOB PEMBERTON: May I ask a quick
9 question?

10 CHAIRMAN BABCOCK: Justice Pemberton.

11 HONORABLE BOB PEMBERTON: Do you envision it
12 being a separate document? I guess do you-all set
13 argument based on just a docketing statement? We usually
14 do it -- judges make a call based on briefs, which we've
15 already been encouraging counsel just to include some kind
16 of statement if they want to within the brief. When would
17 that be done?

18 HONORABLE JANE BLAND: Well, I think every
19 court does it differently, and you know, some courts, one
20 judge decides whether the case --

21 HONORABLE BOB PEMBERTON: Yeah.

22 HONORABLE JANE BLAND: -- goes onto the oral
23 argument calendar. Some courts decide it together. Some
24 decide it -- you know, you have to be at least 21 days in
25 advance.

1 HONORABLE BOB PEMBERTON: Yeah, I know,
2 but --

3 HONORABLE JANE BLAND: So chances are before
4 you've had an in-depth review of the briefing. I know one
5 court sort of automatically in their clerks offices say if
6 it's a summary judgment that's a nonargued case, so -- and
7 it's a court that grants a lot of arguments. It's just
8 for whatever reason summary judgment cases are over here.

9 HONORABLE BOB PEMBERTON: Will not be a
10 separate document and depends on local needs.

11 HONORABLE JANE BLAND: Yeah. I don't think
12 it would be a separate document. It would be in the brief
13 just before the statement of the case.

14 CHAIRMAN BABCOCK: Bill.

15 PROFESSOR DORSANEO: I'm not sure if I'm
16 reading the statistics right, but what is the landscape?
17 I mean, obviously if oral arguments are not routinely
18 granted, I'm probably going to want to say something more
19 than "oral argument requested," because I'm not going to
20 get it in your court. Unless I explain my myself a little
21 bit better, I wouldn't want to say that.

22 Now, you don't want me saying it in -- I
23 want to know am I going to say it in numbered pages or not
24 numbered pages; and if I'm going to say it in not numbered
25 pages I'd want -- you probably want to say how much I

1 could say or might set some limits on it; but those kinds
2 of both what's really going on questions and the practical
3 issues are involved with it. What happens? How many
4 times do -- these statistics look like oral argument
5 doesn't happen very often.

6 HONORABLE JANE BLAND: It varies a lot from
7 court to court, but I think -- and these numbers that I
8 attached, you know, there is a lot of issues, like
9 criminal cases are in there and the way that OCA keeps
10 track of them, you know, arguments for a particular year
11 may not be recorded here; but overall the number of
12 arguments over the last five years have gone down, even if
13 you take all the courts of appeals together, so --

14 PROFESSOR DORSANEO: A lot?

15 HONORABLE STEPHEN YELENOSKY: Yeah.

16 HONORABLE JANE BLAND: Well, I think it's
17 been steadily downward, and if we want to, you know -- and
18 I know there's been some interest among the appellate
19 practitioners in sort of why, and there have been -- I
20 think I have been on a couple of different panels over the
21 last couple years and that's been a hot topic, and it just
22 looked to me like one thing that could help is if you
23 think your case really needs argument to tell the court
24 why.

25 CHAIRMAN BABCOCK: Frank.

1 HONORABLE JANE BLAND: And as far as
2 placement, in the Federal rule it's not dictated and
3 people generally put it in the Roman numeral section of
4 the brief so it's not counted against their page limit,
5 and it's, you know, I don't think been a big problem,
6 unless -- I mean, I haven't filed one in Federal court in
7 a few years, but I don't think it's been a big problem.

8 CHAIRMAN BABCOCK: Frank.

9 MR. GILSTRAP: If -- you know, Justice
10 Bland's logic seems to me to be very clear and makes a lot
11 of sense. If the courts aren't going to grant oral
12 argument in all the cases, there's got to be some way they
13 decide, and as an advocate I'd like to know and I'd like
14 to have some input and tell them why I want oral argument
15 or why I don't want oral argument.

16 CHAIRMAN BABCOCK: Does anything preclude
17 you from doing that now?

18 HONORABLE SARAH DUNCAN: No.

19 MR. GILSTRAP: Well, where do I do it? Do I
20 do it -- I mean, that's the problem. Where do they look,
21 because they're not going to read the whole -- my
22 impression is they don't read the whole brief. In the
23 Fifth Circuit you get one page, usually one page, it's the
24 first page of the brief and it's kind of a mini-petition
25 for review and you take your best shot. I have no idea

1 whether they look at that in deciding it, but they don't
2 grant oral argument in all cases, and that's your chance
3 to tell them why. I mean, if you're not going to get oral
4 argument in all cases, there ought to be some reason why
5 and you ought to have some control over it.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: I don't think you
8 should have control over it. If you want to have input, I
9 think that's great; and we, like the Austin court, the San
10 Antonio court, any time we spoke we said, you know, "Tell
11 us why you think oral argument is appropriate in this
12 case. If we deny oral argument, please know that if you
13 file a motion for reconsideration, we will reconsider.
14 We're not guaranteeing you'll get argument, but we will
15 reconsider."

16 In response to the statistics, I need to
17 make the point that when I got to the court 12 years ago
18 we were not permitted to deny oral argument in criminal
19 cases, only in civil cases, and the rules were -- when the
20 amended rules came out, not the last set of amended rules
21 but the set before that, would have been '94, I think, the
22 rule permitted courts of appeals to deny oral argument in
23 criminal cases. A lot of the statistics, I'm not
24 saying -- I'm not denying that argument is denied in civil
25 cases. I'm saying that a lot of the denials are in

1 criminal cases.

2 PROFESSOR DORSANEO: Which used to be argued
3 orally all the time because they didn't really write
4 briefs once upon a time, the criminal cases.

5 HONORABLE SARAH DUNCAN: When I got there
6 they did write briefs, but we were not permitted to deny
7 argument in a criminal case. I'm not quite sure how a
8 court would decide whether a case should be argued based
9 on a docketing statement. I mean, some of the toughest
10 cases I have had have been summary judgment cases for one
11 reason or another, but if that's true then putting it in
12 the brief isn't going to help. It needs to be put with
13 the docketing statement, if there are courts who are
14 deciding whether to grant oral argument based on the
15 docketing statement.

16 CHAIRMAN BABCOCK: Justice Bland, then Judge
17 Yelenosky.

18 HONORABLE JANE BLAND: I'm not talking about
19 the docketing statement. I'm talking about docketing the
20 oral argument. Calendaring I guess would be a better
21 word, and I don't think there are courts that use the
22 docketing statement for that, but I do think that there
23 are courts that submit the case on the nonargument
24 calendar, get to submission, get to the submission
25 conference and say, "Oh, you know, it's too bad; we

1 probably should have argued this case," because it at
2 first blush didn't appear to be a case that warranted
3 argument and then you get to it and you really get into
4 the merits of it and you realize it should have been
5 argued; and this would just give you an opportunity in the
6 brief for the lawyers to explain; and, you know, it's true
7 that, yes, if you deny argument somebody can file a motion
8 and request that argument be heard; and I think those are
9 often granted; but if we could avoid all that and just go
10 ahead and set cases for argument --

11 CHAIRMAN BABCOCK: Justice Hecht wants to
12 make a comment.

13 HONORABLE NATHAN HECHT: While we're
14 commenting, I would just be interested in knowing what the
15 practitioners think they would say in the statement. "We
16 don't think the court's going to read the brief, so we
17 need to tell them something, some point," or "We haven't
18 done a very good job explaining it, so maybe oral argument
19 will help," or I mean --

20 HONORABLE JAN PATTERSON: "This is a case of
21 first impression."

22 PROFESSOR DORSANEO: "Complicated record,
23 long trial."

24 HONORABLE SARAH DUNCAN: It's like summary
25 of argument. It just gives a lawyer a place to highlight

1 and a judge or attorney at the court to focus on just the
2 considerations of oral argument without regards to the
3 merits.

4 MR. GILSTRAP: Kind of a one-page petition
5 for review is really what it is. This is why the case is
6 sexy, this is why you ought to be interested, and this is
7 why it ought to be argued, and, you know, it's one page,
8 but the idea is the court hasn't read the briefs when they
9 decide whether or not to grant oral argument. If they've
10 read the briefs, you don't need it.

11 CHAIRMAN BABCOCK: Well, on a deeper level,
12 too, this is in response to your question because you
13 wouldn't say this probably in your statement, but, you
14 know, we're living in a society where we're not talking to
15 each other anymore. I mean, we've got Blackberries and we
16 e-mail and we just don't talk, and we could do this
17 Supreme Court advisory stuff on the papers if we wanted
18 to, but there's a terrific dynamic --

19 HONORABLE STEPHEN YELENOSKY: But then there
20 would be no free lunch.

21 CHAIRMAN BABCOCK: Then there would be no
22 free lunch. Is there ever really a free lunch? And
23 there's something good that comes out of the dynamic of
24 talking to people, and especially when you're talking to
25 the people who are charged with deciding the case. I

1 mean, we all know that judges read their briefs, but they
2 also have law clerks that do a lot of the real heavy
3 lifting on reading and researching and writing, and these
4 statistics to me are shocking. I think maybe a lot of my
5 cases get set for oral argument.

6 HONORABLE SARAH DUNCAN: Yeah. I think most
7 people around this table's cases probably get set for
8 argument.

9 CHAIRMAN BABCOCK: But I'm just stunned by
10 some of these.

11 HONORABLE SARAH DUNCAN: Well, you need to
12 come look at the docket of any court of appeals
13 represented at this table, because there is an awful lot
14 of unargument-worthy stuff.

15 HONORABLE TOM GRAY: Actually, he needs to
16 read the briefs that are submitted to the courts of
17 appeals for, you know, a couple of hundred cases. You
18 don't have to read them all.

19 CHAIRMAN BABCOCK: Yeah, but one court only
20 had eleven arguments out of a thousand in a year. That
21 seems low to me, but maybe I don't know. Professor
22 Hoffman had his hand up first, then Justice Jennings.

23 HONORABLE STEPHEN YELENOSKY: You skipped
24 over me.

25 CHAIRMAN BABCOCK: Oh, Steve, I'm sorry.

1 HONORABLE STEPHEN YELENOSKY: It's just a
2 small drafting point, but based on what I've heard, the
3 right to oral argument used to mean two rights. It was
4 assumed we're going to have an oral argument because it
5 says "when the case is called for argument" and what that
6 first sentence really says is "At the oral argument each
7 party who has requested it may argue"; and then it goes to
8 the other right issue, which apparently no longer is a
9 right, which is whether you're going to have an oral
10 argument. So just in drafting it at least one thing it
11 shouldn't say, "right to oral argument" because that
12 implies that you're going to have one, so are we talking
13 about whether you're going to have an oral argument or
14 whether you get to argue, two different rights, and now
15 the difference is apparent.

16 CHAIRMAN BABCOCK: Have I got the order
17 right? Is it Professor Hoffman, Justice Jennings?
18 Somebody over here had their hand up. Pam did, and then
19 Judge Bland.

20 PROFESSOR HOFFMAN: My thoughts are that I
21 think, with Justice Hecht, it is not likely that
22 requesting the oral argument will often make a difference;
23 and I think that it's also probably not likely that
24 putting in the short statement will, in fact, persuade
25 courts to have oral arguments where they are not having

1 it. I think there is a lot of dynamic that goes on that
2 has nothing to do with what the lawyers say or would say
3 in addition beyond what they've already said in their
4 papers.

5 That all said, it's sort of hard to be
6 against it. To me this is sort of like the placard, you
7 know, "For better schools." You know, we're a group of
8 people who our job is to, most of us or many of us, even
9 judges and academics, we convince; and we do that through
10 writing most of the time; and so it seems like it's sort
11 of a -- I'm not going to say it's a no-brainer, but I
12 think I support it. It's hard to see what the substantive
13 argument is against giving people a place in a paragraph
14 or two to say why oral argument -- the court is free to
15 ignore it, and there may be other things going on.

16 By the way, relating to that last point,
17 look at these statistics comparing the First Court of
18 Appeals with the Fourteenth.

19 HONORABLE JANE BLAND: Thanks. Thanks for
20 bringing that up.

21 MR. TIPPS: We do that all the time.

22 PROFESSOR HOFFMAN: So that has nothing to
23 do with criminal law changing or any others. Right here
24 we have a nice control desk, and it looks like the First
25 Court of Appeals is playing a lot more golf than the

1 Fourteenth.

2 CHAIRMAN BABCOCK: Justice Hecht again.

3 HONORABLE NATHAN HECHT: I'm not against
4 oral argument. I think it's a very useful part of the
5 process, but I just wonder -- and maybe it serves a
6 purpose to have counsel focus on why they want it, but my
7 own experience is that a lot of time when counsel might
8 not have a very good idea of why they wanted it and we
9 might not have a very good idea of why we want granted it,
10 it still is useful enough in enough instances that I would
11 never want the default to be the other way. I mean, I
12 wouldn't want to think you should be thinking of reasons
13 not to argue it rather than reasons to argue it because --
14 now, I know on the court of appeals, because I was there
15 for a while, a lot of the criminal cases just -- in fact,
16 when I was on the Dallas court, we set nine cases for
17 argument every week, and rarely would more than one show
18 up, but frequently none of the nine would show up, and so
19 even if we set them, the lawyers just didn't come in, but
20 that was not true of the civil side.

21 CHAIRMAN BABCOCK: Justice Jennings was
22 next, I think.

23 HONORABLE TERRY JENNINGS: Two points. I'm
24 fully in favor of amending the rule, but just to give you
25 a little background on it, I don't think you can just read

1 the rule and the amendment without considering 39.8; and
2 39.8 says, "Under the circumstances where a court of
3 appeals may decide the case without oral argument"; and
4 that is a circumstance where argument would not
5 significantly aid the court in determining the legal and
6 factual issues presented in the appeal; and on some of
7 these panels that Judge Bland and I have appeared on where
8 the Bar is -- many members of the Bar are very much upset
9 about this decline in the oral argument at the
10 intermediate courts of appeals, and I think rightly so
11 given these statistics.

12 The point is, is to give the entire panel an
13 opportunity to kind of consider maybe, well, we should
14 have argument in this case and tell us, "You, as a lawyer.
15 Don't just rely on the rule as it's written now by, you
16 know, writing this little statement on the front of your
17 brief saying 'oral argument requested.'" That doesn't
18 tell us anything, but if you can tell each member of the
19 panel as they're reading the brief when they open it up,
20 "Here's why oral argument in this case would significantly
21 aid you in making your decision," that would be valuable
22 to us, and some of this may be a problem unique to certain
23 courts.

24 Obviously if you look at some courts here,
25 like Dallas, in 2001 they had 61 oral arguments. Well,

1 they've actually dramatically increased. In 2006 they had
2 277 arguments. Fort Worth has remained steady. From 2001
3 they had 157 arguments to 2006, 146 arguments, and last
4 time I looked at their statistics, they are both very
5 productive courts and yet, they're still having a lot more
6 arguments than some other courts are having. Then if you
7 look at Corpus Christi, you know, they went from 172
8 arguments down to 11, and our court went from 135 to 52
9 arguments. So there's something wrong here, and to me
10 it's probably more than just amending the rule.

11 I would probably go further than Judge
12 Bland. The Federal rule says basically that if any member
13 of a panel wants to hear argument, the panel will hear
14 argument. I think the way our court now works is we kind
15 of defer to the assigned judge. When a notice of appeal
16 is filed it's assigned to a judge, and I was talking to
17 Bob. Different courts operate differently in this regard.
18 We kind of -- we defer to basically the assigned judge.
19 They review the case first, set it on the docket, and they
20 say up or down on oral argument.

21 Well, the other members of our panel don't
22 really see that case until a week before it's submitted
23 when we get the briefs and a proposed pre-sub opinion. By
24 that time the 21-day notice letter has been issued, a
25 decision has made -- been made to decline oral argument,

1 so accordingly, sometimes when we come into argument the
2 decision has already been made and then we get to a point
3 where, you know, maybe one or two -- one or the other two
4 panel members think "Well, you know, maybe this is a case
5 that merits argument," and sometimes we do go ahead and
6 the judge will defer and say, "Okay, well, if you think we
7 ought to have argument, we ought to have argument," but
8 there is a serious problem here. I think maybe one way to
9 address it would even be to go further and copy the
10 Federal rule and say, well, if one judge on the panel
11 wants to hear argument, they ought to hear argument.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE JANE BLAND: That's an IOP.

14 CHAIRMAN BABCOCK: Wait a minute. It was
15 Pam.

16 HONORABLE JANE BLAND: I was just telling
17 him it's not in the rule. It's not in the Federal rule.

18 HONORABLE TERRY JENNINGS: Well --

19 CHAIRMAN BABCOCK: Internal operating
20 procedure?

21 HONORABLE TERRY JENNINGS: Well, Rule 34(a),
22 and I think I'm looking at the rule, not the Fifth Circuit
23 rule, "Oral argument must be allowed in every case unless
24 a panel of three judges who have examined the brief and
25 record unanimously agrees that oral argument is

1 unnecessary for any of the following reasons."

2 HONORABLE JANE BLAND: I think that's Fifth
3 Circuit.

4 CHAIRMAN BABCOCK: Pam, waiting patiently.

5 MS. BARON: That's me.

6 HONORABLE TERRY JENNINGS: No, because I
7 have --

8 HONORABLE JANE BLAND: Okay. Well, good.
9 I'm happy for that.

10 MS. BARON: I think it's a great idea. I
11 think as a practitioner I think it's useful to try and
12 give your input to the court before a decision is made
13 instead of trying to get them to change their mind after
14 the fact. I guess in terms of placement, though, I agree
15 with Professor Dorsaneo. I think it would need to be
16 mentioned in the briefing rule. There would need to be a
17 place for it.

18 I've already done this before in some cases
19 where I am concerned that the court won't hear argument or
20 will issue -- I've even explained why they shouldn't issue
21 a memorandum opinion in my case, why it should be a
22 published opinion, before they even write it; and I think
23 it's useful and it also maybe helps with the Bar's
24 expectation. If what you're going to write in that
25 statement is "This is a routine property division case

1 that involves, you know, the application of existing law
2 to really boring schedules of property," you know that
3 you're probably not going to get argument; and you can
4 kind of tell your client that it's very unlikely; but
5 there are situations where the parties have engaged at
6 trial with a fairly significant dispute over what the law
7 is; and it's nice if you can tell the court of appeals
8 that before they make the decision whether to hear
9 argument, because in those particular cases it is very
10 useful to allow the court to ask questions to know what
11 the impact of making that decision is going to be, because
12 it's always not just the parties before them that will be
13 affected by that decision.

14 But I would, you know, say it could be an
15 optional statement, but it should be in the brief. A
16 party may explain to the court the reasons that argument
17 would be beneficial to the court in making its decision in
18 a case, and I would include it in a preliminary Roman
19 numeral part of the brief.

20 CHAIRMAN BABCOCK: I think it was Justice
21 Bland that had her hand up and then Sarah and then Bill.

22 HONORABLE JANE BLAND: I was just going
23 to -- the reason that I didn't -- I thought it would be in
24 the briefing rules, too, but on the Federal side it's in
25 this little oral argument section, and we have this same

1 thing on the state side, and so that's why I put it in
2 there. And as far as it being in 39.1, well, you know, it
3 might be that 39.1 entitled "Right to Oral Argument" is
4 not exactly correct because it's got the "except as
5 provided in 39.8," but, you know, to me if somebody was
6 looking about oral argument, that's where they would look,
7 but, you know, wherever you want to put it is fine.

8 As far as Justice Jennings' comment, if this
9 committee is interested in tracking that, I would be
10 interested in hearing it, but I mean, I think we would
11 need input from all the appellate courts about whether or
12 not they would want a rule like that.

13 CHAIRMAN BABCOCK: Okay. Sarah.

14 HONORABLE SARAH DUNCAN: Just two quick
15 points. One is, at least at the San Antonio court, the
16 staff attorney would go through all of the -- her judge's
17 cases that were set for a particular day or that came at
18 issue, and there would be a stack like this, and that
19 staff attorney is responsible for flipping through all
20 those briefs and making a recommendation to her judge
21 about whether oral argument should be granted. If any
22 member of the panel wants oral argument I don't think our
23 IOPs -- the court's IOPs said that it had to be granted,
24 but that was certainly the custom at the Fourth Court of
25 Appeals.

1 I support this proposal, don't get me wrong.
2 As far as the actual proposal, I think we need a little
3 bit of work on the language because it says, "Any party
4 who has filed a brief and who has timely requested oral
5 argument may argue the case to the court," and we
6 specifically say in 39.7, "Even if a party has waived oral
7 argument by not requesting it on the cover of their brief,
8 the court may direct the party to appear and argue," and
9 there could be -- you know, just because you forget to put
10 it on the cover of your brief, if you've got a section in
11 your brief entitled "Reasons for Granting Oral Argument"
12 that ought to take precedence to me.

13 HONORABLE JANE BLAND: That's the current
14 language. The only thing new is the bold.

15 HONORABLE SARAH DUNCAN: Right, but then
16 further down in the rule --

17 CHAIRMAN BABCOCK: Bill, then Pam. Bill,
18 Frank, Pam.

19 PROFESSOR DORSANEO: Does anybody know where
20 it says in our appellate rules that you put "oral argument
21 requested" on the front cover of the brief?

22 HONRABLE SARAH DUNCAN: Uh-huh.

23 PROFESSOR DORSANEO: Where?

24 HONRABLE SARAH DUNCAN: It's in 39.7.

25 PROFESSOR DORSANEO: 39.7.

1 MR. GILSTRAP: It doesn't belong there.

2 PROFESSOR DORSANEO: Uh-huh.

3 CHAIRMAN BABCOCK: Frank.

4 MR. GILSTRAP: Okay. It needs to go in 38.1
5 in the appellant's brief.

6 PROFESSOR DORSANEO: Yeah.

7 MR. GILSTRAP: It needs to be right after
8 identity of parties and counsel. I think that's how the
9 Fifth Circuit does it. The first thing that the briefing
10 attorney opens up and looks and says, "identity of parties
11 and counsel," anybody have a conflict. Well, I don't know
12 whether the briefing attorney looks at that, but the judge
13 does; second page, reasons for granting oral argument.
14 That way it's there. It doesn't belong in 39 because --

15 PROFESSOR DORSANEO: Right.

16 MR. GILSTRAP: -- you know, that doesn't
17 tell you how -- that's not where you look when you see how
18 to write the brief.

19 PROFESSOR DORSANEO: I'm not sure where it
20 goes, but I think it does go -- I think it should be put
21 in 38.1. I'm not sure whether it's first page, second
22 page, fifth page. The templates that I have seen for, you
23 know, briefs written in other places, it is in the
24 beginning pages, not necessarily right there at the front,
25 and I don't think it should count in the number of --

1 MR. GILSTRAP: Right.

2 PROFESSOR DORSANEO: -- number of -- in the
3 50 pages.

4 CHAIRMAN BABCOCK: Pam.

5 MS. BARON: Just a little bit off subject,
6 but as part of the certification to become board certified
7 in civil appellate law you have to have made a certain
8 number of oral arguments, and as a former chair of the
9 appellate section, our members were having trouble meeting
10 that requirement in order to get certified, and I guess
11 this would give them an opportunity to explain, you know,
12 maybe why.

13 HONORABLE TRACY CHRISTOPHER: "I've done
14 five and I need one more."

15 MS. BARON: And one thing our section is
16 doing is we're working on some pro bono pilot projects,
17 one with the Third Court of Appeals in Austin, that would
18 at least try and encourage the court to grant argument in
19 those cases in which our members are willing to take on a
20 case and represent a party pro bono, and that would help
21 them with certification so we could tie that together, but
22 it is very difficult for our younger lawyers to meet the
23 requirements for board certification right now.

24 CHAIRMAN BABCOCK: Justice Gray.

25 HONORABLE TOM GRAY: A number of comments.

1 First of all, kind of to address one of Frank's comments,
2 and now Frank's gone, but I never recommend advancement
3 without argument without a draft opinion and that draft
4 opinion being provided to the two other judges on the
5 court, so we're well into my cases before that decision is
6 made. I recommended something very similar to this for
7 our local rules when we were reviewing them. It got shot
8 down, but I actually decided ultimately that we didn't
9 need local rules anyway, but the local procedure differs
10 so much from court to court, I think the local rules, if
11 you're going to do something like this, is the place to do
12 it rather than -- so it's applicable to your court and not
13 other courts.

14 Basically Pam Baron's position, as I
15 understand it, is she takes the role of an advocate, and
16 this is why you do it, and so this is why it's important
17 to me and why this case should be important to you, and
18 make that pitch to us in the form of a motion or other
19 argument.

20 We see on the courts of appeals something
21 very close to this in the criminal cases in -- when they
22 file a petition for discretionary review, we have the
23 opportunity to see those before they're actually filed
24 with the Court of Criminal Appeals, so it's a very
25 different procedure than with the Supreme Court, and

1 there's almost always one of three reasons given. It --
2 we decided a significant issue of state law that had not
3 been previously decided, it was -- we decided it contrary
4 to the existing precedent of the high court or that there
5 is contrary precedent in another court of appeals; and
6 that really doesn't help us decide, or if that was
7 provided to us on the front end, it's just very
8 repetitious, it gets very rote.

9 I think that's what you'll see here. I
10 think when Pam files a special motion that says, "This is
11 why this case is important," then you've identified a case
12 that's more likely to need oral argument; and I think
13 there's a significant difference between having this in
14 the court of appeals requirements versus the Supreme Court
15 because -- and the need for oral argument because at the
16 Supreme Court they have the opportunity to not review it
17 at all and they're making a decision -- they've already
18 decided they want to review it, before, you know, they get
19 there; and so the oral argument in the Supreme Court is
20 much more important, is what I'm saying, in each case,
21 because they've already had that discretionary review and
22 have decided they're going to hear it; and in the court of
23 appeals we don't have that option of saying -- there are a
24 lot of cases you can look at on the briefs and say, we --
25 you know, question whether or not it should have been

1 filed as an appeal in the first place, whether or not
2 there was merit to it, and certainly didn't justify oral
3 argument that had been requested. So because this is just
4 adding another feel good provision to a rule that already
5 would accommodate it, I don't think it's a necessary
6 change.

7 CHAIRMAN BABCOCK: Justice Patterson.

8 HONORABLE JAN PATTERSON: I think I agree
9 with most of that, and I could go either way on this rule.
10 I don't feel strongly about it one way or the other, but I
11 think that we should not assume that there is any
12 relationship between the presence or absence of this kind
13 of statement and the number of oral arguments. I think
14 that is a false assumption that there is any relationship
15 between them. The reason arguments have dropped off are
16 for other reasons.

17 I do think that we get a lot of
18 information -- we do it as a practice tip and commonly
19 give it out as a practice tip, and the practitioners in
20 the district, more often than not if they want oral
21 argument they include it or they know that if they file a
22 motion for reconsideration that it's almost automatic,
23 although they don't have to do that, I think, anymore; but
24 we get a lot of information in the table of contents; and
25 I think the practice is -- one reason not to have it is

1 because the practices do vary among the courts so much as
2 to whether it's done by a staff attorney, a single staff
3 attorney, the judge's staff attorney, the judge.

4 I look at all of these briefs and make a
5 determination on oral argument, and what's really helpful
6 is the table of contents. The good practitioners commonly
7 and automatically include a statement of oral argument
8 because they know that perhaps the statement on the brief
9 is no longer sufficient, so I think it's become rather
10 automatic. I do think it is an advocacy piece, so I'm not
11 sure how informative it really is. I do think there are a
12 few items they could include in that. It's usually about
13 a half a page, but to add another requirement for the
14 lawyers when those who want to do it know that they can
15 include it, I think is -- makes it -- makes it mandatory
16 for those who may not know about it or may not want to do
17 it or it might add more work for them.

18 The courts uniformly have different points
19 at time in which they make these decisions, so whether
20 it's done when the appellant's brief comes in or when both
21 briefs come in or the notice of appeal, they're all done
22 at different times and by different methods; and I have
23 one other reason why I think perhaps now is not the time
24 to change it, and that is that I think we ought to be
25 cognizant of the fact that every time we change a rule

1 practitioners have to figure out what the changes are and
2 another change is down the way and another rule book, and
3 I think that if we can do these -- save them up and do
4 them at a time when we want to do much more of a wholesale
5 change, that that's the time to make changes like this.
6 If a rule ain't broke, dot, dot, dot.

7 CHAIRMAN BABCOCK: Yeah.

8 HONORABLE JAN PATTERSON: Or as Judge
9 Jennings says "yadda, yadda, yadda."

10 CHAIRMAN BABCOCK: Yeah, but before you
11 yadda, yadda, Judge Jennings, Buddy.

12 MR. LOW: All right. I totally agree. I
13 was just sitting here thinking about how long it's going
14 to be before there's an article in the Bar Journal or
15 something, "How to Get Your Oral Argument Granted." It's
16 going to be "First, this will have great impact on the
17 jurisprudence in the state. Secondly, judges have many
18 questions, and I want to be sure you're well-informed," so
19 I need -- and you're going to see and West will have a
20 form book on it. So as a practical matter I think the way
21 to do it is if you don't grant it, get something yourself
22 and put it together on a motion to reconsider whether you
23 get oral argument, but that's all.

24 CHAIRMAN BABCOCK: Yeah. Justice Jennings.

25 HONORABLE TERRY JENNINGS: I respectfully

1 couldn't disagree more. I think the rule is broken
2 because I think in a way it's deceptive, because what this
3 is telling you is basically, look, you put your little
4 request on the cover and basically that's the end of the
5 story, and if you don't get argument, there's nothing you
6 can do about it. I think it's important for the
7 practitioners to know and give them some guidance on this
8 part, saying you can include at least a paragraph or a
9 page, certainly no more than a paragraph or page, telling
10 us why in this particular case. This isn't your normal
11 summary judgment; there are recent cases out of the
12 Supreme Court have made this issue influx or whatever. I
13 think that's critical for every single person.

14 Part of the problem is that we're all
15 fighting a huge volume; and, you know, I'm not only
16 handling my cases and making a decision on my cases, but
17 also my fellow panel members. You know, on our court
18 typically a judge authors anywhere from 65 to 75 opinions
19 a year, and then on top of that you're participating in
20 twice as many more cases as that, and if you can give me a
21 summary that would help me make a decision to
22 intelligently grant or deny oral argument, you know, tell
23 us, you know, what is it about this case that doesn't, you
24 know -- tell us what it is about this case where oral
25 argument would significantly aid the court in determining

1 legal and factual issues presented in this appeal.

2 I have been in more situations where I have
3 regretted not having argument than having argument. I
4 like to use argument to test. You know, you read the
5 briefs, you read the pre-sub, you go in with kind of an
6 idea of how the case should come out, you give the counsel
7 a chance to refute that, and then sometimes I have had my
8 mind changed in oral argument; and to me I would rather
9 err on the side of having more arguments than fewer
10 arguments.

11 I don't think anybody can deny there is a
12 huge problem here. The UT Appellate Conference, the State
13 Bar Appellate Conference has noted this in the last two
14 sessions. They're going to talk about it again this
15 summer, I'm sure, in one respect or another. The State
16 Bar is working on something like this. It's a problem
17 that we can't just say, "Oh, it's not there."

18 HONORABLE JAN PATTERSON: But do you
19 think --

20 HONORABLE TERRY JENNINGS: But the bottom
21 line is I do think this deceptive. Well, you just request
22 oral argument; and if you don't get it, there's not a darn
23 thing you can do about it; whereas, you know, all you have
24 to do, if you could tell us in a paragraph why this is a
25 little bit different than your normal summary judgment or

1 something like that, I mean, how can you be opposed to
2 that?

3 MR. LOW: But, no, no, I'm not opposed to
4 oral argument, but in your court, nobody -- if you don't
5 grant it, you won't allow them to file a motion to
6 reconsider? Are you just going to throw it in the
7 wastebasket and do nothing?

8 HONORABLE TERRY JENNINGS: But certainly,
9 but the problem is, is the way the rule is written now. I
10 think a lot of practitioners are reading the rule and
11 saying, "Look, all we can do is put this statement on
12 there, and if the court doesn't agree that this case --
13 oral argument should be granted in this case, we're
14 stuck."

15 MR. LOW: Then you need to educate the
16 lawyers rather than change the rules, if they can file a
17 motion.

18 CHAIRMAN BABCOCK: Judge Patterson.

19 HONORABLE JAN PATTERSON: Well, I think I'm
20 probably --

21 MR. GILSTRAP: You need a *Bar Journal*
22 article.

23 HONORABLE JAN PATTERSON: -- the biggest
24 proponent of oral argument, but are you telling me that
25 you would be more likely to grant more oral arguments with

1 that statement? I mean, if that's -- if you say "yes" and
2 other judges say "yes" then I'm for it, because I think we
3 ought to have a lot more oral argument, but I don't think
4 there is any relationship between that, and our lawyers
5 routinely include these, and I'm surprised that there are
6 some that think you can't.

7 HONORABLE TERRY JENNINGS: What's more
8 helpful a statement on the cover of the brief saying,
9 "oral argument requested" or a paragraph when you open the
10 brief up saying, "Here's why oral argument would help you
11 decide this case"?

12 HONORABLE TRACY CHRISTOPHER: So --

13 HONORABLE TERRY JENNINGS: Presuming you get
14 an intelligent paragraph telling you why it would be
15 helpful.

16 CHAIRMAN BABCOCK: Judge Christopher.

17 HONORABLE TRACY CHRISTOPHER: Well, what
18 strikes me is that in some jurisdictions, apparently,
19 people routinely are adding these paragraphs, even though
20 it's not provided for in the rules and people are
21 routinely asking for a rehearing on the denial of oral
22 argument, which is not included in the rules. I mean,
23 that seems like you've got to be kind of part of the club
24 to know that you can do either of those two things. It
25 ought to be in the rule.

1 HONORABLE BOB PEMBERTON: Yeah.

2 CHAIRMAN BABCOCK: Justice Pemberton.

3 HONORABLE BOB PEMBERTON: I agree with that.
4 I mean, what we've got now is sort of if you happen to go
5 to CLE conference and hear the judge say you can do this,
6 you're in the club and you know to file these things and
7 we won't sanction you for doing so; but if our philosophy
8 of the rules is as I thought it was to be user-friendly
9 and folks who perhaps maybe don't do appeals all the time,
10 we want them to be able to pick it up and kind of know
11 what the rules are, it might be helpful to have a specific
12 provision there saying, "Yes, in this day and time the
13 courts aren't granting as many arguments. You get your
14 shot to say some reasons why they ought to and why it
15 would aid the court" and it wouldn't count against your
16 50-page limit.

17 CHAIRMAN BABCOCK: Justice Bland.

18 HONORABLE JANE BLAND: I think the only
19 basis for comparison we have is the Federal side, so I
20 would be interested for people to share their experiences
21 on the Federal side; but I know when I requested oral
22 argument and I had crummy reasons for it, I didn't get it;
23 and if I requested oral argument and I had good reasons, I
24 did; and maybe that just had to do with the -- you know,
25 that they had read the briefs and they would have granted

1 them anyway; but I have to think that it didn't hurt that,
2 you know, that if I had good reasons, I had them in there
3 for them to look at, and if I had crummy reasons, they
4 realized that I shouldn't waste their time.

5 HONORABLE JAN PATTERSON: So you think we'll
6 restore oral argument with that statement?

7 HONORABLE JANE BLAND: No, I'm not promising
8 that. I'm just saying it would give every litigant a
9 chance to educate the judge, the panel, the reviewing
10 attorney, whoever, in a quick way without having to review
11 the entire brief why it should be calendared or should not
12 be calendared on the oral argument docket.

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH DUNCAN: I think I'm one of
15 the people who has been advocating for more constraints on
16 when to grant oral argument. I have done so despite my
17 belief that oral argument is a good thing; but I came to
18 believe after looking at the volume at the court of
19 appeals that while it may be a good thing, it is a luxury;
20 and as long as the Legislature is tying the courts of
21 appeals funding to the number of cases, the clearance rate
22 of that court of appeals, this is just reality; and that's
23 our practice tip to the lawyers in our district, is "The
24 reality is we've got to have 100 percent clearance rate to
25 get the funding we need from the Legislature. So, given

1 that, tell us why your case deserves oral argument, why it
2 will help us decide your case more quickly," because
3 that's our goal, is to decide cases quickly and correctly;
4 but I completely agree that you shouldn't have to be a
5 member of the club or a member of a group that's heard
6 Judge Pemberton talk about it or Judge Bland talk about or
7 Judge Patterson talk about you can include this in your
8 brief, nothing prohibits it. You can file a motion for
9 reconsideration, nothing prohibits it. You shouldn't have
10 to be a member of a club. So if this is better since it
11 levels the playing field for all lawyers who read the rule
12 books, and that's not by any stretch of the imagination
13 all lawyers, and from my perspective it enables the court
14 to work more efficiently in weeding out the cases that do
15 merit oral argument, how can you, Tom Gray, be against it?
16 And I'm saying that with a smile on my face, but really
17 and truly, I mean, are you concerned that people -- that
18 courts are going to strike briefs because the statement
19 isn't included?

20 HONORABLE TOM GRAY: God, I would hope not
21 after the 44.3 discussion we had before the --

22 HONORABLE SARAH DUNCAN: There have been
23 years that I was an appellate lawyer that that would have
24 happened in some places in the eastern part of Texas, but
25 if it helps the court more efficiently identify those

1 cases that need to be argued and it helps the lawyer feel
2 that they have had input into the decision-making process,
3 how can it really be a bad thing?

4 HONORABLE TOM GRAY: Well, I'm fully
5 confident that when the recodification is done this
6 provision will be in there.

7 CHAIRMAN BABCOCK: Well, before the turn of
8 that century, why don't we get a sense of whether it's the
9 sense of this group that Justice Bland's proposal is one
10 with merit? It may not be in the right rule, it may not
11 be the right language, but generally, we're in favor of
12 it. Stephen.

13 MR. TIPPS: I was going to offer a friendly
14 amendment, which I think would be accepted, that the
15 proposal be relocated from 39.1 to 38.1.

16 CHAIRMAN BABCOCK: Okay. Yeah, Bill.

17 PROFESSOR DORSANEO: Well, we may not want
18 to make it mandatory.

19 MS. BARON: Right.

20 MR. TIPPS: That is true.

21 PROFESSOR DORSANEO: So I think it ought to
22 be in 38, something ought to be said in 38 about this, but
23 maybe just in the page limits and then you can leave the
24 thing in 39, although just a minute ago I didn't know what
25 it said in 39.7 because it's not 38.

1 HONORABLE SARAH DUNCAN: Because they
2 changed all the rule numbers.

3 CHAIRMAN BABCOCK: Okay. How many people
4 think that this is a good idea? Raise your hand.

5 MR. GILSTRAP: Better schools.

6 CHAIRMAN BABCOCK: How many people think
7 it's a bad idea?

8 MR. LOW: Some people don't think either
9 way.

10 CHAIRMAN BABCOCK: By a vote of 25 to 1,
11 Gray, J., in dissent, the motion passed. So, Justice
12 Bland, could you get with Bill and maybe try to figure out
13 the right place and tweak any language based on our
14 discussions?

15 HONORABLE JANE BLAND: Yes.

16 CHAIRMAN BABCOCK: That would be great.

17 There was a letter that was sent to me,
18 which we forwarded on to Bill Dorsaneo this week regarding
19 several TRAP rules and, Bill, I'm assuming that you have
20 not had a chance to get your subcommittee together on
21 those yet.

22 PROFESSOR DORSANEO: I think that came last
23 week, right?

24 CHAIRMAN BABCOCK: Yeah, it came on the 5th.
25 So is that a fair assessment?

1 PROFESSOR DORSANEO: That's a fair
2 assumption.

3 CHAIRMAN BABCOCK: Okay. Good. So we'll do
4 that next time. We have one other thing to talk about
5 today; and that is, David Beck, as you may recall,
6 sometime ago, almost a year ago maybe, sent us a proposed
7 -- a proposed amendment to Rule 226a. We have reviewed it
8 and voted on it and each time -- two times it has met with
9 the disapproval of this committee.

10 The Court is now asking us to look at the
11 revised language, the language that you'll find behind Tab
12 6, which Mr. Beck has sent us; and if we were to have such
13 a rule or a statement, would we be comfortable with this
14 language, recognizing the Court knows that our committee
15 has now twice voted with not insubstantial majority that
16 no such change should be made. Yes, Elaine.

17 PROFESSOR CARLSON: Chip, I believe the
18 initial vote was to endorse the concept that David Beck
19 was advancing, that Rule 226a should have some statement
20 about the role of counsel in light of public criticism of
21 lawyers or misunderstanding of our faith, so there was --
22 I thought that we voted --

23 CHAIRMAN BABCOCK: You may be right.

24 PROFESSOR CARLSON: But we did not ever get
25 a positive vote on the language that we brought.

1 CHAIRMAN BABCOCK: Yeah, I remember two
2 votes being taken and being negative.

3 PROFESSOR CARLSON: They were. I just
4 wanted to clarify that.

5 CHAIRMAN BABCOCK: Okay. Well, good. So,
6 Elaine, do you have jurisdiction over this?

7 PROFESSOR CARLSON: I think I've got a Rule
8 21 violation because I just got this on the 13th, but --

9 MR. DAWSON: Do you want me to speak to it,
10 Elaine?

11 PROFESSOR CARLSON: Yeah, would you?

12 MR. DAWSON: Sure. I was not at the last
13 meeting, and I apologize. I forget what my conflict was,
14 but I'm sure it was really, really good, but I got a
15 report from Elaine and others on the comments, criticisms
16 of the then existing draft of Rule 226a that David had
17 proposed or the committee had proposed, and so I attempted
18 to rerevise the language of the proposed rule to address
19 the two principal issues. One, as I recall, was an
20 endorsement. The committee was concerned about a judicial
21 endorsement of the conduct of any particular attorney and
22 then there was another comment about making sure that we
23 zealously represented clients within the confines of the
24 rules.

25 So I made those changes, circulated it

1 through our subcommittee, and as I recall, it was sort of
2 generally the thought that -- from the subcommittee that
3 the language changes addressed the issues raised by this
4 group. I then sent it to David, who then changed the
5 language that I had proposed and kept the concepts there,
6 but this is slightly different than what our subcommittee
7 I want to say informally agreed -- and correct me if I'm
8 wrong, Elaine, that they may or may not have liked the
9 language, but I think they agreed it addressed the issues
10 raised by this committee.

11 CHAIRMAN BABCOCK: And I'll just say that
12 this draft remedies a substantial problem that I had with
13 the prior drafts, and that is where the court is telling
14 the jury that "Even though the attorney is ethically
15 obligated to represent zealously his or her client, you
16 should not take what I have said as an endorsement by me
17 of any particular conduct," because I was worried about
18 this rule talking about how the lawyers have got to be
19 zealous and advocates and, you know, act like, you know,
20 braying hyenas in the trial court would be sanctioning
21 that kind of conduct, and there is in the trial of cases
22 conduct that is beyond the pail and often does get
23 chastised by the trial judge for not being appropriate, so
24 I really like that change. Having said that, what kind of
25 comments do we have? Hugh.

1 MR. KELLY: I'm in favor of the letter.
2 Having just watched Will Ferrell in a movie about race
3 drivers, we might detune some of the language. The
4 average juror may not even know what zealous really means,
5 for example. That minor comment aside, I think this is an
6 appropriate thing to tell people on the jury.

7 CHAIRMAN BABCOCK: Okay.

8 MR. KELLY: And we ought to support Dave.
9 You know, he's our standard bearer right now.

10 HONORABLE SARAH DUNCAN: Just this morning
11 -- I imagine all of you-all have read about the license
12 plate frame case. Just this morning John Kelso wrote in
13 his column, maybe he was trying to be funny, about how
14 "the court sided with this law." I'm like, "That's the
15 Legislature's law. That's not the Court of Criminal
16 Appeals law." We have fundamental misunderstandings of
17 our system of justice at fairly high educated levels, and
18 people need to understand this. They need to understand
19 that we have an adversary system and that there are
20 ethical obligations to do what we do.

21 CHAIRMAN BABCOCK: Yeah. Having said that,
22 of course, you always talk about the last rodeo you've
23 been to, but I found yesterday that these jurors in this
24 case were asked by my opponent, who was really kind of
25 doing a lot of stuff in the courtroom that was close to

1 the line, and he asked them, "Hey, did you hold any of
2 what I did against me"; and they all said, "Nah, you know,
3 we know you've got to advocate for your client and you're
4 just doing what lawyers have to do in the courtroom."

5 HONORABLE SARAH DUNCAN: Very educated jury.

6 CHAIRMAN BABCOCK: Yeah. Well, actually it
7 was, yeah. I'm sorry. Professor Hoffman, I'm sorry.

8 PROFESSOR HOFFMAN: The first thing I think
9 is I voted against including this before, and I'm not
10 persuaded it ought to come in. I think it is a lot like
11 our conversations we were just having about lawyers in one
12 paragraph or so convincing people to have oral argument.
13 I think we may be fooling ourselves into thinking it's
14 going to make a difference, even if I agree, you know,
15 that perceptions are no good.

16 That said, and let me sort of address the
17 particular question it sounds like the Court asked. The
18 language that seems to be troubling, the only thing that
19 really jumps out at me, is right in the middle there, the
20 ending phrase where it says "which the attorney believes
21 there is a basis for so doing that is not frivolous." And
22 it's especially that latter language, "frivolous," that
23 troubles me. First of all, the term itself feeds into a
24 misperception of the system. If you're going to use that
25 idea, the word should be "nonmeritorious," which I'm happy

1 -- normally I don't care, but "frivolous" actually feeds
2 the misperception.

3 That said, I would recommend just taking out
4 all that, everything I just said. You've already said
5 here, Alistair, above "within the confines of the rules
6 governing attorneys in the trials of this case," so that
7 seems to me to get what you want without engaging that
8 debate.

9 CHAIRMAN BABCOCK: Fair enough. Frank.

10 MR. GILSTRAP: Well, this is kind of like
11 coming out against good schools, but I think as we've
12 watched this evolve, it's -- the thing has happened to it
13 that we predicted. It's become politicized and watered
14 down and where it doesn't have any kick at all. It's just
15 some kind of bland platitude that you're going to read to
16 the jury, and the jury is going to nod off.

17 Now, having said that, if you want to keep
18 it, I'm fine with the first paragraph. I'm fine with this
19 last sentence in the second paragraph. I think the first
20 part of the second paragraph, those first two sentences,
21 one of which is a sentence that contains 66 words, will
22 convince the jurors that lawyers are wordy, and that's got
23 to be rewritten. It just -- I defy you to read that
24 sentence and understand it.

25 CHAIRMAN BABCOCK: Okay. Yeah, Gene.

1 MR. STORY: This may be a question and
2 something I hadn't thought of before, but are there any
3 pro ses doing jury trials; and if so, is this prejudicial
4 to them?

5 HONORABLE SARAH DUNCAN: I hadn't thought of
6 that either.

7 CHAIRMAN BABCOCK: Yeah, that's a good
8 point. See, that's why we have this big group of people,
9 so we can think of stuff we don't think of. Bill. That's
10 a great point, Gene. Thank you.

11 PROFESSOR DORSANEO: Carl has pointed out to
12 me and is apparently too bashful to say that that language
13 that Lonny doesn't like that's not all that felicitous
14 comes right from the Rules of Professional Conduct Rule
15 3.01, "Unless the lawyer reasonably believes that there is
16 a basis for doing so that is not frivolous."

17 PROFESSOR HOFFMAN: Right. Right.

18 HONORABLE SARAH DUNCAN: Well, but that
19 doesn't mean it should be read to a jury.

20 PROFESSOR HOFFMAN: It's just a loaded --

21 PROFESSOR DORSANEO: I just wanted to point
22 out where it came from. I don't know what that indicates.

23 HONORABLE SARAH DUNCAN: Yeah. Just for the
24 record.

25 CHAIRMAN BABCOCK: So certainly this thing

1 was not frivolous, concerning the language it's not
2 frivolous. There was a basis for it is your point.

3 Anybody else? Yeah.

4 MR. MUNZINGER: I think it would take most
5 judges 60 seconds, 90 seconds to read this. If anybody
6 truly believes that you're going to educate jurors in
7 reading something like this in 60 to 90 seconds, I have a
8 bridge to sell you. There isn't anybody that is going to
9 be persuaded by anything in this or educated by anything
10 in this, in my humble opinion. It's a license for a
11 lawyer to take liberties in front of juries that he
12 wouldn't otherwise take because the judge has blessed his
13 conduct in advance. In my opinion, and with all due
14 respect to Mr. Beck, I don't think it has any place in the
15 jury instructions. I've said that before, I say it again.
16 I'll vote vigorously against it.

17 CHAIRMAN BABCOCK: Okay. Yeah, I think the
18 sense, Elaine, am I right that -- did we vote on concept
19 in favor or not?

20 PROFESSOR CARLSON: We did.

21 CHAIRMAN BABCOCK: We did. Okay.

22 PROFESSOR CARLSON: Maybe last August or --

23 MR. DAWSON: My recollection is it was kind
24 of a narrow victory.

25 CHAIRMAN BABCOCK: Yeah, Jody's got it.

1 MR. HUGHES: In October there was a narrow
2 12 to 10 vote, I think in favor of the concept; and then
3 at the December meeting it was voted against, I guess not
4 in concept, but the particular language, 12 to 7.

5 HONORABLE STEPHEN YELENOSKY: Well, how do
6 we know? I mean, some of us might have voted against the
7 language because we didn't want any language.

8 CHAIRMAN BABCOCK: Yeah, that could be.
9 Buddy.

10 MR. LOW: One of the dangers I find in it,
11 for instance, the first sentence or the first part of the
12 first sentence, second paragraph, that "each attorney is
13 devoted to the interests of his client." Well, he's
14 devoted to the interest of justice and, you know, our
15 system and so forth. And then it goes on and explains,
16 but if people don't listen to that closely they're going
17 to get little bits and pieces and things out of it that's
18 going to make it look like, well, lawyers can do whatever
19 they want to for their client.

20 Now, that's not the way it reads, but if
21 they don't listen closely they could come out with that
22 feeling. I think it's dangerous in that sense. In
23 concept, if they would listen to it and they knew what it
24 said, it's good.

25 HONORABLE SARAH DUNCAN: I think Buddy's

1 made a good point.

2 CHAIRMAN BABCOCK: Excuse me?

3 HONORABLE SARAH DUNCAN: I think Buddy's
4 make a good point.

5 CHAIRMAN BABCOCK: Yeah. I think in light
6 of my faulty memory and the closeness of the vote last
7 time, I think it might be good for the Court to hear a
8 revote on concept and then we can get back to the
9 language, so how many people are in -- yes. Judge
10 Christopher.

11 HONORABLE TRACY CHRISTOPHER: What is the
12 purpose of this?

13 CHAIRMAN BABCOCK: Excuse me?

14 HONORABLE TRACY CHRISTOPHER: What is the
15 purpose of this? To encourage zealous advocacy at the
16 trial or to prevent the jury from thinking zealous
17 advocacy is bad?

18 HONORABLE TERRY JENNINGS: Lawyers aren't
19 evil. They're doing their job.

20 HONORABLE TRACY CHRISTOPHER: And I don't
21 mean that in a flip manner. I really want to know what
22 we're ultimately trying to achieve from the language.

23 CHAIRMAN BABCOCK: Alistair.

24 MR. DAWSON: Yeah, I think I can address
25 that. I mean, David's point is that there's a lot of

1 lawyer bashing, a poor perception of lawyers by the public
2 at large, and he sort of says that we're not doing
3 anything about it, and he wants to do something about it,
4 and this is one of the ways he wants to start, and I think
5 it's been communicated to you-all before, is his hope that
6 whatever language, if approved by the Supreme Court, would
7 then go to all the other states and be sort of a model to
8 be used in all the other states, so that's what it's
9 designed to do.

10 HONORABLE TRACY CHRISTOPHER: To make people
11 like lawyers?

12 MR. DAWSON: No, to combat --

13 HONORABLE TRACY CHRISTOPHER: You think
14 reading these three paragraphs is going to do that?

15 MR. DAWSON: To combat the poor perception
16 of lawyers by a lot of people in the public.

17 HONORABLE TRACY CHRISTOPHER: But is the
18 poor -- and I don't mean to be argumentative with you, but
19 is --

20 MR. DAWSON: Yes, you do.

21 HONORABLE TRACY CHRISTOPHER: -- the poor
22 perception of lawyers in the public because they think
23 lawyers are zealous advocates and that that's somehow
24 wrong?

25 MR. DAWSON: Probably not.

1 HONORABLE TRACY CHRISTOPHER: I mean, what
2 is the poor perception --

3 CHAIRMAN BABCOCK: Hayes.

4 HONORABLE TRACY CHRISTOPHER: -- that we're
5 combating?

6 MR. FULLER: Couple points. I think David's
7 response to that would be that zealous advocacy basically
8 colors the public -- the public does not understand that
9 and that contributes to a poor perception of lawyers and
10 the jury system, et cetera; but what I would think, the
11 argument that was persuasive to me in terms of concept
12 last time is that what I think David is trying to achieve
13 and what this statement tries to achieve is already
14 handled by some courts across the state. It's also hashed
15 out between the lawyers in voir dire, if some judges will
16 allow it; and someone argued last time that if perhaps
17 we're going to allow that to go on in voir dire where some
18 judges are going to do it and some judges are not going to
19 do it, perhaps it would be better to let the judges do it
20 and have a uniform script from which to proceed as opposed
21 to kind of making it up, you know, from court to court.

22 I don't think this particular language gets
23 us there. I agree. I think it confirms everything that
24 the public would think about lawyers in terms of wordiness
25 and maybe sitting there wondering "What the heck are they

1 talking about," but I think that's where we were on
2 concept.

3 CHAIRMAN BABCOCK: Bill.

4 PROFESSOR DORSANEO: I think some people
5 think that certain persons, causes, shouldn't be
6 represented at all; and they don't understand what our
7 professional responsibilities are, so they think it's some
8 sort of character flaw that is involved in representing
9 people, zealously or not.

10 CHAIRMAN BABCOCK: Yeah. Justice Jennings
11 and then Judge Yelenosky.

12 HONORABLE TERRY JENNINGS: I just think it's
13 important to keep in mind the context of this. This is in
14 226a. This is before voir dire begins; and maybe it can
15 be shortened considerably to, you know, fit into one of
16 the numbered paragraphs here; but to the extent that it
17 could help set a tone with the jury before the lawyers
18 actually get up and start talking to them that, you know,
19 lawyers have a job to do and this is part of the adversary
20 process, I think it could be shortened considerably, but
21 to the extent it could help set the tone I think it could
22 be helpful.

23 CHAIRMAN BABCOCK: Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: Well, it could
25 be and, you know, suggesting this language to judges is

1 certainly a fine idea. The problem I have is making it
2 mandatory. I guess you could say, well, how can it hurt?
3 Well, one example is you've got a pro se. Am I supposed
4 to read this at the beginning of a legal malpractice case?
5 Doesn't that make a statement? And so the goal of
6 educating the public is a nice goal; but it's one that has
7 to take a backseat to the particular trial and justice in
8 that particular trial; and so I don't want to be compelled
9 to read something that I can't foresee right now would
10 cause a problem; and moreover, I think what will educate
11 the jurors or the voir dire is their experience in voir
12 dire and those that get on the panel, their experience as
13 jurors, and my responsibility there is much greater than
14 this 60 seconds that I'm reading.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: Now, I don't propose to write
17 this, and I totally agree with David's objective, but I
18 would start out by writing that "Your duty and your job is
19 to determine the truth and what happened. We have found
20 that the best way to arrive at the truth is to have each
21 side" -- you know, some way in simple terms. "The lawyer
22 who under the rules ethical to present the testimony on
23 this side, the testimony on that side, and we find that
24 the truth comes out, and it's called an adversary system
25 because he's for this one" or something like that, but

1 when you talk about zealously doing these things that
2 bothers me.

3 CHAIRMAN BABCOCK: Yep. Okay. Yeah,
4 Stephen.

5 MR. TIPPS: I think there's a real risk of
6 unintended consequences from something like this. I think
7 it does -- I think lawyers would use it to try to cloak
8 their misbehavior with some kind of judicial imprimatur.
9 And to the extent that the goal is to address just lawyer
10 bashing in general, well, I certainly share that goal, but
11 I think a jury in a particular case is really the wrong
12 audience, because in my experience at the end of almost
13 every trial the jurors like the lawyers. Now, maybe there
14 are a few lawyers that who don't measure up and they don't
15 get that kind of accolade, but I think juries watching
16 cases understand what lawyers are doing and understand
17 that they're advancing the cause of their client, and I
18 don't think they hold that against the individual lawyers.
19 I really think this is the wrong forum.

20 CHAIRMAN BABCOCK: Okay. Jeff, do you have
21 your hand up or you're just stretching? If it's all right
22 with you-all, let's take a revote on concept just to let
23 the Court know what the committee thinks about concept,
24 and then we'll have to do a little more work on the
25 language it sounds like, but -- Judge Christopher.

1 HONORABLE TRACY CHRISTOPHER: Is the concept
2 a statement that explains the lawyer's role in the
3 adversary system? Is that the concept we're voting on?

4 CHAIRMAN BABCOCK: I think the concept --
5 Alistair can correct me if I'm wrong -- but I think the
6 concept is to explain the lawyer's role in the adversary
7 system in a way that illuminates the fact that lawyers
8 must be advocates, must be zealous, must be, you know,
9 really advancing their clients' interest with the hope
10 that people who hear the speech will think better of
11 lawyers.

12 HONORABLE TERRY JENNINGS: Or not ill of
13 them.

14 CHAIRMAN BABCOCK: Or maybe bring them back
15 to neutral.

16 MR. DAWSON: And, Chip, my proposal,
17 depending on what the vote is on the concept, is that
18 rather than look at this language we go back to the
19 subcommittee if it's necessary and kind of rewrite it.

20 CHAIRMAN BABCOCK: The Court wants us to
21 give them language, so we're going to do that, but I think
22 the Court would also like to hear where we are on concept.
23 So everybody that's in favor of the concept raise your
24 hand.

25 HONORABLE TERRY JENNINGS: How about not

1 opposed to the concept?

2 HONORABLE SARAH DUNCAN: Yeah, not opposed.

3 CHAIRMAN BABCOCK: Seven people are either
4 in favor or not opposed. How many opposed?

5 15 opposed. Okay. Alistair, if you could
6 get with interested parties -- Buddy I know has
7 volunteered and probably Judge Christopher -- and try to
8 come back with some language next time. Judge Christopher
9 always volunteers for things and -- yeah, Buddy.

10 MR. LOW: One of the things that we need
11 to in doing that think about is in jury trials when you
12 talk to the jury, what is their main gripe, and it usually
13 isn't the lawyers. It's wasting time and those kind of
14 things.

15 CHAIRMAN BABCOCK: That's the first, second,
16 and third gripe, wasted time.

17 MR. DAWSON: Repetitive questions.

18 MR. LOW: Okay.

19 CHAIRMAN BABCOCK: Okay. I think we're
20 through our agenda. The next meeting is April 27th, and,
21 Jeff, your subcommittee on rocket docket is going to be
22 back on that, and we've got some spillovers from here, and
23 there may be -- Buddy's 904 will be on the agenda, and
24 there may be some other goodies that get passed down to us
25 between now and then, but thanks so much for showing up

1 and participating so well. We had terrific attendance
2 today. I think we only maybe had five members who didn't
3 show up for this meeting, which is great. We get a lot
4 more done and a lot better work done, work product done.

5 MR. HAMILTON: Richard wasn't here, we got a
6 lot more done.

7 (Meeting adjourned at 03:35 p.m.)

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