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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 28, 2013

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 28th day of September,
2013, between the hours of 9:00 a.m. and 11:54 a.m., at
the Texas Association of Broadcasters, 502 East 11th
Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

13-09 TRCP 145 Report by TAJC no exhibits, 5-6-13
13-10 TRCP 145 Report by TAJC with exhibits, 5-6-13
13-11 TRCP 145 Chart with proposed revisions
13-12 TRCP 145 Current rule
13-13 TRCP 145 Current redlined to proposed
13-14 TRCP 145 Proposed revisions by TAJC

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CHAIRMAN BABCOCK: Richard, is this you or is this Judge Peeples or a combination, or Trish or who else?

MR. ORSINGER: Actually, the committee doesn't have a unified voice on this, so I think we all have opinions we would like to share.

CHAIRMAN BABCOCK: Who is the leader?

MR. ORSINGER: Well, I thought the lead would be the presentation from the task force that has the proposal that we're actually going to consider this morning.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: So that's not me, and I don't know if that's Trish. Is that you, Trish?

MS. McALLISTER: It is me.

CHAIRMAN BABCOCK: Okay, Trish, let's go.

MS. McALLISTER: All right.

CHAIRMAN BABCOCK: But before that, Justice Hecht has a word of preface.

HONORABLE NATHAN HECHT: Back in the Eighties the Supreme Court created the IOLTA program; and at first it was voluntary; and a couple of years later it was made mandatory; and the Texas Access to Justice Foundation was created to hold the money and dispense it

1 to grantees; and they're still in existence; and that's
2 what they do, although they get funds from other sources
3 besides IOLTA, thank goodness, because IOLTA is down to
4 nearly nothing because interest rates are down to nearly
5 nothing. In about 2001, I think it was, the Supreme Court
6 created the Texas Access to Justice Commission, not to be
7 confused with the foundation. It does not handle the
8 money, and unlike the foundation, which that's all they
9 do, the commission strategizes. So when they have various
10 initiatives they try to bring together various
11 constituencies, Legal Aid providers, excuse me, corporate
12 counsel, the law schools, all sorts of Legal Aid providers
13 around the state, all to strategize on the best ways to
14 promote pro bono with the bar. The bar appoints half the
15 members of the commission, and to find ways to improve
16 access to justice in the state. Harry Reasoner is the
17 chair of that commission and has been for several years.
18 Trish McAllister came as the executive director three
19 years ago? Two?

20 MS. McALLISTER: In 2011, February 2011.

21 HONORABLE NATHAN HECHT: 2011, and so she
22 oversees the day-to-day operations of the commission. Its
23 offices are over in the State Bar. They have become
24 concerned about the -- about Rule 145, which was last
25 revised I think in 2005. Since that time TRAP 20 has been

1 revised a couple or three times, and so there is concern
2 that we bring the procedures of Rule 145 up to date. Of
3 course, hard economic times are affecting lots of people
4 in the state, litigants, but also clerks and their
5 budgets, so this is a rule that tries to address the --
6 those procedures. It was discussed by the commission
7 briefly and then sent to the Court, and we in turn sent it
8 to you.

9 CHAIRMAN BABCOCK: Okay. All right, Trish.

10 MS. McALLISTER: Thank you. So first I'd
11 like to thank everybody for giving us the opportunity to
12 talk with you guys today about Rule 145, which governs
13 affidavits of indigency, as you know, and for your time
14 and to address this important issue for Legal Aid and for
15 the poor in our state. Justice Hecht already kind of gave
16 you some background information. We have a standing --
17 the commission has a standing committee called the
18 self-represented litigants committee, which addresses
19 access issues of pro se litigants; and that committee has
20 a subcommittee called the rules committee, which reviews
21 legislations, policies, rules that impact pro se
22 litigants; and Rule 145 came to the attention of that
23 committee because Legal Aid organizations were continuing
24 to have problems with Rule 145 with counties that were
25 contesting affidavits of indigency, specifically

1 accompanied by an IOLTA certificate, which have been
2 uncontestable under Rule 145 since 2005; and they also had
3 a variety of other concerns about the rule as well; and
4 Rule 145 is a rule that impacts all Legal Aid attorneys
5 regardless of their practice area. It's a significant
6 issue for them, for their clients and the poor in this
7 state, and a lot of their time is spent addressing or
8 defending these affidavits in court.

9 So initially the subcommittee spent some
10 time determining whether or not we felt the issue could be
11 addressed by education, which is the preference of the
12 committee, but as the committee proceeded with its review
13 the members became concerned with the inconsistent manner
14 in which Rule 145 is being applied throughout the state
15 and the high possibility of differing outcomes for
16 litigants who are in similar financial circumstances,
17 particularly those that are without representation. So
18 ultimately they just decided that they felt that education
19 would not be sufficient, especially because Legal Aid
20 organizations have been reporting that they had been
21 having discussions with clerks and counties to no avail
22 for the past several years, and there are clerks -- and
23 I'm aware of this simply because we have a Listserv which
24 some of the clerks are on -- that acknowledge that they
25 understand the rule, but choose not to apply the rule. So

1 they contest affidavits that are not -- should be
2 uncontestable and/or make blanket contests.

3 The subcommittee received numerous reports
4 from Legal Aid lawyers, from judges, from clerks, from law
5 librarians, from court personnel, about the problems that
6 were faced by parties who were filing affidavits of
7 indigency, so I just kind of want to summarize some of
8 those. Counties, as I have mentioned, that have continued
9 to contest affidavits of indigency accompanied by an
10 IOLTA, we recently had a pro bono attorney who called to
11 let us know that he was practicing in a very large county
12 and he filed an affidavit of indigency accompanied by a
13 IOLTA certificate on a client who was on food stamps, and
14 he contacted the clerk to let them know that, you know,
15 this is the situation and that these should be
16 uncontestable. The clerk said, yeah, he understood the
17 rule, but that he was going to contest the case anyway, so
18 they set it for hearing, and ultimately the district clerk
19 was ordered to pay \$500 in attorney's fees, but the
20 reality is that the affidavit should not have been
21 contested as it was, and the attorney and the client had
22 to spend time going up and addressing the situation, and
23 this is an everyday occurrence for Legal Aid lawyers in
24 Texas.

25 So that's just one example. We have written

1 data from Legal Aid lawyers, e-mails from folks and things
2 like that, that support all of these -- all of these
3 issues. We have another problem with counties that are
4 assessing costs to litigants who file an affidavit of
5 indigency well after final orders are rendered and the
6 case is concluded, even when there has been no successful
7 contest to the affidavit during the case proceedings. I
8 think many of you may be aware of this. It's the subject
9 of litigation in one of the counties that has this
10 practice. Then we have counties that are automatically
11 contesting affidavits of indigency, as I've mentioned
12 before, even when the person is receiving public benefits
13 and has proof of public benefits. Rather than conducting
14 an individualized review of the specific issue at hand,
15 there is one major county that's doing this, and the clerk
16 stated to me she was doing this, which is not the same
17 county that I just mentioned.

18 Then we have counties that are delaying the
19 filing of the case when it's accompanied by an affidavit
20 of indigency. We had a Legal Aid attorney report that a
21 county has a practice where the clerk refuses to issue
22 citation when an affidavit of indigency is filed. She
23 talked to the clerk and explained the rule, and the clerk
24 said she understood the rule but that she instructs her
25 clerks not to issue citation on cases filed with an

1 affidavit until after the judge rules on the affidavit
2 because in that county they have a practice where the
3 judge must rule on the affidavit before they will issue
4 the citation, which is not in compliance with the rule,
5 the current rule.

6 And then we also have counties that just
7 adopt policies and practices that discourage parties from
8 filing affidavits of indigency. We have counties that
9 require filing the order at the same time they file the
10 affidavit of indigency, and unless they file those
11 documents at the same time they will not issue citation.
12 We see people who continue to require people to retype
13 affidavits of indigency, for those of you that were here
14 at the forms meeting. These are just the same kinds of
15 things we saw with that, and rather than allowing them to
16 use online forms, and then now since divorce step one has
17 been issued we see clerks that provide pro se litigants
18 with the set, but they remove the affidavit of indigency,
19 but most -- the most pervasive issue really is that
20 indigence is being determined inconsistently within the
21 county and the state; and the presumption, of course, is
22 that the current rule simply just does not provide enough
23 guidance to ensure consistent application.

24 In conversations that we've had with judges,
25 you know, they acknowledge that within their own county

1 they are pretty certain that judges apply the rule a
2 little bit differently or have a different way of looking
3 at assets or income of individuals, so, you know,
4 everybody -- the judges have discretion for that, so it
5 just means that it's a potential for inconsistent
6 application.

7 So the problems are occurring in small and
8 large counties alike. Problems were reported in three of
9 the largest counties, so a high percentage of the
10 population in Texas are potentially affected, and as well
11 as many of the smaller counties. So given all this
12 information, the committee felt that Rule 145 could be
13 improved in a way that provided more guidance to clerks
14 and judges but would also make it fairer for litigants.
15 There was also -- the committee was also conscious of the
16 county's need to secure filing fees and costs for the
17 parties that could afford to pay them, but also was
18 mindful of the possible ramifications to litigants who
19 cannot afford to pay costs and the potential ability for
20 them to secure a fair hearing. So as Justice Hecht
21 mentioned, then once it came out of the subcommittee, the
22 rule, the proposed rule, was sent to the full
23 self-represented litigant committee, which reviewed it and
24 then on to the commissioners, who reviewed it and then
25 approved it for referral to you.

1 I do want to take a minute to just talk a
2 little bit about the methodology that we used and
3 specifically about some of the case law that applies
4 that's been incorporated into the rule as well as the
5 definitions of poor, which is something that the committee
6 spent a lot of time wrangling with. So during the course
7 of the review we looked at other -- other states' law,
8 rules, on governing indigency as well as Texas case law,
9 the various definitions of indigency and eligibility
10 requirements used by government public benefit programs as
11 well as Legal Aid and then the relatively recent revision
12 of the Texas Rule of Appellate Procedure 20.

13 As far as other states' rules go, we didn't
14 rely on any one rule from any particular state. We talked
15 about the pros and cons of different rules from different
16 states, but there was no one rule that we particularly
17 followed. All of the rules have the same components that
18 we currently have in Texas, which is a means for somebody
19 to proceed who is poor with their case without paying
20 costs, a provision that anybody who is receiving public
21 benefits is presumptively poor and then a means to contest
22 the -- an application of indigency. But many of the
23 states had greater specificity into the terms of what the
24 definition of indigence was, the costs specifically that
25 were waived, and then the means of contesting the claim of

1 indigence.

2 In terms of case law, Texas case law, we've
3 looked at both case law for Rule 145 as well as TRAP 20.
4 There are about five cases that are sort of the cases that
5 show up all -- you know, all the time on these issues.
6 The seminal case is *Pinchback V. Hockless*, which is a
7 Texas Supreme Court case out of 1942, and it sets forth
8 the purpose of the rule as well as the basic test. So I'm
9 just going to read that that the purpose of the rule is --
10 and this is cited regularly throughout the rest of the
11 cases, which is that "These rules were adopted to protect
12 the weak against the strong, to make sure that no man
13 should be denied a forum in which to adjudicate his rights
14 merely because he is too poor to pay the costs" and then
15 the basic test is "Does the record as a whole show by a
16 preponderance of the evidence that the applicant would be
17 unable to pay costs or give security therefor if he really
18 wanted to and made a good faith effort to do so."

19 And then *Cook V. Jones* is an appellate case
20 out of Dallas in 1975, and it basically held that court
21 costs included the fee for service of citation by
22 publication, and really the main reason why I'm going
23 through these cases is because you will see them in the
24 review of the proposed rule, that we've incorporated these
25 into the proposed rule. *Equitable General Insurance*

1 *Company V. Yates*, a Texas Supreme Court case in 1984 held
2 that uncontested affidavits of inability to pay costs are
3 conclusive as a matter of law. *Higgins V. Randall County*
4 *Sheriff's Office* -- and this is the second Higgins case --
5 is a Texas Supreme Court case, 2008, that dealt with TRAP
6 20; but it basically says that, you know, an appeal -- or
7 an affidavit cannot be dismissed just simply for a defect
8 in a -- a procedural defect unless there's a reasonable
9 opportunity to cure, and then the last case that's the
10 larger case that -- on this matter is *In Re: Villanueva*,
11 and it's a appellate case out of Texarkana in 2009; and it
12 basically is about when a judge ordered a person who had
13 filed an affidavit of indigency, which was not contested,
14 to order to pay the attorney ad litem that had been -- the
15 court had ordered to -- to be on the case as well as a
16 social -- a social study that was done; and they ruled
17 that it was inappropriate for the court to order her to
18 pay when she had an affidavit that was -- was defined as
19 indigent as a matter of law and it effectively denied her
20 a forum to dissolve her marriage and resolve her custody
21 issues.

22 The other thing that I wanted to talk with
23 you about is this really vexing issue about the definition
24 of indigence; and I think this is where we see the most
25 problems in the field on this case, on these issues or

1 these affidavits, is that there really is no uniform
2 definition of poor in this state and really in this
3 nation; and we see it -- there's no uniform definition
4 even within Legal Aid organizations in terms of the
5 funding, but also within public benefit programs; and so
6 when you have various definitions of poor out there it
7 makes it difficult for someone who is applying for an
8 affidavit of indigency to get consistent treatment
9 basically or consistent application of the rule across the
10 state.

11 So I'll go through the most relevant
12 definitions of poor here in a moment, but I want to just
13 give you some general conclusions about all of them.
14 Generally all of them have an income limit that ranges
15 between 125 to 200 percent of the Federal poverty
16 guideline, and you can see in your report that the
17 commission sent over I drafted a -- there's a little chart
18 in there, and I tried to lay out what these definitions of
19 poor are and give -- give you an idea of what the income
20 levels are for each. They also each have some sort of an
21 asset limit test, and usually it's broken -- not usually.
22 They are all broken down into liquid assets disposable
23 income and then nonliquid assets. Each of them has an
24 exemption on nonliquid assets, so they all exempt a
25 person's homestead from a person's car and certain other

1 items, typically household goods, from being included in
2 the count towards what someone's nonliquid assets are.

3 Many of the programs have -- allow an income
4 deduction, so they allow income deductions for things like
5 medical expenses, child care expenses, child support
6 payments. Some of them have a long list of income
7 deductions, and these are things that would bring someone
8 who is above the program's eligibility guideline down to
9 within range for qualification of that -- of those
10 particular programs.

11 The one thing that was very inconsistent
12 throughout all of the programs that we looked at were the
13 liquid asset exemptions, so they ranged from a low of
14 \$1,000 in disposable income that you can have if you're
15 receiving temporary need for assistance -- Temporary
16 Assistance for Needy Families, TANF or to a high of
17 \$10,000 for the individual that's applying, plus \$5,000
18 for each family member. So just to go through the ones
19 that are the most applicable to our clients at Legal Aid
20 as well as to the poor generally, to qualify for Legal Aid
21 a person has to meet both an income and an asset test. If
22 the organization is funded by the Legal Services
23 Corporation, which is the Federal funder, LSC funded
24 organization, and those are to the three main Legal Aid
25 programs that service the entire state, you can -- you can

1 have -- a person can have up to 200 percent of the Federal
2 poverty guideline.

3 However, at a Texas Access to Justice
4 Foundation funded program -- and that's the Texas funder
5 that Justice Hecht mentioned earlier -- you have to have
6 125 percent of the Federal poverty guideline; or if you're
7 a victim of crime, you can go up to 187 percent, 187.5
8 percent of the Federal poverty guideline; or if you are a
9 veteran, you can go up to 200 percent of the Federal
10 poverty guideline. Both of these organizations used one
11 of two asset limits. You know, these are the Federal fund
12 -- the Federal funder and the state funder, so they are
13 the ones that set these guidelines, and they allow
14 discretion in the organization to choose one of two
15 methods of how they're going to determine someone's
16 assets. Both have a limit on liquid assets and
17 nonliquidated assets, and they exempt certain
18 nonliquidated assets like the house, the car, the personal
19 property.

20 In terms of public benefits -- so these are
21 the ones that are already in current -- the current rule
22 that everybody -- across the nation everybody pretty much
23 presumes that somebody who has been tested by a government
24 agency for being poor is poor. The most common public
25 benefits are the Supplemental Nutrition Assistance

1 Program, SNAP, which is formerly food stamps. It's a new
2 name for food stamps. I guess it's not so new anymore,
3 and then what I've already mentioned Temporary Assistance
4 to Needy Families TANF. SNAP sets income eligibility at
5 or below 130 percent of the Federal poverty guidelines,
6 and TANF sets it at 187 percent of the Federal poverty
7 guidelines. Both allow for income deductions for medical
8 care expenses, child care, child support, that bring the
9 household into income eligibility range. SNAP has a
10 liquid asset limit of 5,000. TANF is a thousand. Both
11 have asset exemptions, like I said, with the household,
12 the car, and several other items.

13 The other main program that you see people
14 on is CHIPs, which is the Children's Health Insurance
15 Program. To qualify for CHIPs in Texas, income could be
16 up to 200 percent of the Federal poverty guidelines. It
17 also allows for multiple income deductions. It has no
18 liquid asset test. If your income, family income, is
19 below 150 percent of the Federal poverty guidelines; but
20 if it's between 150 and 200 of the Federal poverty
21 guidelines, it has a fairly liberal liquid asset, which is
22 up to \$10,000; and they have the usual nonliquid asset
23 exemptions that we've been talking about.

24 And then finally, the other major one that
25 you see the poor utilizing is public housing, and public

1 housing is the Section 8 program, voucher program, things
2 like that; and it's a little bit of a different animal. A
3 person's income may not exceed 80 percent of the median
4 income for the area in which they live, but there's a
5 statewide housing guidelines, and it's -- it's very
6 specific, but generally it's about 300 percent of the
7 Federal poverty guidelines if you're a very small family,
8 and then as you get to be a larger family it kind of
9 shifts up to about 200 percent of the Federal poverty
10 guideline. They also have to meet asset eligibility
11 requirements, and each county has very specific guidelines
12 that may be more or less than the statewide guidelines.

13 So the chart, as I mentioned, has -- tries
14 to summarize all of this in a visual that hopefully makes
15 it a little bit easier to digest, and then -- and this was
16 an area that the committee spent a lot of time and had a
17 lot of grappling, you know, whether or not to include
18 certain aspects of this issue in the rule itself.

19 So I'll turn to Chip to see how you would
20 like to proceed with the rule. One of the other things
21 that I do want to mention, I think you guys probably have
22 already seen it, but we try -- I put together a chart that
23 just summarizes the changes in the rationale -- the
24 changes that we made to the rule and the rationale behind
25 each. As you guys have seen, it's pretty much a rewrite

1 of the rule. How would you like to --

2 CHAIRMAN BABCOCK: Yeah, well, first of all,
3 thanks, Trish. Does anybody have any comments on anything
4 that Trish had to --

5 MR. GILSTRAP: Question.

6 CHAIRMAN BABCOCK: Frank.

7 MR. HARDIN: How did she learn it all?

8 MR. GILSTRAP: One of the things that's
9 missing from the report was any kind of financial impact,
10 what's this going to cost. Footnote 15 says, "The
11 subcommittee attempted to estimate financial impact by
12 seeking information from the four largest counties on the
13 number of cases filed on an affidavit of indigency and
14 cost information," and then it says, "The information was
15 not able to be obtained."

16 MS. McALLISTER: Right.

17 MR. GILSTRAP: What does that mean?

18 MS. McALLISTER: Well, we did a -- actually,
19 it was -- it was broader than that stated it. It was the
20 four major counties as well as some of the smaller
21 counties, and we did a -- the committee didn't do it, but
22 Bruce Bower from the Texas Legal Services Center did it;
23 and it was a Public Information Request Act; and it had
24 very specific questions, as is required by a PIA Act, and
25 we got no data back basically. They said they didn't keep

1 it, which was interesting given, you know, some of the
2 news articles that were coming out that stated that they
3 had this information, but we didn't -- we weren't able to
4 ascertain it.

5 MR. GILSTRAP: Well, I mean, I called my
6 district clerk and just talked to him, and he was able to
7 give me information.

8 HONORABLE STEPHEN YELENOSKY: They don't
9 report it, though.

10 MS. McALLISTER: They don't record it, and
11 the way that we did it, we wanted it in writing, so that
12 it was something, you know, that we could present, but we
13 did try in that way. We didn't go around calling
14 everybody, that's true.

15 CHAIRMAN BABCOCK: Judge Evans.

16 HONORABLE DAVID EVANS: Well, I'm in the
17 county -- probably one of the more aggressive district
18 clerks in opposing these matters, and I do think that the
19 numbers are obtainable, and it may just be a matter of
20 asking OCA to have them report it to OCA and then they
21 would be available all over the state and comparable.

22 Writing a larger rule only allows a
23 well-represented clerk to find more holes and more
24 arguments to make to a district judge. It is a
25 complicated matter to try. I'm not saying that you should

1 abandon the effort to rewrite the rule, but they are
2 represented in my county by the civil division of the
3 district attorney's office, and that just gives them more
4 room and more items to talk to a district judge about in
5 contesting them. I'm not sure that you've spent -- and so
6 I know we're going to write a rule. I'm not saying that
7 that's it, but you do know there's a fallacy in that.
8 Your unrepresented people can't apply a complicated
9 five-page rule.

10 HONORABLE STEPHEN YELENOSKY: Or even be
11 aware of it.

12 HONORABLE DAVID EVANS: Well, no, I'm on the
13 county law library committee. I'll guarantee you that
14 they know. But the other part of it is I'm not -- I would
15 urge you to go back and check your assumptions on the
16 education. You may be educating the wrong people. The
17 people you may want to educate are the trial judges in the
18 judicial conferences. Applying all of these standards on
19 what qualifies somebody is very difficult, and making the
20 judges aware that fees are appropriate on contests may be
21 one of the ways in which you can go about solving your
22 problem with some of the more -- people who have -- who
23 differ with your opinion about -- who you would term as
24 recalcitrant, as a neutral trial judge I won't comment on,
25 but we do see a lot of those contests. We see a lot of

1 them in our family law court in Tarrant County, and our
2 clerk, our district clerk, is as opposed to that as he is
3 other things, Justice Hecht.

4 CHAIRMAN BABCOCK: Judge Wallace. Same
5 county.

6 HONORABLE R. H. WALLACE: Yeah, let me
7 briefly -- I'm also from Tarrant County, and most of the
8 contested affidavits that I have seen -- and let me say
9 this about the clerks as far as I know. If they show any
10 form of proof that they have -- are under one of the
11 qualified -- the noncontestable category, I don't see
12 those, at least not in the civil courts I don't. What we
13 see -- and I've never seen a Legal Aid attorney in my
14 courtroom representing someone. What I see are
15 unrepresented litigants, and to echo what Judge Evans
16 says, usually their biggest problem is they haven't even
17 filled out an affidavit or they haven't put in the
18 affidavit what needs to be in the affidavit. So it's a no
19 brainer for the DA's office to come in and win that, so I
20 kind of -- my impressions were sort of the same. It seems
21 like we may be creating a more complicated rule that the
22 DA's office can handle, I can handle, but an unrepresented
23 litigant -- and that's all I -- I take it back, I've seen
24 one that had one lawyer represented about 45 plaintiffs
25 and didn't want to pay the filing fees, but otherwise

1 they've all been unrepresented litigants. That's who we
2 normally see.

3 HONORABLE DAVID EVANS: The other part is,
4 besides the unrepresented we have those who are
5 represented by private counsel, and those are routinely
6 contested in my county. I do agree with what R. H. said.
7 Our civil division of our DA's office will not -- has
8 advised the clerk and the clerk has followed the advice,
9 does not contest any contest where they have the proof
10 that's alleged. Now, I'm sure there's other counties
11 where that happens; but then again, the last one I tried
12 it was pretty hard to apply the standards as to whether
13 they were poor enough or not, especially when they had a
14 cable bill of \$210 a month; and then I ran into the
15 problem, said, "Well, I think you can pay \$10 a month and
16 retire this filing fee"; and then the clerk's office tells
17 me -- or, I'm sorry, the DA's office and the clerk's
18 office tells me, "We can't take partial pay outs," so I
19 was bewildered. You know, so I just said, "Okay, fine,
20 watch your cable TV and you get a free filing," and I
21 really didn't have a choice over it. It was crazy.

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: Well, you know, in defense of
24 Tom Wilder, the Tarrant County clerk, district clerk, you
25 know, his approach is if they show us the Lone Star card

1 -- that's what you get from food stamps, if they show us
2 the Lone Star card it's game over. If they can't show the
3 Lone Star card or some other proof and they say, "Well,
4 come back and show it to us"; and if they still don't do
5 it, the DA will file a contest and then they get into
6 court and they get the applicant up there and they say,
7 "Sir, you understand that you signed an oath and you're
8 under penalty of perjury."

9 "Yes, I do."

10 "Are you still telling me that you're
11 eligible for food stamps?"

12 "Yes, I do."

13 "Your Honor, we withdraw the contest."

14 That's how they proceed.

15 CHAIRMAN BABCOCK: Levi.

16 HONORABLE LEVI BENTON: David just said
17 something that we shouldn't let pass right by us. How
18 difficult is it or is it --

19 HONORABLE JAMES MOSELEY: We can't hear you.

20 MR. MUNZINGER: You're speaking to all of
21 us, Levi.

22 HONORABLE DAVID EVANS: The ones with
23 hearing aids down here.

24 CHAIRMAN BABCOCK: Be especially careful to
25 speak to Richard.

1 MR. MUNZINGER: No, but we can't hear. His
2 head is facing away, and he's just talking to you.

3 CHAIRMAN BABCOCK: Actually, he was
4 whispering to Rusty.

5 HONORABLE LEVI BENTON: Why can't we change
6 the statute or the rule to provide for partial payment? I
7 mean, that would fix a lot, and --

8 HONORABLE ANA ESTEVEZ: We have that. We
9 have that. My clerk does that.

10 MS. McALLISTER: A lot of courts do. I
11 mean, I'm surprised that you got that response, because
12 that's not the case in other counties. People do allow
13 partial payments. And TRAP 20 allows for payments.

14 HONORABLE DAVID EVANS: They just told me
15 that the law doesn't permit it, and you know, I always do
16 what the lawyers tell me, especially if I'm trying to hand
17 them relief and they say, "No, we can't take partial
18 payments." Okay, fine.

19 CHAIRMAN BABCOCK: Judge Yelenosky.

20 HONORABLE STEPHEN YELENOSKY: I don't know
21 if it's appropriate now, tell me if it's not, but I have a
22 suggestion that's conceptual and only requires one detail
23 change at this point, and the reason I bring it up at the
24 beginning is because if it's to be considered at all it
25 needs to be thought about as we go through the details

1 because I think it would change some of them, and to give
2 you an idea of how different it is, I don't think we need
3 a rule at all, shouldn't be in a rule. It should be in a
4 Supreme Court order to --

5 HONORABLE DAVID EVANS: Speak up.

6 HONORABLE STEPHEN YELENOSKY: Can't hear me?
7 I think it should be in a Supreme Court order to the
8 clerk, and I'll explain, if you want me to, now or later.

9 CHAIRMAN BABCOCK: No, go ahead and tell us
10 now.

11 HONORABLE STEPHEN YELENOSKY: Okay. The one
12 detail is we take away the authority of the court to make
13 anyone else pay for the indigence cost. Right now you
14 can. A court can order another party to pay. We take
15 that away. That eliminates any legitimate legal interest
16 that another party could have in contesting. Now, they
17 may want to be a private attorney general or they may be
18 on principle wanting to contest, but they don't have a
19 legal interest. That means -- you take the parties out,
20 that means you have the clerk, at this stage anyway, the
21 clerk, the alleged indigent, and a trial court judge.

22 What you do then is the Supreme Court would
23 issue an order to the clerks which has, first of all, the
24 advantage of being a direct instruction from the Supreme
25 Court to the clerks, which I don't think they could ignore

1 in the way that they're ignoring Rules of Civil Procedure,
2 as I hear it. Two, it takes it out of the Rules of Civil
3 Procedure, and if it needs to be detailed it doesn't need
4 to be detailed in the Rules of Civil Procedure; and three,
5 it allows for easy amendment. Suppose there's another
6 entitlement program you want to list. The Supreme Court
7 can amend that order. We don't have to rewrite the Rules
8 of Civil Procedure and have them republished, and the
9 order would be something like this. It would start with
10 an explanation, court case or whatever, about the
11 significance, constitutional significance, of open courts
12 and the process, just to give background.

13 Then it would require the clerks to do the
14 following: Hand out two affidavits, and one is a
15 government entitlement based affidavit, the other one is
16 other; and if they're not doing that now, purposely, the
17 Supreme Court would say at the end kindly, whatever,
18 "These instructions are subject to mandamus to the trial
19 court." Because if a clerk is not doing the -- at the
20 very front end, a contest isn't going to solve that, the
21 person never gets anywhere. So pro se litigants aren't
22 going to be able to do a mandamus, but Legal Aid will take
23 care of that. If there's a county where they're not even
24 informing people with an affidavit or they pull the
25 affidavit out, Legal Aid will mandamus that issue, and

1 hopefully they'll put it to bed.

2 Then you have, as I said, two affidavits,
3 one is government entitlement, which should be a short
4 form, and then there's a long form. If the clerk sees a
5 deficiency in either or both, they could submit both, the
6 clerk has to write to the person, explain the deficiency
7 in writing, and they have another chance. That's
8 important because, as I hear it, in a number of these
9 they're deficient because they left something out. You
10 left out statement as to your assets, so they have to give
11 them a chance.

12 Now, some people may come back and
13 contradict their first affidavit and state different
14 income, but that will be readily apparent; and if after
15 that the clerk still thinks there's a problem with the
16 affidavit, that it doesn't suffice, or the DA or whatever,
17 the clerk gives all the paper to a district judge; and the
18 district judge has two choices, one, look at the paper and
19 say, "Well, of course he's indigent" or "she"; two, to
20 call a hearing. That has the advantage of allowing Judge
21 Evans to summarily deal with recalcitrant district
22 judges -- I mean, district -- well, there are those, too,
23 but district clerks.

24 Then what you do is say that the clerk's
25 determination that somebody is indigent -- and this is for

1 the appellate judges, and I've heard from them they want
2 this -- carries through the entire case unless there be a
3 safety valve for somebody to initiate something, but there
4 would be no burden on the person to file a separate
5 affidavit. At any further stage somebody would have to
6 initiate something and take the burden of that, and
7 likewise, a trial court determination of indigence would
8 carry forward as well. Trial court denial of indigence of
9 course has to have some due process relief, so there would
10 have to be some court of appeals review of that; and it's
11 already been said statistics, instruction to the clerk
12 would be they have to provide statistics to OCA. I think
13 the whole idea of putting it in a rule is because that's
14 what we're about, but I really question whether it should
15 be there for all of these reasons.

16 CHAIRMAN BABCOCK: Okay. Professor
17 Dorsaneo.

18 PROFESSOR DORSANEO: I notice you're keeping
19 the clerk in this administrative process. For a number of
20 years, clerks could not contest the affidavits.

21 HONORABLE STEPHEN YELENOSKY: You could do
22 that.

23 PROFESSOR DORSANEO: And you call them
24 recalcitrant, they sound, if they exist other than as
25 anecdotal persons, I would think of them as renegades, so

1 one -- one way to preclude renegades from being successful
2 is to disenable them from making a contest.

3 HONORABLE STEPHEN YELENOSKY: Well, we do
4 that -- I propose doing that with opposing parties, but
5 clerks, everybody is going to say that, as Trish has
6 recognized, there's an issue of revenue for the clerks,
7 and I doubt that would carry the day.

8 PROFESSOR DORSANEO: It did for a while.

9 HONORABLE STEPHEN YELENOSKY: Yeah, I know.

10 PROFESSOR DORSANEO: Up until 2005, and I
11 don't know how long before 2005, but for a number of years
12 clerks were not in this game.

13 CHAIRMAN BABCOCK: Pete Schenkkan.

14 MR. SCHENKKAN: Can I talk to the revenue
15 issue for a moment? When we -- Richard convened the
16 subcommittee on the phone earlier this week there was a
17 lot of discussion of that, and at that point nobody on the
18 phone had any data on that, and I went out and tried to
19 get what I could get, and here's what I got that shed some
20 light on this, and then I'm hoping by saying it it will
21 turn out that somebody else in the room will know which
22 parts of what I'm about to say are wrong and in which
23 direction.

24 Two levels of the revenue issue. The
25 general filing fee and citation issue for every case.

1 There's some fee or another that varies with the county
2 and the case, but it's in the bigger scheme of things
3 relatively modest. Then there's a smaller subset of the
4 cases in which there may need to be appointed a guardian
5 ad litem, and there may need to be a social study, and
6 somebody needs to pay for that, and those numbers can be
7 quite a bit bigger. So keep those in mind, two different
8 sets of numbers that somebody has to pay for, filing fees
9 and guardian and social study fees. Looking at the filing
10 fees, OCA has data, of course, on the number of cases
11 filed statewide. You can't go online and get them for the
12 last couple of years because of the budget cuts, they
13 weren't able to publish their reports, but you can call
14 Angela Garcia, the judicial information officer at OCA,
15 and she'll give them to you. She'll give you a -- you
16 know, a spreadsheet, in a PDF attached to an e-mail, so if
17 you want to dig into those numbers --

18 CHAIRMAN BABCOCK: What is she giving you?

19 MR. SCHENKKAN: She'll give you a
20 spreadsheet that --

21 CHAIRMAN BABCOCK: What's on the
22 spreadsheet?

23 MR. SCHENKKAN: It gives you different ways
24 of slicing and dicing what OCA collects on cases filed
25 statewide. It's the first level of what you can get, is

1 cases, and the -- what we're mainly talking about here is
2 family law cases. Ballpark, there are 400,000 family law
3 cases of all types, divorces, parent-child relationship
4 where there never was a marriage, IV-D cases, which some
5 people here would know what those are.

6 CHAIRMAN BABCOCK: Richard would.

7 MR. ORSINGER: That's child support
8 enforcement where the state is prosecuting.

9 MR. SCHENKKAN: Just big picture category,
10 family law 400,000 cases a year. That's out of ballpark
11 600,000 cases of all types. So two-thirds of all the
12 cases are family law. There are 93,000 cases filed each
13 year pro se. Okay. OCA doesn't have a correlation that
14 allows you to say is that -- how many of the 93,000 were
15 in the family law, but you can get at that a little bit by
16 talking to your county, and I did it with Travis County,
17 and the answer is almost all of them, almost all of the
18 pro se cases that are filed are family law cases. So now
19 we've gone from 600,000 cases to 400,000 cases to 93,000
20 or 95,000 people proceeding pro se and thinking that most
21 of them, the vast majority, are in family law cases, and
22 now what we need to know is how many of them are
23 proceeding with an affidavit of inability to afford the
24 costs, and OCA doesn't collect that data at this time.

25 HONORABLE DAVID EVANS: That's right.

1 MR. SCHENKKAN: That is something that might
2 well be addressed going forward, especially if we wind up
3 being worried about a statewide data, but I want us to
4 just do -- since we don't have statewide data -- I'm going
5 to get to Travis County in a minute, which is the one
6 piece of additional light I've got available. Just do a
7 thought experiment. 95,000 a year, let's assume every
8 single one of them is going to file a affidavit of
9 inability to afford costs, and now let's assume each of us
10 gets to make his own guess how many people are going to
11 get away with not paying the filing fees when they
12 shouldn't get away with not paying the filing fees,
13 when -- if you were allowed to contest their affidavit, if
14 someone were allowed to contest their affidavit, someone
15 would contest their affidavit, and the someone who
16 contested their affidavit would win or at least should
17 win. Okay. So do you see what I'm saying? That's what
18 we've got to kind of make up in your own mind what you
19 think that number is.

20 Assume it is 1 percent of the 95,000 who,
21 you know, are going to get away with something they
22 shouldn't get. That's 9,500 -- I mean --

23 CHAIRMAN BABCOCK: 900.

24 MR. SCHENKKAN: 950 statewide. Now multiply
25 it by your filing fee number, let's say, to make the math

1 more or less easy let's make it a thousand and let's call
2 it \$200 per. That's \$200,000 statewide, and that is the
3 gross revenue lost. That is not the net revenue lost to
4 the system because if you have contests somebody has to
5 pay for the contest. I'm kind of guessing that the costs
6 of a bunch of contests get pretty close to \$200,000 pretty
7 fast.

8 HONORABLE STEPHEN YELENOSKY: Are you
9 counting judge time?

10 MR. SCHENKKAN: Yeah. Judge time, court
11 administration time, you know, the whole process. If what
12 we're worried about is the filing fee part of this, I
13 think we're letting the perfect be the enemy of the good.
14 That was based on a one percent assumption, but you can go
15 as high as 10 percent if you want, and now we're talking
16 about, what is it, \$2 million a year, gross, not net.
17 Sorry, Judge, yeah. You want to play through?

18 HONORABLE DAVID EVANS: I don't think that
19 you're wrong about -- I don't know that it's cost
20 effective, but to go back to what Bill said about whether
21 the clerk could contest or not, county government pays for
22 state litigation. The state Legislature does not pay for
23 state litigation. County government pays for the court
24 capital costs of the courthouse, pays all of the salaries
25 of the staff, all of the salaries of the clerk, pays for

1 the lights, pays for the security. The only thing the
2 state pays is my salary. It incurs all the bench costs.

3 In Tarrant County the filing fees for civil
4 cases are sufficient to cover the operating costs, but not
5 the capital costs. The concern of the commissioners in
6 Tarrant County and the district clerk and county clerk in
7 Tarrant County is the growth of pro se litigation, the use
8 of the internet for form filing of affidavits, and that
9 they -- it is their decision on cost effective whether
10 they pay their district attorney to assist the clerk in
11 contesting those affidavits. If it were my client, I
12 might say this is not worth the money, and that's what
13 bothers me about -- you know, we see it at our end of it,
14 but it's not a state cost where it's absorbing.

15 MR. SCHENKKAN: Well, it's not a state cost
16 where it's absorbing, but this is a state policy issue, if
17 it is not a state law issue, if it is not a matter of
18 Federal constitutional due process law. So all I'm trying
19 to do is orient us as we are talking about the policy
20 decision how to implement the law for the Supreme Court.

21 HONORABLE DAVID EVANS: No doubt.

22 MR. SCHENKKAN: Are the states really
23 that --

24 HONORABLE DAVID EVANS: I think the county
25 is attune to the fact that there is a constitutional issue

1 for those who can't pay and that they have to have access,
2 but I think it is their decision on when to contest the
3 unmeritorious decision -- the unmeritorious filings of
4 whether that litigation is cost effective, your one
5 percent, and that's why I think you can't take the clerk
6 out under current politics. Now, obviously different
7 counties have different views. I would believe that we
8 have two counties that start with T, Travis and Tarrant,
9 and I will guarantee you their politics are 180 degrees
10 out.

11 HONORABLE STEPHEN YELENOSKY: Which is the
12 more liberal one?

13 HONORABLE DAVID EVANS: You, look.

14 CHAIRMAN BABCOCK: Judge Estevez. Sorry.

15 HONORABLE DAVID EVANS: And I'm not
16 suggesting that it's a good policy to fight these things
17 and it is cost effective. Obviously that's where the
18 county government comes in. When we're building
19 courthouses at the cost that we're building, their
20 concerns are just right down to the penny about how we
21 operate, and I think anybody that's a state district judge
22 becomes conscious of the fact that they really have to
23 have county government involved.

24 MR. SCHENKKAN: As always, I'm in favor of
25 people being mindful of all kind of realities, including

1 political realities, but being mindful of them I think is
2 not the same thing as saying they get not only to decide
3 which ones to dispute under the rules that say you can
4 dispute this set, but they also get to say which sets they
5 get to dispute. The Supreme Court gets to say which ones
6 are disputable, and I'm saying in making that decision we
7 ought to bear in mind it's not cost effective to dispute
8 them for the filing fees. If you -- OCA also has county
9 by county data. I did not look up Tarrant's, but I could
10 do so in a couple of minutes. I did look up Bexar
11 County's. Bexar County has about 3,500 family law cases a
12 year.

13 HONORABLE ANA ESTEVEZ: That's wrong. It
14 has to be more than that.

15 MR. SCHENKKAN: I'm sorry, pro se filings.
16 3,500 pro se filing.

17 HONORABLE STEPHEN YELENOSKY: Nobody would
18 be getting divorced in San Antonio.

19 MR. SCHENKKAN: 3,500 pro se filings a year.
20 If you did the same one percent thing, we're talking about
21 \$7,000. This is not a good use of Bexar County's time. I
22 don't know the Tarrant County numbers, but I'm kind of
23 thinking they're the --

24 HONORABLE DAVID EVANS: You know, from
25 the --

1 CHAIRMAN BABCOCK: Judge Estevez.

2 HONORABLE DAVID EVANS: I'm sorry, excuse
3 me. I just think that that's Bexar County's decision as
4 to whether or not -- if these folks don't meet the
5 standard, it's Bexar County's decision whether to spend
6 money on --

7 MR. SCHENKKAN: If they don't meet the
8 standard, but in setting the standards we get to say we
9 really ought to reserve the standards for things where
10 it's likely to be cost effective.

11 CHAIRMAN BABCOCK: Judge Estevez. Everybody
12 else be quiet for a minute.

13 HONORABLE ANA ESTEVEZ: When we met as a
14 subcommittee I was more skeptical of the rule, but when I
15 went and -- I spoke to my district clerk to kind of get an
16 idea of what does this mean for one of my counties, I have
17 two small counties, nothing close to the size of theirs.
18 But she pulled some numbers for me that stated that we
19 had -- and we did 2012. They had 2,079 cases that were
20 filed that were all family. They included the CPS,
21 divorce, SAPCRs, all of that. Then she pulled it down to
22 993 cases were divorce, SAPCR, adoptions, divorce only
23 were 686. Okay. I did not ask her for pro se. I know I
24 have -- we probably have 60 percent of those are -- or
25 close to 70 percent are probably now pro se. I mean,

1 that's how many we have.

2 But I did ask her how many affidavits were
3 filed of indigency in 2012, and out of the whole year out
4 of all civil cases, and again, she said I don't even want
5 to separate it for a civil -- just a regular civil action
6 because she didn't even know if there would be one. She
7 only remembered one in all of her career, and I'll just
8 mention that one in a sec, but 77 affidavits were file.
9 She contested four, and lost on one, so it's not -- when
10 we start about 2,079, and we're down to 77 we're talking
11 about 3 percent, and the same rules are going to apply as
12 far as being contestable. I mean, I guess we had that
13 presumption of indigency with the government entitlement,
14 which I'm not a huge fan of that because of how many
15 government entitlement programs there are. At some point
16 I made a comment about the lunch programs. I think some
17 people or some places it's almost 80 percent of the
18 children are receiving lunch programs. Well, that is a
19 government entitlement program, so that would entitle you
20 to file an affidavit, I believe, under the way the new
21 rule is going to be proposed, but I would be very
22 interested to know how many you guys are talking about,
23 because even if you're contesting them all if you're
24 talking about a hundred of them or I guess statistically
25 it would be closer to a thousand of them, you aren't

1 talking about that many cases at the end, and then how
2 many do they win and how many do they lose? I mean, are
3 we really going to try to stop something that is just
4 ineffective. I mean, it's just not going to make a
5 difference at the end of the day of open the doors and
6 let's let them go to the courthouse, too.

7 CHAIRMAN BABCOCK: Frank.

8 MR. GILSTRAP: Well, I -- you know, like
9 most people on the committee I've kind of come late to the
10 party, and when I look at this whole scheme there are some
11 things here that -- some deeper aspects of it that do
12 concern me, and while it may be too late to stop it, I
13 think I need to raise it here. 145 says that you're -- "A
14 party who is unable to afford costs is a person receiving
15 governmental entitlement based on indigency." The
16 proposal from the committee replaces that with "a person
17 who is getting money from a means-tested entitlement
18 program." To get some idea of the impact of that you have
19 to look at the proposed revisions (h)(2), and that has a
20 list of programs that qualify, although it's not a
21 complete list. It's, you know, any program. It's on this
22 document, which is the unredlined document, and it's over
23 on --

24 HONORABLE STEPHEN YELENOSKY: It's (h)(2).

25 MR. GILSTRAP: Yeah, page six, page six is

1 where the list of programs is. It says, "A means-tested
2 government entitlement program is any public benefit
3 program in which the recipient must meet specific
4 financial eligibility guidelines to obtain the benefit."
5 It has a list of programs that duly qualify, such as
6 Section 8 housing, CHIPS, Medicare, food stamps, energy
7 assistance. If someone determines you need help with your
8 light bill, you automatically under this proposal don't
9 have to pay court costs. There is also ones that are
10 not -- that are not mentioned that seemed to also seem
11 somehow unrelated to whether I can pay court costs such as
12 free school lunch. If your kids qualify for free school
13 lunch, you don't have to pay court costs. If you get a
14 free cell phone, a so-called Obama phone, you don't have
15 to pay court costs; and of course the elephant in the room
16 out there is Obamacare, which is coming online next week
17 and which has a means testing program in it.

18 It's -- I'm concerned because of the
19 widespread uncontradictory reports that they're trying to
20 sign up as many people as possible to food stamps and
21 Obamacare is going to be handled the same way, they're
22 going to sign people up and really ignore the means test.
23 They're recruiting people to these programs, and they're
24 recruiting people to this program. They don't have to pay
25 court costs. There's got to be a better way to do it.

1 CHAIRMAN BABCOCK: Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: I agree that
3 there has to be some sifting through these programs,
4 because, as Trish said, they have different percentages of
5 the poverty line; and so even if someone is honest about
6 being -- receiving that program, we may not want that in
7 the list. That is why -- one of the reasons why I think I
8 mentioned, (h)(2) in mind, I thought then it should be a
9 comment and now with this new conceptual program I think
10 what would be done rather than us sitting here and trying
11 to learn about all of these programs is for Trish and
12 other people to say again what she just said to the
13 Supreme Court in a work session or something, and let the
14 Supreme Court decide. The Supreme Court can change that
15 later, but I keep talking about it, to me it's not a rule
16 issue.

17 CHAIRMAN BABCOCK: Okay. Yeah, Pete.

18 MR. SCHENKKAN: I did -- there is some more
19 data that I think is of some use, although it may be that
20 others will conclude otherwise. I did look at Travis
21 County exactly on the basis that it's at least widely
22 perceived that we're the People's Republic of Travis
23 County and have been for a while, and, therefore, if there
24 was a danger of a huge flood of --

25 CHAIRMAN BABCOCK: It would be right here.

1 MR. SCHENKKAN: It would be right here. So
2 here are the numbers. Out of -- there is 9,400 new cases
3 filed last year. Last year's fiscal year just ended end
4 of August, so September 2012 to August 2013. 9,400 cases
5 filed. 3,600 of them filed by pro se plaintiffs. Almost
6 every one of them, 3,438, were family law cases.
7 Affidavits of inability to pay to afford costs, 1,828. So
8 a little bit more than half of the pro se cases involved
9 an affidavit of inability to afford costs. Of those --
10 the way Travis County does it is the clerk
11 administratively screens these filings; and of the 1,823,
12 the clerk administratively denied 120.

13 There aren't -- the county does not have
14 separately docketed hearings to contest affidavits, and I
15 asked how does that work, why is that, how can that be?
16 And I'm hoping you can shed some more light on this,
17 Judge, but that's because what happens is the opposing
18 parties choose to roll any dispute about inability to
19 afford costs into a substantive hearing on something in a
20 family law matter so they can use that to show what a
21 lying piece of whatever this other person is, so it
22 doesn't separately affect the scheduling of the cases. It
23 just has whatever effect it has inside the case, and those
24 who preside over it can shed some light on that. So when
25 Travis County administratively denies them, which is the

1 only thing there's any data on --

2 HONORABLE STEPHEN YELENOSKY: When you say
3 administratively, they still --

4 MR. SCHENKKAN: They just tell the person,
5 and that's what I'm about to do. They contact the
6 applicant. They say, "You didn't do this right" or
7 whatever, but the 120 is what happens when -- even after
8 they've tried to fix it, this is the final.

9 HONORABLE STEPHEN YELENOSKY: So we're sort
10 of doing somewhat like --

11 MR. SCHENKKAN: And of those 120 they work
12 out partial payment plans in -- I don't have the numbers.
13 They worked out -- I didn't write the number down. They
14 worked out partial payment plans in the vast majority of
15 those 120. The -- what they're -- then this is now segue
16 from I think if the Travis County is the People's Republic
17 of Travis County for this purpose, the filing fee problem
18 and the contest problem is not -- the game is not worth
19 the cannon. The question is, what about these guardians
20 and social studies in the SAPCRs and whatever other
21 context you have something like that that might amount to
22 anything. Travis County has got a domestic relations
23 office that's got full-time staff that can be appointed.
24 Is that all who's appointed, or do you ever appoint
25 guardians who aren't from there for this purpose?

1 HONORABLE STEPHEN YELENOSKY: Well, CASA
2 volunteers are.

3 HONORABLE ANA ESTEVEZ: CASA is free. CASA
4 is free.

5 MR. ORSINGER: The question should be broad
6 enough to include attorneys ad litem and amicus attorneys,
7 even though Steve -- or Peter doesn't realize that. Are
8 there appointments of independent professionals, private
9 practitioners, psychologists, or whatever, that generate
10 fees that have to be paid in a lawsuit somehow?

11 HONORABLE ANA ESTEVEZ: I drug test people.

12 MR. ORSINGER: You drug test people.

13 HONORABLE ANA ESTEVEZ: I do, and if they
14 can't afford it -- I actually ask probation because it's
15 only \$10, so I ask them if they can pay them because that
16 way -- I shouldn't put that on the record.

17 MS. McALLISTER: Paternity testing is also
18 one we see a lot.

19 HONORABLE ANA ESTEVEZ: But I use one when
20 we're coming --

21 MR. SCHENKKAN: I'm sorry, the Travis County
22 appointed the DRO staff as guardians and to do the studies
23 in 199 cases in this last year. And then of those 199 the
24 court ultimately ordered one or both the parties to pay
25 fees to the county in 81, and the fees are set out.

1 There's a sliding scale, schedule of the fees that's in
2 the order form, and it's income-based, and the bottom end
3 of the scale is for income below 35,000 gross income.
4 It's not more complicated than that, and the fee for a
5 full guardian is 350, and the top end of the scale, which
6 you've got income above 200,000, the fee is \$2,700. Now,
7 that doesn't match at all with the kind of numbers we were
8 hearing on our subcommittee.

9 MR. ORSINGER: Well, that's because we were
10 talking, Peter, not just about the existing government
11 agencies who provide social study services and independent
12 counsel services and the volunteers like CASA, but in a
13 lot of litigation, even litigation involving people
14 without wealth, courts will appoint people like what they
15 call an amicus attorney, which is not representing any
16 party or the children. They're really advising the court
17 in the capacity of a lawyer, and it's particularly acute
18 with pro ses because in a highly contentious custody case
19 where you have pro se litigants that don't know how to
20 develop the facts of the case for the judge at the trial,
21 some judges will feel insecure and they want to appoint
22 somebody to do an investigation or to represent --
23 represent the Court or in developing the evidence, and
24 those outside professionals under the Family Code, some of
25 them must be paid and then conventionally really all of

1 them have to be paid or they won't do this work.

2 MR. SCHENKKAN: I'm going to stop in just a
3 second here because we're now to the point where this is
4 all I can do.

5 CHAIRMAN BABCOCK: You're going to tie this
6 all together now and tell us what this means.

7 MR. SCHENKKAN: I'm going to tie it together
8 in the form of a question to those who are knowledgeable
9 and ask them to help the rest of us understand it; and
10 that is what we don't know from this database -- and maybe
11 y'all know anecdotally, and if anybody does, it would be
12 y'all, that how often does that happen, how many times do
13 you need to appoint somebody else who is not a DRO staff
14 or is not being able to take care of it with a CASA
15 volunteer, something like that, and find a way to pay for
16 it, you know, it isn't paid for. That's two steps, how
17 many do it in the first place, find somebody to pay for
18 it; and then three, step three, in how many of those cases
19 would the fight over whether this person really is
20 indigent or not result in a significant difference in the
21 amount of money available to pay this person? Surely not
22 very many.

23 HONORABLE STEPHEN YELENOSKY: Well, you
24 mentioned DRO, and I'm unsure about other counties. I
25 mean --

1 MR. SCHENKKAN: Exactly.

2 HONORABLE STEPHEN YELENOSKY: -- county
3 created and county funded, and my guess is that the
4 commissioners looked at not having it and paying private
5 and said, well, if these are salaried people we can save
6 money. Likewise, we have an office of representation in
7 cases where there is a parental rights termination case
8 and the person is indigent; and they get representation
9 through that; and likewise, the county did the numbers and
10 said, well, we can save money by having an office where we
11 pay salaries than paying attorneys ad hoc. That's what I
12 know about DRO, and, you know, the other counties, I don't
13 think many counties have those kind of things, but they
14 certainly could be considered.

15 CHAIRMAN BABCOCK: Well, assuming that we
16 got this data, how does that help the Supreme Court, which
17 has a -- which has a report from the commission that is
18 highly respected and says there's a problem? Is the data
19 going to show in your view that there's not a problem?

20 MR. SCHENKKAN: No. I think data is going
21 to show that we don't need to be overly worried about
22 imposing unfairly on the counties a large amount of costs
23 they don't already face by taking away a large source of
24 money that would help solve that problem, that obviously
25 it is possible to have an individual case somewhere where

1 somebody gets away with being declared unable to afford,
2 who really could have written a 10,000-dollar check to pay
3 for an amicus attorney and a social study.

4 CHAIRMAN BABCOCK: Right.

5 MR. SCHENKKAN: But I'm betting that's one
6 in 10,000 if it's not one in a million.

7 CHAIRMAN BABCOCK: Okay. Professor
8 Dorsaneo, and then Kent, and then Judge Peeples.

9 PROFESSOR DORSANEO: I'd like to know more
10 about this group of self-represented persons. I mean, who
11 are they? I mean, Judge Wallace was talking about
12 somebody who can't do the application, and that's a
13 problem. You know, a person can't do lots of things.
14 That's a real problem. I don't know if we -- if this
15 discussion is about that or that's just a problem we are
16 pretending to deal with by having this discussion, but I
17 would imagine there are a lot of -- and I know some
18 self-represented people who are not -- who are not
19 lawyers, but who are, you know, smarter than most of us
20 and who can navigate through this just fine, particularly
21 if all they're doing is getting a divorce, no property, no
22 children.

23 CHAIRMAN BABCOCK: Are they paying a filing
24 fee?

25 PROFESSOR DORSANEO: I don't know. Okay. I

1 know if -- I know some of the ones if you gave them a
2 packet of forms that said, "Here, fill this out and maybe
3 you won't have to pay the fee" that they'll fill it out,
4 unless somehow that they're told this is something they
5 shouldn't do because it could get you into trouble. So I
6 -- can you tell us more about these people and how we
7 should deal with them?

8 MR. ORSINGER: Well, my bottom line answer
9 to this is the legal system is complicated. We all of us
10 have college degrees, all of us have three years of law
11 school, and many of us had apprenticeship, and all of us
12 have experience after that, and it's still difficult for
13 us; and so when you get into complicated litigation, you
14 can imagine what it would be like for someone who doesn't
15 know any of the vocabulary and any of the procedures; and
16 David Peebles can tell us about two pro ses picking a
17 jury, not even a lawyer in the courtroom except for the
18 judge; and, you know, ultimately the only way that people
19 that are poor are going to navigate the system is with the
20 assistance of a lawyer; but we just can't afford to
21 provide a lawyer to every civil litigant. We can afford
22 to provide it to every criminal defendant, but we can't
23 afford to provide it to every civil litigant, so we just
24 have to make compromises, I think.

25 CHAIRMAN BABCOCK: Kent.

1 HONORABLE KENT SULLIVAN: I just want to
2 follow up on Pete's points because --

3 CHAIRMAN BABCOCK: Speak up, Kent.

4 HONORABLE KENT SULLIVAN: I want to follow
5 up on Pete's points, because I think they're very
6 interesting. I think that in some sense what we are
7 raising is the question of what kind of gatekeeping
8 function you want. What do you want?

9 MR. SCHENKKAN: Yeah.

10 HONORABLE KENT SULLIVAN: And also, there's
11 a question of when do you want it exercised. To get a
12 handle on that, I think you do need to understand the
13 universe of the people that you're dealing with, who are
14 the indigent filers and what costs are they imposing, and
15 I just wanted to add a wrinkle to Pete's calculus. It
16 seems to me it would be interesting to know -- and maybe
17 at least anecdotally some people could come comment on
18 this -- is this issue, this potential problem, defined by
19 a very large number, thousands and thousands of single
20 shot independent unrelated players, if you will, that
21 impose relatively small costs, but added together there is
22 a fairly significant number. That's at least one
23 potential description.

24 There is another description more towards
25 the other end of that spectrum, which would be a small

1 group that imposes a large cost, which they either do
2 because they're somehow repetitive filers, or they file
3 something that sets in motion a chain of events that
4 becomes very, very costly. And it seems to me that, you
5 know, getting your scalpel out a little bit and slicing
6 this a little thinner might yield much more important
7 information about trying to reconcile the tension that's
8 inherent here between not wanting to allow people who
9 either don't deserve to be -- to have free access and/or,
10 you know, not paying for it and counter-balancing the
11 legitimate needs of the counties to try and protect
12 themselves against those sorts of costs once they're set
13 in motion.

14 CHAIRMAN BABCOCK: Okay. Judge Peeples.

15 HONORABLE DAVID PEEPLES: I want to ask
16 everybody to look at the Rule -- the proposed rule itself.
17 I have a clean copy, and so on page six it's (h)(1) and
18 (2). Frank Gilstrap referred to it, and I just want to
19 look at the language. I'm looking at (h)(1) and (2) of
20 the proposed rule. To me there are two overriding salient
21 policy issues that need to be dealt with here, and we've
22 been dancing around them. Okay. First, you know, access
23 to court is just fundamental, to be able to get in the
24 door and get divorced or get an order about family
25 violence or custody or whatever it is, that's fundamental,

1 and I'm looking at (h)(1) now. The definition of costs,
2 this is what the draft says a poor person is not going to
3 have to pay if they file an affidavit of indigency and
4 it's not contested. The first, you know, (a) through (d)
5 or certainly (a) through (c) are access things. Look at
6 them, filing fees, and then (b) and (c), issuance of
7 process service and return of process, whatever it costs
8 to get that done, you've got to be able to do those to get
9 in the door; and then (d) is very minor, certified copies
10 of, you know, judgments and orders would be costs; and
11 those are certainly fundamental for someone to get into
12 the court system.

13 Now, (e) is huge. If (e) -- if when someone
14 files an affidavit of indigence and it's successful, it
15 doesn't bother me one bit for them to get (a) through (d),
16 but (e) is just enormous, and right now judges have
17 tremendous discretion in deciding whether to order a
18 social study and make someone pay for it or to appoint an
19 amicus attorney and so forth. We have a lot of discretion
20 to do that, and what I am saying here is I think that the
21 judge's discretion on (e) needs to be reaffirmed loud and
22 clear, because if (e) is part of this, that changes the
23 fiscal impact we've been talking about. We've been
24 talking about filing fees, and those are small, but if you
25 add -- you know, 200 to 250, but to pay for a lawyer, to

1 pay several thousand dollars for a social study, those are
2 big numbers, if you multiply them very much.

3 And so, to me, (e) is problematic, and we
4 need to seriously consider making just -- saying that's
5 discretionary as it always has been; and I think most of
6 us would be concerned if, you know, you've got a hearing
7 and somebody has gotten in the courthouse door with an
8 affidavit of indigency and there's a social study issue
9 and the judge says, "Okay, let's talk about it. How much
10 is that going to cost?" Several thousand dollars.
11 "Affidavit of indigency, let me talk to you about what are
12 your expenses." And, you know, David Evans, Judge Evans,
13 mentioned seeing \$200 for cable TV. I've had a lot of
14 cases where someone said "Gosh, I just can't pay this,
15 Judge. I've got my 400-dollar payment on my truck," and
16 blah, blah, blah, blah. Yeah, and -- yeah, if they get to
17 pay for a whole lot of things, yeah, there's no money left
18 over, but, I mean, we just need to look at (e), and that's
19 point one. The definition of costs is huge, and also TRAP
20 20, we'll get to it at some point, but if you're entitled
21 to a free record, several days, you know, six, seven,
22 eight days of a jury trial, big clerk's record, those can
23 add up, too.

24 Now, that's point one, that's issue number
25 one that I say is a big one, and the second one is on the

1 bottom of that page. It's (h)(2), and there are all of
2 those means-tested agencies, and now I want to ask
3 everybody to look at page four of the report by the task
4 force, and I thought it was a very effective memo by the
5 group, but four has the table or spreadsheet of the
6 various incomes. The rule itself says that we look at 200
7 percent of the Federal poverty guidelines; and in this
8 table, if I understand it correctly, the number in the far
9 right upper corner, 22,980, is what someone is making if
10 they're making 200 percent of the Federal poverty
11 guidelines. Now, Trish and the rest of you, I just want
12 to say that these numbers look big to me. I mean, I've
13 handled so many cases where the people would barely get on
14 this chart.

15 These are big numbers, and I wish I had made
16 some phone calls on this, but I think that the start out
17 salary for a lot of people at the Bexar County courthouse
18 in the district and county clerk's offices are in the
19 neighborhood of twenty-two nine. I mean, are we really
20 going to say that someone is indigent and entitled to a
21 free case who is making what a clerk at the courthouse
22 makes? I mean, with one child. So these numbers are just
23 huge, and it's a problem, but to me, those are the two
24 issues. The means-tested you know, and what's the level
25 and how you define it and then what costs are going to be

1 paid for. Thank you.

2 CHAIRMAN BABCOCK: Yeah. That's terrific,
3 Judge. Thanks. Justice Brown.

4 HONORABLE HARVEY BROWN: I want to agree
5 that we need to highlight (e), but I don't want to lose
6 Kent Sullivan's point that we also have this issue of the
7 repetitive filer. I mean, we do have a lot of cases where
8 you can see the same people over and over again. I think
9 that you might want to think about the first time the
10 filing fee is nothing, but when they're on their sixth or
11 seventh lawsuit and they're in your court all the time,
12 you start to feel like they're taking advantage of the
13 system and it's not appropriate, so I think you might want
14 to think about treating somebody who does it a second or
15 third time within so many years or months or whatever,
16 maybe a little more proof might be required.

17 CHAIRMAN BABCOCK: Okay. Trish would like
18 to respond.

19 MS. McALLISTER: There's a couple of things
20 that I want to point out. One, I'll just go in the order
21 in which Judge Peeples was talking about them. On number
22 (e) what we are intending to indicate here is this is when
23 somebody has -- is proceeding on an affidavit of
24 indigency, and they are already deemed indigent. This is
25 when a court appoints these officers, so they're asking

1 someone who is already deemed indigent to pay for the
2 services that they have ordered, like to pay for these
3 court-appointed professionals.

4 It's not to intend -- it's not to -- and
5 maybe this is just poorly worded. It's not to imply that
6 anybody who is indigent automatically gets these
7 professionals or whatnot. It's basically just putting in
8 the rule what's already happening on a discretionary
9 basis, which is the judge sees that an ad litem is needed
10 or a social study is needed or whatever. It is to -- and
11 obviously it does need to be reworded because it's
12 obviously problematic for people, but that those are not
13 to be assessed to the indigent person as fees, but that
14 the county has to pay for them, or because it becomes an
15 obstacle to resolving the matter if they can't -- if the
16 indigent person is responsible for paying \$3,000 but
17 they've already been deemed not able to pay the \$300
18 filing fees and they can't conclude their case until that
19 happens, and typically these are family law cases
20 involving children, and many of them are not able to
21 access their children until these things are done. I
22 think it just becomes an access issue. So that's the
23 clarification on that particular part. If that was
24 confusing, I apologize.

25 The other point is that in the committee

1 when we say "means-tested government entitlement programs"
2 that was actually intended to narrow the field, because
3 there are other government entitlement programs that are
4 not means-tested, and I can tell you I don't have the
5 whole list of them, but Bruce Bower is an expert at this,
6 and there was -- it's actually a narrowing from the
7 current rule, which is surprising I realize, but it is.
8 Because right now there's nothing that says that those
9 government entitlements have to be mean tested. They can
10 just be government entitlements.

11 The other thing is that with respect to the
12 chart that has 200 percent of the Federal poverty
13 guidelines, we're pretty confident that these are the
14 actual numbers; and, you know, what concerns us as the
15 committee is that if you have someone who goes to an LSC
16 provider, if you've got someone who qualifies for Legal
17 Aid, they go to one of the three major legal service
18 providers, and these are the three LSC Federal service
19 providers, that poverty guideline is 200 percent of the
20 Federal poverty guideline or that income test is 200
21 percent of the Federal poverty guideline. So to create
22 uniformity, it doesn't seem fair that someone who does not
23 have the benefit or isn't lucky enough to get served by an
24 LSC-funded program would then go to court and be denied
25 because they have to meet a lower standard. I don't -- I

1 don't think that's the kind of system that anybody wants
2 to set up, because that's problematic in and of itself. I
3 mean, you can see litigation coming out of something like
4 that. So those are just the points.

5 I mean, I think, you know, this was the big
6 thing that the committee grappled with, was trying to
7 standardize in some way this definition of poor; and, you
8 know, we didn't want to take -- we didn't want to take
9 away judicial discretion or, you know, some mechanism of
10 that; but at the same time we wanted to feel confident
11 that if somebody came in to -- and got services through
12 Legal Aid that if they hadn't been lucky enough to do
13 that, that they still would be able to qualify for this
14 affidavit. Sorry.

15 CHAIRMAN BABCOCK: Okay. Trish, while you
16 have the floor, what's your response to the gentlemen from
17 Tarrant County? Maybe we could have a Tarrant County
18 rule. That's an idea. Who says that, you know, tying it
19 to these Federal program, sure, it may be means-tested,
20 but if I got your point, Frank, it was but they're
21 recruiting people, they're not paying attention, and the
22 means don't match up with the ends perhaps. Do you have
23 any thought about that?

24 MS. McALLISTER: Well, I have no way of --
25 you know, I'm assuming that -- we have to assume that the

1 programs are being applied accurately. I -- we at Legal
2 Aid see many people who qualify for these programs that
3 don't actually get to access these programs. So, you
4 know, we're on the other side of the fence where people
5 may be concerned that there's just a massive humanity that
6 is getting benefits that shouldn't be getting benefits, we
7 typically see the other aspect of that, so we would have a
8 different perspective than that.

9 CHAIRMAN BABCOCK: Okay. Peter.

10 MR. KELLY: I have one comment, one
11 question, and then sort of a general comment. My question
12 is how is this -- what is the interplay of costs with the
13 private electronic service provider filers? I mean, you
14 know, I get my credit card statement, I've got 30-dollar
15 charges for all of that. Do the private electronic filing
16 providers, do they have to buy into this as well? I mean,
17 are we going to tell them they're just not going to get
18 paid for a bunch of these filing costs? I just want to
19 know what the relationship is. I'm just asking that as a
20 general question.

21 MS. McALLISTER: Are you talking about
22 e-filing, the e-filing fees?

23 MR. KELLY: Yeah.

24 MS. McALLISTER: Underneath the contract
25 that OCA has negotiated those are waived.

1 MR. KELLY: Okay. So it's dealt with under
2 a separate provision.

3 MS. McALLISTER: Yeah, uh-huh.

4 MR. KELLY: Then a very specific comment,
5 which is in the end under "available income," it describes
6 "assets in which the affiant does not have actual or legal
7 control."

8 MS. McALLISTER: Yeah.

9 MR. KELLY: What is actual control? What is
10 legal control? Does "actual" mean anything in this
11 context?

12 MS. McALLISTER: Okay. Well, I'll tell you,
13 two things, the feedback that we got -- and this is
14 actually a Legal Aid standard, so both the LSC and TAJF
15 have a guideline in their income test that you have to --
16 you have to have actual control, and what this is for is
17 because the majority of the clients that come to Legal Aid
18 -- and as you have seen most of these cases that are
19 applied on an affidavit of inability to pay costs is a
20 family law case. That's the majority of humanity, that's
21 who needs to go to the civil courthouse. That's the one
22 time they're going to go. In Legal Aid situations, they
23 are always victims of domestic violence. That's the only
24 kinds of family law cases they really handle. So the
25 typical scenario with a family law domestic violence

1 lawyer at Legal Aid, they do not have control over the
2 assets on the majority of the basis of times.

3 So if -- even if -- even if the spouse has
4 an earning capacity of, you know -- that the financial
5 capacity is much higher than the income criteria, we only
6 count that person's income at the time and also because
7 they are always separated. We don't take cases where
8 they're living together typically. So -- and this is when
9 the judicial discretion of ordering the other party to pay
10 can be helpful because they may have assets that can pay
11 those court costs that the counties need, but we don't
12 require -- we don't count those assets. And it's the
13 same -- there's a court case -- I didn't pull it, but
14 there's a Supreme Court -- I think it's a Texas Supreme
15 Court case that addresses the exact same issue. There was
16 a woman whose family was millionaires, had tons of money.
17 She had a hundred thousand dollars worth of attorney's
18 fees. They paid that. There was -- actually, Stuart
19 Gagnon was involved in this case. He was the guardian ad
20 litem; and he was seeking his \$15,000 payment; and he was
21 saying, you know, these people should -- her family
22 members should pay, they've always paid, they've got a ton
23 of money; and she, however, at that point was actually
24 poor. She had no income. She had no home to speak of. I
25 mean, nobody disputed that she was poor, so that's the

1 other aspect. She didn't have the availability -- she
2 didn't have access to those actual funds, so that was the
3 other intent behind this, is that you're not responsible
4 for securing funds from friends, family members, or
5 something like that.

6 CHAIRMAN BABCOCK: Okay. We're going to
7 take our morning break, because Trish jams a lot of words
8 into a very short period of time.

9 MS. McALLISTER: I'm sorry. I do talk fast.

10 CHAIRMAN BABCOCK: Our court reporter has
11 sent up the red flare.

12 MS. McALLISTER: Sorry.

13 CHAIRMAN BABCOCK: But when we come back, we
14 need to get through this proposed rule because the Court
15 wants us to give comment about these specific things. It
16 doesn't mean that the Supreme Court is necessarily going
17 to adopt this rule or any rule, but they want our advice
18 on it, and we've got a lot to get through because we've
19 got this rule and then the TRAP rule and then the
20 affidavit, so be thinking about what specific problems
21 there are if the Court were to exact this rule. Okay. So
22 we'll be on break.

23 (Recess from 10:27 a.m. to 10:41 a.m.)

24 CHAIRMAN BABCOCK: All right. Let's get
25 through all of this, and we'll start with the proposed

1 Rule 145, subsection (a), and let me know if anybody has
2 got comments on subsection (a).

3 MR. GILSTRAP: I do.

4 CHAIRMAN BABCOCK: Frank.

5 MR. GILSTRAP: I understand that the purpose
6 of this rule is to say that once they file the affidavit
7 the court has to last them go forward. I think that's the
8 purpose of it.

9 CHAIRMAN BABCOCK: Okay.

10 MR. GILSTRAP: But it says, "A party who is
11 unable to afford the costs." Well, that's the end of the
12 process, not the beginning of the process. It needs to
13 say, "A party who contends that he is unable to afford the
14 costs" and then it needs to continue to say, "of a case
15 may proceed without advance payment of costs if the party
16 files with the clerk of court an affidavit of inability to
17 pay costs in compliance with this rule." It needs to stop
18 there, and he can proceed, and maybe it's determined later
19 that it's not contestable or it's not contested, but the
20 point is if he's contending that he can't pay costs and
21 files the affidavit, he needs to go forward. I think
22 that's the goal of the rule. Maybe I'm misunderstanding.

23 CHAIRMAN BABCOCK: No, good comment. What
24 else on (a)? Yeah, Pete.

25 MR. SCHENKKAN: For the same reason, strike

1 "who is unable to afford the cost of the case." It's just
2 "a party may proceed without advance payment of costs if
3 the party files with the clerk of the court an affidavit
4 of inability to pay costs to" --

5 CHAIRMAN BABCOCK: You're mumbling, Pete.

6 MR. SCHENKKAN: "A party may proceed without
7 advanced payment if a party files with the clerk of the
8 court an affidavit of inability to pay" or "afford,"
9 whichever it's going to be, "costs in compliance with this
10 rule."

11 MR. GILSTRAP: I agree.

12 MR. SCHENKKAN: Upon filing of the
13 affidavit, whether or not a contest is filed, it goes
14 forward. This is the separation of the initial gatekeeper
15 versus the what happens at the end once we know whether we
16 have a big pile of SAPCR costs.

17 CHAIRMAN BABCOCK: Gotcha. Justice Gray,
18 and then Levi, and then Richard.

19 HONORABLE TOM GRAY: Well, I've got four
20 comments, one about the advance payment, and it kind of
21 devolved down to some other issues; but first on the kind
22 of the policy aspect, there are a lot of times that the
23 cost is the only screen in a person's decision whether or
24 not to proceed with the litigation. Particularly in
25 termination cases we see it on appeal where the appointed

1 counsel has lost all contact with the party, doesn't know
2 what they want to do in the case, but feels obligated to
3 continue to proceed, so bear that in mind as you're
4 evaluating this.

5 Remember that whatever you do with this rule
6 applies to inmate litigation, inmate civil litigation.
7 That is a problem that nobody has specifically mentioned
8 today, and then what I would like to see from the
9 appellate level and how this rule interplays with 20 is
10 that once you're determined indigent under this rule it
11 applies until it is controverted by someone that's
12 interested. David's always been concerned about -- Judge
13 Evans has always been concerned about his court reporter
14 not having the same interest in contesting the indigency
15 at the beginning as they do at the end when they ask for
16 the reporter's record, and it's not to deprive that court
17 reporter of that opportunity, but if the -- in other
18 words, it just puts the burden on the reporter to tee it
19 up at some point.

20 With regard to the advanced payment of costs
21 specifically, that is a phrase that is repeated later in
22 the rule when it's talking about the assessment of costs.
23 I would like to see it where if they are determined to be
24 indigent then they are exempt from the payment of costs so
25 that it doesn't subsequently engage in a fee shifting

1 issue like Judge Yelenosky mentioned earlier, or more
2 importantly for me is when they appeal these they've been
3 allowed to proceed without the advance payment of costs.
4 That tells me that I still have to assess costs against
5 them in the judgment if they lose, and that gets back to
6 my first point of the policy screening. If they don't
7 have the -- some of the same burdens that litigants who
8 have to pay the costs have in making the decision of
9 whether or not to appeal, they have no interest in not
10 appealing if the costs can't be assessed against them in
11 the event that they lose.

12 CHAIRMAN BABCOCK: All right. Levi, do you
13 have something on (a)?

14 HONORABLE LEVI BENTON: Kinda sorta.

15 CHAIRMAN BABCOCK: Okay. Let's try to -- I
16 know we're not a very disciplined crowd, but let's try --

17 HONORABLE LEVI BENTON: Okay. I'll be
18 shorter than Tom, I promise. Frank's comments and I think
19 it was Peter's comments I really like, but they take me
20 back to Steve's comment, and I really would like to see at
21 least that part of the rule be taken out of the rule and
22 put in a Supreme Court order, and then Tom's comments
23 reminded me about Harvey and Kent, these repeat filers. A
24 lot of the repeat filers are indeed inmates, and I
25 don't -- I have great respect for the inmate suits where

1 there's an allegation of civil rights violation occurring
2 in the prison, but some of those repeat cases are "You
3 were my criminal defense lawyer, you weren't ready for
4 trial, you screwed the case up, I'm suing you," and "The
5 witness lied and I'm suing the witness" and "The jurors
6 got it wrong and I'm suing the jurors," and those sorts of
7 cases I'd like to see in a different class so that those
8 affidavits get a heightened scrutiny and they don't
9 necessarily get to proceed immediately just because they
10 filed an affidavit. Is that quick enough for you? I
11 yield the floor.

12 CHAIRMAN BABCOCK: It wasn't exactly about
13 subsection (a), but --

14 HONORABLE LEVI BENTON: It was.

15 CHAIRMAN BABCOCK: Richard.

16 MR. ORSINGER: First line, "Party who is
17 unable to afford the costs."

18 CHAIRMAN BABCOCK: Now, see, this is about
19 subsection (a).

20 MR. ORSINGER: Yes.

21 HONORABLE TOM GRAY: I worked mine back to
22 the advance payment question.

23 CHAIRMAN BABCOCK: It was very clever.
24 That's why I didn't say anything. Richard.

25 MR. ORSINGER: We started out with the rule

1 that talked about the inability to pay costs, which is, in
2 fact, the title of the section, but we use the concept
3 "afford costs" sometimes and "pay costs" at other times,
4 and there's actually a long, rich history of case law
5 interpreting the inability to pay, both on indigent filing
6 and also as a defense to the nonpayment of child support,
7 and that's been part of our legacy, and they've already
8 done the work to define the parameters of the concept of
9 inability to pay, and by introducing a new concept,
10 whether we do it uniformly or not, of using afford the
11 costs instead of pay the costs, I'm not sure the standards
12 are the same. I mean, if I've got to pay 450 bucks a
13 month for my truck, 250 bucks a month for cable, and child
14 support for three different children then maybe I can't
15 afford to pay costs, but is that the same as the inability
16 to pay costs that we've now known for the last --

17 CHAIRMAN BABCOCK: Professor Dorsaneo.

18 PROFESSOR DORSANEO: Well, when I was in law
19 school and read *Pinchback vs. Hockless*, I thought that
20 this place was way too hard on people without enough
21 assets to be comfortable.

22 CHAIRMAN BABCOCK: Uh-huh.

23 PROFESSOR DORSANEO: And I thought we kind
24 of retired that. In the current rule it uses the term
25 "unable to afford," and I think *Pinchback vs. Hockless*

1 ought to stay as a relic of the 1940s, and we ought to be
2 talking about affordability, and I don't think that that
3 should mean I can't afford to pay because I need to buy,
4 you know, some expensive clothing, suits, or a Cadillac or
5 a Mercedes, but the old idea, Owen Giles, I remember he
6 would do this, and he would ask the person who was on the
7 witness stand, "Do you have any furniture?" Right? "Do
8 you have a couch?" All right.

9 CHAIRMAN BABCOCK: Is that how he said it,
10 "couch"?

11 PROFESSOR DORSANEO: Yes. And I think those
12 days ought to be over.

13 CHAIRMAN BABCOCK: Judge Estevez.

14 HONORABLE ANA ESTEVEZ: I just -- and I'm
15 sorry that I'm going off of (a), but I just wanted to
16 address the issue of the prisoners since I get a lot of
17 those. We do have Chapter 11 of the Texas Civil Practice
18 and Remedies Code, so that does take care of vexatious
19 litigants, and so I think that will take care of that.
20 And also, they have Chapter 14 that has to do with inmate
21 litigation and also has a special provision that says no
22 matter what we want to do we cannot change it because they
23 put a provision in here that Chapter 14 -- "This chapter
24 may not be modified or repealed by rule adopted by the
25 Supreme Court," so we can touch every other class except

1 the inmates on whether or not they have to pay their costs
2 and how they're going to get their money back from them.

3 CHAIRMAN BABCOCK: Lisa. Do you have
4 something on (a)?

5 MS. HOBBS: Absolutely. You can count on me
6 to stick to the text of the proposed rule. A party -- so
7 I'm a little bit worried that the structure of this rule
8 -- and I don't know how to fix it in this drafting
9 committee, but the structure of the rule starting with "a
10 party who is unable to afford costs," which is a defined
11 term, is sort of buying into that clerk who thinks "I
12 don't have to issue process until there is a determination
13 that somebody is a party who is unable to afford costs,"
14 so your structure right now is giving them the textual
15 context to say, "Well, you haven't been determined to be a
16 party who cannot afford costs, so I'm not going to issue
17 process," and that's a real problem with the rule that you
18 just can't fix here, but it needs to be fixed.

19 CHAIRMAN BABCOCK: Okay. Great comment.
20 Now let's go to (b).

21 MR. GILSTRAP: That was the point of my
22 proposal. It says, "A party who contends that he is
23 unable to afford costs."

24 MS. HOBBS: Okay.

25 MR. GILSTRAP: That solves that problem.

1 MR. SCHENKKAN: And of mine, just "A party
2 who files this affidavit."

3 CHAIRMAN BABCOCK: Got it. Let's go to (b).
4 Any comments about (b)? Carl.

5 MR. HAMILTON: In (b)(2)(c), "a Texas
6 nonprofit" what? I think there's a word missing there.

7 CHAIRMAN BABCOCK: "Organization." Yeah.
8 All right. Had you finished, Carl?

9 MR. HAMILTON: Yeah.

10 CHAIRMAN BABCOCK: Okay. Judge Wallace.

11 HONORABLE R. H. WALLACE: (b)(3), "party
12 financially eligible for free legal services who's applied
13 for and was determined to be financially eligible, but was
14 declined representation." How do we know -- I mean, if
15 they say that, has it got to be taken as true? And,
16 secondly, why can they be declined representation? Is it
17 because somebody at legal services didn't think their
18 lawsuit that their neighbor was bombarding their house
19 with x-rays was worth handling or what?

20 MS. McALLISTER: Most of the time it's just
21 that they don't have enough attorneys to take all the
22 cases.

23 HONORABLE R. H. WALLACE: I understand most
24 of the time.

25 MS. McALLISTER: But and I can say I was the

1 executive director of Volunteer Legal Services in Austin,
2 and that was 99 percent of the time. We would reject
3 something for lack of merit very rarely. We just -- most
4 of the cases had merit that would come through, and we
5 just -- you know, we just didn't have the resources to
6 help them.

7 HONORABLE R. H. WALLACE: Okay.

8 MS. McALLISTER: In the full Legal Aid
9 programs it's probably a little bit higher where it's
10 maybe 85 percent of them are rejected for income -- for
11 resources, and the -- actually, it's probably closer to 90
12 percent are rejected for lack of resources and then
13 another five that it's, you know, maybe the case isn't
14 ripe or there's not -- lack of merit or it's not actually
15 a lawsuit, there's just no legal matter that can be
16 addressed, so but it's fairly minimal.

17 CHAIRMAN BABCOCK: Okay. Frank, another
18 comment on (b).

19 MR. GILSTRAP: On (b). On (b), in (b)(2),
20 the second line, it says, "a party who's currently
21 receiving free legal services in this case." I know what
22 that means, but it could be said better, "into the case
23 that's the subject of the affidavit." I know they were
24 trying to do plain English --

25 CHAIRMAN BABCOCK: Right.

1 MR. GILSTRAP: -- but that should be said
2 better. Further down in (b)(2)(C), it says "a Texas
3 nonprofit that provides civil legal services to low income
4 people living at or below 200 percent of the Federal
5 poverty level." We all know what that means, but what it
6 should say is "to persons whose household income is at or
7 below 200 percent of the poverty level."

8 CHAIRMAN BABCOCK: Great point.

9 MR. GILSTRAP: (3), in (b)(3), the reference
10 to "in that case" needs to be added there. Finally, in
11 the very last line in (4) it should be "do not exceed
12 \$2,000" because we're talking about assets.

13 CHAIRMAN BABCOCK: Thank you. Judge
14 Yelenosky.

15 HONORABLE STEPHEN YELENOSKY: Well, first, I
16 didn't understand the last part. What needs to be added
17 there?

18 MR. GILSTRAP: On (b)(4) instead of "does
19 not exceed" it needs to be "do not exceed."

20 HONORABLE STEPHEN YELENOSKY: Oh, grammar.
21 Well, on (b)(3), Trish answered that, and earlier on there
22 was a question about who are these people. I think it's
23 an absolute waste of time to worry about people who are
24 represented by legal services. I did that for 10 years
25 and then did 10 years with another Federally funded

1 program. They are just inundated with cases they can't
2 take. It's a very small percentage. Attorneys are just
3 not available for people who are poor. They have an
4 interest in making sure the person is poor. I don't
5 remember anybody in 20 years who came in and pretended to
6 be poor, so I think we're really wasting time.

7 CHAIRMAN BABCOCK: Okay. Bill Dorsaneo,
8 then Lisa.

9 PROFESSOR DORSANEO: I think more
10 significantly that this 200 percent of the Federal poverty
11 guidelines, take out the percentage and let somebody
12 figure out what it ought to be. I mean, what the Federal
13 government can do to raise money is not what the county
14 can do to raise money.

15 CHAIRMAN BABCOCK: We'll see about that in a
16 couple of days. Lisa.

17 MS. HOBBS: In number (5) are you
18 contemplating the court clerk, that there are some
19 counties where the clerks themselves are making
20 determination, favorable determinations, that they look at
21 the affidavit and they say, "Yeah, this person's poor,
22 we'll let them go without costs"?

23 MS. McALLISTER: Well, this is really the
24 catch-all phrase that is the same phrase that's in the
25 current rule; and, you know, no, I don't anticipate that

1 there are clerks out there, you know, fishing for finding
2 people who qualify under these affidavits; but there are
3 clerks who are making these determinations and so --

4 MS. HOBBS: Well, I can see if you have the
5 IOLTA certificate, but this contemplates somebody coming
6 in and filling out an affidavit.

7 MS. McALLISTER: Right.

8 MS. HOBBS: And then the clerk saying,
9 "Okay, I think you're poor enough, I'll waive your fees."

10 MS. McALLISTER: That does happen.

11 MS. HOBBS: It does?

12 MS. McALLISTER: Yes.

13 MS. HOBBS: Oh, good for them.

14 CHAIRMAN BABCOCK: All right, let's go on to
15 (c). Judge Moseley, I'm sorry.

16 HONORABLE JAMES MOSELEY: A question with
17 respect to the 200 percent number, referring back to the
18 report in that chart, the first column of that chart just
19 says "FPG," and I thought I heard someone refer to that
20 earlier as being 200 percent number. Is that the Federal
21 poverty guideline number, or is that twice the Federal
22 guideline poverty number?

23 MS. McALLISTER: That's at the baseline.
24 That's the baseline Federal poverty guideline, so
25 that's -- and then everything goes up from there.

1 HONORABLE JAMES MOSELEY: So if we were
2 looking at a 200 percent calculation in the rule for a
3 family of four we would be talking about somebody making
4 \$47,000?

5 MS. McALLISTER: Correct.

6 HONORABLE JAMES MOSELEY: Seems kind of
7 rigged.

8 CHAIRMAN BABCOCK: Okay. Let's go on to
9 (c), "Contents of affidavit." Richard.

10 MR. MUNZINGER: In (c) it isn't clear to me
11 that the affidavit must identify the agency from which the
12 affiant is receiving the benefits. It says, "The
13 affidavit must state whether the affiant is currently
14 receiving," et cetera, but it does not require
15 identification of the granting agency. I certainly think
16 that they ought to be required to do that. If the clerk
17 or someone else wants to contest this based on good faith,
18 how do they know whether to call an agency or whether the
19 agency is qualified, et cetera? They ought to be required
20 to identify who's giving them the money.

21 CHAIRMAN BABCOCK: Judge Yelenosky.

22 HONORABLE STEPHEN YELENOSKY: I'm sorry,
23 this is about the \$2,000 on the (3), so I would have to
24 ask your permission to go back to that.

25 CHAIRMAN BABCOCK: Denied. No, maybe you

1 could talk to --

2 HONORABLE STEPHEN YELENOSKY: Yeah, about
3 inflation.

4 CHAIRMAN BABCOCK: Yeah. Frank.

5 MR. GILSTRAP: In (c), (c)(1)(D), "whether
6 the affiant has applied for free legal services," it needs
7 to say "in this case." The danger is they apply for free
8 legal services in some case and have been denied and then
9 they get a get out of jail free card forever. Add a
10 provision in to deal with repeated -- repeat filers, and
11 this needs to say that the affidavit -- affiant has to say
12 that he is not currently a party to more than blank
13 lawsuits. Fill in one, two, or three, but, you know, I
14 figure if -- you know, if they're in three lawsuits they
15 shouldn't get any more free filing fees. So that's the
16 way you deal with repeat offenders.

17 CHAIRMAN BABCOCK: Jim, are you just combing
18 your hair or you got your hand up?

19 MR. PERDUE: No, I don't have anything.

20 CHAIRMAN BABCOCK: Judge Yelenosky.

21 HONORABLE STEPHEN YELENOSKY: Is that a
22 problem? I mean, there are basically two types of people
23 who file these affidavits: Family law, it's a vast, vast
24 majority; vexatious litigants, who will eventually not be
25 able to file anything; and there are no others really in

1 civil cases that I think are of any significance who are
2 refiling and refiling.

3 CHAIRMAN BABCOCK: Lisa.

4 MS. HOBBS: The affidavits, it says, "The
5 affidavit must state," so you're literally going to be
6 requiring the person drafting this affidavit to state, "I
7 have not received free legal services through one of them,
8 I have not applied for free legal services," da-da-da, and
9 I'm not sure that's really what you want. You want they
10 may -- they -- I don't know how to -- it's, again, hard to
11 draft in this situation, but I just point out that that's
12 a problem with the way --

13 HONORABLE ANA ESTEVEZ: Should say
14 "whether."

15 MS. McALLISTER: In TRAP 20 the language I
16 think is also "must" and then there's the 2000 Texas
17 Supreme Court case, 2008, that this was the exact issue,
18 was that somebody had not put in their affidavit every
19 single thing that was required under TRAP 20 and --

20 MS. HOBBS: Because they thought it was
21 irrelevant, right?

22 MS. McALLISTER: Because it didn't apply
23 necessarily --

24 MS. HOBBS: Right.

25 MS. McALLISTER: -- but the Court said they

1 don't have to put every single thing in there, so we --
2 you know, your point is well-taken.

3 MS. HOBBS: Yeah.

4 CHAIRMAN BABCOCK: Okay. Let's go to (d).

5 MR. HAMILTON: Chip? Chip, on --

6 CHAIRMAN BABCOCK: Yes, sir.

7 MR. HAMILTON: On (c)(1)(H).

8 CHAIRMAN BABCOCK: Okay.

9 MR. HAMILTON: "The cash affiant holds," I'm
10 not sure about that word "holds," what that means legally.
11 Should it say "cash, if it's available" or something like
12 that?

13 MS. McALLISTER: Yes, this was actually --

14 MR. HAMILTON: Or does he have to actually
15 hold it in his hands?

16 CHAIRMAN BABCOCK: Let's go to (d). Frank
17 on (d).

18 MR. GILSTRAP: (d)(1) requires proof; (d)(2)
19 and (d)(3) require confirmation. Is that an intentional
20 difference, and what's the purpose?

21 MS. McALLISTER: You know, the reason -- it
22 was an intentional thing, and the committee wanted the --
23 they thought proof suggested something tangible.
24 Confirmation simply kept the language in the current rule
25 that's used for the IOLTA certificate, so they wanted to

1 stay consistent with that, but I don't know that they
2 perceived any particular real difference.

3 MR. GILSTRAP: All right. And on (d)(1), if
4 I come in and I file and I attach my Lone Star card,
5 that's proof, and it can't be contested. If I say that I
6 have a Lone Star card, but I don't attach it, it's not
7 proof, and it can be contested. Is that where we are?

8 MS. McALLISTER: Correct.

9 CHAIRMAN BABCOCK: Judge Yelenosky on (d).

10 HONORABLE STEPHEN YELENOSKY: Yeah. I just
11 refer people to the long e-mail I sent about why are we
12 requiring (e) through whatever it is for people who do (a)
13 through (d)?

14 CHAIRMAN BABCOCK: Okay. Thank you.
15 Anything else on (d)? Justice Brown.

16 HONORABLE HARVEY BROWN: On (d)(3), the
17 phrase "was determined to be eligible." Do y'all make
18 that determination every time somebody comes in the door,
19 and is the determination in writing?

20 MS. McALLISTER: Any time somebody applies
21 for services they do make a determination, and they get
22 something either in writing or at -- you know, it depends
23 on how they're being dealt with. Sometimes they come into
24 a clinic situation, they're just told right there, but
25 usually they're followed up with with a letter specifying

1 how they were denied, whether it was because of resources
2 or because of lack of merit or whatever.

3 CHAIRMAN BABCOCK: Carl.

4 MS. McALLISTER: It's required under LSC
5 regulations.

6 CHAIRMAN BABCOCK: Carl.

7 MR. HAMILTON: It says, "Confirmation must
8 be signed by the legal service provider or a pro bono
9 attorney rendering services through a legal service
10 provider." Does that mean that the legal service provider
11 is providing services?

12 MS. McALLISTER: Well, there's two types of
13 legal service providers, the ones where you have the staff
14 attorneys and obviously the pro bono organizations where
15 it's all legal -- all volunteer lawyers that are doing
16 this; and currently with IOLTA certificates, those can be
17 either drafted by the staff attorneys or they can be
18 drafted by the pro bono attorneys. So this is simply just
19 mirroring that process where the Legal Aid provider that
20 they've come through, if it's, you know, a clinic type
21 situation, they can hand them a letter or whatever that
22 says you've -- "You are eligible, but we just can't
23 provide it," but at the same time the same -- so can the
24 pro bono organization.

25 MR. HAMILTON: But is the pro bono attorney

1 going to know that the application was declined by the --
2 by legal services? Or is he just going to be a pro bono
3 attorney?

4 MR. KINARD: Yes, and -- I'm Lewis Kinard,
5 by the way. I haven't spoken yet, but I was the chair of
6 the rules subcommittee that started this process. So (2)
7 actually is -- when you said "confirmation must be signed
8 by legal services provider." It starts out "if they're
9 currently receiving free legal services," so that's what
10 -- that answers that one. And then "signed by the pro
11 bono attorney who's working through one of those
12 providers," they would know because they either meet with
13 the person, and some of them do the eligibility interviews
14 as well, or they have received an eligibility screening
15 result from someone that hands them the paperwork to meet
16 with someone to say, "I'm sorry they can't help you."

17 MR. HAMILTON: But this section says they've
18 been declined.

19 MR. KINARD: That's (3).

20 MR. HAMILTON: That's what we're talking
21 about, (3).

22 MR. KINARD: Right. So sometimes the pro
23 bono attorneys do the screenings and are declining.

24 MR. HAMILTON: So the pro bono attorney is
25 going to know about that and be able to make that --

1 MR. KINARD: Right. Right.

2 CHAIRMAN BABCOCK: Okay, let's go to (e).

3 Any comments on (e)? Justice Moseley.

4 HONORABLE JAMES MOSELEY: It seems to me
5 that if we're going to impose some kind of good cause,
6 good faith requirement into a contest, we probably ought
7 to allow more than 10 days to allow someone to do that
8 type of investigation to figure out whether they want to
9 attempt to make a contest and figure out whether they have
10 a basis for doing so. Secondly, the stakes of filing a
11 contest may change over time. We were talking earlier
12 about costs involved in a reporter's record, clerk's
13 record down the road, as long as the case is allowed to
14 continue in process until such time as a contest is
15 affirmed, it would seem to me like the requirement to have
16 a contest filed within a certain number of days is
17 superfluous.

18 CHAIRMAN BABCOCK: Okay. Was that a comment
19 on (e) or (f)?

20 MR. GILSTRAP: (f). That was on --

21 CHAIRMAN BABCOCK: That was on (f). Yeah.

22 Anybody have anything on (e)?

23 HONORABLE JAMES MOSELEY: I jumped the gun.
24 I can repeat myself at (f).

25 CHAIRMAN BABCOCK: Yeah, just to drive the

1 point home.

2 HONORABLE JAMES MOSELEY: Thank you.

3 CHAIRMAN BABCOCK: Anybody got anything on
4 (e)? Okay. Now we're on to (f), starting --

5 HONORABLE JAMES MOSELEY: Ditto.

6 CHAIRMAN BABCOCK: -- with Justice Moseley's
7 comment, and Frank.

8 MR. GILSTRAP: Okay, (f)(2)(A), the intent
9 there is to put the fear of God into the clerk about
10 contesting the thing and contesting the affidavit, and it
11 says they've got to file -- they invoke Rule 13. Rule 13
12 is invoked by the signature of an attorney who says, which
13 means that to the best of his knowledge, information, or
14 belief performed after reasonable inquiry that this filing
15 is not groundless. They have muddled it here by putting a
16 sworn certification and good faith. I don't know, it
17 doesn't seem like you can ride two horses here. If you
18 want to put an affidavit in there then say "affidavit."
19 If you want to do Rule 13, just say "Rule 13," but I think
20 when you put the two together you may make it -- may make
21 it unenforceable.

22 CHAIRMAN BABCOCK: Okay. More comments on
23 (f)? Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: Well, I think
25 the intent was to import the penalties of Chapter 13, not

1 the test. It could say it's subject to the penalties of
2 TRCP 13.

3 CHAIRMAN BABCOCK: Lisa.

4 MS. HOBBS: My comment was actually going to
5 be to just say "which is subject to reasonable sanctions"
6 or, you know, some just general sanctions comment, like
7 without referencing another rule and importing that
8 procedure into it.

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: (f), (f)(3)(A).

11 CHAIRMAN BABCOCK: (f)(3)(A). I feel like
12 Carnac.

13 MR. HAMILTON: Talking about the contest has
14 to be heard at the next hearing. Then we say, "The filing
15 of a contest is not the basis for continuing a hearing in
16 the case." I assume that's the next hearing, "but if
17 needed the court may continue a final hearing." Now,
18 what's the final hearing? Is that the same thing as the
19 next hearing?

20 MS. McALLISTER: Could be.

21 MR. KINARD: It could be. It very much
22 could be. You know, you have to remember you've got a
23 range of types of cases from an uncontested divorce
24 through a litigation that requires multiple hearings and
25 disputes and appearances. So the goal is there to not

1 stop the case or require an unnecessary hearing by the
2 court or the parties, but also to leave you the option at
3 the end to take care of a dispute that may still be
4 unresolved at that point.

5 MR. HAMILTON: I know, but if we're going to
6 have the hearing 10 days before the next hearing then why
7 doesn't it say, "The court may continue the next hearing
8 until after the 10-day notice period"? Why do we switch
9 to some other hearing now?

10 MR. KINARD: Because we didn't want the door
11 to close before the end of the case before the 10 days
12 expired, and that usually isn't going to be a problem with
13 an interim hearing.

14 CHAIRMAN BABCOCK: Okay. Lisa.

15 MS. HOBBS: I'm not sure how this is going
16 to work. So the -- let's assume it's the clerk is the
17 contestant.

18 CHAIRMAN BABCOCK: What is the "this" you're
19 talking about?

20 MS. HOBBS: The process, the procedure.
21 Assuming the clerk is the contestant, she's going to file
22 a -- her contest with all these requirements, and it has
23 to state specifically what the grounds are for testing it,
24 and at that same time is she going to be the one providing
25 the notice of the hearing? Because the notice also has to

1 state the specific grounds, so do you envision that she's
2 the one providing the other party notice of the hearing?

3 MR. KINARD: Whoever the contestant is, and
4 if it's the clerk, it's the clerk.

5 MS. HOBBS: Okay.

6 CHAIRMAN BABCOCK: Okay. I think Richard
7 Munzinger had his hand up first.

8 MR. MUNZINGER: If a clerk wants to contest
9 an affidavit because the affidavit has not been, in the
10 clerk's opinion, properly completed, do all of these
11 presumptions apply? The rule doesn't say a properly
12 completed affidavit is presumed to have all of these
13 effects and what have you. So here you've got an
14 application that says you're supposed to tell me how much
15 your current employment income is, and the person doesn't
16 do that, and now here is the clerk who in good faith is
17 charged with preserving the taxpayers patrimony, and
18 they're subject to some kind of penalty for asking a
19 fellow to do what they're supposed to do? It doesn't seem
20 to me to make any sense. There should be something in
21 here that allows a clerk to contest an affidavit that is
22 not completely filled out and presume the clerk's good
23 faith.

24 CHAIRMAN BABCOCK: Brandy.

25 MS. WINGATE VOSS: I just think that Justice

1 Moseley's comment is very --

2 CHAIRMAN BABCOCK: Got to speak up, Brandy,
3 sorry.

4 MS. WINGATE VOSS: Justice Moseley's comment
5 was very important. Ten days is not enough time at all.
6 I know our district clerk administratively reviews these
7 affidavits and has like a standard form letter that says,
8 "Here are all the requirements," and if the affidavit
9 doesn't meet those requirements then the administrative
10 staff highlights what's missing and sends a letter to the
11 party who's claiming they can't afford it. Ten days is
12 not enough time to get a response back, and some of these
13 things might be able to be corrected with notice if the
14 clerk had the time to be able to work with the party to
15 correct this; and our clerk has told me, you know, look,
16 if they've got proof that they're getting these benefits
17 but they didn't attach it to their affidavit, I'm going to
18 send out a letter; and, you know, if they come back and
19 they show me that they have proof, then I will withdraw
20 the contest. But this, you know, sort of forces them to
21 file that contest before they've had an opportunity to
22 resolve the problem.

23 CHAIRMAN BABCOCK: Pete.

24 MR. SCHENKKAN: Do we need to -- and if we
25 don't need to, do we want to provide that the clerk or any

1 party may challenge an affidavit for good cause?

2 MR. GILSTRAP: Where is that? There's a
3 provision in there.

4 MR. SCHENKKAN: That's (f)(2) in the
5 introduction.

6 HONORABLE ANA ESTEVEZ: (2).

7 CHAIRMAN BABCOCK: Kent, did you have your
8 hand up? I can't -- there's a glare behind you guys.

9 HONORABLE KENT SULLIVAN: I did. I just
10 wanted to briefly say that I think the earlier comments
11 really are on the mark, and we really need to take a hard
12 look at (f)(2)(C) and determine whether that is a very
13 significant culprit in this problem. It creates a sort of
14 use it or lose it mentality and probably creates a lot of
15 the log jam that I think people have described during our
16 discussion. I really do wonder if we couldn't create a
17 process where there was a greater incentive and the
18 flexibility for people to look at this issue later in the
19 process, when and if it becomes cost effective and truly
20 necessary, and perhaps create a threshold review that is
21 more of a prima facie review so that access is not slowed
22 or otherwise more cumbersome than it should be.

23 CHAIRMAN BABCOCK: Judge Yelenosky.

24 HONORABLE STEPHEN YELENOSKY: I said earlier
25 and Pete picked up on it, I would take out in (f)(2), "or

1 any party" and complementary I would take out the thing
2 later that says you can tax a party.

3 CHAIRMAN BABCOCK: Justice Brown.

4 HONORABLE HARVEY BROWN: I may be wrong
5 about this, but I thought sometimes court reporters filed
6 these. And is that in Rule 20 but not in this rule?

7 HONORABLE STEPHEN YELENOSKY: I think it's
8 in 20. I think it's TRAP 20.

9 CHAIRMAN BABCOCK: Okay. Lisa.

10 MS. HOBBS: So I serve on the Third Court of
11 Appeals pro bono committee where we screen some cases and
12 then try to find an appellate lawyer to take them, and so
13 I see some of these contests go up, and one of things I've
14 noticed, Trish, is that they come -- the person coming in
15 to prove up that they are poor wants -- doesn't really
16 understand the process of what a hearing is and having
17 evidence, and so -- and the judge clearly doesn't want to
18 give them legal advice, like "Don't you want to get on the
19 stand and tell us that you're poor?" And the guy is like,
20 "Well, it's here on my affidavit," and he thinks he can
21 just stand on this affidavit, and the judge is not telling
22 him, "This is an evidentiary hearing. What do you have,"
23 because they don't want to give legal advice. So
24 somewhere in here you might say what the purpose of the
25 hearing is so that the person knows that he needs to get

1 on the stand and swear that he's poor and present some
2 evidence.

3 CHAIRMAN BABCOCK: Okay. Moving on. Nina.

4 MS. CORTELL: I just want to ask a
5 procedural question, and that is whether clerks and court
6 reporters and other court personnel who are affected by
7 this have had a chance to review and give comments?

8 MS. McALLISTER: We didn't send it out to
9 everybody. We sent it out to a few --

10 HONORABLE JAMES MOSELEY: Can't hear.

11 MS. McALLISTER: Pardon me?

12 MR. KINARD: They can't hear you.

13 MS. McALLISTER: Oh, I'm sorry. We sent it
14 out to some Legal Aid folks, some judges, I mean, specific
15 people. We did have a few clerks review it, but we didn't
16 send it out to a mass of everybody, so I mean --

17 CHAIRMAN BABCOCK: Okay, Richard.

18 MS. CORTELL: Can I -- I just think that
19 that is a constituency that ought to be -- I mean, they'll
20 be administering this, and we used to have representation
21 here of more of those groups, and I think that's important
22 as well.

23 CHAIRMAN BABCOCK: Richard.

24 MR. ORSINGER: Back on (f)(1), I would
25 suggest that we take out the phrase, "the affidavit's

1 allegations will be deemed true," because I don't like the
2 fact that someone can lie under oath and that by someone
3 not objecting or not knowing they're lying that their lies
4 are deemed true. It seems to me we ought to say, "Unless
5 a contest is timely filed, the affiant will be allowed to
6 proceed without payment of costs." Let's not deem false
7 statements true. They should be subject to being
8 prosecuted for perjury. They should be subject to being
9 sanctioned by the court if the court later on finds out
10 that they filed it falsely. This occurs several times in
11 the rule. We don't have to deem them as true. Let's just
12 take the concept out and say if it's not contested they
13 get to go forward without paying costs.

14 CHAIRMAN BABCOCK: Let's go to (g). Any
15 comments on (g)?

16 MR. GILSTRAP: Yeah.

17 CHAIRMAN BABCOCK: Frank.

18 MR. GILSTRAP: Well, this is a big one,
19 (g)(1)(D).

20 CHAIRMAN BABCOCK: Your comment is big or
21 the section is big?

22 MR. GILSTRAP: It's a big issue. (g)(1)(D),
23 "If the court finds that another party in the case can pay
24 the costs of the case then the court may order that party
25 to pay them even if the other party is the prevailing

1 party." That's what it seems to say, and the only place I
2 know we can do that is the Declaratory Judgments Act.

3 CHAIRMAN BABCOCK: Judge Yelenosky.

4 HONORABLE STEPHEN YELENOSKY: Yeah, that was
5 the complementary part. I would take it out.

6 CHAIRMAN BABCOCK: Lisa.

7 MS. HOBBS: I'm going to go back real
8 quickly to the findings required under subsection
9 (h)(5)(C).

10 CHAIRMAN BABCOCK: Does that relate to a
11 comment on (g)?

12 MS. HOBBS: I'm sorry, I had to go back,
13 though. It's important to say.

14 MS. McALLISTER: You mean (f)(5)(C), right?

15 MS. HOBBS: Yes, okay. The judge has to
16 make findings. Who is going to request them? What if
17 they don't make the findings? That's a big issue,
18 requiring findings and requesting them, and what if they
19 don't, and I just point it out.

20 CHAIRMAN BABCOCK: Thank you. You have
21 anything on (g)?

22 MS. HOBBS: No, sorry. Y'all are moving so
23 fast.

24 CHAIRMAN BABCOCK: Richard, on (g).

25 MR. ORSINGER: Okay. We discussed this

1 whole issue early on in the public policy section of our
2 debate I guess, but on (g)(1)(D), basically everyone needs
3 to understand, including the Supreme Court, that this is
4 not just a question of whether the counties will not get
5 revenue because a lawsuit is filed. This makes it clear
6 that other litigants who do have money who are responding
7 to a lawsuit filed by an indigent party or who have sued
8 an indigent party may have to pick up that party's fair
9 share of all these additional professionals that are
10 brought into the family law process. We're not talking
11 about \$200. We may be talking about \$20,000. We may be
12 talking about \$50,000.

13 There are courts in this state that always
14 appoint ad litem in their custody cases. Now then, there
15 is a history we have sometimes of judges appointing
16 favorites and then we know that those favorites sometimes
17 will support the judges in their campaigns. It's a
18 problem, and when you say that we're not now debating
19 whether the courthouse is open, but whether private
20 litigants with money are going to have to pay the freight
21 for all of these extraneous professionals that are
22 appointed in a child custody case, the public policy is
23 entirely different, and now we start having constitutional
24 rights of other litigants that are being impaired, and
25 there hasn't been adequate discussion or consideration of

1 that today in my opinion.

2 CHAIRMAN BABCOCK: Nina.

3 MS. CORTELL: I just want to say that I
4 thought (g)(4) is very important, but I was aware that
5 that had been a real problem, that even though you had
6 indigent litigants, there still ended up being these costs
7 awards in judgments, so it's very important to have that
8 provision.

9 CHAIRMAN BABCOCK: Yeah, Richard.

10 MR. MUNZINGER: I think (g)(3) needs to have
11 some kind of a qualification clause to make it clear that
12 at least a judgment awarding costs pursuant to (g)(2) is
13 exempt from the rules of (g)(3).

14 CHAIRMAN BABCOCK: Frank.

15 MR. GILSTRAP: I think Nina just commented
16 on this, but I want to talk about it more. We're talking
17 about (g)(4), award of costs in final judgment, "A final
18 judgment may not require an affiant to pay costs unless
19 the contest was sustained or the affiant has become able
20 to pay. Any such provision is void and unenforceable,"
21 and this is going to affect current litigation. There is
22 a lawsuit in Tarrant County and perhaps in other cases in
23 which the district clerk says, "Look, the judgment says
24 the defendant pays the costs, and so he's got to pay it,
25 I'm going to try to collect it." And the defendant says,

1 "Well, wait a minute, I'm exempt." If that's how we want
2 to handle this litigation, with this rule, it's fine, but
3 I am a little concerned do we have other rules that say
4 that judgments -- provisions in judgments aren't
5 enforceable? That's what we're doing here by rule.

6 CHAIRMAN BABCOCK: Judge Yelenosky.

7 HONORABLE STEPHEN YELENOSKY: This is just
8 -- the wording says "Any such provision shall be void and
9 unenforceable." I don't think that fits with the sentence
10 before it, because it says, "A final judgment may not
11 contain a provision requiring" -- I guess -- yeah, I guess
12 it does, I'm sorry, but I don't know about the question of
13 making an order void by rule, and it doesn't sound right
14 to me. And, Richard, don't you get the courts to make the
15 people pay their fair share, half?

16 MR. ORSINGER: In what situation?

17 HONORABLE STEPHEN YELENOSKY: The one you
18 described.

19 MR. ORSINGER: If you have an indigent who
20 is receiving a benefit under a Federal program, they are
21 immune from having to pay the costs --

22 HONORABLE STEPHEN YELENOSKY: Right.

23 MR. ORSINGER: -- of all these
24 professionals, so who else is there? There's either the
25 county or there's the private litigant. The task force

1 recommendation is "should be covered for a party who is
2 unable to pay court costs by the county or another party
3 to the case."

4 HONORABLE STEPHEN YELENOSKY: Right.

5 MR. ORSINGER: So if a district judge is
6 worried because the last election somebody ran against him
7 --

8 HONORABLE STEPHEN YELENOSKY: No, I
9 understand that, but what's the current rule on that?

10 MR. ORSINGER: The current rule is that the
11 court can assess the costs of those professionals in any
12 way they want.

13 HONORABLE STEPHEN YELENOSKY: Right. So
14 it's available under the current rule, and if we took out
15 "any party" under (d), I'm sorry, (d)(1)(D), if we took
16 out "another party" there, we would have to change this as
17 well, I think.

18 MR. ORSINGER: Yeah, from the standpoint of
19 your proposal, if you want to say that the other party has
20 no financial --

21 HONORABLE STEPHEN YELENOSKY: Yeah.

22 MR. ORSINGER: -- spin in the game, so why
23 do they care, you're going to have to make them immune
24 from having to transfer this professional cost assessed
25 against them. It's not \$200. It's probably \$20,000 or

1 more.

2 CHAIRMAN BABCOCK: Judge Estevez.

3 HONORABLE ANA ESTEVEZ: I just want to make
4 a comment of how we're treating different classes of
5 people differently. Section 14.006, court fees, court
6 costs, and other costs for an inmate who files a lawsuit,
7 it says that "On the court's order the inmate shall pay an
8 amount equal to the lesser of 20 percent of the
9 proceeding, six months deposits to the inmate's trust
10 account, or the total amount of court fees and costs."
11 These are known indigent people, and we're going to be
12 treating them differently than obviously how we would be
13 treating other indigent people.

14 CHAIRMAN BABCOCK: All right. Let's go to
15 (h). We've already made some comments about them. Let's
16 not repeat them, but Frank.

17 MR. GILSTRAP: Well, I guess we've already
18 commented on (h)(1)(e), fees awarded to court appointed.

19 CHAIRMAN BABCOCK: We have.

20 MR. GILSTRAP: Well, if this rule passes
21 then if once the person is -- the contest is resolved
22 apparently in the affiant's favor, then the county has to
23 pay the ad litem fee. There is no provision to come in
24 here and say, "Well, maybe they shouldn't in this case."
25 It's automatic.

1 CHAIRMAN BABCOCK: More comments about (h)?

2 Yeah, Judge Peeples.

3 HONORABLE DAVID PEEPLES: (h)(2), if you
4 break -- Trish, break those into bullet points, it will be
5 a lot easier for people to understand.

6 CHAIRMAN BABCOCK: Okay. Anything more
7 about (h)?

8 MR. KELLY: General comment.

9 CHAIRMAN BABCOCK: Peter. Sorry.

10 MR. KELLY: You could spend a lot of time
11 and energy developing your own means testing program, and
12 this is a far easier way, more efficient way, to just
13 refer other means tested program, adopt their standards,
14 rather than try to adopt your own, this is a good approach
15 to it.

16 CHAIRMAN BABCOCK: Okay. Any other comments
17 about (h)?

18 MR. GILSTRAP: Yes.

19 CHAIRMAN BABCOCK: Frank.

20 MR. GILSTRAP: In (h)(4) also includes only
21 those persons related to the affiant by blood or by law.
22 Probably -- I know I like plain English, but probably we
23 shouldn't say that. I don't know what being related to
24 someone by blood or by law means. It sounds great. "You
25 are my son by blood or by law," but what on earth does it

1 mean?

2 MR. SCHENKKAN: Is there any need to do that
3 at all? Isn't the key of (5) for a person the affiant has
4 a legal responsibility to support?

5 CHAIRMAN BABCOCK: Okay. What -- what do we
6 want to tackle next?

7 MR. GILSTRAP: Wait a second. We've got one
8 more on (h).

9 CHAIRMAN BABCOCK: Okay. One more on (h),
10 sorry.

11 MR. GILSTRAP: On (h)(7), it says, "A victim
12 of domestic violence shall not be considered to have
13 access to any income or asset." That's great. How do we
14 determine whether the person is a victim of domestic
15 violence? Does there have to be some kind of
16 certification, or can the person just come in and say,
17 "I'm a victim of domestic violence"?

18 CHAIRMAN BABCOCK: Okay. Yeah, Richard,
19 sorry.

20 MR. MUNZINGER: Same section, No. (7),
21 "income or assets to which the affiant has actual and
22 legal access without requiring the consent or cooperation
23 of another person over whom the affiant does not have
24 actual or legal control." I don't know who I have actual
25 or legal control over. I know Mr. Bumble says that if the

1 law presumed I had control of my wife, the law are an ass,
2 but I don't understand that phraseology. I mean, who do I
3 have the right to control?

4 CHAIRMAN BABCOCK: Any more comments on (h)?
5 Okay. Let's go to TRAP Rule 20 and --

6 PROFESSOR DORSANEO: Do we have a proposal
7 for TRAP Rule 20?

8 CHAIRMAN BABCOCK: No changes in TRAP Rule
9 20?

10 MR. KINARD: It was just included for
11 reference as to what the committee sort of started from,
12 since it was a newer version of a similar rule.

13 CHAIRMAN BABCOCK: Okay.

14 MR. KINARD: And it's included for reference
15 and comparison purposes.

16 CHAIRMAN BABCOCK: All right. And if -- if
17 these amendments are made or some of them, is that going
18 to implicate TRAP Rule 20?

19 MR. KINARD: You know, there's two things
20 about 20.1 that -- I don't think it will. There may be
21 some terminology that might be worth consideration, but
22 since 20.1 allows -- or basically requires the party to
23 reply unless they fit one of the exceptions then it's
24 still there. It's a whole new threshold they've got to
25 meet.

1 CHAIRMAN BABCOCK: Okay. Judge Peeples.

2 HONORABLE DAVID PEEPLES: I want to talk
3 about the idea that these certificates are not
4 contestable. To me that's not a problem when you're
5 talking about the filing fees in the trial court, to get
6 into the court system; but when someone has had a trial,
7 and it might be a several day trial, for them to be able
8 to get a free court reporter's record when the
9 means-tested certificate is uncontestable, no matter what
10 the facts are, that's a very different matter; and I just
11 think it's unwise to do that. There ought to be a forum
12 in which they -- it could be inquired about, with a judge
13 there asking questions and find out if a person really
14 can't pay all or part. I mean, you know, not \$200. It
15 might be the court reporter having to hire someone to take
16 the records in court while he or she prepares this one. I
17 mean, the consequences are just infinitely more, and I
18 think to make it uncontestable is wrong. I know it's
19 there now, but it ought to be looked at.

20 CHAIRMAN BABCOCK: All right. Lisa.

21 MS. HOBBS: I would point out there's some
22 talk about whether you -- once you make a determination it
23 follows all the way through the case. The problem with
24 that is that the court reporter has never had an
25 opportunity to contest the affidavit because she never got

1 the affidavit in the clerk's office, and so you're leaving
2 the responsibility to challenge it to the clerk and later
3 the reporter may want the opportunity to challenge it,
4 too, and so I just throw that out there for comment.

5 HONORABLE DAVID PEEPLES: And, Chip, one
6 more thing. There's been a trial, and it's a family law
7 case, and I think every family law case I've ever tried
8 there was evidence about what the people are making and
9 what they do. I mean, you've got sworn testimony after a
10 trial of what the financial circumstances are, and to say
11 that no matter what the truth is, something that was
12 means-tested by some, you know, Federal bureaucrat or
13 whatever, it can't be contested with real -- the truth? I
14 think that's incredible. Just incredible.

15 CHAIRMAN BABCOCK: Nina.

16 MS. CORTELL: I just want to build on the
17 good comments that have just been made and make this
18 point. This has implications for who can contest
19 indigency, when they can contest it, and also the costs
20 involved, because as was pointed out earlier the filing
21 fees are one thing, but when you get to the cost of a
22 record being born that that can be quite significant.

23 CHAIRMAN BABCOCK: Richard.

24 MR. ORSINGER: Let me be sure that I
25 understand clearly. When an appellate record is done for

1 an indigent civil litigant, the official court reporter at
2 his or her own expense must prepare that record and file
3 it; is that correct? The county will not compensate the
4 court reporter for that work?

5 HONORABLE DAVID EVANS: That's correct.

6 MR. ORSINGER: So it's the court reporter as
7 an individual, as a private citizen.

8 HONORABLE ANA ESTEVEZ: My county pays.

9 MR. ORSINGER: I'm sorry?

10 HONORABLE ANA ESTEVEZ: My county, I sign an
11 order and she gets paid for criminal transcripts, so I
12 would assume --

13 HONORABLE DAVID EVANS: Not civil.

14 MR. ORSINGER: Not civil?

15 HONORABLE ANA ESTEVEZ: I don't know. We've
16 never -- I don't know that we've ever --

17 MR. ORSINGER: I think that my point is that
18 the court reporter may have more at stake than anybody
19 we've discussed today in terms of having to reach in his
20 or her own private pocket. To pay for this free
21 government service that we are mandating, and what is the
22 impact of that? Is that going to seriously degrade the
23 salary of these people? Is it going to make it difficult
24 to hire qualified court reporters to agree to work for the
25 state with this huge personal risk?

1 HONORABLE DAVID EVANS: My reporter, in
2 Tarrant County criminal cases are paid for by the county.
3 Civil cases are not paid for by the county, different
4 reporters, and R. H.'s may be different than mine. My
5 reporter doesn't contest them. She just eats it, but I
6 have had a reporter prior to her who did contest them, and
7 in particular, in a very long and drawn out case, and so
8 then the judge has to decide whether that judge will hear
9 his own reporter's contest. And, you know, it's easy
10 enough to transfer it and move it around, but that's one
11 issue, but I agree with you completely. They have a lot
12 invested in that process, and they are the one that are
13 going to incur the -- and to prepare that, reporters hire
14 scopists. I don't know if everybody knows how they
15 prepare their record, but they incur an expense, an
16 out-of-pocket expense they can't -- that is probably about
17 half of what you're going to end up paying because they
18 send the record out to somebody to type up and then they
19 read the record. That's the standard way of doing it now,
20 and they call them scopists, but what they're doing -- am
21 I about right?

22 THE REPORTER: I don't, but --

23 HONORABLE DAVID EVANS: You don't, but a lot
24 of city reporters do, and that's how a realtime feed goes,
25 it goes out of the courtroom, and it's being done by

1 somebody in California and coming back, and they've got
2 large expenses at stake.

3 HONORABLE KENT SULLIVAN: Can you talk and
4 type at the same time?

5 THE REPORTER: Not very well. Not very
6 well.

7 CHAIRMAN BABCOCK: Justice Gray.

8 HONORABLE TOM GRAY: Chip, my point earlier
9 is that it continues through in the appeal, if you'll
10 recall the comment, it was that the rule would have to be
11 revised but that to allow the reporter the opportunity at
12 the point that they receive the notice of the request for
13 the reporter's record to at that point contest it. All
14 I'm trying to do is the majority of these there is nothing
15 that has changed between the time that the initial
16 determination was made and the appeal may proceed, and,
17 yes, give -- that presumption stays until challenged by
18 someone. It can be challenged in the course of the trial.
19 If halfway through one of these proceedings it's suddenly
20 determined, hey, they've got a safety deposit box full of
21 money from drug transactions and they can pay for their
22 lawyer and everybody else involved, you know, I mean, it
23 actually opens up the opportunity to contest for -- in a
24 period and in a time that it is relevant and the evidence
25 may have been discovered, and it doesn't give this

1 artificial barrier of you've got 10 days after it's filed
2 to contest it or you can't contest it at all, and I
3 actually think it gives them more leverage in the process
4 rather than less. But we spend a lot of time on the
5 appeal, the indigency determination, when nobody contests
6 it, nobody's questioned it, everybody knows this person
7 can't pay, but yet the rules require us to go through this
8 determination, and I just think it's a huge waste of our
9 time.

10 CHAIRMAN BABCOCK: Frank.

11 MR. GILSTRAP: Well, the cornerstone of Rule
12 145 is the automatic qualifier. If you are a beneficiary
13 of a means-tested you automatically qualify. If that gets
14 carried forward -- and here we're talking about \$250 out
15 of the county's pocket. If that gets carried forward into
16 Rule 20, the court reporter will not be able to contest it
17 regardless of whether the reporter is allowed to contest
18 it. The contest will not succeed, and we're talking
19 \$10,000 out of the reporter's pocket. It seems to me that
20 no matter what the reporter has got to be able to contest
21 at that point.

22 PROFESSOR DORSANEO: At what point?

23 MR. ORSINGER: Appeal.

24 PROFESSOR DORSANEO: Appeal.

25 HONORABLE STEPHEN YELENOSKY: Well, that's

1 in 20, right?

2 MR. GILSTRAP: That's in 20. Yeah.

3 CHAIRMAN BABCOCK: That's in 20, right.

4 Anything more about TRAP Rule 20? Yeah. Peter.

5 MR. KELLY: How big a problem is this, with
6 giant records with indigent litigants? I mean, most
7 indigent litigants are in there for divorces that we've
8 heard, or, you know, it's half an hour proceedings. How
9 often do we have a 10,000-dollar transcript?

10 MR. GILSTRAP: It only takes one.

11 MR. KELLY: It only takes one, but I mean,
12 no system, no bright line is going to be perfect, but it
13 just seems like a -- does anybody have any personal
14 experience with one?

15 HONORABLE DAVID EVANS: Four-day trial.

16 CHAIRMAN BABCOCK: Justice Gray.

17 HONORABLE TOM GRAY: We see them in
18 particularly termination cases all the time. I've got at
19 least five pending in my court right now in my chambers,
20 probably 15 in the court, where it will be from a one-day
21 to a week or more trial. And they're all there on
22 indigence affidavits, and like I said earlier, in a lot of
23 these cases we're dealing with an appointed counsel, and
24 the appointed counsel can't even find their client, but
25 yet they feel an obligation to continue the appeal

1 because, you know, it's a termination case; and, you know,
2 I think something needs to be done about that, but this is
3 not the forum.

4 CHAIRMAN BABCOCK: Professor Dorsaneo.

5 PROFESSOR DORSANEO: Well, I think our
6 appellate rules subcommittee ought to take a look at this,
7 but we as lawyers have no idea how this is working in
8 terms of court reporters in the trial court and need input
9 on that, and we have really no idea about the problems
10 that courts of appeals have had in working through this
11 rule. So I guess we have some members of the appellate
12 rules committee who could help with that, but we just need
13 that input, and I presume you want us to take a look at it
14 in light of the proposed amendments to 145, or you want us
15 to wait?

16 HONORABLE NATHAN HECHT: Well, wait for now.

17 PROFESSOR DORSANEO: Okay.

18 CHAIRMAN BABCOCK: And of all the meetings
19 that David Jackson would miss since he's here almost every
20 single meeting, Angie, you might just shoot him an e-mail
21 and see if he has any thoughts on this he can share with
22 us by e-mail. Yeah, Eduardo.

23 MR. RODRIGUEZ: Is it possible that the
24 Court could issue a temporary order encompassing some of
25 what we've discussed today for a one-year period to

1 determine the effects on district clerks and their costs
2 and court reporters? In other words, where we can get
3 some actual information to determine whether or not there
4 really is this big and serious an issue to the counties
5 and/or to the court personnel as some people here might
6 say.

7 CHAIRMAN BABCOCK: Okay. Peter.

8 MR. KELLY: It seems to me that it's got to
9 be a very small subset. I mean, you will have a number of
10 transcripts that aren't being paid for, but those have to
11 be for indigents who would otherwise -- for lack of a
12 better word it's the welfare committed slander, the
13 400-dollar pickup truck people who are somehow getting in
14 at the very top end of these income scales. So why don't
15 we try to figure out how many of these transcripts are
16 people that are gaming the system, for lack of a better
17 word, and how many of them just have to be paid for
18 anyway? There should be some social policy they have a
19 constitutional right to have an appeal of a -- no matter
20 how poor they are.

21 CHAIRMAN BABCOCK: Professor Dorsaneo.

22 PROFESSOR DORSANEO: Could somebody tell us
23 what -- why the county will pay in criminal cases but not
24 in civil cases? That just seems baffling.

25 HONORABLE DAVID EVANS: Well, what happens

1 in that is that the -- as I understand it in Tarrant
2 County, we adopted it because it was considered to be part
3 of the constitutional right on an appeal in criminal
4 cases, and it's a -- it's much more prevalent in that
5 environment than it is anywhere else. Our criminal court
6 reporters are compensated on a different scheme than our
7 civil court reporters. Our civil court reporters are
8 purely salaried, but when you get to criminal court
9 reporters they have -- they get a certain amount of money
10 allocated to them to hire people to come in and assist
11 them to get the records up on criminal appeals, and so
12 there's a fund they can draw on, and that's out of the
13 county budget, and it's a fairly large -- it's a pretty
14 good sum for our county right now.

15 On our civil side at this point we do not
16 have such a fund set up, but what happens is if you have a
17 reporter and you have a very active trial docket like
18 where you need your reporter out in the courtroom, she or
19 he will be preparing that record at night or in off hours,
20 and they get compensated for that because they get paid by
21 the parties to produce the record. That's in addition to
22 their salary. They take that, but when they don't have
23 that then they have to make a decision, do we contest this
24 or do I just eat that as part of my overall -- I'm just
25 going to do it because it's not worth the trouble to

1 contest it. And that did -- and they generally -- and I
2 think it differs from reporter to reporter -- don't
3 contest it and because they just say I don't want a whole
4 lot of people -- I don't want to go through the hassle of
5 it, but if it becomes a bigger problem and you've got a
6 paying party on the other side it defrays part of the
7 cost. Remember there's always somebody else they can
8 defray a copy cost, but if it goes to county government I
9 know that the money -- the dollar amount is large in the
10 criminal side, and I don't know what it would be in family
11 law and termination cases.

12 CHAIRMAN BABCOCK: Judge Estevez.

13 HONORABLE ANA ESTEVEZ: I was texting my
14 court reporter so I knew what I do, and she has informed
15 me that she has contested twice, and one on normal civil
16 cases, but that I have always had the county pay for any
17 prison civil inmates that have appealed.

18 CHAIRMAN BABCOCK: Wait a minute. I'm
19 sorry, I didn't catch that.

20 HONORABLE ANA ESTEVEZ: When I have a
21 prisoner -- I sit in a district that has three prisons, so
22 I get a lot of prisoner inmate, and I apparently order the
23 county to pay for those records instead of having her eat
24 every one of those. I guess the county has been paying
25 for those, but as far as private indigent people that came

1 in on a family law, you know, as far as I know, I've never
2 ordered the county to pay for that for her.

3 CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

4 HONORABLE STEPHEN YELENOSKY: I'm pretty
5 sure in the Republic of Travis County that we -- we
6 recognize this to be so unfair that we do pay them, but at
7 a lower county rate.

8 HONORABLE ANA ESTEVEZ: We pay lower for
9 county rates.

10 HONORABLE STEPHEN YELENOSKY: Yeah, and I
11 think we do that all the time, and the real problem here
12 is, as somebody said, well, one can knock the court
13 reporter out. This should be -- let me use the word --
14 socialized because it does hit that way. Why should one
15 court reporter by happenstance have to do \$15,000 worth of
16 work, and so there should be -- we shouldn't just require
17 that person to do it for nothing. I'm not sure socialized
18 through the county or statewide, but that's the real
19 problem.

20 HONORABLE ANA ESTEVEZ: And I meant civil,
21 prison civil inmate.

22 CHAIRMAN BABCOCK: Oh, prison civil.

23 HONORABLE ANA ESTEVEZ: Yeah, those were my
24 civil. I wasn't just talking about the criminal, but the
25 ones that file lawsuits against -- the 1983 cases and all.

1 CHAIRMAN BABCOCK: Got it. Justice Gray.

2 HONORABLE DAVID EVANS: I understood.

3 HONORABLE ANA ESTEVEZ: I know, but I didn't
4 know if they knew.

5 HONORABLE TOM GRAY: I wanted to clarify my
6 response to Peter's question. There is, as I recall, a
7 provision in the Family Code -- I think it's in 263.405.
8 I don't have one in front of me, but -- and I can't
9 remember if it's the attorney or the reporter that has to
10 be compensated as the county does in criminal cases, and I
11 forget exactly what the language is, so there may be in
12 those termination cases a provision that the reporter be
13 compensated, but I think that provision applies to the
14 attorneys that are -- and that they have to be
15 compensated. I'm not sure about that. The other thing on
16 Rule 20, if we're still on that --

17 CHAIRMAN BABCOCK: We're on Rule 20.

18 HONORABLE TOM GRAY: That is -- there are
19 some references to the certification back from Rule 145
20 that would have to be changed, but also there's that
21 concept that the Rules of Appellate Procedure require me
22 to assess costs to the prevailing party or in the
23 judgment, and it makes no distinction about whether or not
24 they were allowed to proceed without the advance payment
25 of costs, and as we have interpreted that language in the

1 Tenth Court of Appeals, it means that they can proceed
2 without the advance payment of costs but it is still due,
3 and therefore, we assess that cost against the losing
4 party at the time of our judgment.

5 CHAIRMAN BABCOCK: Judge Peeples.

6 HONORABLE DAVID PEEPLES: Several points.
7 Termination of parental rights cases were mentioned.
8 There are special rules for termination cases, and there
9 should be, but that's not involved here. Special rules.
10 It was mentioned the length of these cases. There's a
11 right to a jury trial in a custody case; and in my years
12 as an acting judge I tried at least 25 jury cases of
13 family law, custody. It may be 40, but it's a good
14 number. Now, very few of them had pro se people, but
15 those are long cases, long cases.

16 Now, I am not arguing that any person
17 shouldn't have a free appeal. I'm simply saying that a
18 judge ought to look at the truth, the facts. You had a
19 trial, and in every one of them there's been sworn
20 testimony, cross-examined in an adversary process, as to
21 what somebody is making and what they're doing with their
22 life and so forth, and that ought to be open for
23 discussion instead of uncontestable. That's all I'm
24 saying here. There's a small number of these, Peter
25 Kelly, a small number, that's a small number of hearings.

1 I mean, if you're not talking about very much then there
2 won't be very many hearings I think.

3 And the final point, this is over on page
4 three, duty of clerk, the rule as written, I mean, the
5 present rule doesn't require anybody to notify the court
6 reporter that he or she is getting ready to have a free
7 appeal except the clerk, and, you know, they're down
8 there, they're making -- you know, just putting stuff
9 through, they don't know what -- and so to put the duty on
10 the clerk to notify the court reporter, it gets -- the
11 ball gets dropped all the time.

12 CHAIRMAN BABCOCK: Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Yeah, I mean,
14 that's the number one complaint of court reporters. They
15 get notified after the time period has passed. So I think
16 it's really unworkable to have them notified. We've tried
17 to work around that. We're setting up a system with the
18 clerk's office to send an e-mail, but it should be done
19 differently.

20 HONORABLE DAVID PEEPLES: Years ago the
21 rules did require that you notify the reporter and then
22 that was changed, I don't know, 10 years ago or something,
23 notify -- file it and the clerk is supposed to notify the
24 reporter.

25 HONORABLE STEPHEN YELENOSKY: Right. Would

1 it help, David, on the problem where it comes out in trial
2 to add that it's uncontestable, except the judge may raise
3 it sua sponte?

4 HONORABLE DAVID PEEPLES: Give the judge the
5 discretion to say we need to have a hearing on this?

6 HONORABLE STEPHEN YELENOSKY: Yeah.

7 HONORABLE DAVID PEEPLES: Probably a good
8 solution.

9 CHAIRMAN BABCOCK: Judge Estevez.

10 HONORABLE ANA ESTEVEZ: Just quickly on the
11 court reporter issue, my court reporter also let me know
12 that another judge who does predominantly family law, Don
13 Emerson, always pays -- has the county pay his court
14 reporter for any indigent cases, so, I mean, they may not
15 all be unpaid. I don't know.

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: I agree with David that these
18 matters ought to be contestable, and perhaps the fact that
19 there is a means-tested program, a person is on food
20 stamps or something, could be some evidence of his
21 entitlement, but most of these people in our part of the
22 country that have food stamps are richer than I am.
23 Somehow or another they get them. And, you know --

24 CHAIRMAN BABCOCK: You know, maybe you're
25 eligible, Carl.

1 MR. ORSINGER: You can get a free appeal.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: You know, the discussion is
4 -- there's nothing we can do about this I guess, but there
5 is kind of an anomaly that's created. If you're slightly
6 below the qualifying level for a Federal benefit program
7 then you get all of this stuff for free, and if you're
8 slightly above it then you don't get any of this stuff for
9 free. So when it comes to an appeal, if you're just
10 barely poor, you can appeal; but if you're just barely
11 above poor, you can't afford to appeal because you don't
12 have the money to pay for it, and the government won't pay
13 for it, and the court reporter won't do it for free. So
14 we have now created this class where people that are
15 slightly poorer than other people have greater legal
16 rights than those that are slightly wealthier than poorer
17 people, so it's troubling.

18 MR. GILSTRAP: That's why they call it
19 entitlement.

20 PROFESSOR DORSANEO: It's the same thing for
21 being able to ride the rides at Six Flags.

22 MS. McALLISTER: I love that.

23 CHAIRMAN BABCOCK: Got to be a line. Lisa.

24 MS. HOBBS: If the Court elects to change
25 the title of Rule 145, the affidavit of inability to pay

1 costs, they probably want to change the title to Rule 20
2 to match, and I might suggest that the Court would want to
3 be as forward-thinking as Section 132.001 and move toward
4 sworn declarations instead of affidavits, and I throw that
5 out.

6 CHAIRMAN BABCOCK: All right. Has anybody
7 on the -- either our subcommittee, Richard or Judge
8 Peeples, Pete, looked at the impact that this would have
9 on Rule 502.3?

10 MR. SCHENKKAN: No.

11 MR. ORSINGER: Like a pop quiz, everybody's
12 looking in their backpack for some notes.

13 HONORABLE STEPHEN YELENOSKY: Which is what?
14 Rule 505, which is what?

15 HONORABLE KENT SULLIVAN: We're playing
16 stump the band.

17 CHAIRMAN BABCOCK: Indigency in justice of
18 the peace rules.

19 MR. ORSINGER: The answer is no, that's not
20 our turf.

21 CHAIRMAN BABCOCK: Well, that was our
22 charge, but --

23 MR. ORSINGER: Well, my subcommittee doesn't
24 handle those rules, but we would if you wanted us to, if
25 we had the permission of the chair of that subcommittee.

1 CHAIRMAN BABCOCK: Okay, you guys look at
2 it.

3 MR. KINARD: I can tell you a couple of
4 things. Some of this proposed 145 actually patterned
5 there. One is that the clerks are to provide the
6 affidavit.

7 MS. McALLISTER: He's talking about the JP.

8 MR. KINARD: Yeah, which is part of the FED
9 statutes in the JP courts. The other was I think the time
10 line may have come from there, that type of structure,
11 because their rules have a structure in there when
12 contests have to be filed. Now, a lot of those are FED
13 cases. They're on a fast track, and the time lines are
14 shorter than what we have, but we did a similar structure
15 even though the dates were longer.

16 MS. McALLISTER: But the current 502, we
17 didn't spend a lot of time on that, but the current rule
18 is very -- it mirrors the current TRAP -- I mean the
19 current Rule 145, pretty -- most of it, but with these few
20 other anomalies.

21 MR. ORSINGER: So are you recommending
22 parallel changes to the justice rules?

23 MR. KINARD: We did not get to that.

24 MR. ORSINGER: So I guess whenever the
25 Supreme Court decides what's appropriate for Rule 145 you

1 could then maybe write something that fit --

2 MS. McALLISTER: Right.

3 MR. ORSINGER: -- the JP rules.

4 MS. McALLISTER: Yeah.

5 CHAIRMAN BABCOCK: Okay. Anything else --
6 anybody have any insight on 502.3 beside the considerable
7 insight that we have here?

8 HONORABLE DAVID PEEPLES: Is that a repealed
9 rule?

10 CHAIRMAN BABCOCK: No, it's a new rule.

11 HONORABLE TOM GRAY: It's actually in your
12 pocket part, David, that goes in the back of your Family
13 book.

14 HONORABLE DAVID PEEPLES: Public servant,
15 old rule book.

16 CHAIRMAN BABCOCK: Yeah, I think Justice
17 Gray is correct.

18 HONORABLE TOM GRAY: No, it's actually the
19 current rule book, but you get a pocket part for your
20 pamphlet, and it's in there.

21 MS. HOBBS: It seems like that's an easier
22 rule because they don't have reporter issues.

23 CHAIRMAN BABCOCK: 502.3 is titled "Fees,"
24 semicolon, "Inability to Pay," "Text of rule effective
25 August 31, 2013." So we can maybe amend a rule that

1 became effective about a month ago.

2 MR. SCHENKKAN: Set a new speed record.

3 CHAIRMAN BABCOCK: A new speed record. All
4 right. Well, this has been great. Thanks for hanging in
5 there and getting on the fast track.

6 Our next meeting is coming up very shortly.
7 It is October 18th and 19th. It will be a two-day
8 meeting, and it will be devoted to the subject that we
9 started on, which is the restyling of the Texas Rules of
10 Evidence, and I think it's a pretty important thing
11 because I've often seen that restyling sometimes rewrites
12 as opposed to restyles, so if we could take a look at all
13 of that material in advance of our next meeting and come
14 in because we're not quite to Section 5, which is on
15 privileges, but that's where you get into some pretty
16 important stuff. We're almost done with Section 4, the
17 400 rules, but we'll get to some pretty meaty stuff next
18 time. Thanks very much, everybody. Sarah.

19 HONORABLE SARAH DUNCAN: And maybe Levi
20 could do a search and find out how many cases there are
21 trying to figure out if part of the recodification draft
22 of the statutes was a change or not a change given its
23 stated purpose not to change any of the substance.

24 HONORABLE NATHAN HECHT: You need to pay --

25 HONORABLE SARAH DUNCAN: We know how this

1 restyling is really going to go.

2 HONORABLE NATHAN HECHT: You need to pay
3 particular attention to the 500 series because there are
4 no Federal counterparts, so all of the restyling has been
5 done by our committee without the guidance of the Federal
6 process.

7 CHAIRMAN BABCOCK: Buddy.

8 MR. LOW: I pointed out and you might
9 remember there's nothing in there on 511, but the State
10 Bar committee had 511 that was drawn by them, and it's
11 patterned by 2, 502 of the Federal, and we had a different
12 version, my committee, and we came before the full
13 committee here and voted to accept our version instead of
14 theirs, but I've asked them to bring back both versions so
15 we can -- the Court can consider them, but we voted on it
16 once.

17 CHAIRMAN BABCOCK: Right.

18 MR. LOW: But people might take a look at
19 that and see if they changed their mind.

20 CHAIRMAN BABCOCK: Yeah, the sooner you can
21 get it to Angie, the better, so she can distribute it to
22 everybody.

23 MR. LOW: I'll try to -- I'll do that.

24 CHAIRMAN BABCOCK: Okay. Well, thanks,
25 everybody, great two days. We're adjourned.

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(Adjourned at 11:54 AM)

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MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

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