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8 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
9 December 11, 2015
10 (FRIDAY SESSION)
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in and for the State of Texas, reported
21 by machine shorthand method, on the 11th day of December,
22 2015, between the hours of 9:00 a.m. and 4:57 p.m., at the
23 Texas Association of Broadcasters, 502 East 11th Street,
24 Suite 200, Austin, Texas 78701.
25

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2 CHAIRMAN BABCOCK: Good morning, everybody.
3 We've got a full day set up for today, but we will not be
4 meeting in the morning. After today's -- after today's
5 meeting, we'll have the reception at Jackson Walker, 100
6 Congress. 100 Congress, the 11th floor I think. 11th
7 floor, and we'll have our picture taken for this group for
8 this term. Justice Hecht is -- claims that he has a
9 statutory obligation that he must be at this morning, but
10 promises to be here by 9:20, so set your watches and we'll
11 see if he makes it, but in his absence -- and Justice Boyd
12 is very nervous about this, his first time to make a
13 report for the Court, so Justice Boyd.
14 HONORABLE JEFF BOYD: I'm the guy that
15 stands in for Paul Harvey from time to time. I can't
16 think of that guy's name exactly. That's it. Well, good
17 morning. The most important thing to report on since our
18 last meeting that the Court has done is create a
19 commission to study ways to make civil legal services
20 available to those who cannot afford them. As you know,
21 there's often and has long been a struggle to identify how
22 to serve those that are at the low levels of income in a
23 way that they can access the courts, but studies indicate
24 despite all of those efforts of Legal Aid organizations
25 and all of the pro bono work of private attorneys, there's

1 still up to 80 to 90 percent of low and even moderate
2 income persons who have civil needs and are not able to
3 obtain representation because of the cost of affording a
4 lawyer.
5 On the other hand, there are more and more
6 law students graduating with limited job opportunities,
7 and unfortunately significant debt usually comes along
8 with that. Commentators have started calling this the
9 justice gap problem, and the Court has decided that in
10 addition to all that we do and others do for access to
11 justice for those at the lower -- the lowest levels of
12 income, that we should start trying to identify ways to
13 address this gap between more middle to moderate level
14 income folks and those new lawyers who are trying to find
15 ways to do what they've been trained to do. So the formal
16 name of the commission is the Commission to Expand Civil
17 Legal Services. We call it the Justice Gap Commission.
18 Chief Justice Hecht announced the creation of this
19 commission with a press conference right before
20 Thanksgiving.
21 The commission is made up of numerous folks,
22 law deans from around the state, professors, because we
23 think part of the solutions may come from what law schools
24 are doing, but also state and Federal judges, including
25 Justice Bland from this committee, and lawyers from the

1 corporate world and the private firms. Former Chief
2 Justice Wallace Jefferson has agreed to chair that
3 commission. The American Bar Association and several
4 other states have been studying and experimenting with
5 ways to address this issue of the justice gap, and the
6 things they've looked at included expanding the role of
7 nonlawyer professionals and reforming law school
8 curriculum. Our committee has been asked -- this
9 commission has been asked to explore all possible options
10 and provide a report back to the Court next fall.
11 The second item to report on is that in
12 October after our last meeting the Court approved a set of
13 standards at the request of the Board of Legal
14 Specialization for attorney certification in a new area of
15 construction law, so now you can become board certified in
16 construction law.
17 The third item is that the rules that
18 permit, not mandate, but permit e-filing in criminal cases
19 in the trial courts have now been approved and are
20 effective. They, as I mentioned, don't yet mandate
21 e-filing in criminal cases in the trial courts; but the
22 Court of Criminal Appeals is exploring whether and how
23 that can be the next step; and they've set a public
24 hearing for next April and have invited testimony from a
25 variety of folks to come to this hearing in April to

1 address the question of whether e-filing should become
2 mandatory in criminal trial court cases.
3 And then the fourth item is the judicial
4 bypass rules that this committee approved as a
5 recommendation and the related forms. We have a statutory
6 deadline, and the Court is on track to meet it. We did in
7 our last conference -- we've discussed the issues that
8 this committee addressed at the October meeting, and we
9 will go over amendments to the rules and the forms on a
10 line by line analysis next week as a court when we have
11 our conference next week, and we will be releasing an
12 order with the revised rules and forms before the new
13 year, and Chief Justice Hecht asked me in particular to
14 thank this committee for its good work on this project.
15 Is Kent even here today?
16 CHAIRMAN BABCOCK: I think he is somewhere.
17 HONORABLE JEFF BOYD: Where is Kent? Oh,
18 there he is hiding. One of the things the Chief always
19 does is identify great accomplishments of members of this
20 committee, and he never highlights on the failures that we
21 can commiserate together. Kent has switched firms, and
22 I'm told that sometimes your career peaks, and you end up
23 on your way down, and unfortunately he's ended up with
24 Jackson Walker law firm. Chip was bragging, but
25 congratulations to you.

1 HONORABLE KENT SULLIVAN: Thank you very
2 much.
3 CHAIRMAN BABCOCK: No, commiserating
4 actually.
5 HONORABLE JEFF BOYD: Commiserating. So
6 that's the report, and the Chief should be here, as Chip
7 said, within an hour or so to join us.
8 CHAIRMAN BABCOCK: Terrific report. If I
9 were Chief Justice Hecht I would be a little worried that
10 his role here is going to get supplanted.
11 HONORABLE JEFF BOYD: I don't think he is.
12 CHAIRMAN BABCOCK: Probably not staying up
13 at night about this. We're going to change the agenda a
14 little bit because Judge Peeples wants to be here for the
15 ex parte communication discussion, and he is unable to be
16 here until a little bit later in the day, so we're going
17 to launch into Buddy Low, always an entertaining
18 presentation on evidence.
19 MR. LOW: Well, I hate to be the first one
20 because people do a lot of talking about the first item,
21 and I don't have a lot of answers, but when I don't have
22 the answer Harvey will -- Lonny will pick up and he will
23 answer. First, there are three items of evidence. One is
24 203, and that is the one speaking of 45 days, 30 days,
25 with regard to giving notice of a foreign document or

1 translation and so forth, and I sent everybody copies, and
2 when I -- that was sent to me by the State Bar committee,
3 and I asked them to take a look. I found nobody that
4 really had much experience with that. I mean, it wasn't a
5 real problem. So I sent it back and asked them if they
6 had considered whether we just want to do like the Federal
7 court and not set a number of days, but just say
8 "reasonable" or did they want to say a number of days but
9 give the trial court discretion; and a few days ago they
10 called me back and said, "We want you to pull that. We
11 want to do some more work on it." So my committee had
12 already -- I mean, it was fine with my committee, so I
13 will wait, and at their request I will pull that and not
14 ask y'all to vote on that today. That will be the first
15 one.
16 CHAIRMAN BABCOCK: Buddy, just for the
17 future, that's fine. We don't need to take that up today
18 because there's no deadline, but if there's something that
19 the Court thinks is time sensitive, which I don't think
20 the Court does on this one --
21 MR. LOW: No.
22 CHAIRMAN BABCOCK: -- we wouldn't want to
23 pull it from consideration because some outside group
24 asked us to.
25 MR. LOW: Well, no, what the -- it was sent

1 to me by Judge Darr.
2 CHAIRMAN BABCOCK: By --
3 MR. LOW: Judge Darr, who is head of the
4 State Bar committee.
5 CHAIRMAN BABCOCK: Yeah, right.
6 MR. LOW: And the way we operate, they send
7 the things to us, we work through them and then my
8 committee and here. In fact, I was just told a couple of
9 days ago, I had already sent everything out, that they
10 wanted to pull it. They wanted to consider it further, so
11 I mean, we can consider it. I'm ready to vote on it. I
12 think what they did is right.
13 CHAIRMAN BABCOCK: Yeah. No, we don't need
14 to do that, but just for the benefit of maybe the new
15 members, it used to be we would consider anything anybody
16 wanted us to, and that wasted a lot of this committee's
17 time when the Court wasn't concerned about it, so now we
18 only take up things that the Court asked us to look at,
19 and the charge from Justice Hecht on October 9th put Rule
20 203 on here.
21 MR. LOW: Yeah. I understand.
22 CHAIRMAN BABCOCK: So we're going to look at
23 it, but just because some outside group wants us to look
24 at something, we're not going to look at it unless the
25 Court wants us to. An example that Martha and I were

1 talking about earlier today, she's getting weekly probably
2 letters from an outside group that wants us to study
3 something, and the Court doesn't have any interest in our
4 studying it, so we were very polite and say, "Thanks for
5 the input," and that's that.
6 MR. LOW: All three of these items I talked
7 with Justice Hecht about to go through the State Bar and
8 kind of kept him posted. I did not tell him because I
9 just found out they wanted it pulled.
10 CHAIRMAN BABCOCK: Yeah, no, that's fine.
11 MR. LOW: Well, let's go -- first I made a
12 mistake, so let me go from there. All right. Let's go to
13 503, and I call that a common interest privilege, and as
14 you know, we have in discovery we have -- you know, the
15 doctrine of anticipated litigation and what's privileged.
16 The Supreme Court pointed out in XL Specialty Insurance
17 Company, that we did not have a common interest privilege;
18 and in that opinion they put a footnote where the Federal
19 rule -- they don't have one either specifically in their
20 rule; but the Fifth Circuit says they do; and because of
21 litigation now, groups may get together before there is
22 litigation; and they may discuss filing a suit or
23 defending a certain claim. Right now there is no common
24 interest. It has to be a pending lawsuit.
25 Lonny pointed out something to me. It was

1 sent to me where the committee that sent it to me, the
2 State Bar, only struck out "pending," the word "pending,"
3 but it appears -- and I don't have the rule. I thought
4 when we styled we put "anticipated" in there. They didn't
5 show that that was added, but that has been added, and it
6 would have to be added if it's not in there now, to do
7 what the specialty case called for, so it's not a major
8 change. It just means that you don't have to have a
9 lawsuit, but if you anticipate and you get together, and
10 that case pointed out -- I'm sure everybody has read it,
11 but pointed out some things to me that I had forgotten,
12 and I won't go through everything I've forgotten.
13 CHAIRMAN BABCOCK: Yeah, Because you don't
14 remember.
15 MR. ORSINGER: You forgot it, yeah.
16 MR. LOW: So basically we think the
17 recommended should be that where we take out "pending" and
18 insert "anticipated litigation."
19 CHAIRMAN BABCOCK: Okay. Anybody have any
20 comments on that? Bill.
21 PROFESSOR DORSANEO: You want both words,
22 don't you?
23 MR. LOW: Yeah.
24 PROFESSOR DORSANEO: "Anticipated or
25 pending"?

1 MR. LOW: No, no, no. We want to strike out
2 "pending." It was that it only had a privilege only if it
3 was a pending lawsuit.
4 MR. MEADOWS: You want that to continue,
5 don't you?
6 MR. LEVY: You need to leave it that way --
7 MR. LOW: Let me take a look. That's right.
8 Look at what -- yeah. That's true.
9 MR. LEVY: You want me to read it?
10 PROFESSOR HOFFMAN: Buddy, if it's okay if I
11 jump in for one quick second?
12 MR. LOW: Pardon?
13 PROFESSOR HOFFMAN: Can I just jump in and
14 help?
15 MR. LOW: Yeah.
16 PROFESSOR HOFFMAN: If you'll look at the
17 report, if you'll look in the packet, the 503 packet, it's
18 not numbered, but it's the page that begins with "Motion,"
19 that Rule 503(b)(1)(C), the amended. What Buddy's saying
20 is what should have been presented to the committee is in
21 (C) where it says in the middle sentence there "in a
22 pending or anticipated" is not in the current rule, so
23 that should be underlined.
24 MR. LOW: Right.
25 PROFESSOR HOFFMAN: That's the additional

1 language that ARA is proposing we add, and in addition
2 they're proposing deleting the word "pending" from the
3 second to last word there. So those are the two changes
4 that are being made, and Buddy was just pointing out that
5 the draft we have before us makes it seem like there's
6 only one change at the bottom, but in fact, there are two.
7 There is the "or anticipated" words would be added and the
8 word "pending" in the second to last word would be
9 deleted.
10 MR. LOW: What they --
11 CHAIRMAN BABCOCK: The second "pending"?
12 PROFESSOR HOFFMAN: The second "pending,"
13 the second to last word. That's right.
14 MR. LOW: What they did, they struck out,
15 but they didn't underline the word "anticipated".
16 CHAIRMAN BABCOCK: Yeah, Richard Munzinger.
17 MR. MUNZINGER: The use of the word "action"
18 suggests to me that the rule only applies in the event
19 that there is a lawsuit pending, where the issue is raised
20 within that lawsuit, and it's possible to -- I think it's
21 possible to conceive of a set of circumstances where two
22 parties are consulting about claim A that may be filed or
23 that has accrued or it's an issue, and these two parties
24 are conferring about that, and they want to be able to
25 confer and preserve the privilege, but there is no lawsuit

1 regarding subject matter A. There is a lawsuit involving
2 subject matter B, and for some reason their communications
3 become relevant in subject matter B lawsuit. Would this
4 rule cover those communications and provide the protection
5 since it uses the word "action" as distinct from some
6 other word?
7 CHAIRMAN BABCOCK: That's a great point.
8 Only you would think of that, but that's a great point.
9 What do people think about that?
10 MR. LOW: What should we substitute?
11 CHAIRMAN BABCOCK: Justice Gray.
12 HONORABLE TOM GRAY: I thought that -- and I
13 think it would address Richard's concern is that if you
14 just ended the phrase after the word "interest," so that
15 it says "if the communication concerned a matter of common
16 interest," period.
17 MR. MUNZINGER: Which raises a policy
18 question of do you want to have that broad of a privilege?
19 CHAIRMAN BABCOCK: Right. Yeah, Peter.
20 MR. KELLY: The Supreme Court -- I'm trying
21 to find it on Westlaw. In *In Re: Memorial Hermann*
22 discussed the meaning of "action," and as soon as I find
23 it, I will let you know. It came out earlier this year.
24 CHAIRMAN BABCOCK: Stay tuned. Okay.
25 Buddy, I'm sorry. Didn't mean to cut you off. Justice

1 Gray was --
2 MR. LOW: No, I'm listening. I'm looking
3 for the answer to Richard's question. I don't have it.
4 CHAIRMAN BABCOCK: Okay. So Richard's
5 problem would be solved --
6 MR. LOW: Right.
7 CHAIRMAN BABCOCK: -- if you put a period
8 after "interest" and struck "in the action."
9 MR. LOW: All right.
10 CHAIRMAN BABCOCK: But then Richard says,
11 well, maybe now we're creating too big a privilege.
12 Anybody else got thoughts about that? Yeah, Robert.
13 MR. LEVY: I think we should err on the side
14 of protecting the privilege where -- versus trying to
15 parse it too much, and that might end limiting it. I
16 think the purposes for the privilege are very important to
17 allow consultation, discussion, evaluation; and it also
18 would potentially avoid these ancillary battles about
19 trying to undo or challenge privilege. So we should be as
20 clear as we can.
21 MR. MUNZINGER: I agree with that. I think
22 it's important to commerce that people be able to have
23 conversations that they consider to be privileged where
24 they share a common interest in a matter, whether it's in
25 litigation or not litigation, because decisions are made

1 relating to do we or don't we pursue product X, do we or
2 don't we, whatever it is, and people need to have that
3 kind of assurance I think. I agree with you.
4 CHAIRMAN BABCOCK: Yeah. Professor Hoffman.
5 PROFESSOR HOFFMAN: So I raised this exact
6 issue in our committee, the exact point that --
7 CHAIRMAN BABCOCK: So Richard's not so smart
8 after all.
9 PROFESSOR HOFFMAN: As always, I am a few
10 steps behind him. So anyway, I raised it, and the
11 committee talked about it, and I think -- although I'm
12 trying to find our e-mail exchanges because I can't
13 remember. What I believe we said was the concern was that
14 if you take out "in the action" it will potentially be
15 more wide open, and I think the group's -- and others who
16 were on this exchange maybe can have a better memory than
17 I have; but I think what we said was if we keep in "in the
18 action," it would be referencing the two lines above where
19 it says "in a pending or anticipated action"; and so it
20 would encompass both and thus be more limited. The
21 alternative, of course, is you could say repetitively in
22 the very end "in the pending or anticipated action,"
23 though I think the group felt that that was less elegant
24 and so this was a way to get there.
25 CHAIRMAN BABCOCK: Yeah. Roger, and then

1 Frank.
2 MR. HUGHES: Well, I think because of the
3 way the proposed rule is phrased it solves Frank's
4 question, because when you say that a person anticipates
5 "a action," that should mean it doesn't necessarily have
6 to be the action in which the privilege is asserted or
7 necessarily the claim, because all that's going to do is
8 encourage the person seeking discovery to parse their
9 claims. I mean, you know, you anticipate a medical
10 malpractice action, and that's what you're talking about
11 defending, and so the plaintiff decides -- the claimant
12 decides to fox you and instead files it as some sort of
13 DTPA consumer claim against the health care provider.
14 Although now it doesn't provide because it's not the
15 action you anticipated, I think as long as it's some
16 action it ought to be enough, and I also think it -- we
17 need to consider the possibility that it should be
18 extended to claims in which the person who would claim the
19 privilege isn't even a party to the lawsuit. I mean,
20 people may want to use my lawsuit to investigate all sorts
21 of -- well, I won't say -- you know, conferences between
22 parties they think, you know, maybe they want to bring
23 them in someday or they're necessary to establish a
24 background to the claim, et cetera, so I think as long as
25 the parties are considering and anticipating a lawsuit of

1 some sort, that's it. That's as far as you need go.
2 CHAIRMAN BABCOCK: Buddy, and then Frank,
3 and then Richard.
4 MR. LOW: Let me -- I sent around to my
5 committee a packet. It was research was done as to like
6 40 something states and how they consider it, and their
7 argument was weighing privilege with also not having
8 pertinent information about a lawsuit. You could get
9 together and say several drug companies could get together
10 and do certain things to make a drug, and they say. "We
11 always anticipate litigation," and so therefore everything
12 they do may be privileged, and so this was the words that
13 were used, and I'm not sure exactly where as a result of
14 study of what 40 different states do on this where they
15 weigh the privilege, whether there's a chance that
16 relevant information may be hidden.
17 CHAIRMAN BABCOCK: Okay. Frank, and then
18 Richard, and then Peter.
19 MR. GILSTRAP: Well, "anticipated action"
20 covers a multitude of sins, and if we do as is being
21 suggested, if we detach the last phrase about
22 communications concerning a matter of common interest and
23 don't connect it with some kind of reference to an action,
24 then that covers everything.
25 MR. LOW: Right.

1 MR. GILSTRAP: If company A and B are both
2 being sued for an intersection collision, they can talk
3 about whether we're going to bribe the president of
4 Guatemala. I mean, it's anything.
5 CHAIRMAN BABCOCK: Richard.
6 MR. MUNZINGER: Well, you can't use the
7 attorney-client privilege to conceal a crime or fraud.
8 MR. GILSTRAP: It's not a crime there.
9 MR. MUNZINGER: Well, it is in the foreign
10 state, but in any event, it has always been my
11 understanding that the attorney-client privilege is not
12 limited to litigation. The work product privilege is a
13 litigation privilege, but not the attorney-client
14 privilege, and so if you draft a rule that limits the
15 attorney-client privilege to a relationship to an action,
16 have you unintentionally or perhaps intentionally limited
17 the attorney-client privilege; and the attorney-client
18 privilege, we can all remember all the cases we've read
19 how basic it is to our way of doing things and to our
20 society. You have to be able to confide in your lawyer to
21 get good advice as to whether something is lawful or not;
22 and if I have to be afraid that people are going to be
23 reading my mail, am I going to be able to be honest to the
24 client or blunt, especially in a world where I'm supposed
25 to be nice to my adversary and I can get in trouble if I'm

1 not nice to my adversary. I mean, some of this stuff
2 is -- I think it's a very serious issue personally, and I
3 don't think it should be limited to an action for the
4 reasons I've just stated.
5 CHAIRMAN BABCOCK: Peter, then Pete.
6 MR. KELLY: Just to nail down this detail,
7 in the words of Justice Willett, lawsuit -- or "Action
8 is equated with suit. The Legislature says the term
9 'action,' which is a well-established legal term of art
10 synonymous with 'lawsuit'", so the use of "action" means
11 actual lawsuit.
12 CHAIRMAN BABCOCK: Okay. Thanks, Peter.
13 Pete.
14 MR. SCHENKKAN: In the spirit of the
15 discussion we've just been having, I want to ask for maybe
16 a stupid question, which is why do we have in big (C), the
17 one we've been talking about, any restriction to in a
18 pending or anticipated action and then if they concern a
19 matter of common interest? The other four don't have
20 that. They just have it's between a lawyer or lawyer's
21 representative and the client, and the restriction is the
22 one up in the number (1) that applies to all five. It has
23 to be to facilitate the addition of professional legal
24 services, and all of the possible horror stories I've
25 heard so far are covered by some other doctrine, like the

1 Crime Fraud Doctrine which would deal with the bribery
2 deal. I don't think I understand why -- is that
3 ridiculous? Is there a reason we need to restrict it to
4 actions?
5 CHAIRMAN BABCOCK: No, no. Judge Wallace,
6 is Schenkkan being ridiculous? I don't think so.
7 HONORABLE R. H. WALLACE: Well, no. I think
8 Richard's concern about all communications between a
9 lawyer and a client are addressed in subparagraphs (A) and
10 (B).
11 MR. LOW: Right.
12 HONORABLE R. H. WALLACE: Those apply to any
13 communication. The common interest exception really is
14 probably -- I think you see it more in criminal cases than
15 we do in civil cases where you've got multi-defendants
16 represented by different lawyers, and they're going to all
17 get together to talk about their common interest of
18 being -- of winning this criminal case, and I think so
19 (C), you only bring in the conversations between other
20 attorneys and their clients when you're dealing in that
21 matter of common interest, is the way I understand it.
22 And that would normally be --
23 CHAIRMAN BABCOCK: Yeah, I mean --
24 HONORABLE R. H. WALLACE: -- in the context
25 of litigation or anticipated litigation.

1 CHAIRMAN BABCOCK: You can easily see the
2 FDA announces that it's got evidence that cell phones
3 cause some sort of health effect. You can easily see all
4 of the cell phone manufacturers getting together with
5 their counsel to discuss what is surely coming down the
6 pike because of the FDA announcement, lawsuits on a
7 variety of theories against the cell phone manufacturers
8 for harmful effects from their phones, you would want
9 that, I would think, covered by privilege, but maybe not.
10 Robert, and then --
11 MR. LEVY: I was going to make a similar
12 comment. You would have situations like you have asbestos
13 cases, and you have one case and a joint defense involved
14 with that, but you also have multiple other cases where
15 the same issues. The same discussions would apply, and
16 you wouldn't want to have in the second or third or 50th
17 case, have an argument made that the privilege that
18 applied in the first case in the first joint defense
19 discussion should be undone because it's not the same
20 case.
21 CHAIRMAN BABCOCK: Yeah.
22 MR. LEVY: The privilege should still be
23 applicable.
24 CHAIRMAN BABCOCK: Levi.
25 HONORABLE LEVI BENTON: Chip, your example

1 of cell phone use, I think we also need to think about the
2 flip side and be concerned about the manufacturing of
3 litigation. Let's suppose I read about how cell phone use
4 can be harmful and then I call Lonny, my prospective
5 client, and say, "Hey, I've got this great idea. Go use
6 your cell phone under these conditions for this length of
7 time and I'll file a suit on your behalf." It seems to me
8 those communications setting up the action, which would be
9 a fraud on the court, would be privileged; and the
10 question is should those communications be privileged,
11 because we tend to think about this rule really through
12 the viewpoint of a defendant.
13 CHAIRMAN BABCOCK: Right.
14 HONORABLE LEVI BENTON: And we're not really
15 analyzing this rule -- and, frankly, in ways I've seen it,
16 the other side -- respectfully, some members of the other
17 side of the bar manufacture claims.
18 CHAIRMAN BABCOCK: Surely not.
19 HONORABLE LEVI BENTON: Not in Harris County
20 of course.
21 MR. MUNZINGER: Thank God maybe.
22 CHAIRMAN BABCOCK: Justice Gray.
23 HONORABLE TOM GRAY: I was going to follow
24 up on what Pete observed. There are still --
25 notwithstanding the breadth of common interest, there are

1 still two critical limitations on the scope of what is
2 brought within the privilege, and you must still prove to
3 obtain the privilege that it was a confidential
4 communication and that it was made to facilitate the
5 rendition of legal services to the client, and so it's not
6 going to be a general item of common interest, but it has
7 to be proven before you can get to a certain privilege to
8 it to come within the parameters of (b) subsection (1).
9 CHAIRMAN BABCOCK: Justice Busby.
10 HONORABLE BRETT BUSBY: One thing that
11 occurred to me as well in reflecting on Pete's comment
12 about why do we have a reference to "in a pending or
13 anticipated," if we add that, "action" at all. Perhaps
14 one reason is to avoid cloaking with privilege conduct
15 that may violate the antitrust laws, and that's not
16 necessarily criminal or fraudulent conduct, but conduct
17 with people getting together with their counsel when
18 litigation is not anticipated and talking about matters of
19 common interest.
20 CHAIRMAN BABCOCK: Yeah. Yeah, Carlos.
21 MR. SOLTERO: I guess I also -- I kind of
22 think Richard's comment is well-taken because -- about it
23 being broad because, for instance, if it's true that an
24 action is a suit, I assume that includes an arbitration
25 proceeding, too; but I'm not sure that's true or clear;

1 and so I certainly would want, if there's more than one
2 party to an arbitration, that they should be able to have
3 common interest communications; or even, again, think
4 about administrative proceedings. That may not be an
5 action in the sense of a lawsuit in court, but certainly
6 people who have common interests in connection with a
7 hearing before the Railroad Commission or the PUC or
8 whatever I think should have confidential communications
9 protected under the common interest privilege, it seems to
10 me.
11 CHAIRMAN BABCOCK: Robert.
12 MR. LEVY: I agree with that. I think
13 that's a very good point, Justice Busby. Under at least
14 Federal law --
15 THE REPORTER: Speak up, please.
16 MR. LEVY: -- in that syntax it would also
17 apply is that the crime fraud exception would apply to
18 anti-competitive combination discussions. I've litigated
19 that before, so it would provide a basis to get to those
20 communications if they were in the furtherance of any
21 competitive conduct.
22 CHAIRMAN BABCOCK: Pete.
23 MR. SCHENKKAN: And the point is I think
24 Buddy can give us a good example of the crime fraud
25 exception climate in the anti-trust context if you can

1 remember all the way back to the ETSI litigation, the
2 railroads.
3 MR. LEVY: That's what I was referring to.
4 MR. LOW: Yeah.
5 MR. SCHENKKAN: For another time, a war
6 story. I want to give an example of something that I
7 don't think is an action, but I do think ought to be --
8 the communications ought to be protected by the privilege
9 and is now a concrete way to test this proposition of
10 whether or not we should strike more of this language.
11 It's your example, Chip, but instead of getting together
12 about an anticipated lawsuit over this, the manufacturer
13 of the cell phones say, "Let's get our best lawyers and
14 economists and ourselves together and talk about what
15 we're going to do in the rule making," which is actually
16 the way the FDA would probably deal with the matter if
17 they don't already have a rule on point that they can use
18 as an enforcement action, and maybe even if they do, to
19 try to set it up in a rule they can win under. Why
20 wouldn't that be deserving of the same protection?
21 CHAIRMAN BABCOCK: You would think, but
22 would the -- would the Texas Rules of Evidence apply to
23 that proceeding?
24 MR. SCHENKKAN: Well, if it's in the FDA, I
25 guess that's then the question of whose rule of privilege

1 applies, whether it's the matter of the foreign state
2 or --
3 CHAIRMAN BABCOCK: So your situation would
4 be, okay, they got together, talked about rule making, but
5 now they've been sued in a wrongful death or in a personal
6 injury suit, and the plaintiff wants to discover the
7 communications that they had about rule making.
8 MR. SCHENKKAN: That's right. That's right.
9 CHAIRMAN BABCOCK: Okay.
10 MR. SCHENKKAN: Because when they sit down
11 to have that meeting they don't know the context in which
12 it may be -- the conversations they are having to
13 facilitate the rendition of professional legal services.
14 They don't know what the forum or nature of the proceeding
15 or matter or discussion might be under which someone else
16 might want to see what they said.
17 CHAIRMAN BABCOCK: Yeah. Good point, but if
18 you took out the last four words, as Richard suggests,
19 wouldn't you be okay then?
20 MR. SCHENKKAN: No, because you've still got
21 "in a pending or anticipated action" up above.
22 MR. GILSTRAP: It's not the same action.
23 CHAIRMAN BABCOCK: Well, you're representing
24 somebody in a pending action.
25 MR. SCHENKKAN: Not in the FDA example.

1 CHAIRMAN BABCOCK: And there's a discussion
2 among the lawyers.
3 MR. SCHENKKAN: Not in the FDA example.
4 There's no pending action. There's a possibility of an
5 action or a rule-making. There's no pending action.
6 CHAIRMAN BABCOCK: Richard, did you want to
7 say something?
8 MR. MUNZINGER: No, only that in his
9 example --
10 CHAIRMAN BABCOCK: So the answer is, yes,
11 you did want to say something.
12 MR. MUNZINGER: In his example you have a
13 First Amendment concern. Noerr-Pennington, the
14 Noerr-Pennington Doctrine and the antitrust laws is to
15 preserve my right to petition government so I can go to
16 the FDA and say, "Hey, FDA, make a rule that does X."
17 That's protected constitutional speech, for God's sake.
18 CHAIRMAN BABCOCK: Yeah. But is it
19 privileged to get together and plot about it?
20 MR. MUNZINGER: It should be if it -- unless
21 it's a Section 1 conspiracy, which obviously raises a fact
22 question. I've been involved in situations where
23 competitors, they revolutionized an industry because they
24 formed a joint venture; and this was a classic problem 30
25 or 40 years ago, at least in my experience in antitrust

1 law, could two people get together to form a joint venture
2 to produce a new product or something that neither of the
3 two could do by themselves. Was that anticompetitive or
4 procompetitive? And you had to get their lawyers together
5 to write the contract to do the deed.
6 CHAIRMAN BABCOCK: Jim, were you scratching
7 your head or raising your hand?
8 MR. PERDUE: A little of both.
9 CHAIRMAN BABCOCK: Well, then I call upon
10 you for the hand raising. We'll leave your hair out of
11 it, although it's very handsome hair, I will say.
12 MR. PERDUE: Thank you. So this comes to
13 the committee as a means to address Specialty XL, which is
14 a interpretation of the rule which limited it, and there
15 was a fix. So the fix is, as the subcommittee proposes,
16 add "or anticipated action." I do love this committee,
17 and I will be as civil as I can be because that's the
18 rule, but you're talking now about taking the joint
19 interest privilege and expanding it beyond any place that
20 any state anywhere has ever even thought about taking it.
21 So I love the conversation, but the joint defense
22 privilege is not the attorney-client privilege. You're
23 talking about the rendition of legal services, but that's
24 all covered in (A) and (B). In (C) you're talking about a
25 privilege that takes a client to somebody who is not their

1 lawyer and creates a privilege.
2 Now, if that -- if that's not by policy a
3 tailored narrow privilege, I can't think of an instance
4 where it -- where you would want to make sure that doesn't
5 get overbroad, because if you don't limit it in some form
6 or fashion, you are essentially allowing people to have
7 conversations with general counsel of other corporations
8 on some interest and now all of the sudden cloak that
9 communication and privilege, because it's a lawyer with
10 some interest -- it's not your lawyer, but it's a lawyer
11 for somebody else of which you share some commercial
12 interest, common interest, whatever. If you don't tie it
13 back to the legal system then the privilege is completely
14 unlured. So that's my head scratching.
15 CHAIRMAN BABCOCK: Okay. So you've been
16 scratching your head about that. Alex, just a minute.
17 Professor Hoffman, then Professor Albright.
18 PROFESSOR HOFFMAN: Should I have some
19 hesitation about following his excellent looking hair?
20 CHAIRMAN BABCOCK: There was no method in
21 calling you right after.
22 PROFESSOR HOFFMAN: I'll take that risk
23 because I want to echo and say amen to what Jim just said.
24 So to be clear and maybe to somewhat revise what I said a
25 second ago, because maybe I wasn't clear, the State Bar

1 committee, it does not appear to me and I certainly did
2 not from my perspective as a subcommittee member who
3 looked at this, take it as a desire to broaden the
4 existing 503(c)(1) -- 503(b)(1)(C) language to have it
5 untethered to any litigation at all.
6 MR. LOW: Right.
7 PROFESSOR HOFFMAN: So we did not consider
8 it in those terms, and so the -- so the revision of what I
9 said before was the problem wasn't the lack of elegancy in
10 the -- if we were to say "in the pending or anticipated
11 action" in the end. It was that you needed to say "in the
12 action" because it had to be tethered to some existing
13 litigation, exactly as Jim just said; and so it's
14 interesting to talk about it; but my understanding,
15 neither the State Bar nor this subcommittee, the
16 subcommittee of this group, ever considered broadening it
17 further.
18 CHAIRMAN BABCOCK: Okay. Professor
19 Albright.
20 PROFESSOR ALBRIGHT: I just wanted to
21 mention I have not had a chance to study this carefully,
22 but it seems to me that this is directed more towards work
23 product than attorney-client privilege, and I just
24 wondered if anybody has thought carefully about whether
25 you're really trying to protect work product here or

1 expand attorney-client privilege.
2 MR. LOW: You know, a number of the states
3 do not have common interest. They had a group of students
4 at Baylor that researched 40 something states and a number
5 of them do not have that. Now, there is even a more -- a
6 deeper question that I didn't want to go into and
7 certainly we don't need to try to solve it today, but I'm
8 involved in a situation now. It's a major lawsuit in
9 Beaumont, and a number of people have been sued for tons
10 of money, and when the lawyers meet we do not have the
11 clients meet because specialty points out that if Richard
12 and I have different clients and we meet and I talk to
13 Richard's client, that's not privileged, but what I say to
14 Richard. So there's even a question where you have a
15 joint meeting, what is privileged? I mean, if I just call
16 up Richard's client on the phone, that's not privileged,
17 it's pointed out; and what they were trying to do was
18 answer the question in specialty insurance; and that
19 question came up because many times there's no lawsuit and
20 you meet about something you anticipate will be a lawsuit.
21 It wasn't intended to open the door and say,
22 okay, we anticipate we'll get sued any time and now this
23 is privileged because there's always a fight between
24 hiding relevant evidence and protecting a privilege, and
25 those combat, and there are no real clear lines that can

1 be drawn. It was -- this was not drawn certainly
2 apparently from all the discussion perfectly, but it was
3 drawn with the intent that people with a common interest
4 and they figure they're going to get sued or they figure
5 they're going to sue some people over it and they have a
6 common interest, that meeting is designed to be
7 privileged. Now, as been pointed out, it may be too
8 broad. It may be that what we've done is covered -- they
9 could say, well, we anticipate we're going to get sued
10 every time we make a drug, and so therefore -- so I don't
11 know where to draw the line, but that's what was intended
12 by the committee and what we intend, my committee
13 intended.
14 CHAIRMAN BABCOCK: Yeah, Nina.
15 MS. CORTELL: I just want to bring up that
16 there's one potential adverse consequence people may not
17 be thinking about if you further broaden this privilege,
18 and that is we had a case and it ended up being decided by
19 the Texas Supreme Court, *In Re: Godby,* where a firm was
20 disqualified because it received confidential information,
21 not from its own client, but from a joint -- another
22 client as part of the joint defense arrangement, and that
23 later served as a basis for disqualification. So it may
24 not -- at least to lawyers who might be worried about
25 being conflicted out, if you extend it too broadly you

1 might be creating that problem.
2 CHAIRMAN BABCOCK: Okay.
3 MR. LOW: Now, all states do not -- there
4 are like 17 or 18 states that don't have a common interest
5 privilege.
6 CHAIRMAN BABCOCK: Yeah, by the way, what 10
7 states did they not study? You don't need to answer that.
8 MR. LOW: You think I read this report in
9 that detail?
10 CHAIRMAN BABCOCK: All right. We're going
11 to take a vote, and the vote is going to be everybody who
12 is in favor of the proposed amendment. If you think it
13 ought to be something else, and we can talk about what the
14 something else is, then you wouldn't be in favor of this
15 proposed amendment; and the proposed amendment to
16 503(b)(1)(C) is to add the word in the third line "or
17 anticipated" and to strike the word "pending" in the last
18 line of the subsection. So everybody in favor of that,
19 raise your hand.
20 All right, everybody opposed? All right.
21 By a vote of 25 to 7 the proposed amendment passes.
22 MR. KELLY: Can I just make one comment?
23 CHAIRMAN BABCOCK: Yeah, Peter.
24 MR. KELLY: I don't know if there can be a
25 party to an anticipated action, and so that would need to

1 be cleaned up before anything is adopted, going back to
2 the Chapter 74 expert report words.
3 CHAIRMAN BABCOCK: Okay. Good point. All
4 right. Any other discussion? Have we talked out the, you
5 know, the seven people who think the rule could be
6 otherwise? Okay. Let's go on to the next one, Buddy.
7 MR. LOW: Be 801, that would be (k) I
8 believe. And basically what we have here, it's a little
9 bit confusing. We're using the Federal form; but the
10 numbers don't correlate because the Feds have one more
11 definition that we don't have, which is not involved here;
12 and it involves the statements that are not hearsay and
13 using a prior statement; and there are certain
14 requirements for it to meet that; and as it stands now, it
15 was limited only when you could introduce that; and then
16 there was an instruction on not considering it; and now
17 it's to be considered if you have been impeached for
18 general purposes; and you'll see what is proposed.
19 That did -- I think I included the Fed. The
20 Feds studied this a long time, and they showed how it was
21 very limited, and now they're offering it for general
22 purposes. It would be under (l), and I hope that -- the
23 prior consistent statements of a witness, if somebody --
24 the other side wished to open the door for admission to
25 evidence, then you could bring them in, but the scope of

1 the rule, as they said, was limited. It covered only
2 motive, influence, fabrication, or improper purpose; and
3 this has gone on for sometime; and their report, you have
4 to almost study the report to see what was going on; but
5 the designed purpose is to allow it now for all purposes
6 as long as it meets the standard of, what, 403, the
7 prejudicial effect. And the proposed change is listed on
8 (k), and the motion is that these words be used.
9 CHAIRMAN BABCOCK: Okay. Everybody follow
10 that?
11 MR. LOW: Well, all right, first of all, the
12 question was a declarant witness' prior statement under
13 certain conditions of the rule that we're not facing today
14 and not recommending a change or permissible; but they're
15 only permissible in limited purpose; and it's pointed out
16 there are three I think, but now if you open the door to
17 it the other side has to first open the door. Then it's
18 admissible for all purposes.
19 HONORABLE HARVEY BROWN: Chip?
20 CHAIRMAN BABCOCK: Yeah, Justice Brown.
21 HONORABLE HARVEY BROWN: So just to state it
22 a little differently, if you look at the current restyled
23 rule, which is in our packet, and compare it to the
24 addition in the motion, subpart two little (i) is new.
25 It's an addition, and that follows the Federal rule. That

1 addition is in the Federal rule. So what this does is it
2 allows you to put on your client's consistent statement
3 more readily, easier. A lot of lawyers don't even know
4 this about this rule because they think that any witness
5 gets on the stand and talks about something that witness
6 said before is not hearsay, but it's technically hearsay
7 because the prior statement is out of court, and so the
8 question becomes under the existing rule they have to show
9 that they can only get in the prior consistent statement
10 if they show something has happened since, in a recent
11 time frame, that created the motive to lie. This makes it
12 you can put in their prior consistent statement a little
13 more readily by showing the person had been impeached
14 generally.
15 So, for example, if somebody is your best
16 friend. Well, that might be good impeachment, so this
17 rule would allow you to show this person made a statement
18 consistent with their testimony today at some other time
19 frame, and you don't have to limit it to trying to parse
20 out exactly when the statement was made compared to the
21 prior statement, et cetera. So it's a little broader use
22 of prior consistent statements.
23 MR. LOW: Yeah.
24 CHAIRMAN BABCOCK: Buddy.
25 MR. LOW: Two of the things that's included

1 is you couldn't use a prior consistent statement for
2 charges of inconsistency or faulty memory. You couldn't.
3 It had to be it was limited to three things. Now, it's
4 broadened to encompass that it would have a substantive
5 effect if the witness is attacked really.
6 CHAIRMAN BABCOCK: Okay.
7 MR. LOW: It's just to broaden that use, and
8 it was overwhelmingly approved by the Federal rules
9 committee. They studied it, and there's a one-page report
10 on what they studied and what it does, and it's under (f),
11 and this went on -- I followed it before it ever came up
12 here. I followed it, and there were pros and cons as you
13 expect on any rule, but this was kind of overwhelming.
14 They approved as long as it meets like 403, you know,
15 prejudicial effect.
16 CHAIRMAN BABCOCK: Yeah.
17 MR. LOW: So it's just to broaden it to make
18 substantive and then there were many reports but about how
19 cumbersome it is to tell a jury, "Well, you can't consider
20 this for a faulty memory," I mean, you know, and so they
21 said, "Let's don't do that. It's in. The juries won't
22 consider it. Let's let it all".
23 CHAIRMAN BABCOCK: Justice Gray, and then
24 Judge Estevez.
25 HONORABLE TOM GRAY: Mine was a question,

1 and Buddy got pretty close to answering it, but under
2 existing practice to limit the scope of the impeachment by
3 a prior -- to use a prior consistent statement to respond,
4 do you have to ask for the limiting instruction now, or
5 does it come in for all purposes where if you ask -- if
6 you get the limiting instruction, is it limited then for
7 only purposes of impeachment? Excuse me.
8 MR. LOW: What, now, the rule on limiting,
9 you know, if you want to limit evidence to something, you
10 have to -- that's a separate rule, of course, but I mean,
11 and if you don't ask the court to do that, it's in and the
12 jury has got it.
13 HONORABLE TOM GRAY: So under existing --
14 MR. LOW: Yeah. Right.
15 HONORABLE TOM GRAY: -- if you use this
16 methodology without the change --
17 MR. LOW: Yeah.
18 HONORABLE TOM GRAY: -- it still is in the
19 record for all purposes.
20 MR. LOW: Yeah. Unless you invoke the
21 limiting, you know, ask for the limiting instruction.
22 HONORABLE TOM GRAY: Okay.
23 CHAIRMAN BABCOCK: Judge Estevez, and then
24 Frank.
25 HONORABLE ANA ESTEVEZ: I was just going to

1 make the comment that it appears that there is a lot of
2 practitioners at this time, at least in my area, that
3 believes this to be the law anyway, because what I see in
4 my court is they go beyond.
5 MR. LOW: Right.
6 HONORABLE ANA ESTEVEZ: The rehabilitation
7 isn't just the comment that they were -- that they may
8 have made prior and now they've shown an inconsistent "The
9 light was green. Didn't you say that it was red on this
10 day" and then they keep reading and going on and on to get
11 to other areas that were consistent, which I believe is
12 now what they're going to allow them to do under the law,
13 but I don't know that a lot of people didn't know that
14 wasn't the law. I think that it's a very prevalent
15 practice that a lot of litigants don't think about once
16 they -- the door is opened and they had that narrow scope,
17 they kept going. So I think it's a positive change
18 actually. I think that that would be important for
19 litigants to be able to do and gives the jury more to work
20 with when they have those prior statements and they can
21 see what were the statements in a broader area than what
22 was just questioned and what they had said. So I think
23 that that would give more information and probably seek
24 to give us a better ability to find the truth at the end
25 of the day.

1 CHAIRMAN BABCOCK: Frank, you want to yield
2 to Buddy who is --
3 MR. GILSTRAP: I just have one question and
4 I'll yield. It might help to understand what's the reason
5 for prohibiting prior consistent statements to begin with.
6 Is it just to keep people from bolstering the record?
7 What's the underlying rationale?
8 MR. LOW: The underlying reason was the rule
9 wasn't drawn that way. I mean, that's basically it; and
10 as a committee, what the judge pointed out, some of the
11 notes that the committee, when they originally said,
12 "Well, a lot of us didn't know that wasn't the law
13 anyway." I mean, but it --
14 MR. GILSTRAP: It's got to have a reason.
15 HONORABLE TOM GRAY: It's a general
16 prohibition against hearsay statements.
17 MR. LOW: Yeah, right.
18 MR. GILSTRAP: Okay. But you could -- you
19 know, you could blend in. You could change the rule to
20 let it in. What's the reason for keeping it out?
21 MR. PERDUE: It's an out of court statement
22 not subject to cross-examination, and it is by its nature
23 usually used as a bolstering technique. "Didn't you say
24 two years ago" -- blah, blah, blah. "Didn't you say" --
25 well, all of that can't be tested.

1 MR. LOW: Right. That would be, Richard,
2 like if you put a witness and then you say, "Well, here's
3 your statement, didn't you say the same thing here" and
4 then he's written. I mean, it has a purpose.
5 MR. GILSTRAP: Well, the reason I might have
6 said it two years ago, I want that in, is to show I've
7 been consistent all the way through this controversy.
8 That's been my position.
9 MR. LOW: Well, right now it's not -- the
10 other side has to kind of open the door. It's not you can
11 just offer it under the rules.
12 CHAIRMAN BABCOCK: Judge Wallace.
13 HONORABLE R. H. WALLACE: I love that
14 phrase, "open the door."
15 HONORABLE ANA ESTEVEZ: We hear it a lot,
16 don't we?
17 HONORABLE R. H. WALLACE: I hear that all
18 the time.
19 HONORABLE ANA ESTEVEZ: All the time.
20 HONORABLE R. H. WALLACE: It's awfully
21 broad, "to rehabilitate declarant's credibility as a
22 witness when attacked on another ground." Well, I assume
23 if he's cross-examined, he or she, they're going to be
24 attacked on some ground.
25 MR. LOW: That's right.

1 CHAIRMAN BABCOCK: Yeah.
2 HONORABLE R. H. WALLACE: So it's just,
3 okay, now we've let in all of these previous statements to
4 bolster the stuff.
5 MR. LOW: It's going to come in but then it
6 will be limited.
7 HONORABLE R. H. WALLACE: What?
8 MR. LOW: And now it's not.
9 HONORABLE R. H. WALLACE: It wouldn't be
10 limited much. I mean, if there's going to be
11 cross-examination and attacked on any grounds.
12 MR. LOW: Now it wouldn't.
13 HONORABLE R. H. WALLACE: Okay.
14 CHAIRMAN BABCOCK: Professor Dorsaneo, did
15 you have something?
16 PROFESSOR DORSANEO: No, I don't have my
17 hand up. Just cogitating.
18 CHAIRMAN BABCOCK: Justice Brown.
19 HONORABLE HARVEY BROWN: All right. So if
20 you'll bear with me, I'll develop this just a little for
21 us. So somebody testifies at trial the light was green.
22 In their deposition they said the light was red, and you,
23 a lawyer that's put on the witness that says the light is
24 green, want to show that at some other point the witness
25 said the light was green. So you're -- you've got a prior

1 inconsistent statement before trial that contradicts the
2 trial testimony. You've got a prior consistent statement,
3 and the rationale is if you're bringing the prior
4 inconsistent statement we should also put in the prior
5 consistent statement and let the jury work through it all.
6 This only happens if there's testimony at trial that is
7 contrary to a prior statement, because you'll notice the
8 intro says, "The declarant testifies and is subject to
9 cross-examination about a prior statement." So you only
10 get to rehabilitate when there's been this problem that's
11 created that the witness said something before trial
12 contrary to the trial testimony and at the same time has
13 made a consistent statement with his trial testimony.
14 CHAIRMAN BABCOCK: Judge Estevez.
15 HONORABLE ANA ESTEVEZ: Well, I was just --
16 I think on the deposition in a civil case it's not
17 considered hearsay, so it had a different -- it had a
18 different rule. So these are the statements that are
19 unreliable, as somebody else stated. They're not under
20 oath and they weren't subject to cross-examination when
21 they were made, so they don't fall under a different rule.
22 CHAIRMAN BABCOCK: Okay. Anybody else?
23 Okay. Buddy, how would you frame the vote?
24 MR. LOW: For and against the amendment.
25 CHAIRMAN BABCOCK: What are we voting for?

1 MR. LOW: The change as recommended and
2 expressed in what under (k), is that -- yeah.
3 CHAIRMAN BABCOCK: Yeah, it's (k).
4 MR. LOW: Yeah. They have a motion that the
5 proposed restyled version of 801(e)(1)(B) be revised and
6 read as follows, for or against that. Just it's --
7 CHAIRMAN BABCOCK: Okay. So you're moving
8 the second part of this --
9 MR. LOW: Right. That's right.
10 CHAIRMAN BABCOCK: -- attachment? Okay.
11 Everybody with me? Judge Brown.
12 HONORABLE HARVEY BROWN: And if I might just
13 add to that, we want to make it consistent with the
14 Federal rule.
15 MR. LOW: Right.
16 HONORABLE HARVEY BROWN: Which has that same
17 language.
18 CHAIRMAN BABCOCK: Okay.
19 MR. LOW: Because that's what I was talking
20 about. The Federal rule, there was a lot of notes passed
21 back and forth for a couple of years on that, and that's
22 how it came about. The Federal rule is consistent and
23 like this.
24 CHAIRMAN BABCOCK: Okay. So everybody in
25 favor of Buddy's motion as amended by Justice Brown, raise

1 your hand.
2 All right. Everybody opposed? Almost
3 unanimous. 29 to 1 in favor. So let's go to the next
4 rule, Buddy.
5 MR. LOW: I think that's all in the evidence
6 rules.
7 CHAIRMAN BABCOCK: Because we're going to
8 pass on 203?
9 MR. LOW: Yeah.
10 CHAIRMAN BABCOCK: Okay. Great. Thank you
11 very much. So the next item on our agenda --
12 HONORABLE TOM GRAY: Chip, just so that it's
13 clear on the record, on the seven votes on the earlier
14 rule of evidence --
15 MR. LOW: Five.
16 HONORABLE TOM GRAY: Well, five or seven,
17 whatever. I wanted to make sure that although I talked
18 about dropping that phrase, I would -- and modifying the
19 rule further, I don't think any change at all needs to be
20 made to the rule, and that wouldn't have been clear from
21 the record without that.
22 CHAIRMAN BABCOCK: Yeah, Judge.
23 HONORABLE ANA ESTEVEZ: If he feels
24 compelled to say that, that's how I felt as well. It
25 wasn't that I wanted to change the wording. I didn't want

1 to change the rule.
2 PROFESSOR HOFFMAN: This is confession time.
3 CHAIRMAN BABCOCK: Yeah, true confessions.
4 Professor Dorsaneo.
5 PROFESSOR DORSANEO: Well, I'm third in line
6 on that point, plus I have the additional point that as
7 approved by the committee it's poorly worded and subject
8 to a lot of interpretation.
9 CHAIRMAN BABCOCK: You know, Martha is
10 scribbling notes frantically as you speak. Okay. The
11 next item on our agenda is the time standards for
12 disposition of criminal cases. Judge Peeples wants to
13 speak briefly on that, and he's not here yet, so we'll go
14 to the next issue, which is Jim Perdue's subcommittee on
15 three-judge district courts and ADR in constitutional
16 county court judges.
17 MR. PERDUE: Well, we covered a lot on the
18 three-judge district court at the last meeting. You have
19 a slightly supplemented rule in the materials that were
20 circulated thanks to Justice Busby that he can -- what did
21 we do substantively? We changed the language on Rule 57,
22 on TRAP 57, because that's going to come up for subsequent
23 conversation, so it was our committee that -- we were
24 giving that back to the other folks, and Justice Busby
25 worked with them on that. So taking 57 off the table as

1 far as any change other than just to add the word
2 "three-judge district court," to make it conform with
3 this, and I think that's a nonissue at this point in time.
4 So then you get the rule, which basically is the same, but
5 there's two footnotes by Justice Busby which give you a
6 little more information, I think about practice and the
7 thought process.
8 We did get a letter from Representative
9 Schofield that was circulated to the committee, and I now
10 know what it feels like to be in the seat of a jurist
11 called an arbitrary and capricious mind. So the
12 substantive point of Representative Schofield is basically
13 that the 60-day time limit which we put into the rule for
14 the AG to bring the petition to create the court from
15 his -- from his feeling is too short and that there is a
16 reason -- and we discussed this at the last meeting of
17 time limit at all, longer time limit. I have not talked
18 to the entire subcommittee. Justice Busby and I talked
19 about this just through e-mail briefly, and we are kind
20 of -- I mean, I think I said this at the last meeting.
21 Yeah, the 60 days was arbitrary. We just -- we felt like
22 the rule merited a time line.
23 The author of the bill doesn't deny that
24 there is sense to a time line. If 60 days is too short
25 and there is logic to make it 120, I personally and I

1 think -- I don't want to speak for Justice Busby, but we
2 didn't see, you know, a big undermining of the concept of
3 a time line by making it 120 days. So, again, that's
4 before the Court. There is and has been some
5 communication about a time line at all for the AG to bring
6 the petition, whether 60 days is too cold, whether 120
7 days is too hot, is there a Goldilocks somewhere else. I
8 don't know. We could just put that on the table for the
9 Court. Representative Schofield seems to prefer 90 or 120
10 as opposed to the 60, but he doesn't seem to have a
11 problem with a time deadline for the AG to bring the
12 petition, and we talked at length about the thought
13 process behind that last time. So that's kind of where it
14 sits now, and to the extent there's more conversation on
15 the rule that helps the Court or that Justice Busby can
16 answer questions, have at it.
17 CHAIRMAN BABCOCK: Okay. Just for
18 everybody's reference, I think -- Marti, is it tab q2?
19 MS. WALKER: Q1.
20 CHAIRMAN BABCOCK: Q1, that is
21 Representative Schofield and Senator Creighton's letter to
22 me that I received yesterday and sent along. So everybody
23 ought to be sure and take a look at that, and as the
24 sponsors of the bill they have some concern about what we
25 discussed in the last meeting on this.

1 There is a second point that they raise,
2 Jim, about the language about the terms "consolidation"
3 and "transfer." Do you have some thoughts about that?
4 MR. PERDUE: So if you recall, there is --
5 and I think Justice Pemberton probably addressed this
6 better than anybody. There is a problem with this word
7 "transfer" versus "consolidation" as it's laid out in the
8 -- as it appears in the bill itself, and the subcommittee
9 struggled with the idea of how you could have transfer
10 without consolidation or consolidation without transfer
11 because it seemed like the words were inverted on the last
12 sentence of whatever subsection of the bill. But so we --
13 we brought to the proposed 14.8 the best iteration we
14 could that seemed to apply that, and at least as I read
15 Representative Schofield's letter, it seemed to -- I read
16 it as saying we had done a pretty good job. So --
17 CHAIRMAN BABCOCK: If you do say so
18 yourself. Justice Busby.
19 HONORABLE BRETT BUSBY: Sure, thank you,
20 Chip, and thank you, Jim, for laying these out. I think I
21 would associate myself with what Jim said and also just
22 mention that I agree. I think the only thing that's in
23 their letter that is not consistent with the document
24 that's before you is the 60-day item, and so we would open
25 that up for the committee's views and ultimately, of

1 course, the Court's decision about how long that period
2 should be. I didn't feel strongly about 60 days. We just
3 put it out there as a proposal for discussion, so I don't
4 think there is any magic to that; and on the issue of
5 transfer versus consolidation, this is on -- these pages
6 aren't numbered, but page five of the draft that you have
7 under 14.8(g) and (h) you'll see some highlighted words,
8 "consolidate" and "transfer" there with an explanatory
9 footnote; and the issue is that the way the law reads is
10 that the case will first be consolidated with the case
11 before the three-judge court and then be transferred if
12 the court thinks it's necessary.
13 We thought that -- that those words may have
14 been inadvertently inverted in the statute, because if you
15 have a case pending in two different counties, it's hard
16 to understand how they would be first consolidated but
17 only then sometimes transferred, but the letter that you
18 received comes up with an example of how that might happen
19 in a case that's in this -- two cases that are in the same
20 county. So the preference I think of the Representative
21 and the Senator is that we just stick with the language of
22 the statute, and that's the way that it appears in the
23 current draft. We're just tracking the language of the
24 statute, but the footnote gives you a little bit more
25 background about the subcommittee's thoughts on that

1 issue.
2 The other thing that we did add in response
3 to a comment at the last meeting is in 14.9, we added
4 because it wasn't clear where original proceedings would
5 go in these cases, so we added a sentence to make clear
6 that those would also go to the Supreme Court as well as
7 direct appeals.
8 CHAIRMAN BABCOCK: Yeah. Good. Okay.
9 Yeah, Robert.
10 MR. LEVY: Just commenting on the 60-day
11 issue, I think the concern was that you wouldn't want to
12 allow -- if there was not a date that the state could play
13 a game -- a little bit of gamesmanship if they're on the
14 eve of trial and they don't like the way things are
15 progressing or even in trial and they file this notice,
16 that effectively would stop the case. So we felt -- I at
17 least in discussing this, I felt that there needs to be a
18 date, but 60 days could be 120. It just should be early
19 enough so that you don't waste a lot of time in initial
20 proceedings that then have to be reconsidered before the
21 three-judge court.
22 CHAIRMAN BABCOCK: Okay. Pete.
23 MR. SCHENKKAN: I wasn't able to participate
24 in the subcommittee's deliberations and I apologize, but I
25 have a concern, at least a question, about making --

1 providing for more than 60 days, not with regard to the
2 school finance cases where, given the history of those, we
3 could make it 600 days and probably still wouldn't matter,
4 but for the redistricting litigation I have the impression
5 from some newspaper following such cases, that they
6 often -- there is often a question of will the decision be
7 out in time to affect the upcoming election. For that
8 reason I would be inclined to vote, unless somebody can
9 give us a good concrete reason, otherwise to insist that
10 the attorney general make up his mind within 60 days
11 whether he's going to invoke this just so it's kind of
12 another example of gamesmanship possibility if, you know,
13 coming up on an election the difference between 60 days
14 and 120 days may be pretty significant.
15 CHAIRMAN BABCOCK: Okay. Justice Gray.
16 HONORABLE TOM GRAY: As I said last time, I
17 think we're measuring it from the wrong end of the
18 yardstick. It seems to me that what we really ought to be
19 talking about, how many days prior to the trial setting
20 should the attorney general have to make this election.
21 For example, I think there's currently a 45-day notice for
22 the first trial setting, and that seems to be more than
23 enough prior to trial for this election by the attorney
24 general, and the Representative's letter makes reference
25 to there's a lot of things that can be done very

1 efficiently with one judge, but you may not try it with
2 the one judge and so you let it develop. School finance,
3 it may be there for two years developing. Redistricting,
4 it may be there for 15 days developing, but then you get
5 your trial setting and your AG's deal at the same time.
6 There are a few other comments that I have
7 about the rule, but it's note related to the 60-day time
8 frame, so I'll hold those for now.
9 CHAIRMAN BABCOCK: Okay. Yeah, Robert.
10 MR. LEVY: I have a question then. What
11 would happen if you have a substantive pretrial motion,
12 summary judgment motions, that are in the case, ruled on,
13 and then you file your notice to move to a three-judge
14 court? Do those get reconsidered or they law of the case?
15 HONORABLE TOM GRAY: That's one of the
16 questions that I was going to address because it didn't
17 relate to the 60 days, but we do need to address that
18 question because we do say that a motion decided by one of
19 the three judges by agreement of the three judges can be
20 reconsidered --
21 MR. LEVY: But that's after.
22 HONORABLE TOM GRAY: -- but we don't address
23 what about motions that have been resolved by the judge
24 before there is a three-judge panel, and that does need to
25 be addressed in the rule.

1 CHAIRMAN BABCOCK: Yeah. Levi.
2 HONORABLE LEVI BENTON: The MDL rules permit
3 the MDL judge to reconsider all of it, and so I think this
4 rule ought to be consistent with that, so --
5 MR. LEVY: If I could just respond, if we do
6 that then I think we've got to focus on the timing,
7 because that gives the state the chance to get a second
8 bite at the apple if it waits, doesn't like the ruling,
9 and then triggers the notice. Then they get a
10 reconsideration before the extra two judges, and that's
11 one of the issues I was thinking about in terms of putting
12 an earlier date so that the panel gets to hear the major
13 issues.
14 CHAIRMAN BABCOCK: Justice Busby, then Lisa,
15 and then Pete. And then Levi again.
16 HONORABLE BRETT BUSBY: I think the law is
17 fairly well-developed that when you have a transfer and
18 there's an interlocutory order the new judge can
19 reconsider any interlocutory order by the prior judge. So
20 I don't know if it's necessary to say that in the rule,
21 although I certainly wouldn't be opposed to that. I think
22 that's probably the background rule, so I don't know that
23 that's necessary to spell that out expressly, but I guess
24 my concern about Justice Gray's comment about running the
25 time line from the back end would be if you have three or

1 four of these cases going on and you're conducting
2 duplicative discovery in each case and you're having
3 dispositive pretrial motions ruled on in each case, there
4 is a lot of inefficiency in that that could be removed by
5 having an earlier time line to bring all of these cases
6 together.
7 CHAIRMAN BABCOCK: Lisa.
8 MS. HOBBS: My comments were going to be
9 consistent with Justice Busby's.
10 CHAIRMAN BABCOCK: Okay. Pete.
11 MR. SCHENKKAN: I don't think the MDL
12 example is a good reason not to impose a 60-day or some
13 other short deadline in this context. MDL is so much
14 broader, and it only requires that the civil actions
15 involve one or more common questions of fact and filed in
16 the same court. That you can well imagine some need to
17 let the case go a little farther along before the
18 deadline, not to call it shallow. I really don't see why
19 more time is needed in the case of redistricting and would
20 offer as my counter example the Federal rule on -- the
21 Federal statute on this, which is that it's automatic.
22 There isn't a decision to be made. If it's a
23 constitutional challenge to the voting then there will be
24 a three-judge court convene.
25 CHAIRMAN BABCOCK: Levi, then Richard.

1 HONORABLE LEVI BENTON: I'll pass, Chip.
2 Thank you.
3 CHAIRMAN BABCOCK: Richard.
4 MR. MUNZINGER: I'm not familiar with how
5 the state operates because I live and work in the border
6 of New Mexico and --
7 CHAIRMAN BABCOCK: Different time zone.
8 MR. MUNZINGER: -- there's one aspect of
9 this rule that seems to me may not draw the attention of
10 the attorney general or the state governor or others who
11 have political interest in this, and that is the language
12 "operations of this state's public school system," so the
13 time limit says that you have 60 days from the time that
14 the petition raising any of these issues is served on the
15 state or a state agency, and -- at least that's the way I
16 read it. Officer -- officer or agency. So is it possible
17 that there is some case that involves the operation of the
18 state's school system as distinct from electoral districts
19 or state financing, which are obviously subjects that
20 would gain attention of the powers that be early on in the
21 process, but here is it possible that there would be some
22 case relating to the operations of the state's public
23 school system that could evade the attention of those
24 persons who are charged with the statewide public policy,
25 even though they are matters of politics where a 60-day

1 time limit could harm the interest of the state?
2 CHAIRMAN BABCOCK: Justice Busby.
3 HONORABLE BRETT BUSBY: To answer Richard's
4 question, the way that the statute is written is that the
5 claim would both have to challenge the finances or
6 operations of the public school system and there would
7 have to be a state or a state officer or agency who is a
8 defendant in order for the three-judge district court
9 statute to apply, so I think the answer is, no, that you
10 would not have a three-judge district court case where
11 some county level or municipal level person would be the
12 defendant who is served because that would -- it only
13 falls within the statute if the state or a state officer
14 or agency is a defendant.
15 MR. MUNZINGER: No, I understand that, and I
16 understood the statute said that. My question I guess
17 really is if a state officer gets served, it's the
18 attorney general who is given the power to trigger the
19 three-judge court. Is the state officer required to
20 communicate to the attorney general? Will the attorney
21 general learn within a 60-day period of time that this
22 case relating to the state's public school system is
23 pending? Theoretically I think he would know there is a
24 suit pending addressing financing or electoral districts
25 or what have you, but there may be something within the

1 school system thing that doesn't. I don't know. It may
2 be so minimal it's not worth arguing about, but I am
3 concerned about a 60-day time limit that can have such
4 far-reaching effects, because I would think that a
5 three-judge court, if I were to the attorney general I
6 would think it would probably be better to have a
7 three-judge court with all of these issues rather than a
8 one-judge court.
9 CHAIRMAN BABCOCK: Justice Busby, then
10 Robert.
11 HONORABLE BRETT BUSBY: I don't know the
12 answer to this, but others may. My recollection was if
13 you sue the state or a state officer or agency, you need
14 to serve the attorney general, but I could be wrong about
15 that.
16 MR. MUNZINGER: Yes, but may a state officer
17 or state agency be -- intervene or file a suit and not do
18 so without notifying the attorney general? I don't know.
19 And that's again part of my concern. I don't want to take
20 a lot of time on the issue. It's just that there is a
21 time limit. These are political questions. They affect
22 the entire state, and they are obviously close to the bone
23 of what interests citizens, education, elections, et
24 cetera, and I just am concerned that 60 days may be
25 inadequate.

1 MR. LEVY: We talked about that. I think in
2 your second example about intervention, that would be one
3 where the state would not be a defendant, but -- and then
4 the statute wouldn't be triggered, but I might be mistaken
5 on this, but my understanding would be that the attorney
6 general would be defending the state in the cases where
7 the state or a state official was named, but, again, the
8 60 days is not magic. I think if it is our wisdom that it
9 should be 120 days, I don't think that creates any greater
10 issue or concern. It's just the suggestion was a date
11 certain should be specified.
12 CHAIRMAN BABCOCK: Frank.
13 MR. GILSTRAP: Why don't we just shorten the
14 elections along with the schools? That seems to make
15 sense.
16 CHAIRMAN BABCOCK: Yeah, Richard.
17 MR. ORSINGER: I'd like to get a better idea
18 of how this works when there are multiple lawsuits because
19 the discussion seems to me to be on the focus on an
20 individual lawsuit is filed and then when does the AG have
21 to make this election. It's possible, I assume, that
22 there could be two or three or a dozen of these lawsuits
23 filed all over the state. I'm troubled by the fact that
24 the rules require that the district judge in the case be
25 appointed to the three-judge panel because if you've got

1 four lawsuits and each one of them has to have the
2 district judge appointed to the panel, you've got four
3 judges plus the court of appeals judge. I'm not sure how
4 that works.
5 Secondly, the timetable on the first case
6 filed may be relevant, but once the AG has given the
7 notice, wouldn't all of them necessarily be consolidated
8 into the one three-judge panel court, or does that go
9 without saying, or is it said that once the election is
10 made in one lawsuit, that all other lawsuits pending in
11 Texas must be consolidated and all future lawsuits must be
12 filed in front of that three-judge panel? Is that the
13 concept?
14 HONORABLE BRETT BUSBY: Well, in answer to
15 your first question, I think the attorney general gets --
16 if there are multiple lawsuits the attorney general gets
17 to pick which one he is asking the Chief Justice to create
18 a three-judge panel in.
19 MR. ORSINGER: Okay.
20 HONORABLE BRETT BUSBY: So there wouldn't
21 necessarily -- I suppose he could ask for that in multiple
22 cases, but the idea is that there would be a three-judge
23 district -- the attorney general could select and have one
24 and ask the Chief Justice to create a court; and if the
25 Chief Justice decides to do that under the procedure that

1 we've laid out here then the other cases could be
2 transferred and consolidated into that case.
3 MR. ORSINGER: So could be or must be?
4 HONORABLE BRETT BUSBY: Well, this gets back
5 to the issue that we were raising earlier about the
6 statute inverting "transfer" and "consolidation." The way
7 it reads now is that they must be consolidated. We're
8 tracking the statute. They must be consolidated if they
9 meet the requirements and then they may be -- they must be
10 transferred if the court finds that transfer is necessary,
11 which I'm not sure I can think of an example of
12 consolidated cases where transfer would not be necessary,
13 but --
14 MR. ORSINGER: Can the AG decide to create
15 three or four or five three-judge panels by simply making
16 the elections and not moving to consolidate, or once we
17 have one three-judge panel must all of that litigation all
18 over Texas migrate to those three judges?
19 MR. PERDUE: If you read the letter, it
20 seems to suggest that.
21 MR. ORSINGER: What?
22 MR. PERDUE: That -- the letter from
23 Representative Schofield seems to conceive of exactly
24 that, that if you come out on the other side of this rule
25 or the bill that has already in the -- that if the case

1 that's up at the Court now comes back down and the AG
2 makes the petition, that even the current case which the
3 Supreme Court is hearing, if it gets remanded then if you
4 read Representative Schofield's letter it seems to concede
5 that that same case could merit a petition by the AG for
6 which a three-judge panel is created and for which that
7 could then become the vehicle that will attach all other
8 cases that the AG asks to go into that panel.
9 MR. ORSINGER: Okay. So when we debate a
10 60-day window or 180-day window --
11 CHAIRMAN BABCOCK: 120.
12 MR. ORSINGER: 120-day window.
13 CHAIRMAN BABCOCK: Just gave them 60 extra
14 days.
15 MR. ORSINGER: We're talking about a
16 decision in the context of one lawsuit when there may be
17 multiple lawsuits that have been pending for months or
18 years or lawsuits yet to be filed where the clock has not
19 even started running, and so the real -- are we not asking
20 whether the AG has to pull the trigger on all the lawsuits
21 based on when -- which lawsuit they decide to file their
22 petition in?
23 MR. PERDUE: So the real politic in this is
24 humorous to me. I mean, it is the law, but the concrete
25 of what you're getting at is does the AG get to figure out

1 a way to have Dietz plus two or somebody else plus two. I
2 mean, that's what you're talking about. I mean, where is
3 the individual case for which they make the petition, then
4 you get to under the rule, and then you get this
5 transfer/consolidation provision.
6 MR. ORSINGER: Okay. Let's say Judge Dietz
7 is two years into this lawsuit, and the AG doesn't like
8 his ruling, and somebody in East Texas files something
9 right over by the Louisiana border. The AG can file his
10 petition in the Louisiana case, and that district judge is
11 on that panel, and Judge Dietz is not. Is that what this
12 is all about?
13 MR. PERDUE: I think that's the way I read
14 it.
15 MR. ORSINGER: We're debating a -- we're
16 debating a timetable as if it's one type of timetable. In
17 reality it's a multiplicity of timetables, and it's the
18 AG's election which clock it wants to start. It could be
19 under this clock or that clock, and I could be two years
20 out on a clock over here, but if somebody will just file a
21 lawsuit somewhere, I can pull the 60-day trigger there,
22 and that three-year-old lawsuit migrates.
23 HONORABLE BRETT BUSBY: I'm not sure there's
24 a way to get around that possibility under the statute as
25 it's written, though.

1 MR. ORSINGER: Well, can we fix it with the
2 rule? Because it does seem to me that the policy behind
3 this is that instead of having multiple district judges
4 litigating the single issue of constitutionality of public
5 school funding in Texas, and there can only be one right
6 answer or maybe there isn't even a right answer, but there
7 can only be one legal answer, then we don't want multiple
8 lawsuits, shouldn't we craft a rule that helps the statute
9 get us to the place where if the AG says we're going to
10 have one three-judge panel decide for everybody, that's
11 the way it works? Our rules help the statute to get us
12 there.
13 MR. PERDUE: I think the policy of the bill
14 as stated in the history and certainly made pretty
15 explicit was that there was a feeling that Travis County
16 got an outside voice in public policy in the state of
17 Texas, and that the bill was an effort to broaden the
18 judicial input to the policy questions of redistricting or
19 school finance beyond being hosted in Travis County as
20 opposed to judicial efficiency.
21 CHAIRMAN BABCOCK: Robert.
22 MR. LEVY: Richard, I don't know how we can
23 avoid that scenario given the way the statute is drafted,
24 as Justice Busby noted. It clearly provides for the
25 transfer/consolidation, and the question I think would

1 only be how you would craft a time period, but I don't
2 know how we could create a time clock that would apply to
3 a prior case if some -- if a new case is filed, the AG has
4 the right to trigger the court even if it has not elected
5 to do it in a prior case, and then the consolidation would
6 kick in. So I'm just not sure how you could craft it
7 without getting very, very detailed and creating almost an
8 impossible process.
9 MR. ORSINGER: Well, it just seems to me
10 that all of our discussion about whether they've got 60
11 days to do it or six months to do it is really just kind
12 of hypothetical because the truth is they probably have
13 years to do it. They can be three years into a heavily,
14 heavily fought lawsuit in Harris County and somebody files
15 something out in West Texas, and the Harris County lawsuit
16 is finished because they petition it out there and --
17 MR. LEVY: Yeah, and I think that's a
18 legislative policy issue because of the nature of the
19 language in the statute talking about transfer or
20 consolidation. That's automatic.
21 CHAIRMAN BABCOCK: Justice Bland, and then
22 Nina.
23 HONORABLE JANE BLAND: The rule and the
24 statute both provide that the AG can make the initial
25 request for a three-judge panel, but once a three-judge

1 panel is created any party with a related case can move to
2 transfer or consolidate, and that's in the statute and in
3 the rule. So it's not as though the AG alone would be
4 picking and choosing whether to move things to a
5 three-judge panel. The AG would have the ability to
6 request the three-judge panel at the outset. Once it's
7 created any party to any of the litigation that's deemed
8 to be related can move to transfer or consolidate to the
9 three-judge panel, and that panel will make, I guess, the
10 decision about whether or not that suit is related and
11 should be consolidated, and that would be subject to
12 review like the other decisions of the panel, so I
13 think -- I don't think it's going to be that difficult to
14 manage.
15 CHAIRMAN BABCOCK: Nina.
16 MS. CORTELL: I was just going to say as a
17 historical matter, particularly in school finance that we
18 have been involved with for many, many years, you end up
19 in one suit. It may be multiple, but they're always at
20 the same time, and they have always been transferred to a
21 single court, so just at least historically in that
22 context, and I would think in apportionment suits it might
23 be somewhat similar. So I don't know in these particular
24 types of lawsuits that we're dealing with how real this
25 concern should be.

1 CHAIRMAN BABCOCK: Yeah. Judge Estevez.
2 HONORABLE ANA ESTEVEZ: As I'm rereading the
3 statute, perhaps another way of reading what they wrote in
4 the statute under section 228.003, section (b), it says,
5 "On the motion of any party to a case assigned to a
6 special three-judge district court under section 228.002,
7 the court by order shall consolidate with the cause of
8 action before the court any related case pending in any
9 district court or other court," and I guess it does state
10 "or other court in the state" because what I was thinking
11 before I read that was that they were really talking about
12 or meant to use the word "consolidate" in the way we
13 traditionally use it, which means they were already in the
14 same county and it was filed in that same district, and so
15 they were actually consolidating since part (c) was a --
16 it allows the court to transfer if it's necessary, so I
17 was wondering if that's the way we could get out of that
18 situation in which they would have to transfer the case
19 that was filed near the border or I guess the Austin case
20 back to the border, and that case the judge may have that
21 discretion to say the transfer is not necessary because
22 he's had it for two years, and so he's not going to send
23 it back to another court in which they've just -- I just
24 thought that might be the out. I don't know. You may
25 want to read (c), and that would not allow that abuse. I

1 would consider it abuse if someone has been working on a
2 case for two, five years and then they tried to transfer
3 it under that rule, so I don't know.
4 CHAIRMAN BABCOCK: Peter.
5 MR. KELLY: Reading 228.001, "Eligible
6 proceeding," it says, "The attorney general may petition
7 the Chief Justice." It doesn't say that nobody else can
8 either or any other litigants can't, any citizen that has
9 a suit pending, whether it's up near the border or in
10 Travis County can't petition the Supreme Court justice.
11 So arguably it could be read that this only specifies the
12 rights and obligations of the attorney general. It
13 doesn't necessarily limit the rights of other citizens.
14 Perhaps the rule could be -- reflect that anybody can
15 petition the Supreme Court to install a special
16 three-judge district court.
17 CHAIRMAN BABCOCK: Any party or anybody?
18 MR. KELLY: Any party.
19 CHAIRMAN BABCOCK: Richard Orsinger.
20 MR. ORSINGER: One possibility is that -- is
21 to adopt a rule that says the AG cannot make an election
22 after a certain cutoff point, whether it's 60 days or six
23 months. Once that clock has run on that case, that case
24 cannot be forced into a consolidation with the later case,
25 and that way the attorney general can't wait two or three

1 or four years when a case is almost mature and they think
2 they're going to lose and then opt for a recently filed
3 lawsuit elsewhere.
4 Now, the disadvantage of that is it leaves a
5 multiplicity of lawsuits going on, but it does force the
6 AG to decide whether they're going to go with the
7 three-judge court early in the litigation process.
8 Because if they don't then they're going to have multiple
9 lawsuits to defend. So it's possible that by requiring
10 the AG to vote yes or no early on, we'll know whether that
11 case is going to be part of the consolidated whole or not.
12 CHAIRMAN BABCOCK: Yeah, Justice Busby, and
13 then Richard.
14 HONORABLE BRETT BUSBY: Well, I think Nina
15 is correct about the type -- the way that these cases
16 typically work, because you have to keep in mind that
17 under 228.001 the only cases in which this can be -- the
18 attorney general can petition is cases in which a state
19 officer or agency is a defendant. So the attorney general
20 can't come in three years later and file a suit and then
21 create -- ask to create a three-judge district court
22 because the attorney general has to be the defendant, not
23 the plaintiff; and so I'm not sure I see the potential for
24 gamesmanship given that the attorney general has to wait
25 to be sued basically before he or she can trigger this

1 provision; and as Nina points out, most of the time it's a
2 race to the courthouse by the plaintiffs in these cases
3 about who is going to get there first and get the
4 preferred venue and get the preferred court. So I don't
5 think we need to be too concerned about the possibility
6 that the attorney general may three years on trigger a
7 three-judge district court, because it's not within his
8 control whether he's going to be sued three years down the
9 road or not.
10 CHAIRMAN BABCOCK: Okay. Richard.
11 MR. MUNZINGER: If the legislature didn't
12 see fit to tie the attorney general's hands, why should
13 we, or why should the Supreme Court? The Supreme Court
14 has the right to make its own rules of procedure, but that
15 seems to me to be a substantive tie or restriction of the
16 attorney general's power in a subject matter that is
17 fraught with political overtones, and I'm not so sure that
18 that's the role of the Texas Supreme Court. As a matter
19 of fact, I don't think it is the role of the Texas Supreme
20 Court.
21 CHAIRMAN BABCOCK: Jim.
22 MR. PERDUE: Well, all I was going to say
23 was I was going to defer to Nina because in my research on
24 the school finance litigation, for example, the current
25 case, I think there's 23 actions that are consolidated

1 into that case. So in the reality of the practice, I
2 mean, you still have transfer law as it exists now anyway,
3 and if you've got an affiliated claim you can move it.
4 This is about venue or about who is hearing it, but I
5 mean, the reality is that this litigation doesn't end up
6 on a multitrack -- multivenue situation. It gets -- I
7 mean, the past has been, whether it be West Orange or
8 others, they get consolidated into one place.
9 CHAIRMAN BABCOCK: Nina is nodding her head
10 in affirmance.
11 MR. PERDUE: Let the record reflect.
12 CHAIRMAN BABCOCK: Let the record reflect
13 that. Yeah, I think the Richards, the dueling Richards
14 here, raise a good point. I think the Supreme Court ought
15 to be very careful about trying to override legislation by
16 rule, but on the time -- the time thing, I was struck by a
17 sentence in Representative Schofield's letter that said,
18 "A longer deadline may be more feasible and is not
19 inconsistent with the statute," so I don't read him as
20 saying that there's any particular deadline that is
21 compelled by the statute; and so I think that at least
22 from their perspective, the sponsor's perspective, that
23 the deadline is within the Court's discretion; but they
24 would in sponsor say that longer is better than shorter.
25 Would that be fair to say, Justice Busby, you think?

1 HONORABLE BRETT BUSBY: Yes, sir.
2 CHAIRMAN BABCOCK: Okay. Levi.
3 HONORABLE LEVI BENTON: Chip, I don't think
4 he'll read the record, but Representative Schofield,
5 pronounces it "Schofield."
6 CHAIRMAN BABCOCK: And the record will
7 reflect that S-c-h-o-f-i-e-l-d will be the correct
8 pronunciation.
9 HONORABLE LEVI BENTON: It's Schofield.
10 CHAIRMAN BABCOCK: Who else? Richard.
11 MR. MUNZINGER: I just wanted to point out
12 that a letter from the sponsor of legislation is not
13 necessarily an indication that the rest of the Legislature
14 agrees with the sponsor's version of what he adopted.
15 There is a case in England that I cited 25 or 30 years ago
16 where some guy in Parliament said, "My Lord, the worst
17 person in the world to ask what the legislature means is
18 its author."
19 CHAIRMAN BABCOCK: Yeah, so you and Justice
20 Scalia are in the same camp on that, not surprisingly.
21 Justice Brown.
22 HONORABLE HARVEY BROWN: One concern I have
23 with the triggering the 60 days off the filing of the
24 petition is what if there is a change in the judge and
25 what if the judge retires or something happens to the

1 judge and the judge can no longer hear? The attorney
2 general may have been fine with the first judge but not so
3 happy with the second judge who comes in, you know, six
4 months, nine months after the case has been going on.
5 CHAIRMAN BABCOCK: Are you saying that the
6 longer deadline would give --
7 HONORABLE HARVEY BROWN: I think that the
8 longer deadline -- actually, I think there's some merit to
9 Tom Gray's suggestion that what the attorney general's
10 probably most concerned about would be who is going to try
11 the case, and a lot of the stuff is going to be done by a
12 single judge even if there were three judges; and most
13 preliminary rulings, at least what I read in the papers,
14 it hasn't been the preliminary rulings that have been what
15 have caused the problems in those cases or the alleged
16 problems.
17 CHAIRMAN BABCOCK: Nina.
18 MS. CORTELL: I think in these types of
19 cases we have to be concerned that efficiency and
20 expedience, getting it through the system, is a priority,
21 notwithstanding the prolonged time period we have seen in
22 a lot of these cases, so I would be in favor of some
23 timetable that's reasonable off the filing of the
24 petition.
25 CHAIRMAN BABCOCK: Okay. Yeah, Evan.

1 MR. YOUNG: I share the concerns that the
2 statute as written seems to be focused on one thing,
3 giving the attorney general discretion to be able to
4 convene this kind of court and to give the Chief Justice a
5 nondiscretionary duty to do so, and so the idea of the
6 time limits strikes me as sensible as a legislative
7 policy, but I don't really see it in the statute, which is
8 focused exclusively on the AG. However, I get the sense
9 that the majority here feel that other concerns override
10 that, and --
11 CHAIRMAN BABCOCK: We're going to find out
12 about that.
13 MR. YOUNG: We'll find out in a moment. So
14 one thing I might, you know, ask, you know, for some
15 thought on is if there's going to be a time, say 120 days
16 or whatever, could it be unless good cause is shown
17 otherwise; and that would give the Chief Justice the
18 pleasant duty of trying to decide what that might mean;
19 but it would avoid having an arbitrary and absolute date
20 because of the complexity of all the possibilities that
21 have been discussed here suggests to me that any
22 particular date, while maybe advisory or sound, a way to
23 express the Court's desire that the attorney general do it
24 efficiently and expeditiously, may not reflect the
25 realities of a particular case and probably doesn't

1 reflect the realities of what the Legislature was trying
2 to do.
3 CHAIRMAN BABCOCK: Yeah. Good point, and
4 it's his rule, he ought to know what it means. Yes,
5 Justice Boyce.
6 HONORABLE BILL BOYCE: Just a question to
7 try to mesh the second to last paragraph of the letter
8 from Representative Schofield and Senator Creighton with
9 the 60-day time frame with respect to remand in pending
10 litigation.
11 CHAIRMAN BABCOCK: Judge, could you speak up
12 just a little bit?
13 HONORABLE BILL BOYCE: Certainly.
14 CHAIRMAN BABCOCK: The court reporter can't
15 hear you.
16 HONORABLE BILL BOYCE: Looking at the second
17 to last paragraph of the letter and comparing it to a
18 60-day fuse tied to date of answer or date of service or
19 date of intervention, I think the practical effect of this
20 is that with respect to a pending case that might get
21 remanded, including the 60-day deadline, effectively would
22 mean that transfer is going to be accomplished if at all
23 through a consolidation -- transferring it to a
24 three-judge court is going to be addressed through a
25 consolidation/transfer based on a subsequent suit, because

1 otherwise the 60-day deadline is going to be -- tied to a
2 date of service is going to be well past.
3 CHAIRMAN BABCOCK: Justice Busby.
4 HONORABLE BRETT BUSBY: Except for the
5 transition language that we've proposed at the top of the
6 rule for cases that are pending at the time that the rule
7 is adopted, so that's -- that would address that
8 situation.
9 CHAIRMAN BABCOCK: Okay. Frank.
10 MR. GILSTRAP: It seems to me we have a
11 series of questions. One, do we have a time limit or
12 don't we? Two, if we have a time limit, is there some
13 kind of good cause bail out; and three, if we have a time
14 limit is it same for both kinds of cases or different for
15 two kinds of cases; and finally, how long are the time
16 limits?
17 CHAIRMAN BABCOCK: You want to state those
18 again? Do we have a time limit at all?
19 MR. GILSTRAP: Yes, time limit or no time
20 limit.
21 CHAIRMAN BABCOCK: Right.
22 MR. GILSTRAP: If we have a time limit, is
23 there some type of -- do we want some type of good cause
24 bail out provision like Evan talked about? If we have a
25 time limit, is it the same for both kinds of cases, or do

1 we have different time limits for the voting cases and
2 others for the school cases? Finally, if we have time
3 limits, how long are those time limits?
4 CHAIRMAN BABCOCK: Okay. Those are good
5 questions. Richard.
6 MR. MUNZINGER: The question of the Chief
7 Justice making a determination of whether there is good
8 cause for late filing now adds something to the statute
9 that isn't there. It's a judicial determination. The
10 judge becomes -- the Chief Justice becomes the finder of
11 fact as to whether is good cause for delay, a delay the
12 Legislature did not contemplate in the statute. How can
13 you rewrite the statute? That proves -- in my opinion, it
14 proves the point that adding a time limit rewrites the
15 statute.
16 CHAIRMAN BABCOCK: Any time limit?
17 MR. MUNZINGER: Yes.
18 CHAIRMAN BABCOCK: Okay. Richard, the
19 younger.
20 MR. ORSINGER: I'm in agreement with Frank's
21 point. I think the timetables should be discussed
22 separately. I think the school finance litigation, which
23 sometimes takes a decade, has completely different
24 policies from voter re -- from the redistricting
25 litigation, which is frequently pressed up against a

1 deadline; and to me I don't see how we can argue the same
2 timetable for both.
3 CHAIRMAN BABCOCK: Okay. We're going to
4 take a vote, and here's the vote. I think we should vote
5 "yes" or "no" on the rule as proposed, which has a
6 deadline. It is not differentiated, and it is 60 days.
7 So if people think that's okay, that's good, then you'll
8 vote in favor; but if you think something else, it ought
9 to be differentiated, there ought to be a good cause
10 requirement, there ought not to be one at all, then you'll
11 save your vote for the next one. So everybody that is in
12 favor of the rule that the subcommittee has proposed with
13 respect to having a 60-day, undifferentiated, no good
14 cause, time limit, raise your hand.
15 And everybody that thinks it ought to be
16 something different, raise your hand. Okay. Nine to 19,
17 9 in favor of the subcommittee proposal, 19.
18 Of the 19 people who think there ought to be
19 something different, how many people think there should be
20 no time limit at all? You got it up or down?
21 MR. MUNZINGER: No, I wasn't part of the 19.
22 MS. CORTELL: Strict instructions. I'm
23 sorry.
24 CHAIRMAN BABCOCK: Five and a half, six.
25 Okay. We've got five and a half or six in favor of that.

1 How many people think that if we do have a time limit that
2 it ought to be more than 60 days?
3 HONORABLE TOM GRAY: Chip, can I just ask a
4 question for clarification?
5 CHAIRMAN BABCOCK: Yeah.
6 HONORABLE TOM GRAY: When you say time
7 limit, are you measuring it from the date of filing or
8 prior to suit or prior to trial?
9 CHAIRMAN BABCOCK: I'm measuring it as the
10 proposed rule does.
11 HONORABLE TOM GRAY: Okay. All right.
12 MR. YOUNG: Further clarification, if we
13 voted for no time limit on --
14 CHAIRMAN BABCOCK: Anybody can vote on this.
15 MR. YOUNG: Okay, now everybody back.
16 HONORABLE BRETT BUSBY: What's the question?
17 CHAIRMAN BABCOCK: How many people think
18 that it should be more than 60 days?
19 MR. YOUNG: If we have it.
20 HONORABLE ANA ESTEVEZ: Can I ask a
21 question?
22 MR. LEVY: Everybody or just the 19?
23 CHAIRMAN BABCOCK: Huh?
24 MR. LEVY: Just the 19?
25 CHAIRMAN BABCOCK: No. Everybody can vote

1 on this.
2 MR. SCHENKKAN: Chip, one more problem with
3 that, which is the good cause is a major --
4 CHAIRMAN BABCOCK: We're about to get to
5 that.
6 HONORABLE ANA ESTEVEZ: Yeah, but it --
7 MR. SCHENKKAN: Yeah, but it affects your
8 position on them all.
9 CHAIRMAN BABCOCK: Okay. We'll vote on good
10 cause first then.
11 MR. SCHENKKAN: I'm at least in favor of --
12 I voted for the subcommittee as drafted, but it seems to
13 me the good cause exception goes a long way towards
14 addressing the concerns.
15 CHAIRMAN BABCOCK: That's a good point, so
16 everybody can vote on this. How many people think there
17 ought to be a good cause exception?
18 MR. SHELTON: I'm sorry, the question again,
19 Chip?
20 CHAIRMAN BABCOCK: How many people think
21 there ought to be a good cause exception? All right,
22 everybody get them up for a minute now.
23 And how many people think there should not
24 be a good cause exception? All right. That vote is 20 in
25 favor of good cause and 11 against.

1 And how many people think we ought to
2 differentiate among types of lawsuits where the school
3 financing or an election related lawsuit? Everybody in
4 favor of differentiation, raise your hand.
5 Everybody against differentiation. All
6 right. That's 20 in favor of differentiation, 20 against
7 and --
8 HONORABLE JEFF BOYD: And five --
9 CHAIRMAN BABCOCK: Excuse me?
10 HONORABLE JEFF BOYD: How many in favor?
11 CHAIRMAN BABCOCK: Five. That was my count.
12 Do you count something different?
13 HONORABLE JEFF BOYD: I think you just said,
14 "20 in favor and 20 against."
15 CHAIRMAN BABCOCK: I'm sorry. Five in favor
16 of differentiation, and 20 against. Sorry.
17 All right. Now, in terms of the amount of
18 time, how many people think -- well, how should we do
19 this? Because everybody wants --
20 HONORABLE JANE BLAND: 60 days with good
21 cause shown.
22 CHAIRMAN BABCOCK: What's that?
23 HONORABLE JANE BLAND: 60 days or good cause
24 shown.
25 CHAIRMAN BABCOCK: Okay. 60 days. 60, good

1 cause.

2 MR. KELLY: Chip, can I ask a quick

3 question? In addition to good cause could we also have --

4 could we also have -- could we also consider lack of

5 prejudice to the other side, because good cause is just

6 someone making an excuse that can sometimes be a

7 featherweight standard, and in something as important to

8 this it seems you should have to show that the other side

9 is being prejudiced as well.

10 CHAIRMAN BABCOCK: Judge.

11 HONORABLE ANA ESTEVEZ: It appeared that

12 most of the people that brought up concerns, the concern

13 was the judge, and I believe that's probably why the

14 legislation was passed. So I was just wanting to suggest,

15 not that I agree with it, but if the intent of this

16 statute was to pick a judge or to make sure one judge

17 didn't have as much influence in the case that they were

18 hearing, I would suggest that the rule should not have a

19 good cause, but specifically the good cause would be if

20 the case was resigned or another judge hears the case for

21 some reason because we can transfer cases, a judge could

22 not get -- could lose a re-election, he could die. I

23 believe that at that time it may be reasonable for the

24 timetable to just begin again, whatever that timetable is.

25 So it's not a general good cause, but it would be if you

1 thought you liked the judge and now it's a different
2 judge, and so that doesn't allow them to do it with the
3 same judge four years down the road.
4 CHAIRMAN BABCOCK: Okay. We'll get to that
5 in a minute. Let's try Justice Bland's thought about 60
6 days with good cause.
7 HONORABLE JANE BLAND: Or 60 days or good
8 cause.
9 CHAIRMAN BABCOCK: 60 days or good cause.
10 MR. YOUNG: And the alternative would be a
11 higher number would -- what are we --
12 CHAIRMAN BABCOCK: Yeah. If -- I think
13 Justice Bland's idea is 60 days, which is the current
14 proposal, or if you want to do it later, you could do it
15 for good cause. I mean, that's -- is that right?
16 MR. GILSTRAP: I thought good cause went
17 down.
18 HONORABLE ANA ESTEVEZ: No, it was 20 to 5.
19 CHAIRMAN BABCOCK: No, good cause is the
20 leader in the clubhouse.
21 MR. SCHENKKAN: I think Evan is just asking
22 in the alternative to 60 days with the good cause bail out
23 is some number bigger than 60?
24 CHAIRMAN BABCOCK: Yeah, right. We'll vote
25 on bigger numbers than 60 days.

1 MR. SCHENKKAN: I think that is what we are
2 talking about. I don't think anybody is in favor of
3 shorter.
4 CHAIRMAN BABCOCK: Right. Everybody get
5 that?
6 HONORABLE HARVEY BROWN: So procedurally if
7 you favor more than 60 days with good cause, you vote "no"
8 on the 60 days with good cause?
9 CHAIRMAN BABCOCK: Yeah.
10 HONORABLE HARVEY BROWN: Okay, I just want
11 to make sure.
12 CHAIRMAN BABCOCK: That goes down in flames.
13 HONORABLE BRETT BUSBY: Have we had a vote
14 "yes" or "no" on timetables where everybody got to vote?
15 I'm confused about that.
16 CHAIRMAN BABCOCK: Yeah, we did. All right.
17 So now we're going to vote on 60 days or good cause.
18 Everybody in favor of that.
19 MS. CORTELL: As opposed to 120?
20 CHAIRMAN BABCOCK: Yeah. Okay, 19 in favor
21 of that. And how many people want 120 days or good cause?
22 Seven in favor of that.
23 Okay. Now, Peter's idea is in addition to
24 good cause we should have lack of prejudice. How many
25 people think we ought to --

1 MR. ORSINGER: Wait a minute. Is that an
2 alternative, or is that conjunctive?
3 MR. KELLY: Conjunctive.
4 CHAIRMAN BABCOCK: It's conjunctive.
5 MR. ORSINGER: It's conjunctive, good cause
6 and no prejudice.
7 CHAIRMAN BABCOCK: Is that right, Peter?
8 MR. KELLY: Yes.
9 CHAIRMAN BABCOCK: Okay.
10 HONORABLE ANA ESTEVEZ: How could you not
11 have prejudice?
12 CHAIRMAN BABCOCK: So it would be good cause
13 and no prejudice. Whatever your thought is about the
14 days, whether it's 60 or 120, you would also have good
15 cause and lack of prejudice. Okay. Everybody in favor of
16 that? Hayes.
17 MR. FULLER: Chip, why would lack of
18 prejudice not be part of good cause?
19 CHAIRMAN BABCOCK: I think it would be, but
20 Peter is a stickler for these things.
21 MR. ORSINGER: Well, in the discovery rules
22 I think they're differentiated only they're in the
23 disjunctive rather than conjunctive, but I think you have
24 an out for late supplementation either for good cause or
25 no --

1 CHAIRMAN BABCOCK: Or lack of prejudice.
2 MR. ORSINGER: Yeah, lack of surprise.
3 PROFESSOR DORSANEO: So request for
4 admission rules.
5 CHAIRMAN BABCOCK: All right. You wonks can
6 take this outside. Peter's idea --
7 MR. KELLY: There is formulations of it, and
8 I would like to say I have one that is good cause.
9 HONORABLE ANA ESTEVEZ: Undue prejudice or
10 just prejudice? I mean, I'm just asking.
11 MR. LOW: Well, no, that's right.
12 CHAIRMAN BABCOCK: All right. Good cause
13 and lack of prejudice.
14 MR. KELLY: I'll go with that.
15 CHAIRMAN BABCOCK: All right. There you go.
16 Everybody in favor of that?
17 One, Peter; two, Jim, not to identify the
18 voters. Four in favor of that. Okay. So we've got a
19 whole bunch of neat votes here. Rule-making by vote. So
20 anything -- anything else on the time limits we need to
21 vote on, or have we covered the waterfront pretty good?
22 Kent.
23 HONORABLE KENT SULLIVAN: Well, this may
24 have been commented on before indirectly, but I do think
25 that there is a fair amount of mischief here that

1 interacts with views on time lines about the ambiguity of
2 who's being served here. It says, "The State of Texas or
3 a Texas state agency" -- excuse me, "or a Texas state
4 officer or agency," and I think a lot of us are influenced
5 by the notion that any sort of time line you're talking
6 about, you want to make certain that it's triggered
7 exclusively by the attorney general being notified of this
8 and, candidly, presumably the Governor. You would want
9 that really to start a time line for the executive branch
10 to make some decisions about what should or should not
11 happen, and so I start with that in terms of you would
12 want real clarity regarding what starts the time line
13 because I think there's at least the possibility for some
14 mischief there. We don't have a unified executive branch.
15 The Governor doesn't unilaterally control all of it, and
16 so I think that's a significant consideration.
17 CHAIRMAN BABCOCK: Yeah, that's a good
18 point. I think somebody else raised that, too, a minute
19 ago. Okay. Are we -- Jim, do you think there are
20 other -- I mean, there's a lot of stuff been brought up
21 here, a lot of topics, but are there other topics that you
22 think need further discussion?
23 MR. PERDUE: You know, this committee can
24 definitely beat on it, so I don't want to cut off debate.
25 The only other -- the only other thing was whether the

1 language on transfer and consolidation, if there was
2 further insight on that.
3 CHAIRMAN BABCOCK: Okay. And were you
4 in the -- were you in contact with Representative
5 Schofield?
6 MR. PERDUE: I was not.
7 CHAIRMAN BABCOCK: Okay. So you're just
8 relying on his letter?
9 MR. PERDUE: The -- yes.
10 CHAIRMAN BABCOCK: Okay.
11 MR. PERDUE: We spent a lot of time on that
12 topic. We went back to the textual underpinnings as best
13 we could, and I think the report that the committee as a
14 whole has is the best effort that we could give. When you
15 combine it with the letter it was hard for us, again, to
16 think of any realistic situation where you could get this
17 concept of transfer without consolidation or consolidation
18 without transfer.
19 CHAIRMAN BABCOCK: Yeah.
20 MR. PERDUE: We just couldn't figure out how
21 the realities of that strike away those problems with --
22 (Alarm sounding)
23 CHAIRMAN BABCOCK: That means it's time for
24 our morning break. We'll be 15 minutes.
25 (Recess)

1 CHAIRMAN BABCOCK: Okay. We're almost
2 finished with this rule, but Justice Gray has some
3 comments about it, so we're going to take those. If any
4 require discussion, we'll do that and then we'll move on.
5 Justice Gray, the floor is yours.
6 HONORABLE TOM GRAY: I'll try to clip
7 through these as quickly as possible. They're mostly
8 gnats that may or may not be present in the final form,
9 but 14.3, subsection (c), the more e-filing I see, the
10 more sensitive I am as to what is in the attachment as
11 exhibits versus what is attached in an appendix because of
12 the time it may take a file to open, and I'm not sure why
13 those documents need to be attached as exhibits versus an
14 appendix. I'm not sure why it requires all of the
15 pleadings as opposed to the live pleadings or live motions
16 and stuff that may still need to be filed, and so maybe
17 some circumscribe what needs to be actually part of the
18 petition.
19 In 14.4, there's a time period of 10 days.
20 The longer I do this and the more fights I see over
21 whether or not something is timely or not, the more I like
22 multiples of seven in the rules because it doesn't fall on
23 a weekend in that event on the 10-day deal.
24 Under 14.5, where we're talking about the
25 creation and the appointment of the judges, Harvey made a

1 reference to this, as did a couple of other people. I'd
2 kind of like to see in the rule how these judges are --
3 you know, the position is filled in the event of a -- you
4 know, somebody loses an election or they die or they
5 resign from the court they're on or they attempt to resign
6 from the three-judge court, how do you get away from one
7 of these once you get assigned to one and how do you get
8 replaced?
9 Under 14.6(b), the last phrase, "An
10 administrative support of the original district court,"
11 since you're creating a three-judge district court, I
12 think that needs to be clarified. Several issues with
13 14.8, but most of those were talked about or some of those
14 were talked about last time, but 14.8(b) requires
15 something to be filed with the special three-judge
16 district court. I would propose that it needs to be filed
17 with the clerk of the special three-judge district court,
18 since I don't know exactly how you would go about filing
19 it with the court directly.
20 In a couple of places, both in 14.8 and I
21 think in another part of the rule, specifically 14.8(c),
22 the court "may stay all or part of any court." It's also
23 referenced in 14.8(a), "district court or other court." I
24 would sort of like to know as an appellate court whether
25 or not a district court could stay the proceeding or

1 whether or not there is the equivalent of an automatic
2 stay if one of these are created and there's one of these
3 cases already in my court.
4 Under 14.8(d)(2), you require the e-mail
5 addresses of all counsel. I would hope that that would
6 only be all lead counsel of record. We talked a lot about
7 combination -- or consolidation and transfer, something
8 that we do a lot of at the court of appeals is we combine
9 appeals. I don't know if that would be appropriate in one
10 of these situations, but it might be something that the
11 Court wants to think about, the differentiation between
12 combining these cases versus actually consolidating them.
13 Under 14.8(e) there is a reference made to
14 "operative petition." That's a new term for me. It may
15 be in the statute, but I think of things as being live
16 petitions. I think that's what they mean, but I'm not
17 sure. Last phrase of that same rule references "the
18 standards of this rule," word choice, I would probably use
19 "provisions of the rule," and that's all my comments, and
20 I'll be happy to discuss them if anybody has any comments
21 on them.
22 PROFESSOR HOFFMAN: On the clerk issue, so
23 the court won't have a clerk unless we assign it, or maybe
24 the practice would be to have the clerk of the district
25 judge who stays on it.

1 HONORABLE TOM GRAY: That's what is provided
2 for otherwise, if I remember correctly, because it talks
3 about using the clerk of the original district court, and
4 so that would be the clerk I would contend that you would
5 file anything with.
6 CHAIRMAN BABCOCK: Justice Busby.
7 HONORABLE BRETT BUSBY: I think many of
8 those are helpful clarifications. On the issue of what
9 happens when one of the judges on the three-judge district
10 court dies or resigns, we did discuss that in the
11 subcommittee and felt that the existing rules were
12 adequate to address that, that we didn't need special
13 rules for a three-judge district court about how you
14 replace judges in those sorts of circumstances; and on the
15 scope of the stay, we simply tracked the language that was
16 in the statute.
17 CHAIRMAN BABCOCK: Richard.
18 MR. MUNZINGER: I share with Justice Gray
19 the concern over the phrase "relevant under the standards
20 of this rule," and I think it ought to just say "relevant"
21 because the use of the words "under the standards of this
22 rule" seems to be some effort at circumscribing what is
23 relevant without telling us what it is.
24 CHAIRMAN BABCOCK: Okay, great. Anything
25 else? Good. We will move on. I should point out to

1 those of you who don't know her, but I'm sure everybody
2 pretty much does, but Judge Alcala from the Texas Court of
3 Criminal Appeals has joined us, and she has done some
4 great work on one of our subcommittees that Judge Peeples
5 has led, and Judge Peeples has asked that we defer until
6 he gets here, and he is -- his arrival is imminent we're
7 told. So, Judge, if that's all right, can we --
8 HONORABLE ELSA ALCALA: Oh, I'm happy to
9 listen, yeah.
10 CHAIRMAN BABCOCK: Okay. So that brings us
11 to Bill Dorsaneo and Rule 57.
12 PROFESSOR DORSANEO: I know him. All right.
13 I didn't expect to be on the docket this morning, but a
14 pleasure to be here, and I had the last document that I
15 sent, of course, at the last minute is the one that starts
16 with the summary of constitutional provisions. You don't
17 really need to have that, but it would be helpful to have
18 it. I don't know if it's in the box up there, but --
19 PROFESSOR HOFFMAN: It is.
20 PROFESSOR DORSANEO: Okay. Does anybody
21 want me to go pick up what's in the box and pass it
22 around, or are you happy?
23 CHAIRMAN BABCOCK: I think we're happy if --
24 to have it available.
25 PROFESSOR DORSANEO: Okay. All right.

1 Well, this got to the appellate rules subcommittee in a
2 bit of a roundabout fashion. We have -- we were just
3 talking about the three-judge district court statute,
4 which at its very end says that "An appeal from an
5 appealable interlocutory order or final judgment of a
6 special three-judge district court is to the Supreme
7 Court, and the Supreme Court may adopt rules for appeals
8 from a special three-judge district court," and we have
9 had for a long time since before the adoption of the rules
10 of appellate procedure a direct appeal rule to the Supreme
11 Court. Very little time has been spent by anyone on that
12 rule since its adoption pursuant to a constitutional
13 amendment and an amendment to the Supreme Court's
14 jurisdictional statute.
15 So the first pass at working on this was
16 done by the group that just made the presentation, Jim
17 Perdue's group, Brett Busby's group, and I guess, Pam, are
18 you in that group, too, or did you just kind of involve
19 yourself at the last meeting?
20 MS. BARON: I was a volunteer.
21 PROFESSOR DORSANEO: Okay. And what -- what
22 I think happened, and correct me if I'm wrong, is I think
23 what happened is that once that group along with Blake
24 Hawthorne started looking at this assignment, it was
25 concluded that appellate Rule 57 is inadequate for a

1 variety of other reasons; and I got involved when Pam
2 brought this to my attention between the meetings; and
3 there were three aims that the people who had been working
4 on it up until I got first involved, three aims at
5 amending and revising Rule 57.
6 One was to clarify the procedure, like how
7 do you file this direct appeal. The direct appeal rule
8 doesn't say it has and has had from its inception a
9 general statement that except as inappropriate in context
10 the rules for appeals from trial courts to the courts of
11 appeals will be applicable to a direct appeal to the
12 Supreme Court, and that's from the original 1943 rule,
13 civil procedure Rule 499a. Now, that was a more simple
14 directive than it has become, because as you know, the
15 appellate rules have undergone major modification and to a
16 certain extent complication over the years, with the
17 exception of Rule 57 which has more or less stayed the
18 same.
19 One change made in 1986 from the original
20 rule to limit the scope to eliminate appeals of the
21 validity or invalidity of administrative orders because
22 the statute was repealed, but we didn't -- we didn't do
23 anything when the appellate rules were first drafted in
24 changing the predecessor rule, which was 140 in the first
25 recodification, other than to make that adjustment, stayed

1 the same. We didn't spend any time on it. I can
2 confidently say that without fear of contradiction because
3 no one else who worked on the original appellate rules is
4 alive today other than me, but so -- and really nothing
5 much was done to Rule 57 until -- until 1990 when the rule
6 was changed in several respects, but not completely
7 changed. Several significant changes were made, adding
8 discretionary review and some additional modifications,
9 but it wasn't really reworked, and I couldn't find in my
10 records anything but one paragraph in a report I made to
11 this committee in 1990 saying that this rule needs work,
12 and it got some work at the Supreme Court, but it still --
13 it still needs work, and one of the things is to expel out
14 how you do this interim appeal to the Supreme Court
15 directly from trial courts.
16 Of course, the second thing that needed to
17 be done, it needed to say "three-judge district courts,"
18 you know, rather than just the "district and county
19 courts." I, frankly, think we should have probably
20 changed "district and county courts" to "trial courts"
21 long ago or at least "district, county courts, and
22 statutory county courts." I don't know whether we
23 actually had any statutory county courts in 1943, but
24 they're not mentioned; and, for example, in Dallas it
25 would be odd not to have them be within the game of

1 appealing directly to the Supreme Court in an appropriate
2 case.
3 And the third major thing is or involves the
4 record, and in this memo from Blake Hawthorne or is it
5 from -- it's from Brett Busby. The major thing was in
6 providing a mechanism for deferring preparation and
7 transmission of the record, the trial court record, to the
8 clerk of the Supreme Court. The current rule drafted with
9 a view toward the way things used to be done in part was
10 that a statement of jurisdiction would be prepared, and
11 that would be filed with the clerk of the Supreme Court
12 along with the record, and Blake Hawthorne particularly
13 has said that that's too soon to get the record. Okay.
14 Too soon to get the record. They don't need it, and under
15 our current rules the way it would work if we followed the
16 courts of appeals rules is that you have to request the
17 reporter's record at or before the time the appeal is
18 perfected, and that would be even earlier than that.
19 Okay.
20 It would be too early, so we've got special
21 treatment that needs to be -- special handling needs to
22 probably be done with respect to the record, getting the
23 record to the clerk of the Supreme Court; and that's kind
24 of a very brief summary; and what we have decided so
25 far and this is -- the appellate rules subcommittee, kind

1 of a subgroup of that, consisting of Justice Busby and
2 myself. Pam has played a role in it, but not as active a
3 role as she probably will play. The rest of the appellate
4 rules subcommittee has been kept advised, but I'm really
5 more talking for myself at this point than for the entire
6 committee.
7 Well, I started to do a draft. In fact, I
8 learned right away that I didn't understand how the direct
9 appeal rule was meant to work; and that's because the
10 general reference to the rules that are applicable to
11 appeals from the courts of appeals is pretty opaque; and
12 it's not -- it wasn't clear to a lot of people, including
13 people filing these appeals who would call Blake Hawthorne
14 up and ask him, "Well, what do I file," as to how you
15 would go about doing this; and, you know, my idea was to
16 keep it simple but to draft a rule that explained how you
17 would do things, okay, and to try to deal with all the
18 problems that have not been dealt with over time.
19 And I'll say, again, probably less time has
20 been spent on this direct appeal rule than on any other
21 appeal that would ultimately get to the Supreme Court
22 through the courts of appeals or via mandamus,
23 notwithstanding the fact that Pam's research indicates
24 that there are a fairly significant number of these
25 appeals that -- when she measured the matter years ago,

1 like maybe 10 a year or something that we had or maybe
2 it's not that many.
3 MS. BARON: I can look at the current
4 statistics. The last time I did those was in 2003 when I
5 wrote a paper on the subject, but the Court was getting 10
6 or more a year. Many of those were -- didn't belong in
7 the Court because they were filed by parties that did not
8 have a right to a direct appeal, and then the Court had to
9 get the record, whatever, and then decline to accept
10 jurisdiction and send them back, so -- but they were still
11 deciding a fair number that did get accepted at that time.
12 And since 2003 all we've seen are increasing numbers of
13 statutes that permit early review or direct review in the
14 Supreme Court.
15 PROFESSOR DORSANEO: Right. That was the
16 next thing I was going to get to. Another thing that's
17 happened since 1943 and maybe that's -- maybe is more
18 likely to continue to happen, I don't know, I mean, is
19 that the legislature has been given more -- more
20 constitutional authority to authorize and require the
21 Supreme Court to handle direct appeals involving other
22 matters. The original -- the original constitutional
23 amendment talked about appeals of orders granting or
24 denying permanent or interlocutory injunctions on the
25 ground of -- with the appeal being that there is a problem

1 on the ground of the constitutionality of -- you know, of
2 the statute that is the basis of the order; and that's
3 Government Code 22.001(c) that once like the Constitution
4 provided for -- also for appeals of the validity or
5 invalidity of administrative orders; and more recently the
6 Legislature has promulgated or passed, you know, other
7 statutes including this 22 -- you know, Chapter 22a of the
8 Government Code that has just been discussed; and this
9 little memo that I have identifies by attaching various
10 other direct appeal statutes; and they involve, you know,
11 a variety of -- they involve a variety of things.
12 The article identified in the statute
13 crafted by Rance Craft, "Go Directly to the Texas Supreme
14 Court," has several pages talking about these statutes.
15 The article was written in 2014 before -- before the
16 three-judge court statute was passed, but we have
17 modifications in what the Legislature can do. They have
18 been passing more direct appeal statutes of one variety or
19 another. This one that's been the subject matter of your
20 discussions at this meeting and the prior meeting looks
21 like the most significant one in many respects, and it
22 certainly is the motivation behind trying to make the rule
23 more understandable and user-friendly.
24 Now, the current rule doesn't say how you
25 perfect the appeal. Okay. The only thing it talks about

1 in terms of specific behavior is the preparation of a
2 statement of jurisdiction and the filing of that -- filing
3 of that statement of jurisdiction along with the record;
4 and it provides for a preliminary ruling by the Supreme
5 Court on its probable jurisdiction; and if they rule no
6 probable jurisdiction, dismissal; and, you know, I looked
7 at that, having worked on these appellate rules for a long
8 time; and I thought we don't do anything else like that.
9 The jurisdiction question just kind of rides along with
10 the case, and there isn't a preliminary determination
11 anymore of, you know, jurisdiction under the complicated
12 statutes that provides for Supreme Court jurisdiction
13 that the -- you know, that comes later, but that's the way
14 it has been done, and thus far the appellate rules
15 subcommittee has not really addressed whether that's still
16 a good way to do things.
17 Originally the question of jurisdiction
18 seemed to be a very important consideration in 1943, 1941
19 to 1943 when the Constitution was amended and when the
20 predecessor of Government Code 22.001(c) was passed and
21 when Rule 499a was passed. In fact, the rule mostly talks
22 about that. The original rule mostly talks about that,
23 but now that's not the way it is. Constitutional
24 authority of the Legislature is broader, and the statutes
25 that the Legislature has passed seem not to be as

1 susceptible to the argument that there's no jurisdiction
2 in comparison to the -- the original -- the original
3 authority involving orders granting or denying
4 interlocutory or permanent injunctions on the grounds of
5 constitutionality or unconstitutionality of any statute.
6 That is -- that has always seemed to involve, you know,
7 some complexity, strict construction. Well, at least
8 strict construction up until maybe recently with the
9 Episcopal diocese case, but it certainly is -- certainly
10 looks more like it would call for a preliminary
11 determination of probable jurisdiction than maybe some of
12 these newer statutes would. Maybe not. Okay. And maybe
13 there is a perfectly good reason to want to fend off
14 people who want to take direct appeals when they're not
15 entitled to any relief anywhere. Huh?
16 So starting out with the draft of the rule,
17 if I can just go to that, the first idea was to talk about
18 perfecting the direct appeal; and after circulation of
19 e-mails and discussion it became clear to those of us who
20 were working on it that the direct appeal ought to be
21 perfected by written notice of appeal, okay, like -- like
22 appeals to the courts of appeals are perfected; and the
23 question is, you know, what should the timing be; and I
24 think we have in the draft of the rule the idea that --
25 that maybe it should be within the time provided by Rule

1 26.1, which buys into a lot of complexity. Okay. 26.1
2 has -- I thought for a long time was way too complicated.
3 Okay. Two tracts depending upon what post-judgment
4 motions you file and then we've got separate stuff for
5 accelerated appeals, and you get into -- get into that
6 whole thing, but maybe that's good.
7 MR. ORSINGER: Huh-uh. No, it's not.
8 PROFESSOR DORSANEO: Huh?
9 MR. ORSINGER: No, it's not good.
10 PROFESSOR DORSANEO: I didn't say it was
11 good. I said maybe it's good.
12 MR. ORSINGER: No, maybe it's not.
13 PROFESSOR DORSANEO: Well, we've lost this
14 argument a lot of times, Richard, right?
15 MR. ORSINGER: Right.
16 CHAIRMAN BABCOCK: You guys are married,
17 right? I said, "You are married, right?"
18 MR. ORSINGER: We're cousins.
19 PROFESSOR DORSANEO: Fellow travelers, all
20 right. So, you know, the option in the rule is to say,
21 you know, file it like notices of appeal are filed within
22 the time as provided in Rule 26.1 or as extended by 26.3.
23 Okay. Now, once you start doing that, you begin to think,
24 well, maybe -- maybe I need to talk less in this rule
25 about the contents of the notice of appeal. Maybe I ought

1 to go put the contents of the notice of appeal in
2 appellate Rule 25 and maybe -- well, maybe it ought to go
3 in both places. Okay. Both places can tend to be bad
4 because they tend to get out of sync, but that's a
5 separate consideration, but those are, you know, small
6 issues. The appellate rules subcommittee has not really,
7 you know, addressed these refinements and probably should
8 before we take up your time with these -- you know, with
9 these niceties. Okay. It will work fine either way. If
10 we have a special provision in Rule 25 for the contents of
11 a notice of direct appeal to the Supreme Court, we can
12 write that in no time. Okay. And then have a
13 cross-reference over that won't be -- won't be
14 difficult -- won't be difficult to do. Okay.
15 Now, this statement of the next thing, which
16 comes from the original rule moving down through the
17 current rule is a statement of jurisdiction; and the
18 statement of jurisdiction, if it was under 22.001(c) would
19 read one way and under these other statutes would likely
20 be crafted differently; and the current rule doesn't say
21 much about the statement of jurisdiction other than to
22 say -- other than to say that "appellant must file with
23 the record a statement fully but plainly setting out the
24 basis asserted for the exercise of Supreme Court
25 jurisdiction. An appellee may file a response to

1 appellant's statement of jurisdiction." I suspect that if
2 the appellate rules subcommittee talks about this somebody
3 might have some other suggestions about what the statement
4 of jurisdiction provision ought to say. Maybe it doesn't
5 need to say much. If we're only dealing with people who
6 are not entitled to direct appeals, they won't have much
7 to say, and there won't be much to read, and they'll be --
8 they'll be finished before the record ever goes under the
9 revised proposal, before the record ever goes to the clerk
10 of the Supreme Court. Okay.
11 But the statement of jurisdiction provision
12 is the place that says the appellant must file the record,
13 "must file with the record a statement fully but plainly
14 setting out the basis asserted for the exercise of the
15 Supreme Court's jurisdiction"; and the statement of
16 jurisdiction in response subdivision or paragraph, 57.1(c)
17 in my draft, you know, doesn't add much to what's said in
18 the current rule, but it doesn't require the record to be
19 filed, okay, with the statement of jurisdiction. You just
20 have to decide when the statement of jurisdiction needs to
21 be filed. On the same day as the notice of appeal? Why
22 would that be hard? Wouldn't be hard if it's not hard to
23 do. Or within some days thereafter. I like to keep it as
24 simple as possible, and I don't know which one is more
25 simple, but simultaneously, if it wasn't interpreted as

1 some sort of a strict prohibition upon doing it, you know,
2 a little bit later would be fine with me.
3 Then there are other requirements.
4 Docketing statement. The clerk of the Supreme Court needs
5 a docketing statement, too, and we need to have -- we need
6 to have the fees paid. Okay. It's like $195 or something
7 like that, but it is what it is.
8 Now, the "when filed" in our draft here has
9 two options, so I guess -- and I see there is not a period
10 in 26.3, option one, option two, you know, if you want to
11 discuss that, I'm fine with discussing it; but again, the
12 appellate rules subcommittee hasn't really gone through
13 this with any care. Then we've got discretionary review
14 in here, and this happened in 19 -- when did it happen?
15 It happened in -- I have to look in my draft. I'm
16 thinking it happened in 1990, is my memory.
17 HONORABLE BRETT BUSBY: Yes. That's right,
18 Bill.
19 PROFESSOR DORSANEO: Right. And that's a
20 big addition, and it's worded in an interesting way and
21 quoted in the draft of -- of the rule we've worked on.
22 "The Supreme Court may decline to exercise jurisdiction
23 over direct appeal," and it reads now "of an interlocutory
24 order," right, Blake?
25 HONORABLE BRETT BUSBY: Yes.

1 PROFESSOR DORSANEO: Okay. And, of course,
2 that would be the -- it would have been thinking about the
3 interlocutory order that involves a permanent or temporary
4 injunction. They would have been thinking about a
5 temporary injunction, an order granting or denying a
6 temporary injunction, because that's the statute, okay
7 that existed in 1990. I don't think any of the other
8 statutes did. Huh? I don't think so. I don't think any
9 of the other ones did, and even if one did, they weren't
10 thinking about it. Okay. They were thinking about the
11 original statute that had to be dealt with.
12 Well, but "of an interlocutory order" means
13 I think of a limited class of interlocutory orders. If
14 the record is not adequately developed, you know, I
15 personally wonder why is that in there? It's in there
16 anyway. Right? You don't have to say it. "Or if its
17 decision would be advisory," I think why is that in there?
18 You can't do advisory decisions anyway. And then the big
19 thing, "or if the case is not of such importance to the
20 jurisprudence of the state that a direct appeal should be
21 allowed." And, you know, I suspect the Supreme Court
22 likes to have discretionary review whenever -- whenever
23 it's available, huh? But, you know, the availability is
24 open to some question with respect to these statutes, I
25 think, and that may not be a matter that is up to us at

1 all. Okay.
2 The appellate Rule 56.1 says in the context
3 of a petition for review practice certainly, but it
4 says -- it says that all appeals to the Supreme Court are
5 discretionary and then lists the factors, even though the
6 jurisdictional statutes, 22.001(a) only has (a)(6) that
7 clearly provides for discretionary review, but it's
8 interpreted more broadly than that under the rules. So
9 maybe that would indicate that it ought to be interpreted
10 more broadly than that, you know, under this rule. Okay.
11 Now, then the question gets to be, all
12 right, if we're not going to dismiss this, how are we
13 going to proceed; and the current rule says we'll proceed
14 in accordance with -- since the record has already been
15 filed, Rule 38, which is the intermediate appellate courts
16 briefing rule, which has a lot of other stuff in it, too,
17 other than the contents of the brief; and occasionally in
18 directing people how to proceed the clerk of the Supreme
19 Court has made reference to Rule 55, which is the
20 counterpart rule of -- for the Supreme Court briefs on the
21 merits; and I devised by reference to the practice in
22 other areas a brand new section on methods of review -- I
23 might not call it that -- as well as a new section on
24 getting the appellate record to the clerk of the Supreme
25 Court. This was kind of to spell out the procedure, and I

1 used as much of our current rule book as I could to -- to
2 go to school on how this entire practice could be -- could
3 be handled from top to bottom by all the participants, and
4 the preparation and filing of the record has undergone
5 some discussion, but we have more to do.
6 The more to do is, well, if the clerk of the
7 Supreme Court tells the parties to get the record, you
8 know, how does that work? Because it's already going to
9 be -- already going to be past time to request the court
10 reporter to prepare the reporter's record. We're already
11 past that time, so we changed that rule over there or make
12 a special rule over here, or maybe where it happens is not
13 so important as for the explanation to be given as to how
14 it's communicated to the parties, and what they're
15 required to do after that, and in accordance with what
16 rule, and there is a special provision in this rule for
17 review of the appellate record by the clerk.
18 There's a rule, Rule 52, I think, a Supreme
19 Court rule already, telling the clerk to review the
20 record; but it's the record that's come up from the court
21 of appeals rather than the record from the trial court.
22 That could be, you know, woven into this and the rest of
23 it more or less, you know, speaks for itself.
24 At the end we have this continuing question
25 of does the rule need to say the Supreme Court may not

1 exercise direct appeal jurisdiction over questions of
2 fact. And does it need to say that? We need to keep
3 saying that? Maybe we do. Because maybe this is
4 different kind of limitation, like the limitation on
5 deciding questions of fact in connection with mandamus
6 rather than limitation on the Supreme Court's jurisdiction
7 to decide factual insufficiency issues. And, Mr.
8 Chairman, I would like to save the rest of this to do with
9 the -- do with the appellate rules subcommittee rather
10 than trying to work through it here with my preliminary,
11 excellent though it may be, as a first step draft.
12 CHAIRMAN BABCOCK: We're going to have a
13 vote on how excellent it is.
14 PROFESSOR DORSANEO: No, we don't want that
15 vote.
16 CHAIRMAN BABCOCK: No vote on that?
17 PROFESSOR DORSANEO: No.
18 CHAIRMAN BABCOCK: All right. Well, yeah,
19 that's fine. That would be great, Professor Dorsaneo. I
20 did note, and I don't think everybody on the committee got
21 this, but your memo on December 2nd of 2015 regarding this
22 rule to the members of the appellate rules subcommittee
23 and myself and Chief Justice Hecht, Martha, and Blake,
24 noted something that I had missed, and that is that Skip
25 Watson apparently has changed his name to Chip Watson.

1 PROFESSOR DORSANEO: Oh, he has?
2 CHAIRMAN BABCOCK: Apparently, according to
3 your --
4 PROFESSOR DORSANEO: Well, my secretary
5 changed his name.
6 CHAIRMAN BABCOCK: So, you know,
7 congratulations.
8 PROFESSOR DORSANEO: She rarely makes
9 mistakes, so I don't really proofread her work that often.
10 CHAIRMAN BABCOCK: Welcome to the world of
11 Chips. Great.
12 MS. BARON: It's going to affect all of us
13 soon. We'll all be Chips, so --
14 PROFESSOR DORSANEO: Pam, do you and Brett
15 have something you want to add to this, or are we okay
16 with the --
17 MS. BARON: No, I'm in favor of making this
18 a standalone rule because I do know that right now it's
19 completely perplexing to read the direct appeal rule and
20 figure out how to perfect an appeal in the Supreme Court.
21 PROFESSOR DORSANEO: Yeah. If we were going
22 to vote on anything, that would be what I would say could
23 be something that could be voted on.
24 CHAIRMAN BABCOCK: Richard.
25 MR. ORSINGER: The last few times that we

1 have had to create accelerated deadlines that were unique
2 to a particular area, we decided to confine all of them
3 into one rule, because the timetable rules are incredibly
4 complicated and require a lot of cross-referencing
5 already; and if you were going to add even more of that,
6 direct appeals affect very few people very seldom. The
7 people who are trying to conduct a normal appeal shouldn't
8 have to check that cross-reference out to see if it
9 affects them, so I think that that's a good policy. When
10 we have our own special timetables, we have a special
11 rule, and we give notice in the general rule either in the
12 comment or otherwise, you know, "Look over here if you
13 have a direct appeal."
14 PROFESSOR DORSANEO: Well, that's what in
15 effect we were going to do, figure out how to do that. So
16 that would be the record. The statement of jurisdiction
17 would have its own timetable, and the record would have to
18 have its own special timetable built into it since it's
19 not going to be like -- it's not going to operate
20 timetable wise like it normally does in the courts of
21 appeals.
22 MR. ORSINGER: I would go on to say that you
23 need to make a decision whether this is going to be a
24 15-page petition review or a 50-page brief, and I think
25 there's an important discussion that goes in there because

1 I don't see how the Supreme Court can decide significance
2 to the jurisprudence of the state when all they have is a
3 statement of jurisdiction and a record. I think they need
4 a petition.
5 PROFESSOR DORSANEO: Well, as I understand
6 it, that language has really never been important to the
7 decision of any case. Well, I mean, has it ever -- it's
8 an important concept.
9 CHAIRMAN BABCOCK: We're going to get right
10 on that. We'll research that point. Justice Busby.
11 HONORABLE BRETT BUSBY: I agree with Pam. I
12 think the thing that's most important to get the
13 committee's feedback on today is does this seem like a
14 useful enterprise, and in talking with Blake Hawthorne,
15 people always call him because they read the rule and they
16 don't know what to do, because so the thought was it's
17 useful to have it written down in the rule so that people
18 don't have to call Blake. Not that Blake won't be
19 helpful, which of course he will, but it's nice to have it
20 written down in the rules so that everybody understands
21 what they're supposed to be doing.
22 I think one thing that we can continue to
23 discuss in the subcommittee and also get the committee's
24 feedback about at some point is what we do -- and
25 Professor Dorsaneo mentioned this -- with 57.3 because

1 currently it gives the Supreme Court discretion to decline
2 jurisdiction over direct appeal of an interlocutory order.
3 Now that we have these three-judge district courts, the
4 question is would the Supreme Court have jurisdiction to
5 decline a direct appeal from a three-judge district court
6 of a final judgment; and so that's kind of a new scenario
7 for us to advise the Court on and for the Court to
8 consider, whether a direct appeal from a final judgment
9 would have some discretion built in as to whether to
10 decline that or not. The Court hasn't spoken on that, by
11 majority. Rance Craft's paper mentions Chief Justice
12 Phillips' dissent in *Dow Chemical vs. Alfaro,* which
13 suggested that the Court did not have discretionary
14 jurisdiction over whether to hear direct appeals or not,
15 but the Court hasn't spoken on that, so of course, the
16 Court can make up its own mind about whether it wants to
17 build in discretion on appeals from final judgments or
18 not, but that may be something that's useful for us to
19 discuss and give the Court our views about.
20 CHAIRMAN BABCOCK: Lisa.
21 MS. HOBBS: I would posit that the statement
22 of jurisdiction needs to have -- needs to not be filed
23 simultaneously with the notice of appeal. Having been
24 involved with a few direct appeals, that statement
25 actually becomes pretty significant in some of the cases,

1 and I think it will in the future as well, particularly if
2 we don't address by rule whether the Court has discretion
3 or not, because that statement can be important to
4 establish to the Court that it should take the case if it
5 does have discretion or that the Court must take the case
6 because appellant should have at least one -- if a direct
7 appeal to the Supreme Court is required by statute, then
8 maybe it is an appeal of right, because we should all have
9 one level of review. So those kinds of things can get
10 tricky, and so I don't think filing your statement of
11 interest with a notice of appeal is appropriate. I think
12 there needs to be some time in there.
13 CHAIRMAN BABCOCK: Okay. Anybody else?
14 PROFESSOR DORSANEO: 15 pages?
15 MS. HOBBS: Uh-huh. I would limit it to 15
16 pages.
17 CHAIRMAN BABCOCK: Yeah, on the question of
18 does this full committee think you ought to keep studying
19 it, that's probably a question better directed to the
20 Court than to the committee, and I'll talk -- I noticed
21 that this rule was -- got on our list in sort of an
22 unusual way in that there's not a specific charge on it,
23 but I'll get with Chief Justice Hecht and Justice Boyd,
24 and we'll figure that out, and we'll let you know. I
25 noticed that your subcommittee is also working on a new

1 TRAP rule on filing documents under seal?
2 PROFESSOR DORSANEO: Yes.
3 CHAIRMAN BABCOCK: Okay. And so maybe next
4 meeting on that?
5 PROFESSOR DORSANEO: Yes. Justice
6 Christopher said -- characterized that subject as a pain.
7 Right? So I think I would agree with that.
8 CHAIRMAN BABCOCK: Did she elaborate?
9 MR. ORSINGER: A pain in the what?
10 PROFESSOR DORSANEO: Yeah, she did elaborate
11 on it, but it involves a lot of issues. This is also a
12 bit of a pain, so the appellate rules subcommittee is in
13 pain twice.
14 CHAIRMAN BABCOCK: Okay. Well, we feel your
15 pain, and we will move on to the next topic. Judge
16 Peeples still not here. Justice Boyd, should we proceed
17 without him or not?
18 MR. HARDIN: Chip, I think David thinks it's
19 going to be taken up this afternoon after lunch, when I
20 talked to him yesterday.
21 CHAIRMAN BABCOCK: Okay. Judge, you don't
22 mind staying?
23 HONORABLE ELSA ALCALA: Oh, yeah, I'm good.
24 CHAIRMAN BABCOCK: You're all right?
25 HONORABLE ELSA ALCALA: Yes.

1 CHAIRMAN BABCOCK: We've got food. We'll
2 entice you to stay with food. Well, then Jim I guess
3 you're doing yeoman's duty today because we have the next
4 item being the rules for juvenile certification appeals
5 and rules for the administration of a deceased lawyer's
6 trust account, two coupled issues that the Court has asked
7 your subcommittee to take up.
8 MR. PERDUE: Well, we can take up juvenile
9 certification appeals first, and I will give you the
10 Honorable Jane Bland to present on that topic.
11 CHAIRMAN BABCOCK: Jim, do you want to --
12 Jim and Justice Bland, do you want to hold off for just a
13 second, because guess who has arrived?
14 MR. PERDUE: Oh my.
15 PROFESSOR CARLSON: Our people machine.
16 CHAIRMAN BABCOCK: Judge Peeples, welcome.
17 HONORABLE DAVID PEEPLES: Good morning.
18 CHAIRMAN BABCOCK: We've been anxiously
19 awaiting your arrival.
20 HONORABLE DAVID PEEPLES: Bet you haven't
21 been able to do any work while you're waiting, have you?
22 CHAIRMAN BABCOCK: We've been sitting around
23 shooting the bull. We've decided the Texans will beat the
24 Patriots Sunday, and Texas should have been invited to a
25 bowl but were not. Judge Alcala is here, and we didn't

1 want to make her wait around and wade through all of this
2 other stuff, so if when you're ready if you could talk to
3 us about the time standards for the disposition of
4 criminal cases in district and statutory county courts,
5 and we'll do the ex parte stuff later, but if we could
6 knock this one out now, we can get on track, that would be
7 great.
8 HONORABLE DAVID PEEPLES: Okay, you're ready
9 for me, right?
10 CHAIRMAN BABCOCK: We are ready.
11 HONORABLE DAVID PEEPLES: Okay. Everybody
12 get that memo I sent out, the e-mail with some
13 attachments? The bottom line -- and I urge the
14 subcommittee to chime in when I'm finished and correct me.
15 We talked and decided basically there are -- our task is
16 that there is a time standard that refers to a statute
17 that was held unconstitutional 25 years ago and was
18 repealed about 10 years ago, and we certainly need to do
19 something about that, and there are -- dealing with time
20 standards for criminal cases, and there are three options
21 at the bottom of my memo. Options two and three are
22 really the ones that are serious, and it was the sense of
23 the subcommittee that to do anything real in this area, by
24 this group of civil lawyers and judges and professors and
25 so forth, first of all, we don't have the expertise; but

1 equally important is that the Court of Criminal Appeals
2 ought to have some buy in and be consulted on that; and so
3 we want to come back at a future meeting with some
4 specific time standards to talk about; and that would be
5 option three, after a task force or another subcommittee
6 is set up that includes some people from this committee
7 and some chosen by the Court of Criminal Appeals; and then
8 we'll have a tangible proposal with time standards; and
9 also we could consider option two, which would simply be
10 to replace the reference to a statute with a couple of
11 statutes that are in the ballpark.
12 They're not speedy trial statutes per se,
13 but they're close and so that's the proposal today, and I
14 think that the committee did think that it would be
15 helpful for there to be a little bit of discussion, but I
16 don't think we need a lot of docket time, Chip. I haven't
17 had a chance to even look around. Is Rusty Hardin here?
18 MR. HARDIN: Yes.
19 HONORABLE DAVID PEEPLES: You know, Rusty
20 was in trial and was not able to join in the discussions,
21 and I do think -- and I did talk with him yesterday. I
22 think it would be helpful for Rusty with his considerable
23 experience in the criminal area to give us his thoughts
24 about this. I just think we need to hear that. I
25 certainly want to hear it for myself. Rusty, you feel

1 like going before me?
2 MR. HARDIN: Well, I think most of you know
3 that I contend because we do both civil and criminal that
4 means I commit malpractice in two areas as opposed to just
5 one, and but I think it's important to remember the
6 history of all of this, at least as to the speedy trial
7 act and as to the -- Carol Vance was a district attorney
8 in Harris County from like '65 to '79, I guess, and he was
9 the only prosecutor in the state I think at that time that
10 realized that speedy trial act was really a prosecutorial
11 tool, not a defense tool. Prosecutors were all opposed to
12 it when it was statutorily passed. Defense attorneys were
13 kind of moot, but by the time it was in place for a while
14 it became very clear that, similar to what's happening in
15 the Federal system now, the speedy trial act was -- most
16 defendants, first of all, don't want a speedy trial. The
17 only ones that want a speedier trial or get into it as far
18 as the practical in the trial court level are those who
19 want to get out of jail.
20 Judge Peeples has correctly pointed out,
21 well, what about somebody that we hear about these cases
22 where someone is in jail for a year, year and a half,
23 which is possible, and that is more of a bonding issue.
24 Judge Alcala and I both have a great deal of respect for
25 Cathy Cochran, and Cathy and I talked about it at some

1 length, and she actually sent me an e-mail I'll share with
2 the subcommittee later after this is over about it, and
3 the real issue here I think is the criminal system
4 is changing the -- and I don't think the Supreme Court
5 rules committee can contribute to this.
6 I would say my ideal world would be where we
7 had combined courts and we didn't have the specialty
8 courts anymore, and therefore, the Supreme Court and the
9 Court of Criminal Appeals were merged; and if that ever
10 happened then I think we would really be talking about
11 making some progress, because the failing in the trial
12 court position now as far as defendants in the criminal
13 cases is the inability, the incredibly wide range in
14 discretion about bond that keeps people potentially in
15 jail for a very, very long time; and so that's the evil I
16 think for defendants; and I don't think that the Supreme
17 Court would be able to pass rules that would change that.
18 I'm, one, glad to see that this committee is even looking
19 at it, considering it, and I understand it's at the
20 request of Chief Justice Hecht, because quite frankly, the
21 Court of Criminal Appeals has been negligent about dealing
22 with these issues, and I don't think I step on any toes
23 with Justice Alcala being here. I hope that she becomes
24 the representative for the Court of Criminal Appeals to
25 this committee, quite frankly, so that there is input

1 between somebody on the criminal justice system on a
2 regular basis and in some official position.
3 These different rules, I think the idea of a
4 subcommittee is a good idea to look at it. The Court of
5 Criminal Appeals has its nominees to this group, too, then
6 you would be having a way to really consider it. I would
7 love if this committee one day was able to come up with
8 recommendations that the Supreme Court have the power of
9 the Supreme Court to address this bigger issue I'm talking
10 about, and that is people languishing in jail with two
11 potentially bad results. One is they plead guilty to
12 something they really didn't do and they should have a
13 trial over just to get out of jail, and the other is the
14 person that is deprived of a long-time trial. These rules
15 in the Code of Criminal Procedure right now are very easy
16 to get around because it only requires the state to be
17 ready. Well, as a prosecutor of over 15 years, I could
18 always be ready, and all it takes is an announcement from
19 a prosecutor that he or she is ready, and these rules as
20 to somebody getting out of jail go away.
21 I think it would be helpful if we had the
22 subcommittee and we come back with specific things from a
23 merger group of people, but I'm pessimistic and skeptical
24 that a recommendation of time limits from this committee
25 in terms of when things could or should be tried is going

1 to have any meaning. But at the same time I do think that
2 if we muddle around in this, it's not a bad idea if
3 nothing else if recommendations come to the sister system
4 of criminal law to do something about people languishing
5 in jail. The interesting thing is, just as an aside, the
6 studies show that personal recognizance bonds have every
7 bit as statistically the same rate -- Justice Gray knows
8 -- of people showing up at trial, and yet we have a system
9 with a very strong lobbying effect of bondsmen and others
10 that have kept this system going that keep people in jail
11 for far, far too long; and then it gets to an appellate
12 court or a trial court or rather an appellate court when
13 it's too late.
14 So I want you to understand there is no
15 movement among the defense bar for a speedy trial act or
16 anything that resolves to it because what happened as soon
17 as it came into effect, defendants started waiving. When
18 you're over in the Federal system, they have one, too, but
19 every time you -- the first thing that happens when a
20 defendant is charged in Federal court now for the criminal
21 case is they get a trial setting within 90 days through
22 the magistrate, the first day of their arraignment, and
23 immediately file a motion for continuance to say there are
24 complicated facts or this or that. The government
25 generally doesn't oppose them, and it has no teeth in the

1 Federal system either, but there's no constituency between
2 the two parts of the bar for a speedy trial. That's why
3 no one is going back to the Legislature to try and figure
4 a way around it again.
5 On the other hand, there is an incredible
6 need for doing something about people languishing in jail
7 because of unreasonable bond settings. I mean, the fact
8 that somebody could just sit up in Waco and put a million
9 dollar bond on a hundred and something people, and still
10 it just blows my mind. Having said that, I would go along
11 certainly with justice -- I mean, Judge Peeples about
12 let's find a group to come back and maybe have some
13 specific recommendations.
14 HONORABLE DAVID PEEPLES: Let me make a
15 quick point. There is no suggestion, not even imaginable,
16 that either high Court would enact a speedy trial act.
17 We're talking about time standards that would be
18 aspirational, guidelines, something to strive for, but not
19 going something enforceable with a motion to dismiss that
20 would have res judicata.
21 MR. HARDIN: Right.
22 HONORABLE DAVID PEEPLES: So we're not
23 talking about a speedy trial act. It's just that what
24 used to be there was a speedy trial act.
25 MR. HARDIN: And the only thing I'm saying

1 is I realize it's aspirational, but it's an aspiration not
2 shared by a lot of defendants.
3 HONORABLE R. H. WALLACE: If you're not in
4 jail, it doesn't matter if you never go to trial.
5 MR. HARDIN: That's right. That's exactly
6 right. I mean, there are similarities in a criminal
7 defendant's desire between a plaintiff and defendant in a
8 civil case. Usually the defendant is in no hurry, and
9 that's certainly true in a lot of criminal cases. The
10 aspiration I think is shared by people who believe that
11 justice correctly should be efficiently and as timely
12 dispensed as possible, but each side has their own sort of
13 tactical reasons that they don't want to be on one side,
14 and I think you'll find it is -- I suspect you'll find a
15 lot of judges, the problem with aspirational goals, are so
16 they may have reasons within their own docket that are
17 perfectly legitimate and everything and that they will be
18 concerned about having aspirations that have no teeth.
19 There's a reason they couldn't meet it, and I'm not sure
20 that there -- that our desire to have time limits would be
21 shared by large numbers of the judiciary of the state
22 either because they're then going to be judged about
23 things that may have been beyond their control.
24 CHAIRMAN BABCOCK: Judge Estevez, did
25 you --

1 HONORABLE ANA ESTEVEZ: Well, I was going to
2 withdraw my comment, but now I have another one.
3 CHAIRMAN BABCOCK: Your hand was
4 anticipatory.
5 HONORABLE ANA ESTEVEZ: No, it was --
6 whoever is on the committee, you were talking about the PR
7 bonds; and as a trial judge I have never liked the PR bond
8 because no one was on the bond; and so I really enjoyed
9 the use of the PTR, which is a pretrial release bond, but
10 is managed by probation; and you have -- it's something
11 that makes it very easy for someone to get a bond who
12 doesn't have money. The problem became that probation
13 wasn't getting the funding to be able to give me the
14 probation officers, so they asked me not to do as many PTR
15 bonds. So I think what we need to do is find a way to
16 increase this PTR bond issue; and I would share that I,
17 too, would not -- I probably would not as a trial judge
18 with general jurisdiction -- I do civil, criminal, and
19 family law -- welcome the time limits, however you label
20 them in the code, because one of the reasons being we --
21 that may be your intent, but sooner or later we get
22 audited by -- we have indigent plans; and we get audited
23 on whether or not we met every time line that's stated in
24 the court of -- in the Code of Criminal Procedure
25 regarding bonds hearings, arraignments, asking for an

1 attorney, getting an attorney; and I think we would
2 eventually get audited to that, not that there's any true
3 punishment; but it does slow us down in trial if we're
4 going back to try to respond sometimes, so those are just
5 comments.
6 CHAIRMAN BABCOCK: Lisa, did you --
7 MS. HOBBS: I would just add in response to
8 the idea that sometimes defendants may not really want a
9 speedy trial, that sometimes victims do, and I know a lot
10 of times there are many victimless crimes out there for
11 sure, but there is a systematic need for resolution of
12 criminal matters for the victims as well as for the
13 defendants' sake.
14 CHAIRMAN BABCOCK: Yeah, Justice Hecht.
15 Chief Justice Hecht, sorry.
16 CHIEF JUSTICE HECHT: Let me just explain
17 why I wrote the committee about it. The Supreme Court, as
18 you probably know, has the duty and the power under the
19 Constitution to make rules governing the administration of
20 the justice system in Texas, including in criminal cases,
21 but requires that when those rules affect criminal cases
22 that the Court consult with the Court of Criminal Appeals.
23 So we have this rule in there already about the time
24 standards, and someone raises the question shouldn't we
25 remove the cross-reference since the cross-reference is no

1 longer valid, which is an easy point, but then it occurred
2 to me as I was thinking about that, that maybe the -- it
3 would be better to substitute something for the
4 cross-reference or not. I completely agreed that that's
5 an issue that we need recommendations and counsel on from
6 the lawyers and judges who are in that area of the law and
7 certainly the Court of Criminal Appeals, but it's also
8 been the Supreme Court's consistent practice not to even
9 consider a change in the Rules of Judicial Administration
10 without hearing from this committee first. So we sent it
11 over to you to look at, recognizing that there would have
12 to be other input involved and really not proposing a
13 particular outcome; and even if, as Rusty says, this were
14 not a problem or there were a recommendation that there
15 not be time standards in the rule, if there are other
16 questions that come up in the process, then we might want
17 to look at those, too, and just not -- there are several
18 people -- several cooks in the kitchen.
19 The Judicial Council, which is the policy
20 making arm of the judiciary, has appointed a committee
21 that Presiding Judge Keller is on to look at pretrial
22 release generally, and they expect a report back within a
23 few months, and this is an issue that is very -- being
24 looked at very intensely all over the country right now.
25 Lots of states are looking at their pretrial release

1 program, and it's even mushroomed into a more general
2 issue about the whole criminal sentencing system and the
3 criminal justice system, and the Congress has got some
4 bills on it, so it's being thought about in a lot of
5 different fora these days, but the reason it's here is to
6 see from expertise in the criminal justice system what
7 should be done to this rule and anything else that comes
8 up in the process.
9 CHAIRMAN BABCOCK: And one thing I'd just
10 add, an oddity of our system is that the Texas Supreme
11 Court has very broad rule-making authority, as broad as
12 any state probably and maybe broader than the U.S. Supreme
13 Court.
14 CHIEF JUSTICE HECHT: Broader.
15 CHAIRMAN BABCOCK: It is broader than the
16 U.S. Supreme Court, but the Court of Criminal Appeals
17 doesn't have that same power. In fact, their ability to
18 make rules is very limited, so don't be too tough on them
19 for not having rules. Yeah, Rusty.
20 MR. HARDIN: I think that's a great point,
21 and what I would like to remind everybody that if you
22 weren't involved in the criminal justice system at the
23 time we merged to the court of appeals where the court of
24 appeals had both criminal and civil cases, I will tell you
25 as a practitioner during that time, it was an incredibly

1 healthy development, for the development of the law and
2 for common sense. Justice Alcala and I were talking, I
3 remember what happened was is when you came from the civil
4 practice world, whether it -- you brought common sense to
5 a system that had gotten incestuously, intellectually
6 nitpicky; and as a result I would hope that this committee
7 would be involved in -- I don't want to be misunderstood
8 that I think this is a worthless exercise. I think it's a
9 very, very healthy exercise, because -- and I would hope,
10 as you can tell, that if the development goes toward
11 getting people out of jail awaiting trial, to me is a
12 tremendous goal; and I think that this committee may think
13 sometimes that, well, that's not our area, we don't
14 practice criminal law; but whether it's family law,
15 probate, or criminal law, it is very healthy for the
16 general approach practice people to come into contact with
17 it and make reasonable judgments.
18 So I welcome the Supreme Court being
19 involved in this. I think that's very healthy, and I
20 would hope this committee as an advisory would get
21 involved in this area because you don't have to be a
22 seasoned practitioner in the area to reach commonsense
23 conclusions as to what's fair and what should work, so I'm
24 delighted to hear of all of that, Chief Justice. I didn't
25 realize it was that broad. I think that's super.

1 CHAIRMAN BABCOCK: Anybody else on this one?
2 HONORABLE ELSA ALCALA: I was just going to
3 say, when you read the actual Rule of Judicial
4 Administration, it does scream out that something is
5 missing because it has criminal and then it's essentially
6 blank and then you go civil, 18 months from appearance day
7 I think it is for jury and then 12 months for nonjury, and
8 then it goes through juvenile, and then it goes through
9 family; and then you start wondering, well, why not
10 criminal, you know, why aren't there some aspirational
11 time periods for criminal? So it does to me scream out
12 for something and then if you're just citing what's in the
13 Code of Criminal Procedure, that's really some specific
14 instances, but it's not a broader thing that would apply
15 to all cases like the other areas of family and juvenile
16 and that sort of thing.
17 So to me it does seem to -- for consistency
18 alone, if anything, it does seem to scream for some kind
19 of guidance or aspirational goal for courts, and I tend to
20 agree with --
21 MS. HOBBS: Lisa.
22 CHAIRMAN BABCOCK: Lisa.
23 HONORABLE ELSA ALCALA: -- Lisa that it's
24 not just about the defendants. It's about the victims,
25 too, and it's also society. You know, you have some cases

1 that have been pending for five years, and you know,
2 society would look at it and think, "Well, what's going on
3 here? Why do we have these cases going on for five
4 years?" And I tend to agree with everything Rusty said
5 and Chief Justice Hecht about lots of problems in terms of
6 bonds and things like that. I don't really disagree with
7 anything anybody said here, but I do think it is worthy of
8 at least digging a little bit deeper.
9 CHAIRMAN BABCOCK: Okay, great. Okay.
10 Justice Gray.
11 HONORABLE TOM GRAY: I'm reluctant to jump
12 off into this, but I do want to go ahead and say that if
13 you -- that at least David has now placed me in the
14 category of no real support, so I am in support of option
15 one, which would be to simply delete the section with
16 regard to criminal time standards, and my observation of
17 having been in the position where the Court has adopted
18 aspirational goals in the past, aspirational goals lead to
19 statistics being kept. That leads to, as Rusty alluded
20 to, public perception and then the use of those statistics
21 in election cycles when defendant -- when judges are not
22 in a good position to defend why individual cases were or
23 were not met in the goals.
24 The fundamental problem is a burden existing
25 on the trial courts to process the cases in a timely

1 fashion is one of resources. There's more cases than
2 there are judges to hear them or prosecutors to try them.
3 You funnel more money to create more judgeships, to fund
4 the capital murder cases, to try more cases to the DA's
5 offices. County budgets are implicated. Then you turn
6 back and simply more money doesn't necessarily equate to
7 trying the cases more quickly. You wind up trying more
8 cases, and an anecdotal point on that is in the
9 termination area. When the attorney general was
10 successful in increasing the amount of funding for the
11 various departments to prosecute termination cases, the
12 result was not that we resolved those cases more quickly.
13 We got more people in those agencies, and therefore, we
14 wound up with more of those cases.
15 The more marginal case gets tried rather
16 than the one that clearly needed to be tried more quickly
17 to extricate a child from a horrible situation. I fear
18 that this is such a multifaceted problem that an
19 aspirational rule can do more damage than it can good in
20 trying to get people to focus on some more fundamental and
21 underlying problems than simply the time period in which
22 something is made to happen.
23 CHAIRMAN BABCOCK: Thank you, Judge. Judge
24 Estevez.
25 HONORABLE ANA ESTEVEZ: Two comments, the

1 first one just being about the statistics. They're
2 already being kept. We get -- every month our district
3 clerks give us all the cases pending and reports it to the
4 Office of Court Administration, so they know how long
5 every case has been pending as far as every criminal case
6 and every juvenile case, so they get our dispositions, how
7 they were disposed and how long they were pending.
8 I share with Justice Gray's concern. I just
9 feel that at the end of the day what will happen if we're
10 looking for justice then it should just stay the way it
11 is, because when we give an aspirational number at some
12 point it becomes a presumption, and so any case that's
13 pending after 18 months is going to be presumed
14 unconstitutional because of the speedy trial act, at some
15 point if that's our magic number; and so then we're
16 shifting the burden and if we -- you know, assuming that
17 the system worked all the way up and there wasn't truly a
18 prejudice, then we're actually punishing the state for
19 whatever reason they had to take a little longer. I'm
20 assuming it's not the judges. It may just be the case
21 law or the case load, and there may be places where our
22 legislatures can't keep up with putting enough judges in
23 those positions or the act hasn't come up so that some
24 cases can be tried in that period of time.
25 Usually they are the cases that are either a

1 habitual felon case that's 25 years minimum or some sort
2 of murder, you know, it's going to be those first-degree
3 felon cases that aren't resolved within whatever that
4 aspirational period is going to be, and so do you -- at
5 the end of the day do you really -- 13 months could be too
6 long for a lot of cases, and it should be too long, but if
7 we put that number in then it's presumed that that's not
8 long enough, and you just -- I just don't think you can
9 do -- you can't put these criminal cases all in some sort
10 of basket and have that sort of aspiration.
11 I just don't think there is aspirational
12 time limits in a system in which we truly are seeking
13 truth and that we have so much -- this is for you,
14 Richard -- we have so much at stake, so much. It's
15 liberty; and we're looking for truth; and sometimes it
16 takes a little longer; and technology changes, the law
17 changes, the world changes, and what they may have had a
18 year ago, in a month they can prove or disprove a case. I
19 don't know, but I just don't -- they can appeal the cases.
20 The case law is quite large, having had a case go up -- I
21 don't know how far. I don't know if it made it to the
22 court of criminal appeals. It was so many years ago it
23 was before you got on the bench, but on this speedy trial
24 motion after he was found guilty, and there was a long
25 delay. Actually, the state delayed -- dismissed the case

1 and then refiled the case, and we just -- we have what we
2 need. I don't know why we add. I'll just leave it at
3 that.
4 CHAIRMAN BABCOCK: Got it. You're uneasy
5 about aspirational time limits.
6 HONORABLE ANA ESTEVEZ: I just think that
7 it's not the place to put it. I just think that you're
8 out looking for -- both sides. I mean, I understand once
9 the defense and I make the defendant no matter what always
10 file a motion because on a motion for continuance, so
11 there's no passes in my world. If you've -- if you're set
12 for trial, you need to file a continuance. It will
13 probably be granted, but for that same reason, because if
14 I give you a pass it's not going to show on the record at
15 any point, and it's going to look like I didn't continue
16 with your trial and it was the state's fault or the trial
17 court's fault. So I just think you're asking for
18 something greater than what you think you're giving them,
19 and I'm not really sure who is asking for it anyway. I
20 mean, the victims are on the state's case all the time
21 calling them, and I believe that's a legitimate concern,
22 but I don't -- I think at the end of the day it really has
23 to do with the bonds. I mean, people who are out on bond
24 don't want to deal with the fact that they may have to go
25 to prison. I was going to comment about the Dixon case,

1 you know, I knew him personally. That was the one that --
2 HONORABLE ELSA ALCALA: The doctor?
3 HONORABLE ANA ESTEVEZ: Yes, Dr. Dixon, and
4 I know the Court of Criminal Appeals required a lower bond
5 after -- and I was really surprised he was there for
6 trial. I'll just leave it at that. So, you know --
7 CHAIRMAN BABCOCK: Elaine. Professor
8 Carlson, sorry.
9 PROFESSOR CARLSON: The years have not been
10 kind, but my recollection is that the time standard rules
11 were adopted after a legislative mandate that the Court
12 adopt timetables, so we had a very similar discussion oh
13 so many years ago about time standards, if they were
14 needed and good things on the civil side.
15 HONORABLE ANA ESTEVEZ: Well, we do, and,
16 well, on the criminal I know we have something because
17 they make us report it, and they tell us somewhere that we
18 are supposed to have those resolved within a certain
19 period of time.
20 PROFESSOR CARLSON: I don't know if the
21 statute addressed criminal timetables or not. It was
22 quite a long time ago. It was right after Dan Quayle was
23 running for president.
24 MR. ORSINGER: How do you spell "potato"?
25 CHIEF JUSTICE HECHT: Just in response, my

1 experience is if you tell the Legislature, "We'll do it
2 when we get to it," you're not going to like the budget
3 numbers.
4 PROFESSOR CARLSON: I understand.
5 CHAIRMAN BABCOCK: So there you go. All
6 right. Anything else on this? My phone hasn't gone off,
7 but I think it's still time for lunch.
8 (Recess from 12:43 p.m. to 1:34 p.m.)
9 CHAIRMAN BABCOCK: All right. Is Jim here
10 yet? Where is he? There he is. So, Jim, sorry to
11 interrupt you and your presentation on the juvenile
12 certificate -- certification appeals and rules for the
13 administration of a deceased lawyer's trust account, but
14 carry on.
15 MR. PERDUE: Well, so Justice Bland really
16 carried the water on the juvenile certification appeals,
17 so I'm going to let her make the presentation on that.
18 CHAIRMAN BABCOCK: Great. Justice Bland.
19 HONORABLE JANE BLAND: Okay. So this is
20 under number 8 on the agenda, and there are three
21 documents that you probably should have in front of you.
22 One is the enrolled bill, Senate Bill 888. One is our
23 memo to you-all with some proposals to consider, and the
24 third is a Texas Supreme Court Miscellaneous Docket Order,
25 15-9156, that looks like this. And it's interesting, this

1 is a good segue from our discussion before lunch because
2 this is another place of intersection between the civil
3 and criminal practice and the idea of aspirational
4 guidelines to help manage these cases, and it's in the
5 context of juvenile justice.
6 The Texas Legislature has now provided in
7 the Family Code for an interlocutory appeal from an order
8 in a juvenile delinquency proceeding that certifies the
9 child to be transferred for prosecution in criminal court,
10 and you hear it commonly referred to in the media as, you
11 know, "certified to stand trial as an adult," "a juvenile
12 certified to stand trial as an adult." Rusty Hardin I
13 think can probably provide us with some good historical
14 background on this. At one point in time the Texas
15 Supreme Court did review these orders, but in recent
16 history the only way these orders were reviewed was upon
17 appeal of a final conviction by the Texas Court of
18 Criminal Appeals.
19 So, in other words, a juvenile court judge
20 determines that a child ought to be certified to be tried
21 as an adult and waives jurisdiction and transfers the case
22 to criminal district court, whereupon the juvenile is
23 tried and, if convicted, sentenced as an adult; and at
24 that point the conviction was -- is appealable to the
25 Texas Court of Criminal Appeals. What Senate Bill 888 did

1 was provide an intermediate -- I mean, I'm sorry, an
2 interlocutory appeal to the Texas Supreme Court via the
3 Family Code of that trial court's decision certifying the
4 juvenile to be tried as an adult; and some background on
5 that, a trial court judge is required now to make specific
6 findings in connection with certifying a juvenile; but
7 until the Court of Criminal Appeals decided a case called
8 Moon, some of those decisions were being made perhaps
9 formulaically. There was a checkbox form order that was
10 being used, and I think the concern arose that these cases
11 and in particular this order, which is a critical order
12 because it determines whether the minor is -- you know,
13 proceeds in a juvenile proceeding under the Texas Family
14 Code or proceeds in criminal court under the Penal Code,
15 that these orders deserved more scrutiny.
16 So in the Moon case, the Court of Criminal
17 Appeals held that there ought to be specific findings of
18 fact and conclusions made in connection with these
19 certification decisions, and I think added onto that we
20 have this new provision from the Legislature that provides
21 for the interlocutory appeal for immediate review so that
22 a juvenile that is certified to be tried as an adult has
23 an opportunity to appeal that and not be transferred if
24 that decision is erroneous. So the Legislature in the
25 Senate bill provided the appeal, and they also expressly

1 required or asked or requested the Supreme Court to adopt
2 rules accelerating the disposition by the appellate court
3 and the Supreme Court of the appeal, so we have in here a
4 mandate from the Legislature to develop rules for
5 expedited consideration.
6 The other important thing to note about this
7 appeal is the Legislature expressly says that it will not
8 stay the criminal proceedings pending the disposition of
9 the appeal, so there's a no-stay provision, query whether
10 that, you know, a court could individually stay a case to
11 protect its jurisdiction. The statute seems to say no.
12 So the expedition of these cases becomes even more
13 important because you risk not having meaningful appellate
14 review if the case is eventually -- is transferred --
15 there's no agreement to await the disposition of the
16 appeal, the prosecutor proceeds with the trial in criminal
17 district court, at which point the conviction becomes
18 final and reviewable presumably. This order would also be
19 reviewable by the Court of Criminal Appeals, but any
20 opportunity to take an interlocutory appeal to the Texas
21 Supreme Court is lost. So that shows you the importance
22 of having deadlines in the case.
23 So that by way of background, then that
24 legislation became effective September 1. I think the
25 Texas Supreme Court in, let's see, what date, August 28th,

1 so just prior to the effective date of the legislation,
2 passed a miscellaneous docket number. I think this was
3 probably out of concern that, first of all, practitioners
4 and trial court judges may be unaware of this new
5 interlocutory appeal and also out of concern that to the
6 extent that the rules are not modified immediately they
7 wanted to have a stopgap measure in place so that there
8 would be some education of both the bar and the bench
9 about this new statute and about the need to expeditiously
10 complete these appeals; and so they passed the
11 Miscellaneous Docket No. 15-9156, and we don't often have
12 this much guidance from the Texas Supreme Court about what
13 to do, so we're pretty lucky that we have this in drafting
14 these new rules.
15 So the miscellaneous docket number has I
16 think as a guidepost used the parental termination cases;
17 and as you all know, for those who have been on the
18 committee for a few years, we had -- we came up with
19 expedited rules for parental termination -- termination of
20 parental rights cases a few years ago and debated how to
21 handle those in a more expedited fashion, because those
22 cases were languishing and the children were getting
23 older, and so an immediate and quick decision is really
24 paramount in those cases. So taking sort of a cue from
25 that miscellaneous order, our committee then began to look

1 at where the appellate rules and the trial court rules
2 have provisions that affect parental termination cases,
3 and we have inserted language in connection with these
4 juvenile certification cases so that those are covered as
5 well. This is also going to have the same need for
6 Professor Dorsaneo and his committee to review and maybe
7 some other committees whose rules are implicated by these
8 changes, but for today I think we could go through the
9 proposed changes and then if they're -- and then flag, if
10 we need to have further subcommittee work by other
11 committees, we can flag that today for them and we can see
12 where we are at the end of the day.
13 All right. So if you go to the memo and in
14 the memo we've got the various rules where we think that
15 we need to take a look at whether we need to make some
16 changes to reflect rules for juvenile certification cases,
17 and the first is the Rule of Appellate Procedure 25.1,
18 which is a -- the rule that governs the notice of appeal;
19 and if you look at 21 -- 25.1(d)(6), it is talking about
20 what the notice of appeal has to have in it; and we
21 require currently in an accelerated appeal that the
22 parties state that the appeal is accelerated; and we also
23 require, if it involves parental termination or child
24 protection case, we require that it be stated there; and
25 our committee proposes that we add, "or an appeal from an

1 order transferring a child for prosecution in criminal
2 court." And the reason -- the reason to add it there is
3 that is the place that the district clerk can look to know
4 that this case needs individual and extensive management
5 to ensure that we can quickly obtain the record, obtain
6 the briefing, and get it submitted to the Court as quickly
7 as possible; and I'm going to go through all of these and
8 then we can take them up individually after.
9 Next under -- at the very end of the rule we
10 have added a provision or two provisions that are specific
11 to this juvenile certification proceeding, and the first
12 is appeal upon transfer of child for prosecution in
13 criminal court under (i) saying that "An appeal from an
14 order transferring a child from prosecution in criminal
15 court does not stay subsequent criminal proceedings in the
16 transferee court." That's from the statute; and the
17 reason to include it there, if that's the right place to
18 include it, and that's subject to all of your thoughts
19 today, is that immediately above it in (h) we talk about,
20 you know, enforcement of judgment not being suspended by
21 appeal. So that was the idea, the thinking about
22 including it after (h), and then we've got a provision
23 after (i), we've got a provision (j), "The advice of the
24 right of appeal."
25 Now, this may not belong in the appellate

1 rules at all. It may simply belong in the trial court
2 rules, but we've included it here because the Texas
3 Supreme Court in its miscellaneous docket order expressly
4 ordered that "When a juvenile court certifies a child to
5 stand trial as an adult, the trial court must inform the
6 child and the child's attorney orally on the record in
7 open court and in writing in the certification order, one,
8 that the child may immediately appeal the certification
9 decision, and two, that the appeal is accelerated"; and we
10 have included that under Texas Rule of Civil Procedure
11 306, which we'll get to in a minute; but the question is
12 whether we should include a parallel advisory in the
13 appellate rules in order to just super flag this issue.
14 You know, it's not an appellate rule because when you
15 think about it, it's talking about what needs to be in the
16 trial court order; but the question is, where is it going
17 to be noticed; and so that there's one issue about whether
18 we should include it or not in the TRAPs or just leave it
19 in the Texas Rules of Civil Procedure.
20 Then moving to Texas Rule of Procedure 28.4,
21 that rule has some specific -- specifics with respect to
22 accelerated appeals in parental termination and child
23 protection cases; and we've added juvenile certification
24 cases, so the title of the rule will change to
25 "Accelerated Appeals in Parental Termination, Child

1 Protection, and Juvenile Certification Cases"; and
2 basically it says that appeals in these transfer case --
3 transfer order cases will be governed by the Rules of
4 Appellate Procedure for accelerated appeals, except as
5 provided in 28.4; and in Rule 28.4, it just basically says
6 that -- if you flip the page, that these cases are all
7 cases that are going to be governed by accelerated
8 appeals; and it's including a discretionary transfer
9 order, which is defined as "an order waiving juvenile
10 court jurisdiction and transferring a child for
11 prosecution in criminal court," which is the definition
12 from the statute.
13 And then finally, an amendment to TRAP 32,
14 the docketing statement. Again, the docketing statement
15 is a place that the clerk's office can look at to be aware
16 that this case needs special management, and we just added
17 a tagalong provision for juvenile certification cases
18 where the rule mentions parental termination and child
19 protection cases. And then finally -- well, not finally.
20 Next, sorry, got your hopes up, amendments to judicial --
21 Texas Judicial Rule of Administration 6.2. 6.2 is the
22 rule that governs dispositions in cases involving the
23 parent-child relationship, and we've added "and from
24 orders transferring a child for prosecution in criminal
25 court." That rule has 180 days as the aspirational

1 deadline for the intermediate courts to have a disposition
2 and then 180 days for the Texas Supreme Court, and that is
3 the time period that the Texas Supreme Court used in its
4 stopgap miscellaneous docket order that's in place right
5 now, but we should probably think about whether we need to
6 have a different time frame for these cases, if such a
7 time frame is feasible.
8 If you look above to 6.1 that we were
9 talking about before the lunch break, in 6.1 there are
10 some very expedited deadlines with respect to juvenile
11 cases, having to do mostly with detention of juveniles,
12 but also the delinquency hearing, so question, whether we
13 want to try to come up with a different day than 180 days.
14 I will say that when we had our debate about parental
15 termination cases a few years ago we all started out
16 trying to figure out what the least amount of time we
17 could require that feasibly could be attained, and in the
18 end we came up with 180 days because we were figuring in
19 the time for the notice of appeal, docketing statement,
20 clerk's record, reporter's record, and briefing, and then
21 some time to consider the case obviously and issue the
22 opinion. So but I just flag that for your consideration
23 today if we think we need to look at that.
24 And then finally, Texas Rule of Procedure
25 306, the recitals in the judgment, has -- we've added

1 there that the entry of the judgment requires the order --
2 the transfer order to state the specific grounds for the
3 transfer and that is in hoping there that we will be in
4 keeping with the Moon case, which requires those sorts of
5 specific grounds to be included in an appeal from a
6 judgment of conviction in adult -- in adult court,
7 criminal district court; and in Rule 306 we would like
8 to -- you know, at a minimum, we may not have it in --
9 keeping it in the rule of appellate procedure; but in Rule
10 306, we propose having a Rule 306.1; and we'll get to the
11 numbering in a second, and have in there the advice of a
12 right of appeal, and it becomes really critical that the
13 juvenile is admonished about the right of appeal, because,
14 you know, if you don't bring the appeal quickly as an
15 accelerated appeal, you waive it; and in addition in
16 this -- in these cases the criminal proceedings are not
17 stayed. So we want to be sure that the trial courts
18 admonish the juvenile that there is this right of appeal
19 of this certification order, and that is the Texas Supreme
20 Court's work in their miscellaneous docket order, but it
21 needs to be incorporated somewhere. Our committee is open
22 to suggestion about where. We called it 306.1 here.
23 It doesn't -- that doesn't really work in
24 the context of the 306's because there's a 306a and a 306b
25 and there's no ".1." The problem is once you get to 306c

1 and beyond we're afraid that there's going to be less
2 visibility there, because those -- those rules go on and
3 are not really as concerned with recitals of the judgment.
4 They're more concerned with, you know, what is effective
5 notice of the judgment, and, you know, you get some extra
6 time if you didn't get notice of the judgment and stuff
7 like that. So open to hearing from this committee about
8 where this advice or admonishment to the juvenile should
9 go, but think that it's a good idea to have it and that
10 the Texas Supreme Court thinks it's a good idea to have it
11 because it was included in their miscellaneous docket
12 number.
13 CHAIRMAN BABCOCK: Okay. Great.
14 HONORABLE JANE BLAND: And I don't know if
15 you want to start with overall comments and then look at
16 individual issues in the rules or --
17 CHAIRMAN BABCOCK: How would you like to do
18 it?
19 HONORABLE JANE BLAND: However you want.
20 CHAIRMAN BABCOCK: Any overall comments?
21 MS. HOBBS: I have a question.
22 CHAIRMAN BABCOCK: Yeah, Lisa.
23 MS. HOBBS: Why do you say they waived the
24 right to challenge the designation as a juvenile if they
25 go on to trial?

1 HONORABLE JANE BLAND: Not if they go on to
2 trial, but if they don't file their notice of appeal
3 within 20 days. This is an accelerated appeal.
4 MS. HOBBS: Would they not be able to
5 challenge that upon ultimate conviction as an adult?
6 HONORABLE JANE BLAND: I think they would.
7 MS. HOBBS: Okay.
8 HONORABLE JANE BLAND: The Court of Criminal
9 Appeals has been reviewing these decisions, and I think
10 that if you look at the bill analysis for the bill, part
11 of what we want to prevent is if a child is erroneously
12 certified and transferred and incarcerated before that
13 erroneous order is vacated then you've also gone through
14 the inefficiency of a full criminal trial in criminal
15 district court when what we should have had was a juvenile
16 proceeding with a juvenile disposition.
17 MS. HOBBS: Right. No, I agree. I just
18 wanted to make sure there wasn't anything in the statute
19 that said it was actually waived if you didn't take it.
20 HONORABLE JANE BLAND: No, waived by failing
21 to act promptly is what I meant.
22 CHAIRMAN BABCOCK: Okay. Anybody else?
23 Peter.
24 MR. KELLY: Just a general question, going
25 through, the statute speaks in terms of the transfer of

1 the child, which doesn't seem quite right. It seems like
2 it would be transfer of the prosecution, then the Supreme
3 Court order talks about certification as an adult, and
4 then the rule goes back to talking about appealing the
5 transfer, so what order is being appealed here, the
6 certification as an adult, the transfer to the criminal
7 court, or --
8 HONORABLE JANE BLAND: Those are one in the
9 same, and they're kind of I think colloquially referred to
10 as juvenile certification as an adult.
11 MR. KELLY: Right.
12 HONORABLE JANE BLAND: But in the statute,
13 statutorily, they're referred to as, you know, "waiver of
14 jurisdiction by the juvenile court and transfer of the
15 child for prosecution," "transfer of the child," because
16 we're talking about, you know, an individual's liberty, I
17 suppose, "of the child for prosecution in criminal court."
18 Where they -- so it's the same order.
19 MR. KELLY: It's the same order that
20 certifies.
21 HONORABLE JANE BLAND: Correct.
22 MR. MUNZINGER: May I ask Justice Bland on
23 the same subject?
24 CHAIRMAN BABCOCK: Will you yield to --
25 HONORABLE LEVI BENTON: Sure, if it's on the

1 same subject because I have different topic. So yeah.
2 MR. MUNZINGER: The statute that -- Justice
3 Bland?
4 HONORABLE JANE BLAND: Yes.
5 MR. MUNZINGER: The statute that you just
6 described, does it set out the grounds that a trial
7 court -- or the factors that a trial court must find in
8 order to make the certification to try a person as an
9 adult or not? Or is there such a statute?
10 PROFESSOR CARLSON: Yeah, there is.
11 HONORABLE JANE BLAND: I think there is a
12 statute, and it does set out the grounds, but you would be
13 testing me to ask me to recite them for you now.
14 CHAIRMAN BABCOCK: Levi.
15 HONORABLE LEVI BENTON: Does a court hearing
16 criminal matters have the same breadth of discretion as a
17 civil court to abate proceedings? I know Justice Alcala
18 has left, and I -- because the reason I ask this, I think
19 you're reading the statute to prohibit abatement. Am I
20 right?
21 HONORABLE JANE BLAND: No. No. I think the
22 intent is that there not be an automatic stay.
23 HONORABLE LEVI BENTON: Okay, but it doesn't
24 prohibit the court from otherwise abating the criminal
25 proceeding in the interest of justice or in the interest

1 of judicial efficiency.
2 HONORABLE JANE BLAND: I think once it's
3 over in criminal district court it's governed by the Rules
4 of Criminal Procedure.
5 HONORABLE LEVI BENTON: Okay.
6 HONORABLE JANE BLAND: And the criminal
7 trial judge then becomes the person that manages the case,
8 and that can be, you know, the parties may not seek the
9 trial setting, they may decide not to, but I think what
10 the Legislature is saying here is we're going to allow
11 this review through the Family Code, up the civil chain to
12 the Texas Supreme Court, but that is not going to be
13 anything that will automatically stay the prosecution in
14 criminal district court.
15 HONORABLE LEVI BENTON: Does the committee
16 have any feeling about expressly saying in the rules that
17 the language of (i) or 888 that says it's not stayed, do
18 you oppose putting in the rule that this provision of the
19 statute or the rule doesn't prohibit staying the criminal
20 proceedings on some other grounds that might be afforded
21 under the Criminal Rules of Procedure?
22 HONORABLE ANA ESTEVEZ: We don't have stays
23 in criminal matters.
24 HONORABLE LEVI BENTON: You don't have
25 stays?

1 HONORABLE ANA ESTEVEZ: No, there's no
2 abatement that I'm aware of. Are you aware of any, Judge
3 Peeples?
4 HONORABLE LEVI BENTON: There's -- not even
5 in the interest of -- not in the interest of judicial
6 efficiency?
7 HONORABLE ANA ESTEVEZ: No, there isn't.
8 HONORABLE JANE BLAND: You know, it's less
9 formulaic. I mean, I think there are stays, but it's
10 just, you know --
11 HONORABLE ANA ESTEVEZ: They're called
12 passes or continuance.
13 HONORABLE JANE BLAND: Yeah. It's not any
14 formal it's removed from the court's docket or anything
15 like that.
16 HONORABLE LEVI BENTON: Okay. Okay.
17 HONORABLE R. H. WALLACE: I was going to say
18 sort of what Rusty was talking about earlier. Suppose you
19 had someone in custody, how would you stay a criminal
20 proceeding for someone who is in custody?
21 CHAIRMAN BABCOCK: Rusty.
22 HONORABLE JANE BLAND: I was looking for you
23 a minute ago.
24 MR. HARDIN: I was back here. I was going
25 to ask a question. I was going to ask a question. You

1 know, prosecutors might be willing to in effect stay
2 themselves if they think they're going to get an answer in
3 a reasonable time and they won't get too much heat from
4 the family of the victims, and so if they just say this
5 process, but you've really got built in a whole year,
6 don't you?
7 HONORABLE LEVI BENTON: Nine months.
8 HONORABLE JANE BLAND: Six months.
9 MR. HARDIN: But it's six months, I thought
10 it was six months at each stage.
11 HONORABLE JANE BLAND: Well, if you go --
12 yeah, that's true.
13 MR. HARDIN: As I'm looking at the --
14 HONORABLE JANE BLAND: Yeah, that's true.
15 MR. HARDIN: So if -- wouldn't it be
16 interesting to know from the judges, the court of appeal
17 judges and Supreme Court judges, as to whether 90 days for
18 each stage would work. I could see prosecutors or DAs
19 saying, "Look, it doesn't make any sense to go forward
20 until we get a reading from the appellate courts," and if
21 they could say, "I'll get one within six months or seven
22 months or something like that." I don't know that they
23 would be willing to wait a year. That's --
24 HONORABLE JANE BLAND: Right, and there
25 probably are fewer record -- I mean, it's unlikely that

1 this kind of a hearing is going to have maybe the same
2 amount of time and testimony, so perhaps the record can be
3 compiled faster. I mean, there could be ways to expedite
4 it faster.
5 CHAIRMAN BABCOCK: Yeah, Roger.
6 MR. HUGHES: Well, maybe it's too soon to
7 say, but what are the DAs and the trial judges doing now?
8 I mean, I can see for prudence reasons you would want a
9 result on the interlocutory appeal before devoting the
10 resources, putting the victim through a trial, taking up
11 the court's time. On the other hand, I can see some
12 judges going, no, I feel pretty comfortable about that
13 decision that's been made. I don't think courts are going
14 to set it aside. I don't want to stop the train and then
15 start it up again. So, I mean, has any practice developed
16 about how trial courts are handling this?
17 MR. HARDIN: I'd be interested to hear from
18 the judges. I think from a prosecutor standpoint, though
19 long ago dated prosecutor, I don't think it's changed.
20 Let's take Houston, for example. What Houston is going to
21 do is they reserve those for the most serious type of
22 cases. They don't really have any doubt in their own mind
23 that it's appropriate. They don't really care what an
24 appellate court is going to say, because they really
25 believe it's going to stand up, and it's only reserved --

1 so they just go forward, as do the Houston trial judges.
2 HONORABLE JANE BLAND: And their review --
3 and particularly those courts that are dedicated criminal
4 courts, they're comfortable with review ultimately resting
5 with the Court of Criminal Appeals, which is because it's
6 been the traditional --
7 MR. HARDIN: That is very accurately
8 delicately put.
9 HONORABLE JANE BLAND: And so we've got that
10 dichotomy working as well.
11 MR. HUGHES: Okay.
12 CHAIRMAN BABCOCK: Lisa.
13 MS. HOBBS: I would agree that 180 days
14 seems long, but I tried to do the math under the current
15 briefing schedule, and I don't think we can get under 90
16 because I think it's 85 days if you don't get any
17 extensions. It's just 85 days for an accelerated appeal
18 just to get the matter submitted to the Court. So we can
19 shorten those briefing deadlines and make everything 10,
20 10 days to get the record, 10 days to get the brief in,
21 you know, and maybe try to get it into 90, but I agree
22 that's aspirational. I just don't see how it gets done
23 unless we change the briefing rules.
24 CHAIRMAN BABCOCK: Justice Boyce, and then
25 -- oh, I'm sorry, Justice Busby, you had your hand up?

1 HONORABLE BRETT BUSBY: No, I'll pass.
2 CHAIRMAN BABCOCK: Justice Pemberton.
3 HONORABLE BOB PEMBERTON: I just thought it
4 would be helpful to consider, what do the records in these
5 certification proceedings look like? Does anybody know
6 that? You may have --
7 HONORABLE JANE BLAND: Well, the records up
8 until the Moon decision, which came out last summer, was a
9 piece of paper, a piece of paper with some boxes checked,
10 but the expectation is that we're going to see more
11 extensive records now.
12 HONORABLE BOB PEMBERTON: Are we talking
13 about like, you know, calling the kid or some
14 psychologists or like an afternoon of testimony?
15 HONORABLE JANE BLAND: Psychologists
16 typically have testified in these, and even with the
17 checkboxes.
18 HONORABLE BOB PEMBERTON: Okay.
19 HONORABLE JANE BLAND: But there may be more
20 fleshing out of these cases as --
21 HONORABLE BOB PEMBERTON: Right. So I guess
22 we really don't know at this point. In contrast, these
23 termination appeals, those may go three or four days or
24 longer sometimes. You know, CAs have been turning those
25 around within 180 days under the new rule pretty

1 routinely.
2 CHAIRMAN BABCOCK: Peter.
3 MR. KELLY: To answer Bob's question, the
4 section 54.02 requires that there be a full diagnostic
5 study, social evaluation, and full investigation of the
6 child, full hearing on the merits, full investigation. So
7 it seems like the record should be relatively elaborate
8 and have a lot of things in there. In just reading the
9 statute, it does say at one point that the criminal court
10 may not remand back to the juvenile court. So how does
11 that fit into the ability to have an appeal if the remand
12 is never possible?
13 HONORABLE BOB PEMBERTON: And my question
14 was really aimed more at the practicalities. I mean, we
15 can say "full investigation," but what does that mean in
16 terms of volume of record, et cetera?
17 HONORABLE JANE BLAND: The criminal court,
18 on the remand issue, I think that is that the criminal
19 district court can't second guess the certification
20 decision.
21 MR. KELLY: Well, if it's --
22 HONORABLE JANE BLAND: But I don't think it
23 was talking about the juvenile court keeping its
24 jurisdiction if the decision -- the decision that the
25 juvenile judge made to waive jurisdiction is reversed. So

1 at that point I think the juvenile court would have
2 dominant jurisdiction. It wouldn't be a question of the
3 criminal district court needing to remand it. It would be
4 that the jurisdiction never left the juvenile court, so
5 proceedings in the criminal court would have to stop.
6 CHAIRMAN BABCOCK: Okay. Anything else?
7 Yeah, Justice Gray.
8 HONORABLE TOM GRAY: I note that there are
9 six things that the -- have to happen in one of these
10 orders. Oral and written notice has to be given to both
11 the attorney and the child that the appeal is immediate
12 and accelerated, and in deciding this I'm going to be
13 interested to see what happens when one of those six is
14 missing, but I know that's -- the consequence of that
15 failure is something that will have to be fleshed out by
16 the courts as we address them. As to the timeliness and
17 the 180 days, this is just one of those things rattling
18 around in my brain that I thought the Supreme Court had
19 recently said that in the context of injunctions that they
20 frowned upon the process of trial courts abating
21 injunction trials while a -- an appeal of a temporary
22 injunction was pending. I may be wrong. That may have
23 been a court of appeals that I was reading, but --
24 PROFESSOR DORSANEO: Nope.
25 HONORABLE TOM GRAY: -- in this context in

1 particular, as an appellate court I would want nothing
2 more than the timely prosecution and ongoing trial of the
3 juvenile as quickly as possible in the trial court. It
4 may obviate the need for the appeal or moot the issue in
5 the appeal that could be brought up, as Lisa was referring
6 to, in the direct appeal from a possible conviction; but I
7 mean, you know, if they get acquitted, it certainly would
8 moot the appeal of whether or not they're going to be
9 tried as an adult; and, you know, we have had very little
10 success in accelerating the process by which we get the
11 records from clerks in our jurisdiction. I mean, it's
12 just -- it's a never ending battle that we continue to
13 fight because of the balance they are trying to strike
14 between taking notes in their ongoing criminal cases,
15 civil cases, requests for, you know, excerpts of
16 transcripts, and then prepare hearing or trial records
17 for, you know, these type of accelerated appeals; and we
18 spend an inordinate amount of time trying to get those
19 records; and I really without some teeth in the mechanism
20 for us to get those records more quickly, it's going to be
21 180 days; and I hate to say that and see it happen; but I
22 would hope that in 180 days the juvenile has been tried
23 and we know the result of the trial and that this gets
24 rolled into part of the appeal of the criminal conviction
25 if that's what happens or the kid gets to go home with his

1 parents. But as far as looking at the details of what
2 you've done in these proposals, I don't find a thing that
3 I would have done differently.
4 CHAIRMAN BABCOCK: Okay, yeah, Lamont.
5 MR. JEFFERSON: Two things real quick. On
6 the numbering, I would just put it in 306.
7 HONORABLE JANE BLAND: Well, we thought
8 about that, too.
9 MR. JEFFERSON: Call it, I don't know,
10 general and then whatever "a" and "b" for what's there,
11 and then secondly, maybe this doesn't bother anybody else,
12 but this idea of the court waiving exclusive jurisdiction
13 seems weird to me. You know, I know that's how the
14 statute describes it, too, but that's not practically
15 what's happening, is it? I mean, really aren't the --
16 isn't jurisdiction being conferred on another court by the
17 Legislature? Can the Legislature delegate to a court the
18 ability to, you know, kind of legislatively waive its
19 jurisdiction?
20 CHAIRMAN BABCOCK: Richard Munzinger has the
21 answer to that, Lamont. I'm sorry. Orsinger. Munzinger
22 has the answer, too.
23 MR. SCHENKKAN: They may not be the same
24 answer.
25 MR. ORSINGER: I don't know if this is the

1 correct answer to your problem, but let me just say that
2 under the Family Code there is a concept of continuing
3 exclusive jurisdiction for the court that has exercised
4 control over a minor. That's for civil purposes and not
5 criminal purposes, but this is like a blend of civil and
6 criminal. So in my mind when I hear "waiving continuing"
7 or "exclusive jurisdiction," I'm hearing a family law
8 concept. Yeah, they're both district courts. They both
9 have subject matter jurisdiction, but the family law court
10 has continuing exclusive jurisdiction, and they're
11 relinquishing that in favor of the criminal court. Now,
12 that may not be what was --
13 HONORABLE JANE BLAND: No, I think that's
14 beautifully said. I think that's exactly what --
15 MR. ORSINGER: I'll take that compliment.
16 MR. JEFFERSON: I rest my case.
17 MR. ORSINGER: I rest my case.
18 CHAIRMAN BABCOCK: Munzinger, would you set
19 Justice Bland straight?
20 MR. MUNZINGER: Well, I do have a question
21 about this because --
22 CHAIRMAN BABCOCK: See, I knew you would.
23 MR. MUNZINGER: It seems to me that once
24 under this section 54.02 you determine that the person --
25 the state or whoever it is that prosecutes these things

1 has met the requirements to take this child away from the
2 family court as a juvenile and prosecute him or her as a
3 criminal adult in a criminal court, that the family court
4 has lost the jurisdiction because that status no longer
5 exists. The person is now presumptively to be indicted or
6 whatever before the criminal court, which -- and I have
7 another problem. "An appeal from an order entered under
8 section 54.02 respecting transfer of the child for
9 prosecution as an adult does not stay the criminal
10 proceedings." I don't read that as depriving the criminal
11 trial court of the jurisdiction to exercise its discretion
12 to stay it. I read that as saying simply because you've
13 appealed this, doesn't stop you from trying the case. You
14 can try it, but I do think that the trial court is left
15 with discretion or should be.
16 Justice Gray is saying, hell, we can't get
17 the record in six months. Here is a guy going to trial.
18 He's being tried as an adult. His entire future is
19 dependent upon what the jury does in the trial court.
20 He's a citizen. He may be a bad one, but he's a citizen
21 with all the same rights as everybody else, and he's going
22 to be determined to be a criminal when the trial court
23 that made the certification under 54.02 made it wrong or
24 committed some crime, and the criminal trial court says,
25 "I've got to go ahead and try and put you away in jail, in

1 prison, and do all of these other things," and the guy
2 that started the whole process made a mistake. It doesn't
3 make sense to me.
4 HONORABLE TOM GRAY: But that mistake is
5 still reviewable even after the child is convicted, and it
6 will be a more timely ultimate disposition if you let him
7 go ahead and try it.
8 MR. MUNZINGER: Well, but so now I've got a
9 jury verdict over here that I'm guilty, but it was not
10 proper, so now I'm back in the juvenile court, and I'm
11 going to be tried as a juvenile. Is there res judicata
12 effect? Is testimony admissible, et cetera, et cetera?
13 All kinds of problems, at least in my mind, I see coming
14 up. I wouldn't interpret this statute as saying that the
15 trial court, the criminal trial court, lacks discretion to
16 continue the case if there is an appeal. I don't read
17 that into the statute at all.
18 CHAIRMAN BABCOCK: Kent had his hand up a
19 minute ago. Did you want to say something, Kent?
20 HONORABLE KENT SULLIVAN: Well, just to note
21 in passing, I don't know that this bothers anyone else,
22 but it just concerns me that we are, you know, dealing
23 with yet another category of accelerated appeal, and it's
24 a process that I think doesn't work all that well in the
25 sense that anybody has the expectation that from the

1 filing of notice of appeal that six months later you're
2 going to get an answer, and that is problematic it seems
3 to me, because the whole predicate for this process is
4 based on that, getting some very quick response. I think
5 that was Rusty Hardin's point in large part with respect
6 to this particular process, and so I do wonder if, you
7 know, we're going to continue down this path if we don't
8 need to revisit the whole idea of what are the requisites
9 of accelerated appeals and what do we need to do to really
10 facilitate getting a quick response. We need to change
11 the process of what's required relative to the record and
12 preparing the record, the briefing requirements, the work
13 product that you expect from an appellate court.
14 I mean, if you look at, you know, the
15 relevant rule, I mean, we've got full opinions and
16 memorandum opinions, but there's no -- you know, there's
17 no specific dispensation for trying to deal with something
18 more summarily perhaps so that you get a very quick
19 response that you may need in certain categories of cases,
20 and I think revisiting some of the basic premises of an
21 accelerated appeal might be called for.
22 CHAIRMAN BABCOCK: All right. Justice
23 Busby, and then Levi, and then Judge Estevez, and then
24 Roger.
25 HONORABLE BRETT BUSBY: I agree with Judge

1 Sullivan's point. We might be able to get them out faster
2 than 180 days if we didn't have to write, you know, the
3 type of memorandum opinions at least that we write now,
4 but Judge Gray is also correct that without throwing court
5 reporters in jail it's going to be hard to get these
6 records and get everything done in 90 days. I just don't
7 see that that's feasible.
8 The other point I would make in response to
9 Justice Gray's point about it may be in 180 days that the
10 process will have come to conclusion and there will be a
11 conviction in criminal court, but I'm not sure that
12 answers the question of what would happen if the court of
13 appeals that's hearing the certification appeal reverses
14 and says this case should never have gone to criminal
15 court in the first place. I think there would be a good
16 argument that that conviction is void, and then you try
17 the case again. So there may be good prudential reasons
18 to make clear to the criminal district courts that they
19 have the ability, as Richard was saying, even though it's
20 not automatically stayed, that they have the ability to
21 somehow let that case wait a little bit.
22 CHAIRMAN BABCOCK: Levi.
23 HONORABLE LEVI BENTON: Two things. One, is
24 there no provision for just a summary decision from the
25 court of appeals with an opinion to follow, so that you

1 take care of the concerns raised by Justice Busby? You
2 know, you don't have to wait weeks trying to get an
3 opinion out, but I am more concerned about the 16-year-old
4 who is pressured to plead because the consequences of the
5 conviction are so harsh and then -- and does he or she
6 then lose the right to hear from Justice Gray on whether
7 that certification order was right in the first place?
8 That just seems very harsh to me that our -- what?
9 HONORABLE ANA ESTEVEZ: I'm going to wait
10 until I'm called on.
11 CHAIRMAN BABCOCK: She's stacking up points
12 to make.
13 HONORABLE ANA ESTEVEZ: I'm ready.
14 HONORABLE LEVI BENTON: I just think you've
15 got to have an accelerated -- I'm okay with giving the
16 criminal trial court the discretion to go forward, but
17 they also ought to have the discretion to put it in
18 neutral.
19 CHAIRMAN BABCOCK: Judge Estevez.
20 HONORABLE ANA ESTEVEZ: I agree with you.
21 Number one, I think what we need to do is look at the
22 overall picture, and I'm sorry that Rusty walked out
23 because this really does come back down to the other issue
24 we were talking about before, and that is the bond issue.
25 Practically, if the child is out on bond then, yes, we can

1 wait, and we can wait until we get an opinion before we
2 go, and I think both parties normally would do that. If
3 the child is out -- is in custody because they can't make
4 bond or there's some other reason why bond hasn't been
5 made, then we're dealing with constitutional issues that
6 go beyond the certification. We're now dealing with the
7 speedy trial issue, so we need to have that 180 days to
8 deal with the speedy trial issue.
9 One of the concerns was what if they're
10 found guilty? Well, if they're found guilty and the
11 certification was the right thing to do then they have
12 their verdict, they had their day in court, nothing was
13 slowed down because of it, and they got all of their
14 constitutional rights. If they're found not guilty and
15 then at that point it's moot. There would have been a
16 double jeopardy issue, so there was no harm; and if they
17 were found guilty and the certification was wrong, they
18 get a new trial, but I don't know that that's bad. I
19 mean, that's just kind of how it works now. The state
20 already went through, and they chose -- I mean, they're
21 the ones that wanted the certification. They're the ones
22 that chose to go through it, and so that's not a bad
23 result. That's the reality of all of the results that we
24 get.
25 As far as your consequences, I'm just going

1 to share a case that came up in my court because it's
2 true. It is a very, very harsh -- it could -- this whole
3 statute results in a harsh reality. There was a child who
4 was certified as an adult, and he took a plea offer of
5 deferred in my court because they wouldn't offer him
6 deferred, and it was a -- you know, if he would have been
7 in juvenile court his maximum would have been 40 years and
8 now his -- he's a five to 99 to life. He violated his
9 conditions of probation. I ended up adjudicating his
10 guilt and sentencing him. At that point he wanted to
11 appeal the certification, and they did not allow that
12 appeal, and so that may be harsh because it is a great
13 idea for someone who's thinking I could get on deferred,
14 never have to do A, B, or C, as opposed to going through
15 juvenile and having to risk that 40 years, and so that's a
16 legitimate concern.
17 CHAIRMAN BABCOCK: Okay. Roger, Pete, and
18 then Justice Bland, and then Professor Dorsaneo.
19 MR. HUGHES: Well, I was going to echo what
20 Judge Busby said about I don't think the young man or
21 woman being convicted moots their appeal on certification.
22 I think it still remains viable. I have been in cases
23 where I represent the defendant who got whammed with a
24 judgment. I take up the judgment. We can't bond it, so
25 now we're fighting post-judgment execution, and that goes

1 up, and there are two trains running on separate tracks,
2 and if the conviction -- pardon me, if the judgment gets
3 overturned then the collection efforts are whatever the
4 turnover relief, that all goes away. For prudential
5 reasons maybe we might want an advisory that the judge may
6 be able to postpone trial to see how it comes out, but
7 it's still entirely possible that the certification and
8 the conviction will be two trains running down the same
9 track in the same court.
10 CHAIRMAN BABCOCK: Pete.
11 MR. SCHENKKAN: One comment on the
12 discussion we've been having and then one on a separate
13 wording issue. On this discussion, a statutory provision
14 -- and this comes right out of the statute. This isn't
15 optional for us, that an appeal from this kind of an order
16 does not stay the criminal prosecution has not been
17 interpreted in analogous contexts as meaning that the
18 trial judge can't abate his or own proceedings. There is
19 a concrete example that's important to those of us that
20 practice administrative law. There's a special provision
21 in the Government Code that allows you to challenge an
22 agency ruling, and there is an exception in the statute to
23 this limited extent that says filing such a lawsuit will
24 not stay a license suspension, revocation, cancellation
25 proceeding that's already ongoing at SOAH. So if the

1 particular SOAH proceeding that's related to the rule
2 involves the rule and may well turn on the validity or
3 construction of the rule, the SOAH ALJ can go forward, but
4 what they often do is say why should we waste our time,
5 let's find out what the law is --
6 CHAIRMAN BABCOCK: Right.
7 MR. SCHENKKAN: -- and abate, so I don't --
8 I would assume that's the more likely right answer to this
9 scenario, that the trial judge doesn't have to go forward,
10 though clearly under the statute they don't have to wait.
11 The wording thing I wanted to ask about, I
12 hope there isn't a very obvious answer in here somewhere
13 that I missed, but in all of the sections of the draft of
14 the proposed changes except 28.4, we say an "order
15 transferring a child for prosecution in criminal court."
16 In 28.4 we say "a discretionary transfer order."
17 HONORABLE JANE BLAND: We can make that --
18 harmonize that. That's just a one off.
19 CHAIRMAN BABCOCK: Picky, picky, picky.
20 Justice Bland.
21 HONORABLE JANE BLAND: Helpful, helpful.
22 With respect to bonds, this is another place where this
23 decision is so important because for juveniles under the
24 Family Code there's a presumption that pretrial the trial
25 -- the child is released to the parent or guardian and not

1 detained unless the trial judge makes findings relating to
2 that detention, and that -- those findings are reviewable
3 every 10 days. So the presumption is that minors are not
4 detained pretrial under the Family Code, and it's very
5 different, as Judge Estevez was pointing out, under the
6 criminal code. The question of jurisdiction that Justice
7 Busby raised and Roger commented on is an open question,
8 whether that interlocutory ruling merges into the final
9 judgment that then is reviewable as a criminal proceeding,
10 or is it alive regardless of what happens over in the
11 criminal side? That's an open question beyond the scope
12 of our rules. That's going to have to be worked out by
13 courts at some point, but the most important thing that we
14 can do with these rules is educate the practitioners about
15 invoking the appeal to begin with, because if they don't
16 file their notice of appeal from the order they -- you
17 know, there won't ever be this question even subject to
18 consideration, and there won't ever be the challenge of
19 resolving whether the ruling was -- resolving that ruling
20 civilly because they've never invoked it, and that's where
21 the rules can help, and that's what we should focus on.
22 CHAIRMAN BABCOCK: Professor Dorsaneo.
23 PROFESSOR DORSANEO: If we're ready I wanted
24 to talk about 306 and those rules. I realize you're the
25 victim of a very bad part of the rule book here.

1 HONORABLE JANE BLAND: Yes. Want to redo
2 the whole thing? I think we should.
3 PROFESSOR DORSANEO: Yeah, but taking a
4 minimal list approach to it, one, you could put -- maybe
5 you could at least consider putting this 306.1 in the hole
6 that's now 306b. I don't know whether --
7 HONORABLE JANE BLAND: That was repealed?
8 Yes. Yes.
9 PROFESSOR DORSANEO: I don't know whether it
10 would look kind of in an odd place there, but I don't
11 necessarily think that it would.
12 HONORABLE JANE BLAND: I defer to you
13 because I didn't know as a question of statutory history
14 if something has been repealed, do you -- and then you
15 call something completely different by its name, does that
16 matter and when you're trying to do, you know, rule-making
17 history?
18 PROFESSOR DORSANEO: Well, I don't -- I have
19 Lexis-Nexis rule book, and it frequently doesn't have all
20 the information that's available about sources and reasons
21 for change, but I don't remember what 306b was at all
22 and --
23 HONORABLE JANE BLAND: I looked at it.
24 PROFESSOR DORSANEO: -- it was repealed
25 quite sometime ago, approved for repeal on November 19,

1 1982, ultimately taking place April 1, 1984, so I don't
2 think that would be a problem here.
3 HONORABLE JANE BLAND: Okay. I like that.
4 PROFESSOR DORSANEO: The other thing, given
5 the fact that all of this is not very good, you know, from
6 301 on, if you're going to mess with 306 I would suggest,
7 you know, doing a little more tinkering or considering
8 doing a little more like by taking the first sentence of
9 Rule 301 from there and putting it in 306, maybe calling
10 306 "Contents of judgment." Okay.
11 HONORABLE JANE BLAND: Okay.
12 PROFESSOR DORSANEO: And having subheadings.
13 The first sentence says "The judgment" -- of 301 says "The
14 judgment of the court shall conform to the pleadings, the
15 nature of the case proved, and the verdict, if any," and
16 then it continues "and shall be so framed as to give the
17 party all the relief to which" -- says "he" -- "may be
18 entitled either in law or in equity." That at least --
19 that "shall be" -- "shall be so framed" or something "so
20 framed" thing seems to fit right in with the first part of
21 306, which doesn't really say much. You know, it says
22 "names of parties for or against whom the judgment is
23 rendered" but doesn't say anything about the -- about the
24 judgment until you get into the news thing that was added
25 about termination cases in 2012. Okay. And if you can

1 get away with thinking about doing that, maybe you could
2 just go over to the end of 301 and think about adding
3 "judgment may be in a proper" -- "judgment in a proper
4 case" -- "judgment may in a proper case be given for or
5 against one or more of several plaintiffs and for or
6 against one or more of several defendants or intervenors,"
7 and that would come pretty close to making 301 be about --
8 be apparently what it's about. What it's about now is
9 merely stated in a proviso. Okay. It's very -- and the
10 substance of the rule is really the proviso, though it
11 would just be better if we just made a few little changes.
12 If that's all we can do, I would like for you to at
13 least -- your committee to at least consider doing that
14 much. It would be better. Okay.
15 CHAIRMAN BABCOCK: Got it. Justice Gray.
16 HONORABLE TOM GRAY: Not on 306, but back to
17 what we were talking about before that, I agree that the
18 trial court doesn't -- does not have to go forward, but
19 can. On the question of whether or not it's two tracks or
20 one, I may have misspoke, but my -- where it becomes moot
21 is if the appellate court -- if the trial in criminal
22 court results in acquittal, the determination of whether
23 or not it was properly certified as an adult would become
24 moot at the court of appeals. What would be interesting,
25 since the court of appeals has both criminal and civil

1 appeals, if he's -- if the appeal of the certification is
2 at the court of appeals, then there's the conviction and
3 it's appealed, and the certification and the conviction is
4 affirmed, then who gets what part of the petition for
5 review? Does the certification go to the Supreme Court
6 and the criminal conviction go to the Court of Criminal
7 Appeals or is there some way to merge those?
8 And as far as Levi's question, I'm not aware
9 of any court of appeals having issued a order or a
10 judgment opinion to follow. I know the Supreme Court did
11 that in the Jane Doe cases. For the better part of a
12 decade I have advocated for a concept of summary
13 affirmance when all of the judges on a court of appeals
14 agree that there is no merit to the appeal to be able to
15 affirm it with a summary paragraph to that effect, but got
16 no traction or acceptance on that, and there is one other
17 thing that we could do to squeeze some of the time out
18 potentially, and I may need some help here on a rule, but
19 I think it's the habeas rule, habeas appeals, that we can
20 consider --
21 HONORABLE JANE BLAND: On the briefs.
22 HONORABLE TOM GRAY: -- without a brief.
23 HONORABLE JANE BLAND: Or on the record.
24 HONORABLE TOM GRAY: And so we can take it
25 up on just the record.

1 HONORABLE LEVI BENTON: What about the plea
2 bargains?
3 HONORABLE TOM GRAY: We don't get plea
4 bargains.
5 HONORABLE LEVI BENTON: I know, but what
6 about if the juvenile pleads, you would say that
7 certification appeal is moot?
8 HONORABLE TOM GRAY: No.
9 HONORABLE ANA ESTEVEZ: Only if it's an
10 acquittal.
11 HONORABLE TOM GRAY: Yeah, it would only be
12 if it's acquittal.
13 HONORABLE ANA ESTEVEZ: I mean, we have
14 double jeopardy.
15 HONORABLE LEVI BENTON: I'm sorry. If the
16 juvenile who has been certified as an adult pleads, is the
17 order certifying the juvenile as an adult and that appeal
18 of that order moot?
19 HONORABLE TOM GRAY: I wouldn't want to give
20 an advisory opinion, but I don't think so.
21 HONORABLE LEVI BENTON: Okay.
22 HONORABLE TOM GRAY: I would have to wait
23 and look at the briefing and arguments, but I don't -- I
24 mean, because it's --
25 HONORABLE LEVI BENTON: So if the

1 16-year-old pleas, pending that appeal could he or she
2 withdraw the plea if you say that order certifying was
3 erroneous?
4 HONORABLE TOM GRAY: Yeah. I mean, we get
5 appeals all the time, some of -- probably more appeals
6 that doesn't -- on a plea bargain with "a subject to my
7 motion to suppress ruling."
8 HONORABLE LEVI BENTON: Okay. Okay.
9 HONORABLE TOM GRAY: We see those all the
10 time, and so that wouldn't surprise me at all to run those
11 down the same track, to use your analogy.
12 CHAIRMAN BABCOCK: Richard Orsinger.
13 MR. ORSINGER: Just to fill a little point
14 in the record, I checked it out on my iPhone, and Rule
15 306b was a nunc pro tunc rule that said that if it's a
16 valid nunc pro tunc the timetable for appeal runs from the
17 date the nunc pro tunc was signed, so that's the ghost
18 from the past that we would inherit if we used that rule.
19 MR. LOW: Let me give you something
20 historical. He's the one that led the drive. He doesn't
21 remember what --
22 MR. ORSINGER: To get rid of it?
23 PROFESSOR DORSANEO: No. Those were
24 Clarence's rules in November of 1982.
25 MR. ORSINGER: There we go.

1 CHAIRMAN BABCOCK: Professor Hoffman.
2 PROFESSOR HOFFMAN: Going back to this
3 two-track thing and also to something, Jane, you said
4 about maybe it would be beyond the scope of our rules to
5 what happens when you have -- if have you a -- the
6 interlocutory appeal going and then you have the
7 post-conviction appeal. What about the --
8 HONORABLE JANE BLAND: No, what happens if a
9 conviction takes place and that's being reviewed as a
10 final judgment --
11 PROFESSOR HOFFMAN: Correct.
12 HONORABLE JANE BLAND: -- and potentially
13 ruled upon.
14 PROFESSOR HOFFMAN: Correct. So here's my
15 question about that. In the act that was enacted in
16 section (h) when it talks about that the appeal will have
17 precedence, the interlocutory appeal of the transfer order
18 has precedence, does that not give us some rule-making
19 guidance that in that circumstance the civil appeal should
20 come first?
21 HONORABLE JANE BLAND: That language is
22 typically used in cases where the Legislature has
23 requested that the Supreme Court adopt rules accelerating
24 the disposition of the cases, and it means, I think, that
25 it takes precedence over the other cases on the appellate

1 court's docket. Elaine is nodding.
2 PROFESSOR HOFFMAN: But wouldn't that at
3 that point include the post-conviction review case?
4 HONORABLE JANE BLAND: Well, potentially if
5 the court of -- yes, potentially it could, if that one is
6 pending and the other one comes up.
7 PROFESSOR HOFFMAN: It also has virtue that
8 it kind of deals with kind of our first file.
9 HONORABLE JANE BLAND: But like I said, I
10 think that's something that will have to be decided.
11 That's a problem for future Jane, as I like to say.
12 HONORABLE JEFF BOYD: Chip, I have a
13 follow-up question.
14 CHAIRMAN BABCOCK: Yes, Justice Boyd.
15 HONORABLE JEFF BOYD: So it sounds like
16 several people think the criminal trial court should have
17 -- either does or should have discretion to stay the
18 prosecution trial pending the interlocutory appeal. Do
19 you or the committee have a view as to whether the statute
20 allows the juvenile court or the intermediate court of
21 appeals or the Supreme Court who are hearing the
22 interlocutory appeal to have discretion to grant a motion
23 to stay the effect of the certification order?
24 HONORABLE JANE BLAND: That's a problem for
25 future Justice Boyd. The Legislature clearly had an

1 intent that the criminal prosecution could continue.
2 The -- and because in the bill they say that an appeal
3 from this kind of an order does not stay the criminal
4 proceedings pending the disposition of that appeal. If
5 you liken that to an automatic stay like we have in other
6 kinds of interlocutory appeals, you could read that
7 statute to say there's no automatic stay, but in cases
8 where there are interlocutory appeals where there is not
9 an automatic stay, occasionally, or maybe even routinely
10 in some kinds of appeals, the courts of appeals or the
11 Texas Supreme Court or both issue a stay, you know, to
12 preserve their jurisdiction or so that the appeal will not
13 be rendered moot or for any of various reasons, and I
14 think the question that's presented, which I don't think
15 is going to be answered by rule, is does this provision in
16 the bill -- in the statute -- is it more like a provision
17 that said there's no automatic stay, but leaves the
18 general discretion of intermediate appellate courts and
19 Supreme Courts to -- on a case by case basis enter that
20 sort of a thing --
21 HONORABLE JEFF BOYD: Sure.
22 HONORABLE JANE BLAND: -- or is this
23 intended to say, "Look, we don't want any stays of any
24 kind."
25 HONORABLE JEFF BOYD: Right. Just to

1 clarify before people respond to that, the question I'm
2 asking is if it's to be read merely to prohibit an
3 automatic stay, is there any reason why then that would
4 only allow the criminal court the discretion to grant a
5 stay and not allow the juvenile court to stay the effect
6 of its certification order or the intermediate court or
7 Supreme Court who are hearing the interlocutory appeal?
8 Is there any reason why they wouldn't have the same
9 discretion?
10 HONORABLE JANE BLAND: The juvenile court at
11 this point loses jurisdiction upon entry of the order, and
12 so I think that pretty clearly the juvenile court can't --
13 can't stay it, can't stay the order, because the juvenile
14 court by signing the order is waiving its jurisdiction and
15 transferring the case to the criminal court, and I think
16 beyond that we're going to have to look at specific
17 circumstances.
18 CHAIRMAN BABCOCK: What about if the
19 juvenile court said, "I'm going to stay the order. I'm
20 going to stay the order I'm about to enter"?
21 HONORABLE JEFF BOYD: Well, yeah, "I hereby
22 certify and at the same time I stay the effect of this
23 order, pending the appeal, the interlocutory appeal."
24 MR. KELLY: Because it's in pursuit of its
25 own jurisdiction, which it's trying to waive.

1 HONORABLE JEFF BOYD: Right.
2 HONORABLE BRETT BUSBY: But then would you
3 be able to take an interlocutory appeal from an order like
4 that? I don't think that's an order waiving jurisdiction.
5 MS. BARON: Yeah.
6 HONORABLE BOB PEMBERTON: You start with the
7 premise that interlocutory appellate jurisdiction is
8 limited, unless you dot your I's and cross your T's in the
9 type of order that the Legislature has authorized an
10 appeal from, I don't think you can.
11 CHAIRMAN BABCOCK: Lisa.
12 MS. HOBBS: When I first saw this draft,
13 which is very well done, one of my comments was why we
14 were putting the stay in the rules, because we have
15 automatic stays and not automatic stays, discretionary
16 stays, in other contexts that we don't include in the
17 rules. We just trust the parties are going to go read the
18 statute, so I still stand by that initial impression of
19 it.
20 On the other hand, if we are going to
21 include it in the rule, I think we should just address
22 this issue and say it's not an automatic stay, but the
23 criminal court or the appellate courts have discretion in
24 appropriate cases to stay it. So if we're going to do the
25 rule, I would say let's do the rule and resolve this issue

1 by rule rather than wait for it to percolate up. If we're
2 not going to opine and add to that, then I would just
3 leave it in the statute and let people fight about what
4 the statute means.
5 CHAIRMAN BABCOCK: Judge Estevez, and then
6 Richard, and then Buddy.
7 HONORABLE ANA ESTEVEZ: I just want to
8 caution the group if we give anyone the power to stay the
9 proceeding then you are bringing up the constitutionality
10 of the rule because without the defendant's consent they
11 cannot -- you can't stay a proceeding, especially if the
12 person is in custody. You're just -- there's just no
13 provision. The Constitution states that they are entitled
14 to a speedy trial, and so it can't be -- with their
15 consent, okay, you obviously disagree, but I --
16 MS. HOBBS: No, no, no. Then you just write
17 the rule.
18 HONORABLE ANA ESTEVEZ: -- the juvenile
19 court probably can because they're a civil court, so but
20 then you have the problem of how are you going to get it
21 appealed. But once the court -- once the court starts
22 staying their own cases, then what you're doing is you're
23 refusing to set the case for trial and refusing to give
24 them a speedy trial, and if they object to it, I would
25 suggest that there would be a clear constitutional issue

1 that would --
2 CHAIRMAN BABCOCK: Would you yield briefly
3 to Lisa for her counterpoint?
4 MS. HOBBS: I would just say you write the
5 rule that if the defendant requests the stay you have
6 discretion to do it, and that's the defendant invoking it
7 instead of the prosecutor.
8 HONORABLE ANA ESTEVEZ: I think that would
9 be fine.
10 CHAIRMAN BABCOCK: Richard.
11 MR. MUNZINGER: I was going to say that I
12 agree with Lisa and principally because of Levi's
13 observation about the youngster who is in custody who has
14 this great pressure to enter into a plea. How many of us
15 have represented people who have been indicted or faced
16 prosecution specifically -- most especially in my
17 experience in Federal courts, where people plead to these
18 five-cent crimes. You lied to the FBI and spend a year in
19 jail rather than spend their fortunes to defend
20 themselves. It happens all the time, and it's
21 disgraceful. It's disgraceful, and it is a very valid
22 concern that some youngster's life is sorely affected
23 because of some circumstance, and I do believe that she is
24 correct. We ought to not let some kid plead and force
25 this issue to be resolved in the courts over the next two,

1 three, four, five years to get an answer to it when we can
2 in good faith -- I think the Court can in good faith
3 interpret the statute the way we have discussed and
4 should.
5 CHAIRMAN BABCOCK: Buddy.
6 MR. LOW: No, I'll waive. I don't think it
7 will add much to what's been said.
8 CHAIRMAN BABCOCK: We'll be the judge of
9 that.
10 MR. LOW: No, I have a question about
11 waiving jurisdiction, whether you waive, you decline to
12 take it; and traditionally, one court has jurisdiction of
13 a certain thing and another, and jurisdiction may
14 transfer --
15 CHAIRMAN BABCOCK: Yeah.
16 MR. LOW: -- but I'm not familiar with
17 jurisdiction being in several different courts.
18 CHAIRMAN BABCOCK: Yeah. Seems odd.
19 Justice Busby.
20 HONORABLE BRETT BUSBY: I agree with Lisa's
21 comment. I think it's a good point that if we're going to
22 have this in here it might be helpful to say that the
23 appeal doesn't automatically stay the subsequent criminal
24 prosecutions. Then I guess the question is can we by
25 appellate rule tell a criminal court what it can and can't

1 stay when the criminal courts are governed by the Code of
2 Criminal Procedure? And I don't know the answer to that
3 question, but I just throw it out there for people to
4 think about.
5 CHAIRMAN BABCOCK: Jim.
6 MR. PERDUE: I was questioning whether the
7 Texas Supreme Court can stay a criminal district court.
8 HONORABLE JEFF BOYD: But aren't you staying
9 the effect of the juvenile court's order? You're not
10 staying the proceeding in the criminal court. You're
11 staying the effectiveness of the juvenile court order
12 until that -- the validity of that order is determined on
13 interlocutory appeal.
14 MR. PERDUE: That makes sense, but then you
15 go back to the language of the bill, which says that an
16 appeal of that order does not stay the criminal
17 proceeding.
18 CHAIRMAN BABCOCK: Necessarily.
19 MR. PERDUE: Necessarily.
20 MR. KELLY: It might be a secondary effect.
21 CHAIRMAN BABCOCK: Roger.
22 MR. HUGHES: Well, in some sense this gets
23 back to whether a -- whether a conviction is going to moot
24 the appeal, because the moment the court -- I mean,
25 assuming that the Legislature hasn't already decided all

1 of this in advance and doesn't want any stay under any
2 circumstances issuing from the court of appeals, but if
3 you say the court of appeals has some discretion, but on
4 the other hand, the conviction will not moot the appeal.
5 It may continue on and become a second train operating on
6 a second track, then what's the basis for the stay? I
7 mean, usually when we provide for an emergency stay
8 somehow through gloss or case law, we say what is the
9 trial court to consider. Well, what is the trial court
10 going to consider as the grounds for a stay if it's not
11 preserving its jurisdiction? All it's doing is then it's
12 saying in one sense do we really want to put everyone
13 through the burden of a trial, young man being -- or woman
14 being forced to consider a guilty plea to avoid all of
15 this, putting the victim through all of this, spending all
16 of the government's money to do all of this, if the order
17 is invalid in which case then you're just getting back to,
18 well, we're weighing the merits of this order against the
19 consequences of pushing the case to trial. I raise the
20 question as simply then why are we granting the stay other
21 than for the reason that maybe the Legislature has already
22 decided it's not a good policy reason?
23 CHAIRMAN BABCOCK: Richard.
24 MR. MUNZINGER: If you follow the idea that
25 you have two tracks, you now have a juvenile who is

1 appealing to the Supreme Court. The court of appeals --
2 the family court's order to a court of appeals, which if
3 unsuccessful he goes to the Texas Supreme Court, but in
4 the interim he's been convicted so now he's going to the
5 Texas Court of Criminal Appeals and appealing a criminal
6 conviction. Who's got that kind of money? Who's got that
7 kind of strength? We're not talking about judicial
8 economy. We're talking about the rights of a citizen. We
9 are not talking about prudent use of courts. We're
10 talking about rights of a citizen, and that's serious
11 business, and for the Legislature to craft a statute that
12 says an appeal doesn't stay the criminal proceedings,
13 could have said if there is an appeal you can't stay the
14 proceedings. They didn't choose those words, so maybe
15 Justice Scalia has something in some of his arguments.
16 We're limited to the words the Legislature used, and if
17 they are ambiguous or uncertain we can interpret them. Or
18 we can't. The Court can. In this case, again, I think
19 it's very important, especially because of what Levi has
20 pointed out, and I share it. The pressure is on people to
21 make these life changing decisions are terrible, and
22 they're life changing. A record, a criminal record, good
23 God, that's serious business.
24 CHAIRMAN BABCOCK: No question. Justice
25 Bland.

1 HONORABLE JANE BLAND: Thinking about Lisa's
2 comments and the others that have joined in the
3 discussion, it may be prudent to remove this provision
4 regarding the stay from the rule. It was in there because
5 it's part of the statute and it informs the parties about
6 the statute, but -- and it's not part of 51.014. Is that
7 right?
8 MS. BARON: 51.014.
9 HONORABLE JANE BLAND: 51.014 where the
10 other sorts of interlocutory appeals, most of them, not
11 all of them, are collected and where there is language
12 about whether there is or is not a stay, but to effect
13 what the Texas Supreme Court did in their miscellaneous
14 docket order and what the Legislature did in creating this
15 appeal, we don't have to say anything about the stay in
16 the rule. So we could take that out, and that might be
17 prudent given the fact that there's a lot of discussion
18 about what that means.
19 CHAIRMAN BABCOCK: Yeah. Yeah, Judge
20 Wallace.
21 HONORABLE R. H. WALLACE: I don't know,
22 somebody who handles these cases can tell me; but from
23 what I read in the paper it seems like most of the cases
24 where a juvenile is certified as an adult are pretty bad
25 cases, they've done something bad; and if that's the case

1 I can see situations where a prosecutor, either zealous or
2 overzealous, whichever you want to call it, could say,
3 "We're going to try this kid as an adult before he has a
4 chance to run the table on this -- on these appeals," and
5 maybe that's what the Legislature intended.
6 CHAIRMAN BABCOCK: But, Judge, would you
7 still say -- would you still withhold to the trial court
8 the ability to stay it if they thought it was appropriate?
9 HONORABLE R. H. WALLACE: Would I?
10 CHAIRMAN BABCOCK: Yeah.
11 HONORABLE R. H. WALLACE: I don't think you
12 -- Rusty hit on it earlier. I don't think it necessarily
13 has to be a formal stay. I think in a number of the cases
14 the judge can run the railroad in such a way that it will
15 have time to get through the appeal. I don't know -- I
16 don't know for sure how I feel about a formal stay, and
17 like I said, I don't know if that's what the Legislature
18 envisioned.
19 CHAIRMAN BABCOCK: Yeah.
20 HONORABLE R. H. WALLACE: But I think in
21 most cases it will work out.
22 CHAIRMAN BABCOCK: Yeah. Your docket is
23 real crowded for the next 180 days.
24 HONORABLE R. H. WALLACE: Well, you know,
25 and sensible lawyers, yeah.

1 CHAIRMAN BABCOCK: Got it. All right.
2 Nina.
3 MS. CORTELL: Well, Levi was first.
4 CHAIRMAN BABCOCK: Who did? Oh, Levi.
5 HONORABLE LEVI BENTON: Yeah, I just wanted
6 to make a motion to modify my friend R.H.'s language to
7 what he really meant to say they're accused of doing
8 something bad, not that they have done something bad.
9 HONORABLE R. H. WALLACE: I'll stand
10 corrected. Thank you.
11 CHAIRMAN BABCOCK: That presumption of
12 innocence.
13 HONORABLE LEVI BENTON: Exactly.
14 CHAIRMAN BABCOCK: Okay. So Justice Bland,
15 I think -- oh, I'm sorry, Nina, you were going to say
16 something.
17 MS. CORTELL: Just on a different issue, I'm
18 a little concerned whether it's 306.1 or (b) or whatever
19 that as currently proposed doesn't give enough notice of
20 what it's really about. It's about an order, not a
21 judgment. I would hope that the title itself would be
22 more explanatory so at least people looking for titles and
23 you could look at 25.1 for the proposed title you have
24 there. If we were going to have a stay provision, I would
25 put it here I think in -- or somewhere where, you know,

1 this is what this -- how this order must read.
2 HONORABLE JANE BLAND: When you say "here,"
3 Nina, you would put it --
4 MS. CORTELL: Somewhere where we're talking
5 about the form of the order itself, I think, but right now
6 you have it in the appellate rules. I'm not saying not to
7 have it in the appellate rules.
8 HONORABLE JANE BLAND: We have it in both
9 places, but that was one of the things we wanted your
10 input on.
11 MS. CORTELL: Right. I think at a minimum
12 it needs to be here, right here.
13 HONORABLE JANE BLAND: "Here" meaning 306?
14 MS. CORTELL: Yeah, or in that area, so this
15 is what the order must say, and when I see an order title
16 that just says, "Advice of Right of Appeal," you know,
17 that's not going to draw my attention there, so I would
18 err on the side of having it in both places but being very
19 clear in the title and then including in it, if we are
20 going to include anything about a stay, including it there
21 as well. Yeah, you have the title in 25.1(i).
22 CHAIRMAN BABCOCK: Lisa.
23 MS. HOBBS: Well, I wonder what trial judge
24 is going to be reading the appellate rules as he's
25 drafting his order.

1 MS. CORTELL: That's why I'm saying at a
2 minimum I would put it in the Rules of Civil Procedure.
3 MS. HOBBS: But I just don't know why it's
4 in the appellate rules, because either the judge did his
5 duty and he advised you. I don't think he's the one
6 reading the appellate rules, and then if you later read
7 the appellate rules, I mean, presumably that would be the
8 lawyer reading the appellate rules, and at that point he's
9 either lost his right to appeal or he's gotten it.
10 MS. CORTELL: I'm fine. I'd err on the side
11 of having it both places just because more notice is
12 better.
13 CHAIRMAN BABCOCK: Okay.
14 MS. CORTELL: This is important enough.
15 CHAIRMAN BABCOCK: Carlos, are you
16 scratching or --
17 MR. SOLTERO: Just scratching.
18 CHAIRMAN BABCOCK: Okay. Let the record
19 reflect. Okay. It seems to me, Justice Bland, that we
20 might benefit from a vote. It will be our eighth of the
21 day. We're nearing a record, and the vote would be
22 whether, as you suggest, to take the stay language out of
23 the rule. So everybody in favor of that raise your
24 hand.
25 Okay. And people opposed to taking it out?

1 All right. That carries 15 in favor of taking it out to 7
2 leaving it in.
3 MS. HOBBS: What about a motion for adding
4 it, but resolving the issue of who has authority to issue
5 a stay?
6 CHAIRMAN BABCOCK: Yeah, Professor Hoffman's
7 thought. That would be a ninth vote.
8 MS. HOBBS: Can we do it? Is it possible?
9 CHAIRMAN BABCOCK: Let's do it.
10 HONORABLE ANA ESTEVEZ: Are you limiting who
11 can vote on it?
12 CHAIRMAN BABCOCK: Everybody can vote on it.
13 No limits on who can vote on it. This is a democracy,
14 Judge.
15 MR. MUNZINGER: State the question again,
16 Chip. State what the question is.
17 CHAIRMAN BABCOCK: I'm going to try to state
18 the question. You would vote in favor if you're in favor
19 of having, as Professor Hoffman and Lisa Hobbs say, a rule
20 that sets out what is -- what the situation is in our
21 view for the Court's view, which is the statute doesn't
22 provide for an automatic stay, but a stay is within the
23 discretion of whatever court may have the case at the
24 time.
25 MS. HOBBS: Upon request by the defendant.

1 CHAIRMAN BABCOCK: Upon request by the
2 defendant, or the prosecutor. Why would you limit it to
3 the --
4 MS. HOBBS: Because she has a good point,
5 unless the defendant asks for it we might be violating his
6 right to speedy trial.
7 CHAIRMAN BABCOCK: Oh, okay. So only the
8 defendant. I'm with you. Okay. So everybody in favor of
9 that, raise your hand.
10 A very popular topic. Anybody against? 22
11 to 5 in favor of that proposal. Lisa, you have -- you
12 have just shot the lot today. Our ninth vote. Okay.
13 Anything else we've got to talk about on this rule?
14 HONORABLE ANA ESTEVEZ: I just want to
15 comment on the other effect -- I think it's a positive one
16 for someone in custody. For someone who is not in custody
17 then it's a dream statute because it can delay their trial
18 by 180 days or a year or as long as they -- as long as it
19 takes, so I guess --
20 CHAIRMAN BABCOCK: All right. Let's talk
21 about dead lawyers' trust accounts. Jim, I know you're an
22 expert on this.
23 MR. PERDUE: I think we have found a pinhead
24 on which no angels can dance.
25 CHAIRMAN BABCOCK: Oh, I don't know, you may

1 underestimate this crowd.
2 MR. PERDUE: So you have a memo, I forget
3 which tab.
4 CHAIRMAN BABCOCK: I think it's (bb), maybe.
5 MR. PERDUE: The issue with Senate Bill 995,
6 this creates a new chapter within the Estate Code. I
7 tried to research this. Anecdotally there seems to have
8 been a case that gave rise to this bill. Essentially what
9 has been created in the Estate Code is a means by which a
10 lawyer who has passed but has funds remaining in their
11 trust or escrow account, the probate or estate proceeding
12 can have a lawyer or a personal representative of the
13 deceased attorney who is a lawyer sign on to get that
14 money disbursed. So the concept of the professional
15 responsibility rules would apply to that representative,
16 and you provide a means by which if there is some money
17 left over in a trust account for a deceased attorney to
18 get it -- to get it out of the trust account and not bog
19 down in the estate since you don't have essentially the
20 attorney on the trust account anymore, and the
21 subcommittee read the code.
22 It is laid out in the memo, and the short
23 take is that we felt that the section of the Estate Code
24 reads clearer. It provides a very obvious means by which
25 this is achieved, and frankly, we could not think amongst

1 our group of a place elsewhere in the rules subject to the
2 rule-making authority of the Texas Supreme Court that
3 makes more sense to reiterate this statement than a
4 chapter in the Estate Code. So the long and short -- the
5 subcommittee's report to this committee is that no rule is
6 necessary to effectuate this chapter of the Estate Code
7 because if you're in a probate proceeding, and it -- the
8 decedent is an attorney and there's left over in a trust
9 account, the place that you would look for how to get that
10 trust account finished up is the Estate Code. It provides
11 guidance to the probate, it provides guidance to the
12 estate's lawyers, provides guidance to the judge who has
13 the proceeding.
14 It's very straightforward in that it
15 essentially creates a written delegation to the lawyer
16 that takes it on. The institution that has the trust
17 account then must follow the directions of that -- of that
18 individual, and then it provides safe harbor for that
19 institution in disbursing the funds as directed by the
20 personal representative. So from an institutional
21 standpoint, they've got protection, and we, frankly, in
22 reading it over and over, it doesn't make sense from the
23 subcommittee's perspective to try to -- I don't know where
24 you put it other than the Estate Code. It doesn't make
25 sense, for example, in the Supreme Court's rule on the

1 access to justice or IOLTA rule, and so our take was it
2 reads clean, it makes sense, and you've got this chapter
3 in the Estate Code that holistically handles the issue.
4 CHAIRMAN BABCOCK: Okay. Sometimes the
5 Legislature says that the Texas Supreme Court "shall make
6 rules." This one, I think says "may make rules." So that
7 would -- we wouldn't be frustrating legislative intent if
8 we didn't have any rule, and I think what you're saying is
9 that the statute is adequate regarding the administration
10 of funds in a trust or escrow account subject to the law
11 there?
12 MR. PERDUE: That was the -- I mean, I leave
13 the other members of the subcommittee to join in, but we
14 had kind of a unanimous take. It's sufficiently clear.
15 It's in the right place, and it does what it needs to do.
16 CHAIRMAN BABCOCK: Okay. We've had a lot of
17 instances over the years where the subcommittee has said
18 we don't need a rule, and Justice Hecht has sat up here
19 and said, "Yeah, yeah, I get that, but we want you to
20 propose a rule." I don't sense that that's the case on
21 this one, but I'll let the Court speak for itself, but
22 Lisa wants to speak first for the Court.
23 MS. HOBBS: I'm looking -- no, not for the
24 Court. Never. I'm looking for the rule, but I think
25 there is a Texas Disciplinary Rule of Procedure that

1 governs winding down a law practice, and that includes
2 winding down the law practice of a decedent. Did the
3 subcommittee look at the disciplinary rules at all?
4 MR. PERDUE: Well, so the disciplinary rules
5 are obviously Bar rules, and we didn't see anything
6 inconsistent with the Estate Code in what we did look at,
7 but we did not --
8 CHAIRMAN BABCOCK: So that would be a "no."
9 MR. PERDUE: -- pursue actively the idea of
10 the Supreme Court writing into the disciplinary rules.
11 CHAIRMAN BABCOCK: All right. Anybody else
12 on the subcommittee wish to be heard on this? Justice
13 Hecht, do you want them to go ahead and write some damn
14 rules anyway?
15 CHIEF JUSTICE HECHT: We'll think about it,
16 but probably not.
17 CHAIRMAN BABCOCK: Okay. So we'll think
18 about that.
19 MR. PERDUE: Okay.
20 CHAIRMAN BABCOCK: Yes.
21 HONORABLE BOB PEMBERTON: I was just going
22 to say you could always add a comment to the existing rule
23 that cross-references the Estate Code if there is any
24 concern about lack of clarity and people not knowing.
25 CHAIRMAN BABCOCK: Yeah, that's a good idea.

1 Yeah, I had thought about that.
2 MS. HOBBS: It's 13.02 of the Texas Rules of
3 Disciplinary Procedure.
4 CHAIRMAN BABCOCK: Okay. Great. All right.
5 Any other comments about that? All right.
6 Hayes, you've got the constitutional
7 adequacy of Texas garnishment procedures. That's a great
8 topic at about this time of the afternoon.
9 MR. FULLER: I can tell. I'm going to be
10 standing in for Carl today, but basically our charge was
11 very simple. The solution to that charge was not so
12 simple, and basically we were asked to take a look at a
13 Georgia case which had declared the Georgia garnishment
14 procedures unconstitutional, and compare those with the
15 proposed garnishment rules that we have come up with to
16 see how ours stack up and whether or not we needed to
17 consider revising those.
18 Specifically, the Georgia procedure that was
19 declared unconstitutional was found to violate due process
20 because it did not require that the debtor be notified
21 that certain seized property may be exempt under state or
22 Federal law. Secondly, that it does not require that the
23 debtor be notified under the procedure for claiming an
24 exemption. I want to come back to that, focus on those
25 words, and thirdly, that it does not provide a prompt and

1 expeditious procedure for a debtor to reclaim exempt
2 property.
3 Our subcommittee read the case, and the
4 first thing I want to point out is our procedure differs.
5 I mean, our proposed procedure differs from the Georgia
6 procedure. The Georgia procedure clearly did not require
7 notice to the debtor, first of all, and ours does; and
8 secondly, there was an inordinate amount of time insofar
9 as resolving the issue as far as the claiming exemption
10 and getting the property returned to the debtor. Ours has
11 a much more indefinite time period; and secondly, the
12 other thing that we kind of focus on really becomes we do
13 provide notice, we do have a time period for, you know,
14 for resolving the issue, but really -- and we do actually
15 notify you with a procedure to reclaim your property in
16 our proposed rule. So on the surface we could claim, you
17 know, ours is good enough; but if you read the opinion
18 regarding the Georgia procedures, they do raise some
19 interesting issues about the sufficiency of what I will
20 call the sufficiency of the notice; and it was the sense
21 of our subcommittee that ours is probably good enough; but
22 it could be better, particularly in the area of the
23 sufficiency of the notice.
24 Now, took a stab at proposing some
25 modifications to our proposed rule. I would -- I would

1 view those as a starting point, depending on which way we
2 go as this committee. I'm not even sure I would consider
3 them a first draft, so to speak, but specifically here's
4 the problem as far as the sufficiency of the notice. The
5 case said that you must notify -- or the notice must
6 identify what property may be exempt, so there is a
7 discussion. I think there's a good authority. There's
8 good discussion of authority in the case regarding the
9 Georgia statute that seems to indicate or that does
10 indicate you don't have to provide in your notice an
11 exhaustive list of every state and Federal exemption that
12 may apply, but there's also some language in the case
13 which would indicate you may need to give some examples of
14 the most common exemptions that might apply. Open
15 question.
16 So we probably need to decide I guess --
17 well, and secondly, they talk about the procedure for
18 claiming your exemption or asserting your exemption. We
19 list the procedure or identify the procedure, I guess I
20 should say, in our proposed rules; but we don't
21 necessarily go into an, "Okay, and here's what you do
22 next," sort of thing, a step-by-step process.
23 Lastly, one thing we touched upon and didn't
24 do anything about at all is who is the notice being
25 directed to? It's being directed to the debtor; and, you

1 know, I'm pretty sure debtors in Texas and probably
2 anywhere else have no idea what a replevy bond is; and I'm
3 pretty sure they don't know what garnishment necessarily
4 even means unless they've encountered the process before.
5 So, you know, I would raise, for lack of a better term,
6 the legalese. You know, is our notice provision
7 insufficient simply because of, you know, does it make --
8 to the average person who is being confronted with this
9 does it mean anything at all? We kind of approached it --
10 and I'm not sure this is sufficient, but we did make some
11 changes as far as -- and I'll just go through kind of the
12 changes we looked at.
13 First of all, there's a difference between
14 the district court, 20 days, and the JP court, 10 days.
15 Carl said, you know, that's confusing, we probably ought
16 to see if we can combine those time periods and went with
17 the 10 days as opposed to 20 in both instances, which also
18 had the added effect of getting this resolved sooner for
19 everybody.
20 Secondly, we linked -- when we talk about
21 "your funds or other property may be exempt from
22 garnishment" rather than just stop with "exempt" we
23 thought what is it exempt from, so we linked the
24 garnishment to the exemption. Okay. Then we added, again
25 linking it all together, "If you believe your property is

1 exempt from garnishment under state or Federal law or has
2 been wrongfully garnished, you have a right to regain
3 possession." So we're giving them the procedures of what
4 they have to do, and I think Carl also put in there the
5 other thing that -- let's see. I thought he had a
6 suggestion, but I'm not seeing it. Oh, yeah, here it is,
7 "You should consult a lawyer." I don't know if that's --
8 I mean, the intent is good. That's what we put in instead
9 of identifying even a partial list of what exemptions
10 might apply, but, you know, if folks don't have the
11 ability to go to a lawyer or they go to the lawyer and the
12 lawyer says, "No, not me," I'm not sure that really
13 accomplishes what the Court was talking about in the
14 opinion on the Georgia procedure.
15 So I guess what we would look for in
16 direction from the committee is, first of all, is our
17 procedure good enough. You know, we do do the things that
18 they say the Georgia procedure does not. The question is
19 do we do them well enough. So the first thing I'd like to
20 get, our sense was it did not, but we'll gladly be
21 second-guessed by the committee. So is ours good enough
22 or does it need to be changed, would be the issue number
23 one.
24 Number two is if it is not good enough, then
25 what do we do in terms of the sufficiency of the notice?

1 Do we want to take a look at giving some examples in terms
2 of the most common exemptions under state or Federal law?
3 How do we address that particular issue? And then lastly,
4 do we want to do anything along those same lines in terms
5 of the legalese with the understanding that this is being
6 put in the hands of a debtor who probably has no legal
7 education at all?
8 CHAIRMAN BABCOCK: Were you able to
9 determine, Hayes, whether the district court opinion here
10 was appealed to the Eleventh Circuit?
11 MR. FULLER: I do not, and I probably should
12 have looked at that, so we don't know -- I believe that it
13 was decided on cross-motions for summary judgment. For
14 some reason I think Carl did check that, and I think he
15 said it had been appealed.
16 CHAIRMAN BABCOCK: It had been?
17 MR. FULLER: Yeah.
18 CHAIRMAN BABCOCK: Yeah, because it looks
19 like there is a final judgment here.
20 MR. FULLER: Yeah.
21 CHAIRMAN BABCOCK: In our papers. It would
22 be interesting to know whether that's an appeal. I have
23 been looking it up online here, and I can't see one way or
24 the other, but unless there's a motion for new trial or
25 something, it would have been -- the time for appeal would

1 have --
2 MR. FULLER: Expired.
3 CHAIRMAN BABCOCK: Expired, yeah.
4 MR. FULLER: Yeah. And the Georgia
5 procedure was really -- I mean, stepping back one more
6 from it, the facts were really bad, as often is the case,
7 in terms of what happened to the debtor in this particular
8 instance; and as far as legalese is concerned, Georgia has
9 some legalese that even befuddles me, but --
10 CHAIRMAN BABCOCK: Yeah. Apparently there
11 was a prior Eleventh Circuit opinion in the case.
12 MR. FULLER: Which they cited, yeah.
13 CHAIRMAN BABCOCK: But not on point. All
14 right. So Hayes' thoughts about are our procedures good
15 enough, do they need to be amended? Justice Brown.
16 HONORABLE HARVEY BROWN: Well, to me the
17 question isn't whether they need to be amended to comply
18 with the Constitution. It's whether they should be
19 amended to make the rule better. I think that should be
20 the question we address.
21 CHAIRMAN BABCOCK: Okay. Yeah, Orsinger.
22 MR. ORSINGER: It seems to me that we may be
23 in a situation here where there will be some
24 self-represented individuals, whatever the correct name is
25 for people who don't have lawyers that are trying to do

1 their best to navigate the legal landscape, and, you know,
2 perhaps we should be sensitive to the fact that all of
3 these writs came to us from a previous century with the
4 names like sequestration and things that are not even
5 meaningful to lawyers. Only law professors really know
6 what it means.
7 CHAIRMAN BABCOCK: Well, he's going to speak
8 next.
9 PROFESSOR DORSANEO: Professors of --
10 MR. ORSINGER: Only professors who are
11 teachers of garnishment, right, so I mean, I really think
12 that we would be doing a lot of good if we use modern
13 language, but I think that we could also be doing a lot of
14 good if we could introduce some forms into the procedure
15 so that these people have an opportunity to take advantage
16 of these procedures. So I think that this probably is
17 pretty archaic. It needs to be modernized, simplified,
18 and we need to provide forms and all of that as a worthy
19 effort of maybe a task force, not my subcommittee.
20 CHAIRMAN BABCOCK: Are you a proponent of
21 forms?
22 MR. ORSINGER: Not my subcommittee, no.
23 CHAIRMAN BABCOCK: Professor Dorsaneo.
24 PROFESSOR DORSANEO: The one problem with
25 that is we have all of these statutes which are less

1 willing to be amended by us than the rules, so I don't
2 know if we can get away from this terminology, quite
3 frankly, but I personally don't think that the change, if
4 I understood correctly and if I'm reading correctly, the
5 change for the answer day, I don't think makes the rule
6 better. I think it just means that lawyers and everybody
7 else need to know that the normal timetable does not apply
8 to garnishment petitions. You know, it's like "Following
9 expiration of 10 days from the date the writ was served,"
10 you know, the 20 days is the normal, 20 days after service
11 of the -- of the petition and citation is the normal deal.
12 I don't know why going to 10 doesn't create more trouble
13 than it solves.
14 CHAIRMAN BABCOCK: Hayes, what do you think
15 about that?
16 MR. FULLER: Well, Carl's thinking was that
17 you've got two. You've got a 10-day if it's not a
18 district court; you've got a 20-day if it is a district
19 court. So basically he was trying to come up with one
20 timetable --
21 PROFESSOR DORSANEO: Then use 20.
22 MR. FULLER: -- and went with the shorter as
23 opposed to the longer.
24 CHAIRMAN BABCOCK: Bill says use 20. Hayes
25 is okay with that.

1 PROFESSOR DORSANEO: Good. I'm happy.
2 CHAIRMAN BABCOCK: Okay. Elaine.
3 PROFESSOR CARLSON: Richard, we had a task
4 force on ancillary proceedings and tried to do what you
5 suggested, but Bill is absolutely right. There is so many
6 statutes that tie into writ that you would have to really
7 get the Legislature to sign onto changing that process.
8 MR. ORSINGER: That may not be impossible.
9 The family lawyers do it every session, but it just takes
10 a group --
11 PROFESSOR CARLSON: We're putting you in
12 charge.
13 MR. ORSINGER: -- of people who -- yeah, I'm
14 not claiming any expertise. I'm just telling you that it
15 can be done.
16 CHAIRMAN BABCOCK: Those rules were painful.
17 PROFESSOR CARLSON: They were very painful.
18 And the second point I want to bring up to you, Hayes, is
19 my recollection as one of the members of the task force
20 was with Legal Aid, and they did present to this committee
21 as well as at the task force level, a Federal statute that
22 I believe requires certain notice on garnishment that
23 Federal monies that go for -- I think it's for subsidized
24 housing is exempt from, and it might be other entitlements
25 as well, and that was a Federal statutory requirement that

1 I'm happy to track down for you.
2 MR. FULLER: Yeah, there's a number of
3 instances like that, and so, I mean, we had -- without
4 doing the research on all of the possible exemptions under
5 state and Federal law there could be, our initial reaction
6 was when we do that we're going to have a 14-page notice,
7 but, you know --
8 PROFESSOR CARLSON: This wasn't just
9 exemption. It also required notice on the writ or on the
10 papers.
11 CHAIRMAN BABCOCK: Judge Wallace.
12 HONORABLE R. H. WALLACE: I was just
13 counting, if you changed it to 10 days, and if it was
14 served on a Friday afternoon, you've got 5 working days to
15 answer, so I don't know, that may be cutting it pretty
16 tight.
17 CHAIRMAN BABCOCK: Lisa.
18 MS. HOBBS: Especially if you're wanting
19 them to go consult a lawyer about what might be exempt or
20 not. It's hard to get a new client in the door and advise
21 them in that time frame.
22 CHAIRMAN BABCOCK: Yeah. Yeah, Cristina.
23 MS. RODRIGUEZ: I was just flipping ahead in
24 the memo. Is part of the issue for our consideration the
25 notice itself and the form of service and form of giving

1 notice in addition to the substance of it?
2 MR. FULLER: The real -- if I'm
3 understanding your question, the real focus of the case
4 considering the Georgia statute focused on the notice or
5 the lack thereof, and the sufficient -- because they
6 did -- and I would have to go back into the opinion, but,
7 you know, that was raised early on, that there was no
8 notice, and then they started looking at the various
9 things that did occur under the Georgia procedure that
10 could be considered notice, and the court's response to
11 that was, well, if that's what you're considering notice,
12 it's insufficient.
13 MS. RODRIGUEZ: No way.
14 MR. FULLER: Yeah.
15 CHAIRMAN BABCOCK: Okay. Other comments
16 about the proposal? Yeah, Pete.
17 MR. SCHENKKAN: I understand that there is a
18 lot of statutes out there and they tie our hands in terms
19 of recommending rules to the Court, but I understood
20 Richard's proposal to be that we do our best to come up
21 with some essentially pro se forms, and I would have
22 thought that the statutes would not prevent us from
23 looking, for example, at this notice form right after it
24 says, "You're hereby notified that the property alleged to
25 be owned by you has been garnished" from putting in a

1 sentence, "This means," comma, "among other things,"
2 comma, "that whoever can do whatever with your bank
3 account." So that it's not a full education of what
4 garnishment means --
5 MR. FULLER: Right.
6 MR. SCHENKKAN: -- but it's enough to get
7 them started of the basic concept of what are they dealing
8 with; and similarly, I would think we could scrub the word
9 "replevy bond," as filing a bond and direct people to
10 where they would go to learn what they need to know about
11 what does that mean? What does filing a bond mean? And
12 so I would -- I don't think I was deeply involved in that
13 previous -- I know I was here for the group discussion,
14 but did we encounter some obstacles that meant we really
15 couldn't even --
16 PROFESSOR CARLSON: No, no. We dealt with
17 the rule revisions but not renaming writs of attachment.
18 MR. SCHENKKAN: Not doing forms for pro se
19 people.
20 PROFESSOR CARLSON: No.
21 CHAIRMAN BABCOCK: Okay.
22 MR. LOW: Chip?
23 CHAIRMAN BABCOCK: Yeah.
24 MR. LOW: In support of what Richard said,
25 wouldn't it be possible to -- even though these terms are

1 used that are ancient, couldn't you put "replevy" and then
2 paren, what it really means, and then these antique words,
3 put them in English, and that wouldn't change the form of
4 the statute if you interpreted and put a modern
5 interpretation of what it says.
6 MR. ORSINGER: In parentheses.
7 MR. LOW: So I think Richard -- I know it's
8 been looked at, but I think it could be done --
9 CHAIRMAN BABCOCK: Yeah.
10 MR. LOW: -- by making -- we know how to
11 interpret it.
12 CHAIRMAN BABCOCK: Justice Gray.
13 HONORABLE TOM GRAY: I was just going to ask
14 Hayes if anywhere this thing that the person gets
15 identifies the property that's been garnished? Because to
16 me that's the first thing the person is going to want to
17 know, is what property.
18 MR. FULLER: Well, I think -- well, it's not
19 I think. It's going to be in the writ.
20 HONORABLE TOM GRAY: Okay. It's going to be
21 in the writ.
22 MR. FULLER: It's going to be in the writ,
23 and one other thing that may be germane to our discussion
24 as far as thinking the sufficiency of the notice, there
25 was a pretty lengthy description of the facts in the

1 opinion that considered the Georgia statute, and one of
2 the things that the recitation of facts did was they kind
3 of took the perspective of here's what the debtor got
4 under Georgia law, and here's what the debtor did in
5 response to what the debtor got, and this debtor actually
6 did some stuff. I mean, he went to the bank and kind
7 of -- and all he could get from the bank was "You need to
8 talk to the creditor's attorney." I mean, the debtor
9 tried to do some things here, so it did cross my mind
10 reading that and looking at our notice, is if you got what
11 we serve on you, do you have an idea as to what you need
12 to do? And that's, you know --
13 CHAIRMAN BABCOCK: Uh-huh. Yeah. Somebody
14 else had their hand up. Bill.
15 PROFESSOR DORSANEO: Well, I was just going
16 to say, you could write what garnishment does easily
17 enough. It doesn't do -- you're not talking about that
18 many different things that are subject to garnishment,
19 mostly bank accounts.
20 CHAIRMAN BABCOCK: Right.
21 PROFESSOR DORSANEO: Other property, too,
22 but that's less so, other obligations. It could be
23 relatively easily done by looking at any creditor's rights
24 program, frankly.
25 CHAIRMAN BABCOCK: Yeah. Yeah. Richard,

1 then Wade.
2 MR. ORSINGER: It's probably unwieldy to
3 disclose everything these people need to know in the
4 process that's served on them, but you could refer them to
5 a web page that was more complex and had some navigation
6 tools and some explanatory terms and some forms you could
7 print out. A form you could print out, for example, would
8 be "If you want to claim an exemption, you know, here is
9 the following exemption: Social Security distributions,
10 VA disability payments, subsidized housing payments," and
11 you can have a check off and have them sign it under oath
12 or sign it in front of the clerk of the court or whatever
13 and file it, and that's the way they do their exemption.
14 We don't do that with the writ that gets served on them.
15 The writ that gets served on them says, "If you want more
16 information, go to this web page," and then the web page,
17 they can print out the packet, and they could figure out
18 how to represent themselves. That would be, to me,
19 workable.
20 MR. SHELTON: I'm just wondering --
21 CHAIRMAN BABCOCK: Wade.
22 MR. SHELTON: Oh, forgive me, I'm sorry.
23 CHAIRMAN BABCOCK: Wade.
24 MR. SHELTON: I'm just wondering who's
25 getting this notice of garnishment, right? It's somebody

1 who likely has a judgment rendered against them, and if
2 that's happened they may have already been represented or
3 they may have already defaulted on their citation earlier,
4 and so I'm wondering how far -- I mean, I'm sympathetic to
5 making sure that we don't use confusing language and
6 things of that nature, but at a certain point these folks
7 have been exposed to the process. They've either ignored
8 opportunities to do something about it time and time
9 again, or they have been represented, and they would know
10 to go back to their lawyer to ask them what's going on
11 about this garnishment, and then honestly, I know that not
12 everybody has this, and I don't want to be insensitive to
13 the fact that some folks don't, but you just Google
14 "garnishment" and all of the sudden you say, "Oh, what's
15 this got to do with my bank account?" I mean, I don't
16 know how far we want to go, and I'd rather people go see
17 Lisa with 20 days for her to get a fee and do something
18 about it.
19 MS. HOBBS: Yeah.
20 CHAIRMAN BABCOCK: Hayes.
21 MR. FULLER: I told you the facts were bad
22 from this case, but in this instance it was a credit card
23 default judgment, and the reason why it was in default is
24 the guy had cancer, was in the hospital, and he missed
25 everything for a period of months, and what they garnished

1 was health care benefit money or something that was in the
2 hospital to pay for his -- it was just --
3 MR. ORSINGER: Sounds like a Dickens novel.
4 MR. SHELTON: I'm ashamed of myself. I'm
5 going to watch the 15th anniversary of Charlie Brown's
6 Christmas.
7 CHAIRMAN BABCOCK: Hey, Wade, I'll take the
8 plaintiff's side. You can have the defendant's side.
9 MR. SHELTON: Lawyer Scrooge.
10 CHAIRMAN BABCOCK: Yeah, Frank.
11 MR. GILSTRAP: Why don't we give some kind
12 of notice like this? "You are advised that the garnishor
13 named above is trying to take your bank account or other
14 property. You may be able to get your property back by
15 filing a bond or going to court. You should consult a
16 lawyer."
17 CHAIRMAN BABCOCK: That's pretty
18 straightforward.
19 HONORABLE ANA ESTEVEZ: "Example, Lisa
20 Hobbs."
21 MS. CORTELL: Well, my question is, is there
22 any form where we tell them to consult a lawyer? I
23 mean --
24 MR. FULLER: I'm sorry?
25 MS. CORTELL: I'm wondering the propriety of

1 having a form that tells --
2 CHAIRMAN BABCOCK: The family law forms do
3 that, don't they?
4 MR. ORSINGER: I think they're designed for
5 you not to consult a lawyer unless you have --
6 CHAIRMAN BABCOCK: But doesn't it say
7 something about "If this is too complicated, you ought to
8 check with a lawyer"?
9 MR. ORSINGER: I'll check it out. I think
10 we told them the forms are not to be used -- the forms
11 without lawyers are not to be used if you have children or
12 if you have real estate and maybe retirement. I forget.
13 There was some adjustment in there.
14 MS. CORTELL: I just think we ought to be
15 thoughtful about that. First of all, there will be a lot
16 of times when they should consult lawyers we don't say it,
17 and when we -- just a blanket statement like that might be
18 viewed as inappropriate by some.
19 MR. GILSTRAP: "It may be in your best
20 interest to consult a lawyer." We can tone it down.
21 CHAIRMAN BABCOCK: What if we call them a
22 "counselor"?
23 MS. CORTELL: All right. Okay.
24 MR. ORSINGER: Realistically I don't think
25 these people have the money to see a lawyer. I think

1 they're just going to try to get through it themselves.
2 CHAIRMAN BABCOCK: Okay. Anybody else on
3 this one? Yeah, Elaine.
4 PROFESSOR CARLSON: So doesn't --
5 statutorily doesn't it say, "You must include the
6 following language"?
7 MR. FULLER: Yep. That was one of the
8 changes that was made to the language that must be
9 included in the notice.
10 PROFESSOR CARLSON: So are you going to
11 include the language the statute requires or just
12 paraphrase it?
13 MR. FULLER: Well, oh, no, I'm sorry. I
14 misunderstood your question. You're talking about the
15 statute that the --
16 PROFESSOR CARLSON: Yeah. Yeah.
17 MR. FULLER: Okay. Good point.
18 CHAIRMAN BABCOCK: Okay. If there's nothing
19 else, we'll take our afternoon break, and we'll come back.
20 The first shall be last, ex parte communications.
21 (Recess from 3:31 p.m. to 3:45 p.m.)
22 CHAIRMAN BABCOCK: Okay, guys, the moment
23 we've all been waiting for, ex parte communications.
24 Richard, you ready for this? Orsinger?
25 MR. ORSINGER: Yes, sir.

1 CHAIRMAN BABCOCK: You ready for this?
2 MR. ORSINGER: I'm ready for it. We're
3 going to do ex parte.
4 CHAIRMAN BABCOCK: We're going to ex parte
5 this thing. Let's all go outside and talk amongst
6 ourselves.
7 MR. LOW: That's what we're doing right now
8 is ex parte.
9 CHAIRMAN BABCOCK: That's what it looked
10 like. All right. Nina has done the yeoman's work on
11 this, along with others. Judge Peeples, for one.
12 MS. CORTELL: Right. And Lonny.
13 CHAIRMAN BABCOCK: Professor Hoffman.
14 MS. CORTELL: And Tom Gray and Justice
15 Boyce.
16 CHAIRMAN BABCOCK: This doesn't have to be
17 like the Academy awards.
18 MS. CORTELL: Yes, we want to acknowledge
19 everybody, and actually a couple of words on behalf of the
20 entire subcommittee. First, don't blame the messenger.
21 Secondly, the subcommittee probably is, it's fair to say,
22 a bit divided on this concept, but everybody worked very
23 hard to put together the best draft possible. A little
24 bit of a review, you-all that were here last time or have
25 otherwise reviewed the materials -- and, by the way, the

1 proposed rule is under tab 3a, and the accompanying
2 materials are also under tab 3. The Supreme Court
3 received some -- justices received various e-mails from
4 nonparties regarding a pending case, and the question was
5 how do we handle communications that are outside the
6 parties that come to a judge in connection with a case and
7 also to look at that in terms of social media, what kind
8 of rules we come up with.
9 Initially we were asked to do a canon,
10 propose a canon for the Code of Judicial Conduct. For
11 those of you that were here last time you will recall that
12 that met with a resounding thumbs down. The subcommittee
13 thought that our work was done, but we were asked to go
14 back and look at a rule, and that's what we did. Now, let
15 me also say that in drafting this rule we were very aware
16 of the comments, the extensive comments that were received
17 at the last meeting, so we worked very hard in this rule
18 to be responsive to the comments that were made. Most
19 specifically to really tighten it up and make it as simple
20 as possible, provide additional guidance in the comment,
21 and so that has led us to the proposed rule.
22 Now, we made it a proposed Rule of Judicial
23 Administration. It doesn't need to be. It could be
24 wherever you think it should be, but that seemed to be the
25 best bet. That's really secondary. I would suggest that

1 we as a committee look at the rule itself, which is,
2 again, very straightforward and intended to be very, very
3 targeted so that when a judge actually receives and sees a
4 communication from a nonparty with regard to a pending
5 case, these are the few things that that judge must do.
6 So, A, preserve the writing among the
7 documents in the case, send a copy of the writing to all
8 parties, and three, just an open-ended "take whatever
9 other action may be deemed appropriate." Some of the
10 wording may seem a bit awkward, but let me explain why we
11 used certain words. We said, first of all, "a written
12 communication," and we said "sent to and received by a
13 judge." It's not enough that it be just sent to the
14 court. It has to be actually received by the judge. It
15 has to be with regard to a pending action. You'll recall
16 that the language from the code talked about "impending"
17 as well, so we said, no, it has to be an actual case
18 that's pending and it has to be actually seen by the
19 judge. So we wanted to make sure everybody understood
20 what we were intending to cover; and that's why we have a
21 pretty extensive proposed comment to make sure that the
22 public understood that we were speaking to electronic
23 communications as well as other forms; and then we went
24 and wanted to define what "sent to and received by" meant;
25 and that's what the second sentence does, the second and

1 third; and then we wanted to give some examples of other
2 actions the court could consider, including a letter
3 informing the parties that they may respond to the
4 communication for the response to the sender of the
5 communication if the Court felt it was appropriate.
6 Finally, on the third page -- well, second
7 page, you'll note a committee -- a note to this committee,
8 Justice Gray pointed us to section 36.04 of the Texas
9 Penal Code, which was pretty interesting to learn about,
10 and in some circumstances criminalizes improper
11 communications. We thought about whether to reference the
12 statute in our comment. This committee could vote on that
13 if it wants. We felt that would be very heavy handed and
14 that it just probably won't apply in most circumstances,
15 but that would be for this committee to consider. So I
16 think with that I would open it up to discussion.
17 Let me repeat something we often hear. I
18 understand that there may be a feeling by the committee
19 that we not have any rule, and obviously feel free to
20 state that, but remember that our charge is to provide a
21 proposed rule to the Court, so assuming that the Court
22 wants to consider a rule, I think we ought to really be
23 focusing on what should that rule look like. Having said
24 that, if air time is permitted to everybody to voice their
25 discontent with the idea, we heard a lot of that last

1 time, but I think it would be most constructive in the
2 hour or so that we have to look at the language being
3 proposed.
4 CHAIRMAN BABCOCK: I saw, Nina, that you've
5 got subpart (3), "take such other action as the court
6 deems appropriate." Did you-all consider having some
7 provision like they have in the Corpus Christi court of
8 appeals and other places that there would be some response
9 to the people communicating, like, "Hey, judges can't
10 consider this, they won't consider this, this is ex
11 parte"?
12 MS. CORTELL: Right. We actually spent a
13 great deal of time. This has been a hard-working
14 subcommittee. We have had many meetings to talk about
15 both the language and the concepts. You'll note in the
16 comment we kind of ducked what the response would say. We
17 said you could consider a response to the sender of the
18 communication, but we had language in a prior version that
19 would say something about the communication being
20 inappropriate. What we bumped up against there is the
21 idea that this is a public court, right of free speech
22 that -- is that necessarily wrong to send a communication
23 to a judge? So if this committee feels comfortable
24 putting in some language we certainly can, but that was
25 the problem that the committee encountered, and that's the

1 reason we don't have it in this version.
2 CHAIRMAN BABCOCK: Here's the reason I ask
3 the question. You're absolutely right. In the First
4 Amendment there's a right to petition government, and of
5 course, it's not proper to ex parte a judge, but a lot of
6 people out in the community wouldn't know that, and they
7 would feel like they're just talking to their government
8 about what they want to see happen. I thought the Corpus
9 Christi rule was a little harsh, the response from Corpus
10 Christi was a little harsh and might be misperceived by
11 somebody who is just trying to, you know, have civic duty;
12 and I wondered if it might not be better if the Supreme
13 Court in almost a leadership way said, you know, "Here's
14 an appropriate response"; and not criticizing anybody
15 because everybody has had to kind of respond to it as they
16 get situations presented to them, but, say, you know,
17 "This would be the kind of response that might be
18 appropriate." So that's --
19 MS. CORTELL: So are you saying that we
20 should suggest -- and this is what Justice Gray would call
21 a teaching moment in our discussion. Should we be telling
22 the sender of the communication, "The form in which you
23 are communicating is improper. We refer you to the amicus
24 rule, for example, as a way to do it properly," but let me
25 -- let me restate a principle from our last -- that we

1 talked about last time, and I think Justice Gray explained
2 it to the group, but when we embarked on this study what
3 we have learned, and although I'm going to assume many
4 people don't think of it that way, but the ex parte
5 communication really is a narrower term, and it really
6 refers to a communication by a party to the proceeding to
7 the judge outside the presence of another party. So when
8 you're talking about ex parte communications, you're
9 really not talking about nonparty communications, and so
10 our prohibition against ex parte technically really
11 doesn't apply to nonparty communications to the judge, so
12 that's the other sort of problem, right? So we don't
13 really necessarily have a prohibition against nonparty
14 communications. Maybe we should, but --
15 CHAIRMAN BABCOCK: Yeah.
16 MS. CORTELL: -- we don't.
17 CHAIRMAN BABCOCK: Okay. Comments? Yeah,
18 Bobby.
19 MR. MEADOWS: So I have just a couple of
20 questions, and maybe you just answered one of them, and
21 that is that this rule is singularly focused on
22 nonparties?
23 MS. CORTELL: Right.
24 MR. MEADOWS: And, I'm sorry, so I'm fine
25 with that. And then, well, why just written communication

1 as opposed to any communication that's -- and why not make
2 it clear that we're talking about a private communication?
3 Because you could have -- just leaving it with written
4 communications for the moment, a nonparty could send the
5 communication to the judges and all the parties, which
6 seems to be to create a different atmosphere than --
7 MS. CORTELL: Well, we anticipated that with
8 (b). You don't have to send the copy out if the author
9 has already done that. I think most of the examples we're
10 encountering that's not occurred actually.
11 MR. MEADOWS: Yeah, I wouldn't expect.
12 MS. CORTELL: The communication goes to the
13 court, and that's really one of the issues we're trying to
14 direct, is that the litigants don't know necessarily about
15 these communications unless there is a mechanism that
16 requires they be apprised of them.
17 MR. MEADOWS: Well, what about someone who
18 approaches a judge and has a oral communication?
19 MS. CORTELL: Right. The prior version that
20 we had at the last meeting did encompass oral, and we had
21 a whole complicated deal about how the oral communication
22 gets documented. I mean, we can expand it. This was
23 really in reaction to our last meeting. We were really
24 working hard to narrow it down.
25 CHAIRMAN BABCOCK: I've seen an effort to

1 have a communication about a case to a sitting justice of
2 the Supreme Court who was trapped. Remember when
3 Southwest Airlines used to have those seats where you face
4 each other; and the justice was in the window seat; and
5 the person was right across from him and started talking
6 about a case that was pending before the Court; and the
7 judge said, "Hey, I can't talk about this"; and the guy
8 keeps yapping away; and, you know, the plane is full,
9 we're taking off. What do you do about that? I trust
10 that's a rare occasion.
11 MS. CORTELL: Well, we would hope so.
12 CHAIRMAN BABCOCK: Levi.
13 HONORABLE LEVI BENTON: I wasn't here last
14 time, and I apologize, I haven't read the transcript, but
15 suppose I was not a lawyer and I posted on Justice Boyce's
16 Facebook page. Would that be covered by this rule?
17 MS. CORTELL: Yes, I think so. Now, the one
18 handicap of our subcommittee is that none of us are on
19 Facebook. So I think if -- I think the distinction we
20 were making in our discussions was if it's a posting
21 directly to that judge regarding a pending case then the
22 answer is yes. As I understand it, one can do sort of a
23 generic, you know, to the world kind of thing.
24 HONORABLE LEVI BENTON: I think, yeah.
25 MS. CORTELL: But, yeah, we are trying to

1 encompass that.

2 CHAIRMAN BABCOCK: Okay. Richard, and then

3 Buddy, and then Frank.

4 MR. ORSINGER: Okay. Just a couple of

5 things, I think that it's probably not going to be

6 successful to use the term "written communication" in the

7 rule and then try to define it to include a bunch of

8 things that aren't written. I think it's better to say

9 "communication" and then define "communication," and an

10 example is now e-mails can be really voice messages.

11 There's no text. There's just a little symbol, and you

12 touch it and then you hear your voice message. So by

13 e-mail you have not received any text or anything in

14 writing. You have just received an oral communication.

15 So I think that we would be better off to use the word

16 "communication" in the rule and then do our very best to

17 define it in as vague a way as we can so that we can kind

18 of keep up with technology and not be outvoted in a month

19 or two.

20 MS. CORTELL: Well, what about --

21 MR. ORSINGER: Then the other one -- I'm

22 sorry.

23 MS. CORTELL: I'm sorry, go ahead.

24 MR. ORSINGER: The other point I wanted to

25 make is --

1 CHAIRMAN BABCOCK: Go ahead and ask him,
2 what about?
3 MR. ORSINGER: -- a communication that goes
4 to a judge and is seen by the judge. A lot of judges, in
5 my experience, when they become aware that they're reading
6 an improper communication, they stop reading it before
7 they get into the content of it. They realize that it's
8 on a case or something, but they've seen it because they
9 read enough into it to realize it was related to a pending
10 case. Rather than say that it was seen by the judge, I
11 would rather say that it was read by the judge or heard by
12 the judge so we don't have to have a judge who isn't
13 actually influenced by communication turning it over to
14 the clerk and sending it out to everybody so they can file
15 responses to something that the judge didn't read in the
16 first place. I think that kind of compounds the problem,
17 and now, we have to trust the judge to be -- to tell us
18 where that fine line is between realizing you have a
19 communication and stop reading it versus having read the
20 content and perhaps being influenced, but I would rather
21 trust the judge with that than I would to say anything
22 that the judge sees with her eyes or hears even the first
23 few words of with their ears now has to be replicated and
24 then parties can file responses.
25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: But I'm not for the judge reading
2 it, but somebody has to read it because one of those
3 messages might be threatening the judge, and that needs to
4 go and be followed up. So somebody needs to monitor that
5 before it goes to the court, and I mean, because people,
6 you know, do strange things, and it could be threatening
7 and they need -- I know that's happened before.
8 CHAIRMAN BABCOCK: Yeah. Frank.
9 MR. GILSTRAP: The problem with applying
10 this to oral communications is that suppose the judge is
11 walking down the street and somebody comes up and
12 buttonholes him and says something. Well, that judge has
13 got to go back and write a memo, I mean, you know, and
14 then he may get it wrong. I mean, the problem here is I
15 think e-mail is electronic communication. I think that's
16 what's caused this, so I think -- with oral communication,
17 I don't think the pain is worth the gain.
18 In terms of the language of the rule and the
19 comments, I do have a couple of comments. The first line,
20 "If a written communication is sent to and received by a
21 judge from a nonparty," I understand that, but I would
22 have a hard time diagramming it, and whether it's sent is
23 immaterial. It's received that we're talking about. I
24 would replace that up to the words "nonparty" with, quote,
25 "If a judge receives a written communication from a

1 nonparty."

2 In the comment, the first sentence I think

3 is, you know -- we try to define all forms of written

4 communication. Just say, "This rule applies to electronic

5 communications." That's what we're trying to cover, and

6 avoid the complex language. The second sentence --

7 MS. CORTELL: Wait, wait, wait. It doesn't

8 apply to a letter?

9 MR. GILSTRAP: Well, no, it does, but I

10 don't think -- I don't think that there is a need to --

11 you know, we know what written communications are, except

12 maybe it doesn't include electronic communications, so say

13 it applies to electronic communications. Other stuff is

14 in writing, we know it's written communication.

15 The second sentence, I think you could do

16 better by just taking out the first two lines, which says

17 "communications sent to a judge or communications that are

18 directed to a judge individually or collectively with

19 other judges, and the term does not include communications

20 directed to a broad audience." Just say, "This rule does

21 not apply to communications directed to a broad audience

22 such as newspaper, editorials, billboards, and nonspecific

23 posts on social media."

24 MS. CORTELL: Well, I even -- right at our

25 break someone came and asked me the question, "What if

1 it's a communication to several people including the
2 judge," and we were trying to make the point here that
3 even if it was a communication that goes out more broadly,
4 it's still included, and you would lose that idea.
5 MR. GILSTRAP: Well, I don't know. I mean,
6 if you say, "This rule does not apply to communications
7 directed to a broad audience," it seems like everything
8 else is covered. I mean, if someone sends you a copy of
9 the *Dallas Morning News* editorial, you know, it's no
10 problem unless it happens to come from a state senator;
11 but, you know, everything else is covered except for the
12 broad communication.
13 The third sentence, I don't know. I have a
14 real problem with that. That gets back to, you know, what
15 if it's received but not seen? You remember we had this
16 controversy a couple of years ago where Attorney General
17 Holder and then Secretary Clinton said, "Well, I got the
18 e-mail but I didn't read it," and I'm sure people get
19 e-mails and don't read them, you know. Here I would just
20 say if they don't read them, it doesn't make any
21 difference, but if they do read them then apply the rule.
22 Finally, I'm not sure that you would send --
23 that you would -- I'm a little troubled by the notion of
24 sending the copies of the writing to all parties. What if
25 you get 20,000 e-mails? You have to send them out to all

1 parties? You know, somebody here has had some dealings
2 with the U.S. Supreme Court. I'm sure they deal with this
3 stuff all the time. I'm sure on the Obergefell case they
4 got, you know, maybe millions of e-mails if people found
5 their e-mail address; and this is going to be worse
6 because, you know, litigation is kind of a blood sport in
7 the media now; and everybody knows how to use e-mail,
8 everybody knows how to use social media. So it's a
9 problem that's not going to go away. This would be how I
10 would change the rule, though.
11 CHAIRMAN BABCOCK: Kent, and then Justice.
12 HONORABLE KENT SULLIVAN: I want to follow
13 up on Frank's comment because I think it's a good one, and
14 maybe it's useful to discuss what problem we're really
15 trying to address. Frank raises the issue I think of are
16 we really talking about a particular problem that has
17 arisen because largely because of the prevalence of e-mail
18 now, and if that's the case then we've got one solution.
19 The other problem -- and I confess that it's one that I'm
20 more concerned about is ex parte, and the reason that I
21 say it that way is because the most unsophisticated ex
22 parte attempt is written. Who is going to write a letter
23 to a judge or an e-mail to a judge, leaving a trail of --
24 you know, if they have an evil intent, trying to
25 improperly influence the judge; but candidly, I think that

1 does happen. I think it does happen around the state,
2 that there are people that make improper attempts to
3 influence the judiciary, and most often it's going to
4 happen orally, and then the question is what rules do we
5 have to require the reporting of that, rein it in, and
6 otherwise effectively deal with them, and I think that's
7 something that we maybe need to consider.
8 CHAIRMAN BABCOCK: Okay. Justice Busby, and
9 then Judge Peeples.
10 HONORABLE BRETT BUSBY: I agree with Frank's
11 comment about leaving in the written communication
12 narrowing concept because the one concern that was
13 discussed the last time is nonparties using this as a way
14 to bring, you know, some sort of proceeding against a
15 judge if you don't comply with this; and so I think the
16 more specific we are, the easier it's going to be for all
17 concerned to comply with it. I do think Richard has a
18 good comment about perhaps instead of "sent to and
19 received by" maybe we should consider "is sent to and
20 reviewed by a judge," because if it is not reviewed then
21 perhaps we don't need to follow these procedures.
22 With respect to (b), I also can see the
23 burden on the court, if you receive a whole lot of these,
24 having to find the money to send copies of them to all
25 parties. Perhaps we could consider something like

1 "informing all parties," I mean, and leaving it to the
2 clerk to decide, you want to come to the courthouse and
3 inspect them, you can, but we don't have to send them all
4 to you; and then also the last part of that where it says
5 "if that has not already occurred," I think that's
6 suggesting if the court has not already sent a copy to all
7 parties. Maybe we could change that to say, "if they have
8 not already received it," because I think you're right,
9 Nina, in what you said earlier that -- I understood the
10 intent of this to be if the nonparty sent copies to the
11 parties, the court wouldn't need to do so; but I think the
12 way it reads now is if the court hasn't already sent it to
13 the parties they need to do so, so I think you can -- if
14 you just tweak that last part of (b) to say "if they have
15 not already received it" or something like that, that
16 would take care of that.
17 On the comments, I think we should keep the
18 detail in the first two sentences, because that's helpful
19 to judges in knowing what their obligations are. Also, I
20 think it would be useful to include in the list
21 "communications directed to a broad audience." Mass
22 e-mails, we talked about this last time, when e-mails go
23 out to thousands and thousands of people, and some judges
24 happen to receive those e-mails, but they're not directed
25 to the judge. So I think, you know, some use of a term

1 like "mass e-mail" in there would be helpful.
2 CHAIRMAN BABCOCK: Okay. Judge Peeples, and
3 then Judge Estevez.
4 MS. CORTELL: Can I respond to one, just to
5 clarify one thing?
6 CHAIRMAN BABCOCK: Yeah, respond and
7 clarify.
8 MS. CORTELL: On the burden issue, I talked
9 to Blake Hawthorne, and all he does is he posts it on the
10 website, and that would not be burdensome, I don't think.
11 I mean, maybe so, but --
12 HONORABLE BRETT BUSBY: Maybe not for Blake,
13 but I think it would -- I mean, it depends on how many
14 there are, I think, and are you then publicizing it even
15 more. I mean, are you giving folks like that a platform
16 if you're posting it on the website?
17 MS. CORTELL: This is probably an issue that
18 it would be good to get guidance from the committee on.
19 CHAIRMAN BABCOCK: Okay. Judge Peeples.
20 HONORABLE DAVID PEEPLES: I want to say four
21 different things. The first two are based on my
22 experience. Point one is in the trial court it is very
23 rare to get an ex parte communication. I can remember a
24 couple of times in my many years, and I am vague about
25 one, but one I remember very well. It was in a family law

1 case; and it was from a grandparent, not a party; but they
2 cared about the case; and they wanted to tell me how bad
3 the other person was than their child, communicate to me
4 the badness. I don't remember if it was a child abuser or
5 crime or whatever it was; but it was information that was
6 outside the record and was utterly improper; and these
7 things are rare, but I remember that; and I think I
8 remember one -- sometimes you'll get an envelope with no
9 return address, that kind of thing, not signed, nothing,
10 you know, but just "You need to know about so-and-so," but
11 I think family law more than other cases has been my
12 experience. Rare, but it was communicating information,
13 not, you know, you need to zap same sex marriages or
14 something, but information and very improper. So that's a
15 couple of points.
16 Now, I don't think we -- the third point, I
17 don't think we have the option of doing nothing because
18 there is a 1993 ethics opinion that's already on the books
19 that doesn't do exactly what the proposed rule does, but
20 it's close. I've looked at it. You know, it applies to
21 communications from litigants, not nonparties, and it just
22 says "litigant receives" -- excuse me, "Litigant sends a
23 letter." This is broader, "communicate privately to the
24 judge information." So this isn't lobbying. You know,
25 "We want you to rule a certain way in a case," which

1 that's very ineffective; but communicating information
2 that is outside the record is durn serious; and so I just
3 respectfully disagree with the suggestion that we can do
4 nothing -- well, to do nothing leaves this on the books
5 undisturbed, which is in the materials over here.
6 The fourth thing, point I want to make, is
7 that I do have concerns that we should not -- the Court
8 should not do anything that makes it easier for the
9 Judicial Conduct Commission to sanction people for being a
10 little bit careless. Sanctions ought to be for serious
11 misconduct by judges, and so I think that as the Court
12 works on this, as we do, we just need to keep in mind -- I
13 would hope that there's some way that this is not a new
14 basis for people to file complaints and hassle judges
15 before the conduct commission and hire lawyers, spend
16 money to defend themselves, and that would be a bad
17 collateral consequence.
18 CHAIRMAN BABCOCK: Okay. Judge Estevez.
19 HONORABLE ANA ESTEVEZ: Well, I have a
20 different experience from Judge Peeples because I believe
21 I get ex parte communications nearly everyday, but I
22 also -- I don't read them. They go through my court
23 coordinator, and she files them and sends them to each
24 side, and usually they're criminal. The criminal
25 defendant wants to tell you whatever he feels like he

1 wants to tell you. Sometimes he wants to tell me what
2 happened, sometimes -- I don't know because I don't read
3 them, but I understand that some of them may be
4 substantive. They are filed, and they follow pretty much
5 the procedure that you've put in here.
6 I wanted to make the comment about whether
7 or not it's a burden. I don't believe that the way the
8 Supreme Court has now required all the courts to be on
9 electronic filing that it is going to be much of a burden
10 at all because at this point we have scanners that once we
11 scan anything I believe it goes to the file and to all
12 parties; and so that takes care of that; but a thought
13 that I hadn't considered was whoever brought it up
14 regarding do you want to give these parties more power,
15 because if every time an ex parte communication comes in
16 and it's from someone that may not be a party and then you
17 put it in the file, then you're publicizing it; and it may
18 cause other people that feel the same way to also send ex
19 parte communications as opposed to deter them from filing
20 a communication. So I didn't think of that, and I don't
21 know how to address that, but I wouldn't worry about -- I
22 don't think the burden is the same as it used to be in --
23 CHAIRMAN BABCOCK: Okay. Levi, and then
24 Richard, and then Judge Evans.
25 HONORABLE LEVI BENTON: Chip, I pass.

1 CHAIRMAN BABCOCK: Huh?
2 HONORABLE LEVI BENTON: I pass.
3 CHAIRMAN BABCOCK: He passes. Richard.
4 MR. MUNZINGER: I want to disagree with
5 Judge Peeples respectfully. I don't think you need a
6 rule. I think you're asking for trouble. If I'm -- if I
7 want to cause problems to a judge that I don't like or a
8 justice that I don't like, I have lots of ways I can do
9 it; and one of them is to trigger proceedings before the
10 judicial commission that looks into his fitness, seek to
11 disqualify him from some case, do whatever. How many
12 thousands of e-mails do each us -- good Lord, 10 years ago
13 I got 30 e-mails a week maybe. I probably get 70 a day
14 today and 65 of them are from people I don't know anything
15 about, don't care about, but I have the ability right now
16 -- and I don't mean this in a political sense -- to do
17 what Sarah Palin claimed happened to her that forced her
18 from the office of the governor of Alaska. She got so
19 dang many letters, e-mails, people crawling over her
20 fences and photographs taken of her, she said, "I can't do
21 my job." Now, that was her point of view, I understand
22 that, but she said, "I can't honor my oath as governor of
23 Alaska under these circumstances."
24 So here I'm going to have a rule now that
25 says that if I've got a justice on the court that I think

1 is really -- he's too damn loyal to those insurance
2 companies, by God, I'm going to do something about that,
3 and so I start this e-mail campaign. I think you can
4 cause problems here. We aren't talking about ex parte
5 communications. We are talking about communications from
6 citizens or people who have a bone to pick. I've got
7 members of my family who might write a letter to a Supreme
8 Court justice, either Texas or United States, saying, "By
9 God, you blew it in that case. You be careful next time,"
10 or whatever. People think this way, and they ought to
11 think this way. They're free people, and there's nothing
12 that says you can't talk to a judge.
13 Ex parte is different. We've never allowed
14 litigants to talk to our judges off the record, and the
15 judges now have a duty to report ex parte communications
16 whether they're meritorious, persuasive, or not. They're
17 ex parte, and they have a duty to report it to the
18 parties. Leave it alone. Don't cause a problem here. I
19 argued against this thing that I have to be, quote, civil,
20 close quote, to my adversary. No one defined "civility."
21 CHAIRMAN BABCOCK: That's the second time
22 you've mentioned that today.
23 MR. MUNZINGER: It's silly. It leaves -- it
24 causes problems that -- it hadn't caused many problems
25 yet. It probably will, but for God's sakes, don't make so

1 dang many rules you've got people tied up, they can't
2 move. In my opinion this is something the Court ought not
3 to get into. I think you're asking for trouble, because I
4 can make trouble for you if I were so disposed by sending
5 you thousands of e-mails and you didn't obey the law. I
6 mean, I've been involved in cases where I filed amicus
7 briefs for people who were attacked. That's not right,
8 and they're not attacked because people gave a damn about
9 the merits of the case. They're attacked because they are
10 political opponents, and you need to be careful when you
11 adopt a rule like this that you're not putting bullets in
12 somebody's gun to cause problems.
13 CHAIRMAN BABCOCK: So I don't want to put
14 words in your mouth, but you're against this rule?
15 MR. MUNZINGER: I am.
16 CHAIRMAN BABCOCK: Judge Evans.
17 HONORABLE DAVID EVANS: I don't believe a
18 rule is necessary, but if the Court determines that one is
19 necessary, this rule would now cover a press -- a request
20 from the press about an e-mail about when the case is
21 going to be set, on when the next setting is. It needs to
22 be limited to the merits, communication about the merits
23 of the matter and maybe not about a setting; and I would
24 limit that; and a communication received by my clerk
25 acting as my agent and my coordinator is a communication

1 to me; and we commonly get asked when is the next MDL
2 hearing, so I'm losing serious money by talking today. I
3 told myself I wasn't.
4 So, number two, I do disagree with Justice
5 -- Judge Peeples, and not often, but I do. I think the
6 ethics opinion has been a sufficient guidance for the
7 judiciary on handling ex parte, and I'm sure that an
8 ethics opinion would be forthcoming with how to handle
9 communications from nonparties if they agreed with the
10 committee that ex parte only applies to litigants.
11 Third, if the Court is going to adopt this,
12 then the only thing that should be required of the trial
13 judge is the posting of a notice of receipt of improper
14 communication upon the electronic file, with it to go to
15 the parties, with content to be described by the court as
16 to what is appropriate, and that will limit the burden put
17 upon the court coordinator and the clerks of the trial
18 judges on receipt of the communication. I don't think
19 it's necessary. I think the judges can handle this by
20 themselves, but if the Court determines it, that's what I
21 would recommend.
22 CHAIRMAN BABCOCK: Okay. Peter was next I
23 think.
24 MR. KELLY: My question is about limiting it
25 to written communications. What do you do about images,

1 whether it's antichoice activists sending pictures of
2 fetuses to judges or pictures of opposing counsel in
3 compromising positions or something like that?
4 MR. ORSINGER: Parties.
5 MR. KELLY: Which actually has happened.
6 That's communications to the --
7 MS. CORTELL: I think all of this is a lot
8 of good comments. Our intent was just to carve out a
9 rule, so we could put communications and then maybe in a
10 comment make clear that --
11 MR. ORSINGER: Non-oral communications.
12 CHAIRMAN BABCOCK: Richard.
13 MR. ORSINGER: On this issue of whether we
14 should have a rule or no rule, if we have no rule, we will
15 have several hundred rules. Each judge is going to have
16 their own rule, and there may be no consistency, and some
17 of them may be better and some of them may be worse. Some
18 of them may fit that particular court's procedures better
19 than another court, but I think that there's a lot to be
20 said to have an analysis of what the real public policy
21 issues here are, due process of law weighed against the
22 right of the public to express their opinions on important
23 issues. I think that a rule that is thought through and
24 that the Supreme Court stands behind, even if it leaves a
25 lot of discretion, is better than nothing because right

1 now everybody has their own rules.
2 It's my understanding that these unsolicited
3 communications to the Texas Supreme Court end up getting
4 treated as amicus briefs. I don't know if that's --
5 they're just filed as if they were an amicus thing. I
6 don't know if that -- that's happened in one of the cases
7 I was in. I don't know if that's a standing policy, but
8 you know, there may be content in there that we don't want
9 to put on -- into the Supreme Court's public file or onto
10 their website, if it's profanity or if there's threats or
11 if there's just inappropriate communications. So when we
12 do that we're republishing it when we send it out to the
13 litigants and give them a right to file a response, and in
14 a sense we're compounding the original wrong, but at any
15 rate, I'm very much in favor of us thrashing through all
16 of these public policy issues and coming up with some
17 rules, even if you give the trial judges some flexibility
18 in how they apply them in their court, but if we have no
19 rule, we're not -- we don't have no rule. We have a
20 different rule for each judge and each court.
21 CHAIRMAN BABCOCK: Yeah, Buddy.
22 MR. LOW: What would be wrong with having
23 somebody in the judge's office, not the judge, to review,
24 though, any written communication and send a form letter,
25 "Judicially, the judge cannot and will not receive others"

1 and, you know, "We can only receive amicus that are
2 approved. Please do not continue to communicate, because
3 it won't get to him." In other words, just telling them
4 that, have a form letter and let them know that he doesn't
5 read them. He can't read them ethically, and I don't know
6 that that will end it, but you would handle every
7 situation the same.
8 MS. CORTELL: Well, that may be an issue for
9 this committee to work through. Our subcommittee felt
10 uncomfortable because of the general right of speech, the
11 right to petition government, so on and so forth, to say
12 it's inappropriate, there was some concern about that, but
13 if the committee wants this -- the sender of the
14 communication to be told that then we can draft that.
15 MR. LOW: The general right of speech
16 doesn't allow you to violate rules or regulations.
17 MS. CORTELL: But there's no -- unless we
18 write it, there's no --
19 MR. LOW: There's a rule against the judge
20 reviewing it.
21 MS. CORTELL: -- rule prohibiting a
22 nonparty. The prohibition we currently have does not
23 apply to nonparties.
24 MR. LOW: Okay. Okay.
25 CHAIRMAN BABCOCK: I'll get you guys in a

1 second. We've got Roger here first.
2 MR. HUGHES: Well, I think the rule that was
3 proposed came as very close to something I could vote
4 "yes" on, with maybe some minor tinkering. I think the
5 purpose of the rule, of having a rule -- I'm very
6 sympathetic. This rule should not be a gotcha thing for
7 judges so that people who don't -- who like to harass
8 judges will have one more thing to talk about and to send
9 the commission. It ought to be just a very simple thing
10 to allow judges, as they say, cover. That is, if you get
11 one of these things and you start reading -- oh, no, can't
12 do that. Then you know how to handle it so that when the
13 -- if that gets done, there can't be any complaints; and
14 after that, I think it ought to be just a matter of the
15 litigants knowing that somebody tried to influence the
16 judge on the merits of their case.
17 My real worry is that it is -- about this
18 rule and this is -- maybe I'm -- maybe I'm over thinking
19 it, but it will become a situation like we see in the
20 national politics where somebody gets to drive the
21 discussion just because their stuff ends up in the clerk's
22 file, and the litigants see that somebody -- you know,
23 that there's this e-mail campaign, which as far as the
24 appellate judge is concerned, this e-mail campaign is like
25 reading a brief that's full of nothing but insults of the

1 trial judge. It's offensive. They don't like it. They
2 don't want to read it. They want to close it and go on to
3 the next case; but the litigants get concerned, thinking
4 that, "Oh, my gosh," or their clients. That's usually the
5 one that gets really concerned. They think it's
6 effective, it's influencing the judge, when it's not doing
7 it at all.
8 So all of the sudden we're going to get
9 requests from the parties to, quote, respond to these
10 informal amici. I think that to me is a concern, but
11 otherwise I think the purpose of the rule ought to be to
12 provide judges with a simple expedient that if they follow
13 this, that's it, they've done exactly what judges ought to
14 do.
15 CHAIRMAN BABCOCK: Judge Wallace.
16 HONORABLE R. H. WALLACE: Well, I don't know
17 if one size fits all. What may be good for the Supreme
18 Court, may not -- may be totally unnecessary in light of
19 what Judge Peeples said. I mean, if I were going to have
20 a rule for the trial court, and if I had to have a rule, I
21 would just eliminate subparagraph (b) and say if I get it
22 I'm going to preserve it among the documents and take such
23 other action as I deem appropriate, and because now with
24 everybody who is doing electronic filing, once the clerk
25 uploads it to the electronic file, it's there for the

1 litigants to see. So why have to bother to send out a
2 letter and all of that kind of stuff?
3 CHAIRMAN BABCOCK: Lisa had her hand up, and
4 then Pete, and then Judge Evans, and then Justice Busby.
5 MS. HOBBS: I completely agree with your
6 sentiment that it seems like there might be different
7 rules for appellate judges than for trial lawyers.
8 CHAIRMAN BABCOCK: Trial judges.
9 MS. HOBBS: I mean, trial judges, but for
10 trial judges I wonder why we want it preserved in the
11 record. Isn't the point just to send it to the parties,
12 so that it's no longer -- because when you're talking
13 about somebody sending offensive material and stuff like
14 that, it seems like that's more likely to happen at the
15 trial court level than at the Texas Supreme Court where
16 hopefully people have an air of dignity about the court.
17 Maybe I'm wrong on that, but there's a lot that goes on in
18 a trial court that's not part of the record. Especially
19 today, it drives me crazy, these e-mails between the
20 parties and the judges that never get into the record, but
21 it's happening all the time, and so I don't really see the
22 point in preserving the writing. I definitely see the
23 point in making sure that the parties, the litigants
24 themselves, see it, so if I were to exclude one, I would
25 exclude (a) and not (b).

1 CHAIRMAN BABCOCK: Judge Evans, and then
2 Pete, or maybe Pete and then Judge Evans. Whatever. You
3 guys work it out.
4 HONORABLE DAVID EVANS: If any comment I
5 made indicated that I don't think a judge doesn't have a
6 duty to inform the parties as he or she deems appropriate,
7 that's wrong about a communication like this. The problem
8 is that we're starting to write rules for every aspect of
9 judicial conduct now, so we can write rules on every
10 potential ethical issue that could come up for a judge on
11 what they have to do particularly involved in it. We have
12 rules of recusal and conduct that you have to disclose,
13 and if you don't, you must recuse yourself and the parties
14 want to waive it, they can, but we haven't prescribed the
15 form in which the judge must disclose it in the Rules of
16 Civil Procedure.
17 You know, I get an invitation every year
18 from one firm to go to the rodeo in Fort Worth, and every
19 year I turn it down. Now, do I need to call everybody in
20 town and tell them they've got three cases in front of me
21 and I've just gotten my rodeo ticket offer? I mean,
22 that's the kind of communication that this is just
23 overwriting for in our environment.
24 CHAIRMAN BABCOCK: Pete.
25 MR. SCHENKKAN: I think if we get the

1 introductory part limited in the way various people have
2 discussed we say, "If the judge receives and reviews a
3 communication from a nonparty with" -- "concerning the
4 merits of the case pending before the judge," and then we
5 say "then the clerk or the judge must" -- then I don't
6 know whether "preserve" is quite the right term, but
7 basically collect, put in a particular place, the
8 communication, and then notify the parties that they're
9 there so the parties can go and review them if they think
10 they need to make sure there's nothing they want to
11 respond to, then I think we've done all we need to do.
12 I think there is a virtue to having a rule,
13 and it is way back to Judge Peeples' original concern,
14 that we have a reasonably easy or wide width rule for the
15 judges habit and know what it is and do it, then there's
16 less opportunity for mischief to be created.
17 The "take other such action as the court
18 deems appropriate," that doesn't belong as a "must." It
19 isn't a "must" anyway. It's a discretionary thing, and I
20 think the main thing you might want to consider, but this
21 might be one of the areas where it does differ from what
22 level of judge we're talking about. I can easily see
23 where the Texas Supreme Court might want to do this, but I
24 can't very well imagine why very many district judges
25 would. We might have a standard procedure set up where

1 Blake, you know, sends people at least in a way that's
2 easy to respond by e-mail, an e-mail back that says,
3 "Sorry, the judge" -- "justices are bound by law not to
4 consider communications concerning merits from nonparties,
5 except ones that are filed in accordance with the amicus
6 curiae rules and have to be served on the clerks."
7 CHAIRMAN BABCOCK: Yep.
8 MR. SCHENKKAN: And that won't change the
9 fact what happens already been not only sent but reviewed
10 because, remember, we're not -- none of this applies
11 unless it's been both received and reviewed, but it would
12 at least help make the public statement. What we're
13 trying to do here is not prevent people from having free
14 speech removed, but we're trying to have speech that
15 allows parties a chance to respond.
16 CHAIRMAN BABCOCK: Yeah. Justice Busby.
17 HONORABLE BRETT BUSBY: I do agree with what
18 was said earlier about that it's really important to limit
19 this rule to communications with respect to merits of the
20 case and not just communications about the case. Also, it
21 occurs to me in reading this that this covers amicus
22 briefs, and so we probably want something in the comment
23 to say this doesn't cover amicus briefs. I mean,
24 presumably you would comply with all of these things if
25 you complied with the normal amicus rules, but I don't see

1 a need to have two different rules that regulate amicus
2 briefs.
3 MS. CORTELL: We're in agreement. We talked
4 about that. We thought that that was clear it wouldn't
5 apply, but we can put that comment.
6 CHAIRMAN BABCOCK: Okay. Frank, and then
7 Peter.
8 MR. GILSTRAP: There have been a couple of
9 comments saying we ought to limit this to communications
10 concerning the merits of the case. What about if you
11 decide -- "If you decide this case for me, Judge, I'll
12 give you and your wife a free trip to Hawaii"? That's
13 nothing to do with the merits of the case, but
14 obviously --
15 CHAIRMAN BABCOCK: Well, it might have
16 something to do with the merits of the case.
17 MR. MUNZINGER: That's ex parte. That's not
18 a nonparty.
19 MR. GILSTRAP: Okay. I'm not a party. I'm
20 not a party.
21 CHAIRMAN BABCOCK: Yeah, you're the cousin
22 of a party. Peter.
23 MR. KELLY: With regard to Justice Busby's
24 comment, the amicus briefs are technically -- they're
25 received but not filed, so that does create a problem here

1 by saying "received." There's so many places that
2 "received" is used in the Rules of Appellate Procedure.
3 For amicus briefs that does sort of tie into that.
4 Secondly, if you were going to have what to
5 do with the notification when it arrives you would have,
6 one, notify the parties; two, make it available for
7 inspection; and then, three, "if requested by either party
8 preserve it in the record"; and that way you're just not
9 including every, you know, crayon written note in the
10 record that's received, only the ones that might have an
11 impact.
12 CHAIRMAN BABCOCK: Buddy, then Nina.
13 MR. LOW: Whatever we do and I'm not --
14 don't have the answer to that, but we want to keep in mind
15 that if some fool thinks that everything he writes is
16 going to be filed, it's going to be sent to this lawyer
17 and that lawyer, one of them is probably going to tell him
18 he got it. He's going to keep writing. We want to try to
19 discourage this. I don't know how to do it, but whatever
20 we do we want to keep that in the back of our mind. We
21 want to discourage that person from writing again. Now,
22 how we do it, I don't know.
23 CHAIRMAN BABCOCK: Nina, then Richard.
24 MS. CORTELL: I really have a question for
25 the committee, and that is what is our obligation to the

1 public generally? Take the example that led to our being
2 asked this question, to look at this rule. A lot of
3 e-mails were being sent by one sort of group of people who
4 have a certain view to the Court. Is there not a public
5 right to know that those types of communications are
6 occurring so that others with a different view might
7 either file an amicus or do whatever else they think the
8 rules permit?
9 MR. GILSTRAP: Send their own e-mails.
10 MS. CORTELL: In other words, we're assuming
11 only the parties get to know, which is contrary to
12 everything else that happens with regard to a case in
13 terms of written communications to the court. Everything
14 is public unless it's like Social Security, et cetera,
15 names of children. I mean, is there not a public right to
16 know? That's my question, because a lot of the
17 suggestions being made would make this only sort of a
18 secret between the court and the parties.
19 CHAIRMAN BABCOCK: Okay. Richard, and then
20 Lisa.
21 MR. MUNZINGER: Well, once again, some of
22 these comments point out a number of things to me. I'm a
23 lawyer in a case, and I start getting these things from
24 the judge, and it's 15 or 20 people who are writing
25 letters saying A, B, C. Do I have to reply to them? Am I

1 negligent in not replying to them? The judge thinks
2 enough of them that I'm getting them. Not only that,
3 there's a rule now that says he has to send them to me.
4 Your question, does the public have a right
5 to know that somebody is getting a letter, even if they
6 are a public officer? I don't know that that is
7 necessarily the public's right, but once again, the system
8 has worked preventing -- theoretically preventing ex parte
9 communications addressing a lawsuit on its merits or
10 otherwise. All ex parte communications are supposed to be
11 forbidden, supposed to be forbidden; and if the rules are
12 honored, they are being reported, et cetera. This has
13 nothing to do with that, and I think that this -- I really
14 do think you're over-regulating, and you're oversensitive.
15 CHAIRMAN BABCOCK: Lisa.
16 MS. HOBBS: Well, I appreciate Nina's
17 comment about --
18 CHAIRMAN BABCOCK: Oversensitive?
19 MS. HOBBS: -- the public's right to access
20 the court system. I don't think it's as broad as you
21 think it is, but I think you can weigh that right with how
22 burdensome or how -- not even burdensome. It's not
23 burdensome to file something in the files, but not
24 everything does get filed, and some of this stuff that
25 these trial courts probably get is not like -- we're

1 giving them more of a -- more of a stage than they need,
2 the author of it, and so I think that there is some
3 weighing that can be done with the public's right to
4 access, and I don't think excluding some items from the
5 file that are offensive, leaving it within the discretion
6 of the parties and the judges as to what should be filed
7 or not be filed, I think it's within the public's right to
8 access.
9 CHAIRMAN BABCOCK: Okay. Justice Bland.
10 HONORABLE JANE BLAND: Well, I've been
11 offered the opportunity to be shot by a firing squad or
12 hung by the neck until I was dead, but never a trip to
13 Hawaii. So that being said, also that I couldn't rule
14 because at the time of the Republic women couldn't own
15 property or vote.
16 HONORABLE ANA ESTEVEZ: I got that one, too.
17 HONORABLE JANE BLAND: But I think the
18 committee has swayed me to supporting their proposed rule
19 in general with the good amendments that we've heard
20 today, because I think about the public's, you know,
21 access to this material. They have access to this
22 material. Would you rather the court put it in the
23 court's file and say, "This is what I got," or would you
24 rather have some other person, some other third party,
25 either the sender or someone else say, "This got

1 communicated to the court, and the court didn't say
2 anything." And because now the ease of sending written
3 communications is -- you know, letter writing is kind of a
4 lost art, so I didn't -- we didn't get that many, but now
5 people can fire off an e-mail, you know, in their pajamas
6 when they're not feeling great about some issue in the
7 case, and they can fire it off, and better for us to put
8 it out there and have everybody say, you know, "See, this
9 is what we got," than to have some other person, you know,
10 be the recipient of that e-mail, see that the court was,
11 you know, involved or something was sent to the court or
12 somebody bragged they sent something to the court and the
13 court hadn't done anything with it. So, you know, I think
14 everything is out there these days, and we just have to
15 get used to that.
16 CHAIRMAN BABCOCK: Richard.
17 MR. MUNZINGER: If you set these aside for
18 the public to look at, is it part of the record that goes
19 up on appeal? If not, why not? Did the judge read
20 something from Mr. Smith, and was he persuaded of it?
21 What's the purpose of keeping all of this stuff? So,
22 "Well, I sent an e-mail. Here is an e-mail I sent to the
23 judge. Here's the proof I sent it. It's not in the
24 record, it must have influenced the judge," and I'm the
25 guy that lost the case, and now I'm sitting here looking

1 at all of these e-mails to make sure that the ones that
2 they said were sent the judge reported. Again, why?
3 CHAIRMAN BABCOCK: We're going to take our
4 record time 10th vote. The vote is going to be should we
5 have a rule, forget about what's in it, but should we have
6 a rule; and if you're in favor of that, raise your hand.
7 All right. And who thinks we should not
8 have a rule? All right. I know you're waiting with bated
9 breath for the results. It is 18 think we should have a
10 rule and 11 think we should not have a rule, the Chair not
11 voting. So that's our record-setting, record-tying 10th
12 vote of the day, and now, Marti has some instructions on
13 how to get to Jackson Walker.
14 (Off the record)
15 CHAIRMAN BABCOCK: Thanks for another great
16 meeting. We will see you next year, and we'll get a
17 schedule of meetings out for next year shortly. Thanks,
18 everybody.
19 (Adjourned)
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2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

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8 I, D'LOIS L. JONES, Certified Shorthand
9 Reporter, State of Texas, hereby certify that I reported
10 the above meeting of the Supreme Court Advisory Committee
11 on the 11th day of December, 2015, and the same was
12 thereafter reduced to computer transcription by me.
13 I further certify that the costs for my
14 services in the matter are $ 1805.00 .
15 Charged to: The State Bar of Texas.
16 Given under my hand and seal of office on
17 this the 4th day of January, 2016.

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