1
2
3
4
5
6
7 *
8 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
9 October 21, 2011
10 (FRIDAY SESSION)
11
12 *
13
14
15 COPY
16
17
18
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 21st day of October,
22 2011, between the hours of 9:01 a.m. and 5:02 p.m., at the
23 Texas Association of Broadcasters, 502 East 11th Street,
24 Suite 200, Austin, Texas 78701.
25

INDEX OF VOTES

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

Vote on	*Page*
TRAP 28.4(c)(6)	22,886

Documents referenced in this session

11-19 HB 906

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

11-21 HB 79

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

1 *-*-*-*-*
2 CHAIRMAN BABCOCK: Welcome, everybody.
3 Thanks for being here. We'll start as we always do, with
4 a status report from Justice Hecht.
5 HONORABLE NATHAN HECHT: Earlier this week
6 the Court approved the changes in the rules for expedited
7 foreclosure, and they have gone to the *Bar Journal* to be
8 published on November 1st and to take effect with any
9 changes after comments on, excuse me, January 1st.
10 We also approved this week changes in some
11 of the rules governing citation, service, although if you
12 were here at the last meeting you know that those rules
13 are scattered all through the rules book. Basically we
14 conformed the rules governing service of citation and
15 service of writs of injunction to the statute. We weren't
16 sure that the statute covered more than citation, but it
17 was easy to do injunctions, and so we did that, but we did
18 not change the rules governing service of all kinds of
19 other process that are -- that is involved in ancillary
20 proceedings.
21 The task force on rules in small claims and
22 justice proceedings met, had its organizational meeting a
23 couple of weeks ago. It's chaired by Judge Russ Casey of
24 the Fort Worth area, and so they're beginning to work on
25 their project. The task force on rules and expedited

1 actions to be chaired by former Chief Justice Tom Phillips
2 is supposed to meet Wednesday of this week, coming week,
3 and has already done quite a bit of spade work on that,
4 and then finally when we get to it, because we've got
5 plenty of other things to do, but a subcommittee of the
6 State Bar appellate section is going to propose rules that
7 would confine the length of briefs based on characters and
8 words rather than on pages, because in an electronic age
9 it's harder and harder to tell what constitutes a page and
10 much easier to tell the prescribed length otherwise since
11 word processors count words and characters. So the
12 Federal circuits have had this -- a rule like this for a
13 long time, and so they're going to look at that for the
14 Texas rules and propose something in due course. And
15 that, I believe, is all I have. I would be happy to
16 answer any questions.
17 CHAIRMAN BABCOCK: I've gotten a couple of
18 questions from the bar that relate to the work that
19 Justice Peeples and his subcommittee are working on
20 relating to the motion to dismiss, the 12(b)(6) motion,
21 and the question is this: The statute, the enabling
22 statute the Legislature promulgated, took effect September
23 1. Our rules, we don't have to report to you until March
24 1, so the lawyers say, "Well, can I file a motion to
25 dismiss now?"

1 HONORABLE NATHAN HECHT: No.
2 CHAIRMAN BABCOCK: Okay.
3 HONORABLE NATHAN HECHT: I mean, you can.
4 HONORABLE STEPHEN YELENOSKY: You can file
5 it.
6 HONORABLE NATHAN HECHT: You can. It's a
7 free country, but --
8 HONORABLE DAVID PEEPLES: Have they ever
9 heard of a special exception?
10 HONORABLE STEPHEN YELENOSKY: Or a no
11 evidence motion that's just based on the law? We can do
12 it now.
13 CHAIRMAN BABCOCK: Okay. That's the answer
14 I will give them from the source. All right. Richard has
15 the parental rights termination issue, and Professor
16 Dorsaneo claims that you will need close, strict scrutiny
17 on your work. I don't know why he said that.
18 MR. ORSINGER: Yeah, and I thought we would
19 be out of here by lunch. He told me it will take all day,
20 so -- first of all, as was attached to the agenda, we have
21 the letter of assignment dated July 13, 2011, from Justice
22 Hecht, and this was the commission we received from the
23 Supreme Court. On page two of the letter, House Bill 906
24 amends section 107.013, 107.016, 109.002, and 263.405 of
25 the Family Code regarding post-trial procedures in cases

1 for termination of parental rights. Section 263.405(c)
2 calls for rules accelerating the disposition by the
3 appellate court and the Supreme Court of an appeal of a
4 final order granting termination it have parent-child
5 relationship. The amendments will require revisions to
6 Rule 28 of the Rules of Appellate Procedure. The
7 committee should consider whether revisions in Chapter 13
8 of the Civil Practice & Remedies Code are necessary.
9 So that was our assignment, and in
10 connection with the assignment a task force was put
11 together toward the end of August, and you-all are already
12 familiar from a previous meeting in September, that was
13 the meeting -- pardon me, August 27th of 2011, the
14 Saturday session, a little bit, some of you who were here
15 might be familiar with the task force, but the liaison
16 from the Supreme Court was Justice Eva Guzman. The chair
17 was a family law district judge from Midland, Dean Rucker,
18 who is board certified in family law; and we had as a
19 member of the task force Supreme Court Justice Debra
20 Lehrmann, who those of you who know her career know that
21 she has been involved with children's rights for three
22 decades. After our initial meeting there was added Sandra
23 Hachem from the office of the Harris County Attorney, who
24 prosecutes government-sponsored termination proceedings as
25 her main job, and she was an excellent resource, and she

1 actually took over the responsibility of preparing and
2 revising the rule revisions that we developed and
3 progressed.
4 Everyone on the committee contributed, and I
5 don't want to take the time to discuss them all, but I
6 just wanted to point out that we also had on the task
7 force Justice Ann Crawford McClure from the El Paso court
8 of appeals, who in the process has been promoted to the
9 chief justice, and so we had the perspective of someone
10 who has administrative responsibility for a court of
11 appeals on this task force. And we also had Charles A.
12 Spain, Jr., also known as Kin Spain, who is the senior
13 staff attorney from the First Court of Appeals in Houston
14 and who I know has been interested in the subject matter
15 of termination appeals for at least a decade and a half
16 that he and I have been working together to try to find
17 legislative solutions to the problems, and so he was a
18 very important contributor to the task force because he
19 has to deal with the practicalities of handling all of the
20 complications associated with termination appeals, and we
21 were assisted in our process by Marisa Secco, the Supreme
22 Court rules committee lawyer or rules attorney, and she's
23 going to help me today in this presentation.
24 You can interrupt at any time. I'm sure
25 that those of you who have studied have much to say.

1 Before we get in today's task, though, I thought it might
2 be good to recap what has already happened, because the
3 Legislature had a requirement that provisions -- certain
4 provisions become effective on September 1 and other
5 provisions will become effective I believe in March, March
6 1 of 2012, so the task force had a very accelerated
7 process of making changes that we felt were essential to
8 be made by September 1. They were brought to the
9 committee meeting on Saturday, August 27 of 2011. They
10 were vetted there. There was a preliminary task force
11 report. Most of it was carried forward by the Supreme
12 Court in the rule promulgated; but in the -- at the end of
13 the committee meeting it was determined that some of the
14 language that was in the task force report was surplusage;
15 and it, in fact, did not get carried forward into the
16 rule; and I e-mailed this around yesterday for those of
17 you who care, but this is something that has already
18 become a rule, and I'll just briefly summarize that.
19 The statute, House Bill 906, at a general
20 level is attempting to respect the constitutional
21 dimensions of the termination of the parent-child
22 relationship while also giving weight to the public policy
23 in resolving appeals from termination proceedings quickly
24 so that children who are in foster care and whose
25 terminations are affirmed on appeal can go ahead and be

1 placed, typically in an adoptive environment, and the
2 appellate process is slow, and it's particularly a burden
3 on the children whose futures are held in suspense while
4 the appellate process is going. The Legislature has been
5 aware of this for sometime. They've tried different
6 fixes. Up until the recent statutory amendments there
7 were different efforts that they made. One of them
8 required that the appellate points to be raised by a
9 parent in an appeal from a termination had to be set out
10 in writing and filed within 15 days of the date the
11 judgment was signed. That often was not done due to
12 oversight by the trial lawyer or the lawyer who was
13 handling the appeal, and many courts of appeals felt like
14 they were precluded from judicial review. Some of them
15 even declared that it was unconstitutional and a denial of
16 due process. So the old system was not working, and so
17 the Legislature adopted House Bill 6, and I'll take you
18 briefly through it and then you can see where the
19 emergency or quick action in the preliminary report came
20 from.
21 On House Bill 906 there was an amendment
22 there in section 1 of the bill, an amendment to section
23 107.013 of the Family Code, and that's what we
24 colloquially call the presumption of indigence. It said
25 basically if a parent has been determined indigent for

1 purposes of the trial, which means they're entitled to a
2 free lawyer paid for by the county, then that presumption
3 of indigence will continue without the necessity of filing
4 a new affidavit of indigency and having another hearing to
5 see whether they qualify for a free appellate lawyer and
6 an appellate record with no advance payment. So the
7 Legislature basically said we're going to eliminate the
8 new evaluation of their indigency, and there's a
9 presumption that it goes forward. That would be section 1
10 of that bill.
11 Now, section 2 of the bill, I want to skip
12 to subdivision (2). It says that an attorney appointed
13 under this subchapter to serve as an ad litem for a parent
14 or alleged father continues to serve until the earliest of
15 three events, either the case is dismissed, the case goes
16 final after the judgment is signed or after an appeal, or
17 the attorney is relieved or replaced by the trial judge
18 after a finding of good cause. So the impact of that is
19 that the trial lawyer who was in there for the trial is
20 also in there for the appeal, if there is one, unless
21 they're relieved, and that was a significant change.
22 Section 3 of the bill didn't change the
23 Family Code; but I do want to point out that the
24 preexisting law, which still continues in section 3 of the
25 bill, which is section 109.002(a) of the Family Code, says

1 that these appeals shall be given precedence over other
2 civil cases and shall be accelerated by the appellate
3 courts; and section 4 of House Bill 906, largely
4 unchanged, says that the appeals will be governed by the
5 procedures for accelerated appeals under the Texas Rules
6 of Appellate Procedure.
7 Then if you look to subdivision (b) of
8 section 4 of House Bill 906, you see that there is an
9 advisory statement that is required to be included in the
10 final order after a termination case, and it has to be all
11 caps or underlined or boldface, and it is a warning or a
12 proviso. It says, "A party affected by this order has the
13 right to appeal. An appeal in a suit in which termination
14 of the parent-child relationship is sought is governed by
15 the procedures for accelerated appeals in civil cases
16 under the Texas Rules of Appellate Procedure. Failure to
17 follow the Texas Rules of Appellate Procedure for
18 accelerated appeals may result in the dismissal of the
19 appeal." Now, that warning is supposed to be included in
20 every judgment that terminates a parent-child
21 relationship.
22 Under House Bill 906, section 4, subdivision
23 (c), there is a new proviso that says, "The Supreme Court
24 shall adopt rules accelerating the disposition by the
25 appellate court and the Supreme Court of an appeal to a

1 final order" -- "appeal of a final order granting
2 termination of the parent-child relationship rendered
3 under this subchapter," and they have deleted the
4 provision of the 15-day filing of the statement of the
5 points to be made on appeal. So the Legislature has
6 basically given a narrow delegation of what the Supreme
7 Court rule-making authority is -- the confines of it.
8 What the initial task force report was to introduce into
9 Texas Rule of Appellate Procedure 20.1 that this
10 presumption of indigence, that once indigence has been
11 established in the trial court, the presumption is that it
12 continues, and that was in 20 point -- 20.1, subdivision
13 (a)(1), that we put the presumption of indigence in there,
14 and it was adopted by the committee and been enacted by
15 the Supreme Court.
16 Then there were a few other rules statements
17 where an exception had to be recognized because of that
18 change about the presumption of innocence. Then in Rule
19 25, TRAP 25.1, civil cases, subdivision (8), this is the
20 rule that requires or states the contents of a notice of
21 appeal, and the task force recommended that we add onto
22 the list of things that must be in the notice of appeal a
23 subdivision (8), which says that the notice of appeal must
24 state if applicable that the appellant is presumed
25 indigent and may proceed without advance payment of costs

1 as provided in Rule 20.1(a)(3). So when we get over to
2 the Supreme Court, they essentially implemented those
3 provisos, and that is out there already as a promulgated
4 rule, and I know that we shouldn't replow that ground
5 unless someone has detected some kind of deficiency since
6 that time, and so with that background then I would
7 prepare to move into the most recent task force
8 activities, unless there is someone that wants to say
9 something about what's transpired so far.
10 CHAIRMAN BABCOCK: Any comments, questions?
11 Okay.
12 MR. ORSINGER: Okay. So what we'll do then
13 is move into the current task force report, and the
14 structure of it is that it sets out the meetings, which
15 were all telephone conferences, which worked quite
16 successfully I might add, and then one face-to-face
17 meeting here in Austin, and then we have come up with
18 recommendations that we think fulfill or embody the
19 directives given by the Legislature, and the first one
20 that's listed in the task force report relates to the
21 process of findings of fact and conclusions of law, which
22 we are already familiar from in ordinary nonjury appeals.
23 Now, many of these cases have jury verdicts,
24 and in that instance the jury charge is going to contain
25 all the necessary law and findings of fact that are

1 required to evaluate the case on appeal, but if the case
2 is not tried to a jury then the only way to find out what
3 law the court applied and what facts the court found is
4 this process of securing from the trial judge findings of
5 fact and conclusions of law, and that procedure is a
6 well-established procedure starting at 296 of the Rules of
7 Civil Procedure, and it's triggered by a request, which
8 has to be filed within 20 days of when the judgment is
9 signed, and then there's a process of a deadline for the
10 court to file. If the court doesn't file, there's a
11 deadline for a reminder. If the court does file, there's
12 a deadline to request additional and amended findings, and
13 all of those deadlines if expressed or pushed out to their
14 extreme constitute 85 days worth of time passing just in
15 the fact finding process.
16 So the first thing that we did as a task
17 force was to figure out what we could do to compress that
18 time frame so it would still allow everyone to do their
19 job, but it wouldn't take so much time, and the first
20 suggestion we made was let's set up a separate rule to
21 govern the finding and conclusion process and these kinds
22 of appeals so that we don't complicate the ordinary
23 process, but we can have an accelerated process that
24 mimics the sequence of events and the terminologies that
25 we're already familiar with. So the task force has

1 proposed that we adopt an amendment to the Rules of Civil
2 Procedure, and you'll find that in Appendix A to the task
3 force report, and that is a proposed Rule 299b, and now
4 would be a good time to say that the way the report is
5 structured is the proposed rule changes are appendices to
6 the end, but the report explains the operation of these
7 rules and the task force motive and some of the factors it
8 considered in arriving at its recommendations.
9 So if you look at Appendix A, which is page
10 13 of the task force report, you'll find a brand new rule
11 tagged onto the end of the other findings rules that
12 unique to these kinds of cases; and a distinction that
13 we're going to have to make, and we may as well make it
14 now, is that it's not only government termination cases
15 that are affected by these rule changes. It's also
16 privately brought termination cases, because any person
17 with standing can bring a suit to terminate the
18 parent-child relationship; and you quite often will find
19 that in a divorce, remarriage, and a stepparent adoption
20 situation, that you'll have a privately brought
21 termination case, not a government brought termination
22 case. But it's also important to understand that there
23 are some cases where the State of Texas will bring a
24 lawsuit not to terminate the parent-child relationship,
25 but to have a governmental agency appointed as the

1 managing conservator of the child while leaving the parent
2 still with a parent-child relationship.
3 So the rules that we're talking about here
4 really are broader than just government termination cases,
5 even though that's going to be the bulk of them, but
6 they'll govern also private termination cases and cases
7 brought by the state to be appointed managing conservator.
8 PROFESSOR DORSANEO: Richard?
9 MR. ORSINGER: Yes.
10 PROFESSOR DORSANEO: Both of those kinds of
11 cases are accelerated? One of them under 109.002 and the
12 other one under another chapter later; is that right?
13 MR. ORSINGER: Yes. Yes. Although I'm not
14 going to tell you which chapter later, but we believe that
15 the managing conservatorship cases have to be accelerated
16 just like the termination cases because of the language in
17 the statute.
18 PROFESSOR DORSANEO: Okay.
19 MR. ORSINGER: Okay.
20 PROFESSOR DORSANEO: I think it's 263, but I
21 may be wrong.
22 MR. ORSINGER: All right, Bill. You can
23 apply for your board certification until, I think, March.
24 PROFESSOR DORSANEO: In many subjects.
25 MR. ORSINGER: Point well taken. All right.

1 So, anyway, back to the trial court process, the first
2 suggestion here you'll find in proposed Rule 299b,
3 subdivision (a), is that we eliminate the day -- the
4 passage of time that it takes to get your first set of
5 findings and conclusions by requiring that the trial judge
6 sign and file findings and conclusions when they sign the
7 judgment, and we will require it in every case, and it
8 will not be dependent on the appellant's request, and
9 there will be no delay associated with the appellant's
10 request. The trial judges, they will be aware of this
11 obligation. The county attorneys will be aware of this
12 obligation, and we can eliminate a potential delay of 20
13 days by just saying that when the judge signs the judgment
14 and the trial is fresh in his or her mind then she also or
15 he also signs findings and conclusions that same day, so
16 we've eliminated 20 of the 85 days just by that.
17 So the proposed rule change says, "In a suit
18 for termination of the parent-child relationship or a suit
19 affecting the parent-child relationship filed by a
20 government agency for managing conservatorship," that is
21 tried without a jury, "the court shall file its findings
22 and conclusions at the time the final order is signed.
23 Finding of fact shall be stated with the clerk of the
24 court" -- "filed with the clerk of the court as a document
25 separate and apart from the final order. The court shall

1 cause a copy of its findings and conclusions to be mailed
2 to each party in the suit."
3 The reason we want a separate document, not
4 only does that conform to the practice, but if you were to
5 include findings in the judgment and a request would be
6 made to amend the findings, you would have to amend the
7 judgment to amend the findings, which would then reset the
8 appellate clock and introduce delay. So we want the
9 judgment not to contain findings. That's the prevailing
10 practice right now for nonjury trials, and the findings
11 must be filed on the day the judgment is signed, and then
12 all of the ensuing processes will start running on the day
13 of the judgment. So I'll offer that up for criticism or
14 comment.
15 CHAIRMAN BABCOCK: Okay. Yeah, Richard.
16 MR. MUNZINGER: The judge is trying a
17 nonjury case that's within the purview of these rules.
18 The evidence is concluded, and the judge says, "I grant
19 custody to the state" or "I do" whatever. The effective
20 moment of the judgment is at the time the judge makes the
21 verbal statement in the court, true or false?
22 MR. ORSINGER: If it's a noninterlocutory
23 oral pronouncement then it's effective immediately. If
24 it's interlocutory because there's some unresolved relief
25 then it's probably not effective immediately.

1 MR. MUNZINGER: Well, let's assume that it's
2 not interlocutory, but it is final, so now the child is
3 taken from daddy or mama or whoever.
4 MR. ORSINGER: If you don't mind, I don't
5 want to be overly picky here, but it's not final. It's
6 just noninterlocutory. Finality really has to do with
7 appealability and plenary power, so it's --
8 CHAIRMAN BABCOCK: Where's the kid going?
9 MR. MUNZINGER: Bad choice of words on my
10 part.
11 PROFESSOR DORSANEO: No, you were right.
12 He's wrong.
13 MR. MUNZINGER: It's effective, and the
14 child is effectively removed from the custody of the
15 parent, and the status has changed when the judge verbally
16 announces his or her ruling.
17 MR. ORSINGER: Correct.
18 MR. MUNZINGER: Now, this rule contemplates
19 that the final judgment includes the findings of fact, but
20 the delay is still there if the judge doesn't timely enter
21 the findings of fact. In other words, I like what you've
22 done in the rule. All I'm saying is I don't know that you
23 have cured the problem of delay because you still don't
24 have a written judgment.
25 MR. ORSINGER: Yes, so we haven't certainly

1 eliminated any delay that may exist between oral rendition
2 and the signing of judgment, and we can certainly consider
3 that, but it would not make any sense to require findings
4 and conclusions before the judgment because it's not until
5 the judgment is actually put down on paper that you really
6 know what you're appealing. So probably if you were
7 worried about the delay between rendition and signing, we
8 should address that over in a judgment rule because that's
9 really not a finding and conclusion problem. You see what
10 I'm saying?
11 CHAIRMAN BABCOCK: Justice Jennings.
12 HONORABLE TERRY JENNINGS: I was just going
13 to point out in regard to Munzinger's concern, the child
14 in a termination case is already not in the custody of the
15 parent in this kind of a situation because the child's
16 already been removed and is already in kind of a temporary
17 foster situation until these decisions are made anyway.
18 CHAIRMAN BABCOCK: Professor Dorsaneo.
19 PROFESSOR DORSANEO: I was just going to say
20 Richard's draft says it's signed, so he is -- I think as
21 he's explained clearly enough that it's from the date the
22 draft of the judgment is signed, not from the date of the
23 judgment necessarily. That might be the judgment, or it
24 might be after the judgment.
25 CHAIRMAN BABCOCK: Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Richard, I may
2 be confused. I don't understand -- and if we're not up to
3 this point, the second paragraph under (a), are we talking
4 about that yet?
5 MR. ORSINGER: No. If we can get (a) out of
6 the way first then --
7 HONORABLE STEPHEN YELENOSKY: Well, it is in
8 (a).
9 CHAIRMAN BABCOCK: No, it's in (a). The
10 second paragraph of (a).
11 MR. ORSINGER: The first paragraph of (a).
12 Well, if you want I can -- let's talk about this.
13 CHAIRMAN BABCOCK: Well, we've got some more
14 comments about the first paragraph apparently. Frank.
15 MR. GILSTRAP: You're talking about
16 judgment, but the term you use in a rule is "final order."
17 What is a final order?
18 MR. ORSINGER: Well, the reason we do that
19 is because under the Family Code they tend to talk in
20 terms of orders rather than judgments. To the extent they
21 talk about judgments, they talk about decrees, and so I
22 think that the safer approach is to use the word "order,"
23 but I think we mean judgment, and if to conform with the
24 terms in the Rules of Procedure we want to use "judgment,"
25 then I think probably we should use "judgment."

1 CHAIRMAN BABCOCK: Justice Christopher.
2 HONORABLE TRACY CHRISTOPHER: I don't like
3 the fact that you have "mailing the findings of fact." I
4 would prefer to say sent or given, because it seems to me,
5 especially with the 10-day limit in the next paragraph
6 that -- and with the way people are doing things
7 electronically, the judge could easily e-mail the findings
8 to the parties, so -- or hand them out at the time he
9 signs the final order.
10 CHAIRMAN BABCOCK: Eduardo.
11 MR. RODRIGUEZ: Can you just substitute the
12 word "delivered" for "mailed," and it can be delivered by
13 e-mail or fax or whatever? It doesn't have to be mailed.
14 CHAIRMAN BABCOCK: Okay. Professor Carlson.
15 PROFESSOR CARLSON: Richard, did you make
16 any attempt to look at the findings of facts and
17 conclusions of law this committee signed off on in
18 February or March of this year?
19 MR. ORSINGER: No.
20 PROFESSOR CARLSON: Do you know if this will
21 dovetail with that?
22 MR. ORSINGER: No, I don't.
23 PROFESSOR CARLSON: Great.
24 CHAIRMAN BABCOCK: And what is the
25 implication of that?

1 PROFESSOR CARLSON: We've sent to the Court
2 draft findings of facts and conclusions of law rule, and
3 these are working off of a former version, which is no
4 longer the committee's recommendation. I don't know where
5 the Court comes out on it.
6 MR. ORSINGER: Well, these would conform to
7 the existing rules, but they wouldn't conform to a
8 possible future change in the rules.
9 CHAIRMAN BABCOCK: Worth noting, I would
10 think.
11 MR. ORSINGER: But, I mean, Elaine, is it
12 possible for us to distill the differences, and would they
13 have an impact on our accelerating the timetable, do you
14 think?
15 PROFESSOR CARLSON: I don't know. I would
16 have to go back and look at our proposals. I don't think
17 so, but I don't know for sure.
18 CHAIRMAN BABCOCK: Gene.
19 MR. STORIE: On the last sentence of that
20 paragraph, whether mailed or delivered, would you want to
21 add something like "promptly" or "immediately"?
22 MR. ORSINGER: Absolutely, yeah. What about
23 using -- does the word "delivery" connote physical
24 delivery, or would we agree that that's broad enough to
25 include mail or e-mail? Because I don't want to require

1 it to be mailed or e-mailed if the judge is -- if the
2 litigant is there or the litigant's lawyer is there and
3 you hand-deliver the findings. That's better than mail or
4 e-mail.
5 HONORABLE STEPHEN YELENOSKY: "Delivered."
6 MS. CORTELL: Does "delivered" connote
7 physical delivery, or would it be broad enough to include
8 mail or e-mail?
9 HONORABLE TERRY JENNINGS: Well, you get
10 into a problem there because at least one of the parties
11 to this lawsuit is usually living in poverty, and they may
12 not even have access to a computer, and some of them may
13 not even have a physical address to mail it to, so some --
14 HONORABLE STEPHEN YELENOSKY: They both have
15 lawyers.
16 HONORABLE TRACY CHRISTOPHER: They're going
17 to have lawyers.
18 HONORABLE STEPHEN YELENOSKY: They're going
19 to have lawyers.
20 HONORABLE TERRY JENNINGS: Well, my
21 experience is that on a lot of these appeals is that there
22 are a number of miscommunications between lawyers and
23 their clients, because their clients are hard to get a
24 hold of
25 or --

1 HONORABLE STEPHEN YELENOSKY: But I would
2 never get --
3 HONORABLE TERRY JENNINGS: -- they get lost
4 in --
5 HONORABLE STEPHEN YELENOSKY: I would never
6 be mailing it to them if they have a lawyer. I would be
7 sending it to their lawyer.
8 HONORABLE TERRY JENNINGS: Well, a lot of
9 the problems that I'm seeing involve notice to the
10 clients, especially when you get into a situation where
11 there's this confusion about whether they're going to be
12 pro se or not and all that.
13 HONORABLE STEPHEN YELENOSKY: But that's a
14 bigger problem, and you would be suggesting a delivery to
15 the party directly even if they have a lawyer, which is a
16 huge change.
17 HONORABLE TERRY JENNINGS: Well, the way the
18 proposed rules read now is to each party. You could say
19 to the lawyer or whatever, but there is a practical
20 problem, and all I'm saying is that there is a practical
21 problem. I'm trying to point that out.
22 MR. ORSINGER: Let me point out, Justice
23 Jennings, that it may be somewhat different because of the
24 Legislature's decision that when you're in for the trial
25 you're in for the appeal.

1 HONORABLE TERRY JENNINGS: Right.
2 MR. ORSINGER: Because that didn't used to
3 be the case, and sometimes there was this gray area where
4 the trial lawyer has finished and the appellate lawyer
5 hasn't started, and --
6 HONORABLE TERRY JENNINGS: And that's what
7 I'm talking about, and if that's been fixed then --
8 MR. ORSINGER: Well, you know, the
9 communication difficulty may exist, but it will be the
10 same one that existed during the trial.
11 HONORABLE TERRY JENNINGS: Right.
12 MR. ORSINGER: Because it's going to be the
13 same lawyer.
14 HONORABLE TERRY JENNINGS: Right.
15 MR. ORSINGER: And so -- and I don't think
16 that by the use of the word "party" here we meant to say
17 the individual client as distinguished from the lawyer if
18 they have an attorney of record. I'll rely on one of the
19 rules professors over here to comment on that, but when we
20 use the term "party" in the Rules of Procedure, doesn't
21 that mean the lawyer representing the party? So when we
22 require that these findings and conclusions be mailed or
23 delivered to a party, that can be fulfilled by mailing or
24 delivering to the lawyer representing the party, right?
25 PROFESSOR DORSANEO: Right.

1 MR. ORSINGER: We don't need to specify or
2 distinguish between attorney and party.
3 HONORABLE TRACY CHRISTOPHER: Right.
4 MR. ORSINGER: Okay.
5 CHAIRMAN BABCOCK: Justice Hecht.
6 HONORABLE NATHAN HECHT: How often are
7 findings in these cases more detailed than just the formal
8 finding of grounds for termination and best interest of
9 the child?
10 MR. ORSINGER: I wouldn't be able to tell
11 you that, but some of the appellate judges here could
12 maybe.
13 CHAIRMAN BABCOCK: Yeah. Justice Bland.
14 HONORABLE JANE BLAND: Not often. Not
15 often. And in our area they're often included in the
16 final judgment. They're not in a separate document, and
17 I'm not sure statutorily -- I think statutorily they have
18 to state the statutory grounds for the termination in the
19 judgment, so I'm not certain about the separate document
20 requirement.
21 MR. ORSINGER: Well, if we don't have Rule
22 296 findings in a separate document then when you amend
23 them -- if you amend them on request, you've issued a new
24 judgment, which starts the appellate timetables all over
25 again, and that's really just not necessary.

1 CHAIRMAN BABCOCK: Justice Gaultney, then
2 Justice Patterson.
3 HONORABLE DAVID GAULTNEY: I think there may
4 be some findings that are required to be in the judgment,
5 so what happens as a practical matter, what does an
6 appellate court do when a case gets before us and the only
7 findings are in the judgment? And, I mean, the rule says
8 they shall be filed, which sounds mandatory. Do we ignore
9 the findings that are in the judgment, or do we require an
10 additional process to obtain separate findings?
11 HONORABLE STEPHEN YELENOSKY: That's
12 paragraph (2).
13 MR. ORSINGER: Yeah. And under the existing
14 practice, Rule 299(a), it says, "Findings of fact shall
15 not be recited in a judgment." So that's just a strict
16 prohibition, and then it says if there's a conflict
17 between findings in the judgment and findings under Rule
18 297 and 8, the latter control for appellate purposes.
19 Now, the discussion at the task force was that in most of
20 these cases as a practical matter there are not separate
21 findings, and they are included in the judgment, and the
22 appellate court goes ahead and handles the appeal based on
23 the findings in the judgment, even though the rules say
24 that's really not what you're supposed to be doing, but
25 that's -- as a practical matter, they don't send it back

1 down for findings that are separate. They just decide the
2 appeal and the judgment, and I would like for some of the
3 appellate justices here to confirm that that's what goes
4 on.
5 CHAIRMAN BABCOCK: Justice Patterson.
6 HONORABLE JAN PATTERSON: I haven't seen
7 that happen, Richard, but I do think that we get both
8 detailed findings of fact and also cursory that look --
9 that satisfy the judgment, the basic information, so I
10 think we kind of get them both. One of the values, I
11 think, of this rule is that if it is required at the time,
12 and these are usually drafted by the parties, it's going
13 to be less detailed, I would think, with this rule, and it
14 will be just to satisfy the elements. So I think that
15 that's maybe one of the advantages of this rule, but I've
16 never seen when we're required to have findings of fact
17 that we haven't had those, because we have sent cases back
18 in instances where they've failed to make the findings.
19 CHAIRMAN BABCOCK: Professor Dorsaneo.
20 PROFESSOR DORSANEO: Well, I do know that
21 Rule 299a was remodeled and I think changed significantly
22 in our discussions before. Whether the changes to the
23 earlier rules were -- or would be problematic in this
24 context, I'm not sure, but I know 299a was changed a lot,
25 and 299a as currently written is not a good rule. I mean,

1 you have to ask the appellate judges what it means. Okay.
2 You can't tell what it means on its face. If you say,
3 "Findings of fact shall not be recited in a judgment,"
4 that that's a flat prohibition, well, yeah, standing alone
5 it is, but when it starts talking about if there's a
6 conflict between findings of fact stated separately and
7 ones in the judgment, you kind of think, well, maybe they
8 can be stated in the judgment, and the Family Code does
9 require findings to be in the judgment I think in this
10 context. That's caused me some difficulty in reconciling
11 these issues. So all of that is problematic, and I think
12 the right answer probably would be if there were changes
13 in the findings that that might well change the judgment
14 or would require the judgment to be changed.
15 MR. ORSINGER: Well, if you require the
16 judgment to be changed every time a finding changes then
17 you're building delay in cases that don't need to have
18 delay.
19 PROFESSOR DORSANEO: I'm not saying every
20 time, but sometimes the findings --
21 MR. ORSINGER: If it's in the judgment,
22 though, it will reset the appellate timetable every time a
23 finding is changed because you have to amend the judgment.
24 Let me also point out that if there is -- if there's two
25 diverging lines on what the finding process ought to be,

1 this rule is a standalone rule that applies only to these
2 kinds of appeals. So while there's some value in them
3 being -- mimicking each other, the fact that we may adopt
4 something now because we have a deadline of March 1 of
5 2011 and we may go somewhere else with the other rules,
6 the decision can be made when the other 296, 297, 298 are
7 amended that we can either conform at that time or we can
8 have two separate tracks, because there is a narrow
9 subdivision of nonjury trials, and they're all in a
10 self-contained rule, and they don't involve any other
11 appeals. So that would limit the harm. You see what I'm
12 saying?
13 PROFESSOR DORSANEO: Yeah, well, I think
14 that's fair enough. It's different. We don't need to
15 talk about the other thing.
16 CHAIRMAN BABCOCK: Justice Bland, then
17 Justice Jennings.
18 HONORABLE JANE BLAND: The reality is that
19 in these cases the findings are the grounds for
20 termination that are set forth in the statute, and the
21 trial courts include those grounds in the final judgment,
22 and they do not make separate findings on a separate
23 document, and I think it's different in different parts of
24 the state.
25 HONORABLE TERRY JENNINGS: Right.

1 HONORABLE JANE BLAND: And my -- and my only
2 thinking is that to require findings in a separate
3 document when none of the trial judges, at least in some
4 parts of the state, are doing it that way, doesn't make a
5 lot of sense, because it doesn't hurt to make the findings
6 in a separate document if that's how some places in the
7 state do it, but if we're going to require it and then the
8 judgment is going to be somehow defective, and -- without
9 it doesn't make a lot of sense to me because statutorily
10 the trial courts have to state one of the statutory
11 grounds, and that's what they do, and they include that in
12 the judgment.
13 CHAIRMAN BABCOCK: Justice Jennings.
14 HONORABLE TERRY JENNINGS: Right, and yeah,
15 it may be different in different parts of the state, but
16 my experience has been the same as Judge Bland. I don't
17 recall ever seeing -- it may have happened. I don't
18 recall ever seeing separate findings of fact and
19 conclusions of law in these kinds of cases; and it may be
20 because counsel has never requested them and they just
21 rely on the judgment, because usually what happens is, is
22 the department will make its allegations in its petition,
23 alleging a parent has violated certain laundry list
24 provisions of the statute; and then in the judgment the
25 court will find that the parent violated, you know,

1 subdivision (d), (e), and (o) of the statute; and they
2 never have made findings of fact and conclusions of law.
3 Now, that may just be a matter of the lawyers in Harris
4 County just haven't been requesting them, but -- and this
5 goes back to the old world before the new statute. A lot
6 of times lawyers weren't even appointed to represent
7 someone on appeal until after the deadlines had run, which
8 was a huge problem, which I'm hoping is -- this new
9 statute is going to address.
10 MR. ORSINGER: If I can respond, as a
11 practical matter, and I don't know from personal
12 experience, but I do think that a lot of times the
13 findings were not timely requested, and that's why you
14 didn't see them.
15 HONORABLE TERRY JENNINGS: Or never
16 requested, yeah.
17 MR. ORSINGER: And in this situation, when
18 it's a government sponsored lawsuit, if the rule provides
19 that they are required and it's the trial judge's duty to
20 give them, not the appellant lawyer's duty to request
21 them, I would assume that the government lawyer is going
22 to understand that when they draft the judgment they need
23 to draft the findings; and but let me say that I don't
24 think that it's fundamentally different whether the
25 findings are in the judgment or are in a separate thing;

1 and this proposed Rule 299b doesn't contain the
2 prohibition that findings of fact shall not be recited in
3 the judgment, which is in 299a. That provision is not
4 here, but what concerns me about all of this is that in
5 cases where the trial judge actually does issue new
6 findings or alter old findings, if they are only in the
7 judgment, you have to amend the judgment, and that
8 introduces an unnecessary delay, and I say weighing
9 against that is the fact that under the prevailing
10 practice nobody files findings anyway, well, I think
11 that's part of the deficiency of the current practice.
12 CHAIRMAN BABCOCK: Justice Peeples.
13 HONORABLE DAVID PEEPLES: The important
14 thing here is that the appellant, whose rights have been
15 terminated, needs to know how many theories that he or she
16 has to attack on appeal. That's the important thing that
17 we should keep our eyes on the ball, doesn't matter
18 whether it's in the judgment or findings of fact in a
19 separate instrument. I mean, I think Richard has
20 persuasively told us why it needs to be in a separate
21 instrument, but the appellant needs to know that, and
22 here's an example. I've tried a bunch of these. They
23 usually fall into three categories: Somebody didn't
24 support a child within his or her ability; somebody
25 affirmatively abused a child, an act of comission; or

1 somebody allowed -- neglected, allowed someone else to
2 abuse the child, an act of omission. I mean, it's usually
3 nonsupport, abuse, or neglect, just speaking generally;
4 and so the appellant needs to know am I facing all three
5 of these on appeal or only neglect and so forth; and there
6 needs to be an additional finding that it's in the best --
7 that termination is in the best interest of the child.
8 And I mean, what I think -- if we really
9 want to speed these things up, which I think we do, maybe
10 we need to say that to make findings that roughly parallel
11 the E.B. case, which is the Supreme Court case that
12 mandated broad form jury questions, that was a termination
13 case, and they said keep it general in the language of
14 statute when you submit one of these cases. We could do a
15 lot of good, it seems to me, if we just made a special
16 statement. I don't know what the Supreme Court is going
17 to do with these other, you know, findings of fact rules
18 that we sent, but if we say we don't want it evidentiary,
19 on so-and-so date, you know, the boyfriend beat the child
20 and the mother stood there and watched it and didn't call
21 the police. I'm serious. You know, and on another date
22 something else happened, on another date she did something
23 herself, and all of this adds up to neglect. I don't
24 think we want that.
25 What we want is something that's in

1 the degree of generality of E.B., which would tell the
2 mother, you've got -- you didn't support, you abused
3 yourself, and you allowed someone else to abuse, which is
4 neglect. You've got to defeat all three of those on
5 appeal, or only one of them, and to me that's the
6 important thing, not where it is, judgment or findings,
7 and if we would say don't give us 50 separate acts of
8 abuse or neglect, just tell us which of these theories the
9 mother or the father has to face on appeal, we would speed
10 these cases down the road.
11 CHAIRMAN BABCOCK: Judge Yelenosky.
12 HONORABLE STEPHEN YELENOSKY: And correct me
13 if I'm wrong, Justice Peeples or Richard, but there was
14 earlier a reference to the difference between statutory
15 grounds and perhaps more detailed facts, although
16 obviously there can be a gray area there, but aren't we
17 already required to specify essentially which
18 subparagraphs of the potential statutory termination are
19 found or relied upon? Aren't we already required to put
20 that in the judgment, Richard, Justice Peeples?
21 MR. ORSINGER: I will see if I can answer
22 that question.
23 HONORABLE STEPHEN YELENOSKY: My
24 understanding is that the AG will come in typically, or,
25 I'm sorry, the district attorney, will come in and say

1 we're proceeding on 161 whatever, (e)(1)(2), and it's very
2 important for the other party to know what they're
3 proceeding on before you ever get to the judgment and at
4 the point of the judgment what they succeeded on.
5 Separately, you know, I guess it could depend on the case.
6 There could be cases in which you would want to put some
7 level of detail in the findings of fact. You know, this
8 is a termination of parental rights, and I think there can
9 be a higher expectation of specificity or some judges are
10 going to want to put it, and I wouldn't want to put it in
11 the order for the reasons that Richard said, but, Richard,
12 what's the answer to the grounds that have to be stated?
13 MR. ORSINGER: Okay. Section 161.206,
14 subdivision (d), of the Family Code says, "An order" --
15 and that's an order, not a judgment there, Bill. "An
16 order rendered under this section must include a finding
17 that," number one, "a request for identification of a
18 court of continuing exclusive jurisdiction has been made
19 as required by section 155.101," and number two, "all
20 parties entitled to notice, including the Title IV-D
21 agency have been notified." That seems to me that they're
22 not mandating that you have the findings that would be the
23 basis for the relief granted.
24 HONORABLE STEPHEN YELENOSKY: Well --
25 HONORABLE JANE BLAND: That's not the right

1 section.

2 HONORABLE STEPHEN YELENOSKY: No, there's

3 another section, and I'll look for it.

4 MR. ORSINGER: Okay. I've got a Family Code

5 here if anyone wants to borrow it.

6 CHAIRMAN BABCOCK: Justice Patterson in the

7 meantime.

8 HONORABLE JAN PATTERSON: I agree with

9 Justice Peeples that there are only certain things that an

10 appellant needs to know to move forward. I also agree

11 that there's a lot of confusion about the requirement of

12 findings of fact and conclusions of law. Is this a time

13 when we can clarify, Richard? I mean, is there a reason

14 to use the term "findings of fact and conclusions of law"

15 when we're really talking about the grounds for

16 termination? Because I think findings of fact and

17 conclusions of law are a particular thing that can contain

18 facts, and when you just have a conclusion as to

19 abandonment, neglect, those are combinations of fact and

20 law, so we're sending out a signal that we want something

21 different than just that, but I agree that that's really

22 the main thing that we're desiring for this.

23 CHAIRMAN BABCOCK: Justice Gray.

24 HONORABLE JAN PATTERSON: And that also is

25 the reason why there's confusion about whether it can be

1 in the judgment or not, because they sometimes do look
2 alike, which will lead us into that second paragraph which
3 really causes a lot of confusion, but I'll hold my
4 comments to that.
5 CHAIRMAN BABCOCK: Justice Gray.
6 HONORABLE TOM GRAY: I've got a number of
7 comments, and the first being I'm always very nervous when
8 we carve out an entirely new procedure from the rules for
9 a particular type of cases, because it really does create
10 a lot of confusion on the practitioner, especially if
11 we're using the same type labels.
12 CHAIRMAN BABCOCK: Although there is
13 precedent for that in the family area.
14 HONORABLE TOM GRAY: I understand, but I
15 think this is an opportunity to eliminate rather than
16 create a parallel universe for family law cases. My first
17 more or less detailed comment, there was a conversation
18 over here about they're all going to have lawyers and
19 getting the notices. That is true, as I understand the
20 existing -- or the preexisting 263.405, but I don't
21 think -- and I'm obviously subject to correction on this.
22 There was a time when all termination cases, the parties,
23 if they were indigent, got court-appointed lawyers. Then
24 when we got the dramatic changes to 63.405, it was -- they
25 dropped the appointment of lawyers in private termination

1 cases, and it was only the government termination cases
2 that got the appointed counsel. So when we're talking
3 about lawyers, that's in government sponsored, appointed
4 if they're indigent, but it is not necessarily the case in
5 private termination cases, so be careful about assuming
6 that there will be a lawyer involved.
7 With regard to the conversation that was
8 going on more or less down here about the judgments or
9 orders, all of these appeals are coming up from an
10 interlocutory order. They deal in the sense that we
11 frequently refer to over in the Probate Code of an order
12 that deals with a finite solution for some of the parties.
13 The will is admitted to probate, heirs are determined.
14 Those are interlocutory orders in a probate proceeding
15 that are appealable just like the termination order is an
16 appealable order. That child is still in the system.
17 That child is still in the same case, and it's going on,
18 but in that sense it is a -- has been determined to be
19 really under case law a judgment that affects the child
20 that is subject to immediate appeal.
21 As far as where the findings need to be or
22 not be, I don't think there should be any opportunity to
23 have a separate findings of fact and conclusions of law in
24 these cases. As the judges from Houston have pointed out,
25 the process -- the ones that I see, they're always in the

1 judgment. I think they need to be in the judgment; and I
2 think they need to be limited, as Judge Peeples said, to
3 which grounds for termination have been found by the fact
4 finder; and if they do that, it will address Richard's
5 concern that each modification is going to result in a new
6 judgment. It should, if you are changing the grounds on
7 which termination is being granted. The ground upon which
8 termination is granted has consequences later.
9 If it is in a separate document, not part of
10 the judgment, that is a real problem, but if you terminate
11 a parent's rights to child A because they have abused the
12 child, and they come back in a later proceeding and that
13 finding has to be in the judgment under the concept that
14 I'm thinking, if that finding is in the judgment, that
15 ground is therefore in the judgment, and the party has
16 appealed or not appealed and been successful or not
17 successful on appeal, it goes with it. The finding may or
18 may not wind up being out there, but the -- the judgment
19 is there. It's archived, and then later when they have
20 another child and the state again seeks termination
21 then -- and one of the grounds of termination is previous
22 abuse of a child, and that can impact the finding in the
23 subsequent case, and so I just don't think you're going to
24 have realistically this perpetual restarting of the
25 appellate clock by new judgments in the event that you

1 require the finding of only the ground -- the grounds that
2 you're terminating on if you require that to be included
3 within the judgment. See if that was all the -- I think
4 that covers the bulk of the comments I had.
5 MR. ORSINGER: Chip, can I ask a follow-up
6 question?
7 CHAIRMAN BABCOCK: Yeah, sure. Then can I
8 ask mine?
9 MR. ORSINGER: These rules are supposed to
10 be broad enough to include managing conservatorship cases,
11 too, which of course, don't have those eight grounds for
12 termination. Do all of those policies hold when it's just
13 a custody case and not a termination case?
14 HONORABLE TOM GRAY: In all candor, that was
15 a new wrinkle when I got the report and I started reading
16 that it was going to pick up more than just the
17 termination cases. As I read what was the marching orders
18 of the Supreme Court from the Legislature and -- I didn't
19 think it would be that broad to reach out and get the
20 other custody decisions, but I -- that was a nuance that I
21 missed, Richard, and so my arguments are primarily
22 directed towards termination cases because those are the
23 ones that really hit the constitutional dimensions that
24 are really problematic.
25 CHAIRMAN BABCOCK: Justice Gray, you said

1 that you don't believe that there needs to be a separate
2 findings of fact, separate and apart from the judgment,
3 but, Justice Peeples, you said you were persuaded that
4 there did need to be?
5 HONORABLE DAVID PEEPLES: I was after
6 hearing Richard speak. You know, if we keep them general,
7 like E.B., what amendment or change can there be but
8 another ground coming in, and that is important?
9 HONORABLE TOM GRAY: Or the elimination of a
10 ground. Maybe you convinced the trial judge that one of
11 the grounds is not supported and they pull it out and then
12 it targets the appeal, it makes the appeal move faster.
13 HONORABLE DAVID PEEPLES: And, again, in
14 terms of speed, if you let the bar, the bench and bar,
15 know that they need to be simple and general, this won't
16 slow things down very much, but if you allow them to be
17 evidentiary, you know, there can be 25 bits of evidence
18 that support one ground in these cases.
19 CHAIRMAN BABCOCK: Justice Jennings.
20 HONORABLE TERRY JENNINGS: Well, and I
21 wanted to clarify, just because I haven't seen findings of
22 fact and conclusions of law being used in -- at least
23 through our appellate courts, doesn't mean that I'm
24 against asking or requiring findings of fact. I mean,
25 Richard I think made a good point. When you have

1 different grounds like endangerment or you left the child
2 with someone else who endangered the child or they failed
3 to comply with a service plan under (o) or whatever that
4 subdivision is, I do think because this is kind of
5 quasi-criminal and because of the taking a child away from
6 a parent is so severe and in many cases considered a
7 punishment, you do have to have, I think, some kind of
8 specific allegation, "You violated this subdivision," and
9 I do think in a judgment you should have -- and I think it
10 is statutorily required, although I can't put my finger on
11 it. You should have to have a specific finding that you
12 violated (e) or (d) or (o) or whatever.
13 A findings of fact could be helpful on
14 appeal because oftentimes when the allegation is
15 subdivision (d), endangerment, there really becomes a
16 question of, well, did that parent's conduct really rise
17 to the level of endangerment, was the evidence legally and
18 factually sufficient to support a finding of endangerment,
19 and a finding of fact could be helpful to the appellate
20 court to understanding what the trial court was thinking.
21 You know, what specific behavior or action of a parent was
22 the trial court focusing on, and then maybe requiring the
23 trial court to go through that exercise might make the
24 trial court rethink, well, you know, having thought
25 through this and looking at these specific instances, they

1 may change their mind and say, well, you know, this really
2 isn't -- this doesn't constitute endangerment.
3 So my point is although it hasn't been
4 utilized I could see Richard's point that maybe it is
5 something that practitioners should be doing, and it
6 should be required. If that was your point.
7 CHAIRMAN BABCOCK: Justice Jennings, is
8 the -- or actually, anybody, is the practice now or what
9 you've seen in practice that the proponent of the
10 termination or the conservatorship, if it's granted, is
11 the one providing the findings of facts and conclusions of
12 law? They give it to the judge, they say "Please sign
13 this"?
14 HONORABLE TERRY JENNINGS: Practice is not
15 --
16 HONORABLE DAVID PEEPLES: Yes.
17 HONORABLE TERRY JENNINGS: Yeah, but this is
18 not a very sophisticated practice.
19 CHAIRMAN BABCOCK: Don't tell that to
20 Orsinger.
21 HONORABLE TERRY JENNINGS: Well, when you're
22 dealing with people with court-appointed lawyers and
23 they're having court trials instead of jury trials,
24 they're not getting the representation that Richard would
25 provide.

1 MR. ORSINGER: Thank you.
2 CHAIRMAN BABCOCK: Justice Gray.
3 HONORABLE TOM GRAY: I don't know what the
4 origin --
5 CHAIRMAN BABCOCK: Is that good or bad?
6 Justice Gray. Sorry.
7 HONORABLE TOM GRAY: I don't know what the
8 origin of the form is, but the forms that we get in Waco
9 are extraordinarily consistent, and they -- you know, they
10 look like the -- you've got all the other provisions about
11 a decree in there of some things that are happening, but
12 they get down to almost check boxes of the grounds of
13 termination and the finding of best interest, and I don't
14 know if that's because of local practice or that the AG
15 has standardized the form for termination orders or where
16 it comes from, but the -- much like what Jane described,
17 the ground is set out in the order that terminates the
18 parental rights, and it's basically the statutory text,
19 and the trial court makes that finding, and then sometimes
20 it -- the one thing I have noticed is sometimes best
21 interest is first and -- but most often it's last. Every
22 once in a while for some reason it winds up -- but it's
23 very standardized in what we're seeing, except in those
24 private termination cases. They can be much broader then.
25 CHAIRMAN BABCOCK: Uh-huh. Okay. Yeah,

1 Buddy, sorry.
2 MR. LOW: Richard, Rule 299a starts out by
3 "Findings of fact shall not be recited in the
4 judgment." Now, I hear -- I know that those are
5 traditional where they're requested, and here they are
6 mandated, but that rule does state that they shall not be,
7 and if there's a conflict then it's resolved. Did you --
8 when that issue came up, did you focus on the fact that we
9 do have a statement that they tell the judge they shall
10 not be in the judgment?
11 MR. ORSINGER: Yes. I mean, we were well
12 aware that the supposedly prevailing current practice is
13 to have separate findings. Now, in this particular
14 environment where you're dealing with pro se litigants --
15 MR. LOW: Right.
16 MR. ORSINGER: -- or young, inexperienced
17 lawyers who have been appointed either for the trial or
18 the appeal, there -- I'm hearing around the table from the
19 court of appeals judges that that rule is not prevailing
20 in this subtype of family law litigation, even though it's
21 supposed to be separate. So we were not proposing what
22 Justice Gray and others here are, that we deviate in these
23 kinds of appeals from others and that we continue to have
24 separate findings in ordinary civil litigation but
25 findings folded into the judgment in this. I mean, it's a

1 plausible argument, and as long as its application is
2 narrowly to this area then I don't see the harm in it
3 other than potential delay.
4 MR. LOW: No, 299a doesn't make it fatal. I
5 mean, you know, it says -- it recognizes that it may be
6 done, and as far as Judge Peeples' point, aren't the
7 findings of fact supposed to just take the place of the
8 way it would be submitted to the jury? In other words, we
9 have broad submission, and findings don't go, you know,
10 just detail by detail. Isn't that right?
11 MR. ORSINGER: That is right, and the term
12 that the appellate practice uses is ultimate issues.
13 MR. LOW: Right.
14 MR. ORSINGER: And so perhaps an amendment
15 to this language would be that the findings should consist
16 only of ultimate issues, and that's a term I think the
17 appellate lawyers in this room will agree with me that
18 ultimate issues has a heritage or a pedigree on the
19 appellate side, because you're only supposed to submit
20 ultimate issues to the jury, so we've got 30 years worth
21 of -- or more longer jurisprudence on what is an ultimate
22 issue, and maybe that's the way to address David Peeples'
23 concern.
24 CHAIRMAN BABCOCK: Justice Patterson, and
25 then Justice Bland.

1 HONORABLE JAN PATTERSON: I think that
2 language would be helpful. In my experience most of the
3 litigation over findings of fact is for purposes of delay,
4 either they were not filed or they were untimely filed.
5 So the litigation doesn't tend to be over the substance,
6 but there's a certain gamesmanship over what they are and
7 how to file them, and so I think this is the opportunity
8 to clarify that they can be simple and they're not
9 required to be factually detailed or evidentiary, and so
10 we may want to use different language than findings of
11 fact and conclusions of law.
12 CHAIRMAN BABCOCK: Justice Bland.
13 HONORABLE JANE BLAND: I haven't seen a real
14 problem with this aspect of termination cases; i.e., I
15 haven't had anybody litigating about where these findings
16 are or that the findings are inadequate, and it would be
17 my suggestion that we just take the sentence out.
18 "Findings of fact shall be filed with the clerk of the
19 court as a separate document and apart from the final
20 order." If we delete that sentence we will still have the
21 rule that requires findings of fact at the time the final
22 order is signed, which I think is the objective of the
23 task force, that the trial judge enter the findings at the
24 same time the trial judge signs the order, but not
25 micromanage where those findings should be found, whether

1 they should be in a separate document or in the order,
2 because I don't think it's a problem that's out there
3 right now and I agree with Judge Patterson that we don't
4 want a lot of satellite litigation about these findings.
5 HONORABLE JAN PATTERSON: Right.
6 HONORABLE JANE BLAND: We want to just --
7 once we have them -- we need them, and they're required by
8 statute by clear and convincing evidence the trial judge
9 has to find particular things to grant a termination. So
10 once we have those findings we can proceed, and we don't
11 want a lot of extra litigation about where they are
12 contained and how they ought to be amended, and we might
13 be inviting it by including this one sentence in the rule
14 that we don't really need to accomplish our purpose, our
15 purpose being that we would like the trial judge to make
16 the findings at the same time the trial judge enters the
17 judgment -- or, I'm sorry, signs the order, signs the
18 order.
19 CHAIRMAN BABCOCK: Justice Pemberton.
20 HONORABLE BOB PEMBERTON: It seems like
21 we're importing a lot of different understandings or
22 perhaps misunderstandings of the phrase "findings of fact
23 and conclusions of law" into this regime, perhaps
24 unnecessarily. I think the focus that everybody seems to
25 agree we ought to have is advising the litigants of the

1 statutory grounds on which the fact finder or the trial
2 court relied. That perhaps, maybe as Tom suggested,
3 should be in the judgment, just require the trial judge to
4 state in the judgment which statutory grounds for
5 termination he relied upon. There may be room for
6 findings of underlying fact, you know, the abuse
7 situations, and maybe that procedure ought to be
8 available, phrased -- using the term I guess I've just
9 said "underlying facts," which is at least -- you know, we
10 see that sometimes in the context of administrative law
11 where you refer to a fact that, you know, on which an
12 ultimate -- you put some of these together, and it's the
13 basis for a finding of ultimate fact, but you have the
14 statutory ground determination stated in the judgment, and
15 this might be a way to clear up some of the confusion
16 since it surrounds this.
17 CHAIRMAN BABCOCK: Professor Dorsaneo.
18 PROFESSOR DORSANEO: Yeah, it's -- Richard,
19 it seems to me that aside from the -- that if we're trying
20 to give somebody notice of what they need to know in order
21 to attack the judgment, and I can't find the statute that
22 I thought existed. Okay?
23 MR. ORSINGER: Let me clarify what -- I gave
24 you my Family Code so you could find the provision that
25 requires these findings in the judgment, and even

1 Professor Dorsaneo cannot find it.
2 PROFESSOR DORSANEO: Well, I usually find
3 things by assigning other people to find them.
4 MR. ORSINGER: Oh, I see.
5 PROFESSOR DORSANEO: No, I swear that there
6 at least was such a provision, but even if there isn't, it
7 seems to be a better idea to put them -- put the findings
8 in the judgment, especially if the findings are going to
9 need to be made at the time of the judgment. Having a
10 separate piece of paper that's mailed to somebody in
11 addition to the judgment in order to tell them, you know,
12 what the judgment -- what you need to do to attack the
13 judgment, what you need to attack, doesn't seem like a
14 very good way to do things to me. I mean, it seems more
15 confusing than helpful, and I agree with Justice Gray. It
16 ought to all be in the judgment, and I don't -- I see
17 you're trying to eliminate something to make things move
18 faster that actually makes things perhaps go more slowly.
19 MR. ORSINGER: What's that?
20 PROFESSOR DORSANEO: Well, this whole
21 findings of fact/conclusions of law process, separate from
22 the judgment in the context of these kinds of orders, and
23 certainly the termination orders. Just put -- just do the
24 judgment and don't -- don't worry about this slowing
25 things down. We're not going to do this.

1 MR. ORSINGER: So you're -- would you allow
2 for a procedural opportunity for someone to ask that the
3 findings and the judgment be modified, or are you just
4 going to eliminate that? You file a motion for new trial
5 or a motion to modify judgment.
6 PROFESSOR DORSANEO: Not distinct from the
7 appellate review, no.
8 MR. ORSINGER: Okay. So what you're
9 suggesting, Bill, is completely sidestep the whole finding
10 and conclusion process, put your findings and conclusions
11 in your judgment. If you don't like them, file a motion
12 to modify the judgment or a motion for new trial, and
13 there is no finding of fact and conclusion of law process.
14 There's just a judgment process. Is that what you're
15 suggesting?
16 PROFESSOR DORSANEO: Yeah.
17 MR. ORSINGER: Okay. Well, I think that's a
18 serious suggestion, but going back to what Justice Bland
19 said before, we must say where these findings and
20 conclusions are going to be, because I don't think the
21 Family Code tells you, and Rule 299a says they can't be in
22 the judgment, so we've got -- if we're going to set up a
23 no finding, no conclusion process independent from the
24 judgment, no reminders, no additional or amended findings,
25 then I think we better clearly say that these findings

1 have to be woven into the judgment and are not subject to
2 the Rule 296 through 299a process.
3 CHAIRMAN BABCOCK: Justice Hecht.
4 HONORABLE NATHAN HECHT: I want to come back
5 to what Justice Pemberton said. It may be that you just
6 want the grounds in the judgment and don't use the word
7 "findings and conclusions."
8 MR. PERDUE: "Findings" is what's confusing
9 everything.
10 HONORABLE NATHAN HECHT: Typically the cases
11 we get, at least, which is just a fraction of them, it's
12 one or two or three grounds, and the trial was pretty
13 short and usually a day, maybe two days at the most, it
14 was pretty clear what the thrust of the -- at least when
15 it's the department that's involved, it's pretty clear
16 what the thrust of the department's position is, and so
17 you don't really need the finding and conclusion procedure
18 that we're accustomed to in nonjury trials, but if you
19 needed it for some reason, leave it out there, and if
20 somebody wants to request findings, let them request them
21 and let them just follow the usual procedure, but for
22 the most -- the appellant, if it's a parent, will know
23 what he's facing from the judgment itself, and maybe
24 this -- separating the two procedures would simplify it.
25 CHAIRMAN BABCOCK: Justice Patterson.

1 HONORABLE JAN PATTERSON: I do like the idea
2 of the option, because as Justice Jennings pointed out,
3 sometimes these are -- you don't want to complicate what
4 the litigants have to do because sometimes it is a
5 daunting process for some of the lawyers who are involved
6 in that area. On the other hand, there may be
7 instances -- and I think one of the things we have to
8 contemplate is that there may be a use for those times
9 when is neglect or abuse shown by poverty or by terrible
10 things that aren't working in a house and sometimes the
11 litigant will want the judge to establish what is the
12 ground for the neglect or the abuse, because sometimes
13 they may want to challenge those facts. So I think there
14 is a place for them in the process, but it should be
15 voluntary or perhaps in the exceptional case and shouldn't
16 be so complicated that lawyers can't figure it out because
17 it really is a very complicated process for all lawyers I
18 think.
19 CHAIRMAN BABCOCK: Judge Yelenosky, then
20 Buddy.
21 HONORABLE STEPHEN YELENOSKY: Well, here's
22 my proposal, that we say that "The judgment shall contain
23 findings of fact stated only in the statutory
24 language." Because if you look at what we're calling
25 grounds or findings of fact, usually when we refer to

1 grounds we're talking about, you know, a statement of law
2 of some sort. The grounds are based on whatever, but the
3 statutory grounds uniquely in this context really are
4 factual findings. For example, we wouldn't normally say
5 that a ground for something is that somebody left the
6 child alone. That's a finding of fact.
7 So in stating -- in -- I don't know if it's
8 required to be in the order or not. I can't find it
9 either, but it's clearly required to be in the petition,
10 what are the statutory grounds that the state is
11 proceeding on, and so in the judgment the court should be
12 required to state which of those, if any, obviously, it is
13 ruling on, and "in the statutory language" will
14 necessarily provide a factual finding at the level of
15 generality that we want. So I don't know how anybody
16 could complain that they didn't get separate findings of
17 fact if the judgment itself says that "I find by clear and
18 convincing evidence that," quote, subparagraph whatever,
19 "you voluntarily left a child," blah, blah, blah, or "that
20 you abused the child," whatever it is. "It is both a
21 statutory ground and a general finding of fact."
22 CHAIRMAN BABCOCK: Okay. Buddy, let's hear
23 your comments and then let's move on to the next paragraph
24 of 299b, subparagraph (a), for a brief discussion. Buddy.
25 MR. LOW: But the more we relate back to

1 traditional findings of fact, the more chances for delay.
2 I mean, like somebody requests and then we go back to
3 that. Well, it's the child's interest and the speed that
4 we're interested in, so calling it findings of fact and so
5 forth may slow the process down. Now, the appellate
6 judges, they keep talking about for appeal, but not
7 everybody is going to appeal. They don't see the ones
8 that aren't appealed, but that person is entitled to know
9 and should know the grounds on which they lost parental
10 rights. They may -- they don't have to appeal, but if
11 they do know, if they state the grounds, as Judge Peeples
12 said, and they can appeal that ground if they want to.
13 CHAIRMAN BABCOCK: Okay. Richard.
14 MR. ORSINGER: A couple of final points
15 then. Somebody is going to have to think through the
16 consequence of all of this debate that's premised on eight
17 statutory grounds for termination, when you move that over
18 to the noninconsequential cases -- number of cases where
19 we have only managing conservatorship that is not based on
20 a statutory laundry list and if we abandon findings of
21 fact and conclusions of law, we have to do something about
22 Rule 299, which has to do with omitted findings, because
23 we have problems with omitted findings and deemed findings
24 for nonjury trials just like we do jury trials, and that's
25 fixed in Rule 299, and if we abandon the finding process,

1 what do we do about amended -- omitted findings or deemed
2 findings, and we haven't -- we haven't debated that. I've
3 mentioned it several times. The focus of this debate has
4 been on the termination cases, but there is a body of law
5 out there on findings and conclusions that we're stepping
6 away from when we abandon the finding and conclusion
7 process, and we're either going to have to reinvent a
8 parallel universe for this new world of findings inside a
9 judgment or we're going to have to do it by rule.
10 CHAIRMAN BABCOCK: Okay. Richard, are you
11 prepared to defend the next paragraph?
12 MR. ORSINGER: Okay. I'm prepared to --
13 HONORABLE STEPHEN YELENOSKY: Before you do
14 that, can I respond to that? Richard, why is it a problem
15 if you don't change the rule to -- if you change the rule
16 to say, "In an order or judgment terminating parental
17 rights" then you put aside all those orders or judgments
18 that don't terminate, that just establish managing
19 conservatorship.
20 MR. ORSINGER: Well, then what do we do
21 about the 85 -- we have to perfect an appeal and file a
22 brief in an accelerated appeal before the finding of fact
23 process is concluded, which is -- does not work, and so
24 would you suggest that the task force proposals for an
25 accelerated finding process apply to the state custody

1 proceedings and that our findings and conclusions in the
2 decree would apply to termination proceedings? Maybe that
3 would work, but if we just leave managing conservatorship
4 proceedings under the current findings process then we're
5 having briefs filed before we even have findings in some
6 cases, and that's -- that's a dysfunction that we need to
7 try to fix, I feel like.
8 HONORABLE STEPHEN YELENOSKY: Yeah, I can
9 see that. I'm just saying that one of the solutions may
10 be -- because all of this discussion has been about orders
11 in which we're trying to put grounds or findings and there
12 is a termination, that it may be something you want to
13 separate.
14 CHAIRMAN BABCOCK: Justice Jennings and
15 Justice Patterson are not willing to let this thing go.
16 Go ahead.
17 HONORABLE TERRY JENNINGS: I don't know if
18 this would help solve the problem, but going back to what
19 Judge Pemberton said about the confusion between what
20 we're talking about when we say findings of fact, would it
21 be helpful to have a sentence, maybe a first sentence,
22 saying, "In a suit for termination of the parent-child
23 relationship the trial court shall state the grounds for
24 terminating the relationship," and then I think the
25 problem is, is you have in here, Richard, "shall file as

1 findings of fact." Then you would start another sentence
2 saying something to the effect of, "Upon the request of a
3 party, the court shall make its finding of fact," which is
4 the problem I think you were trying to solve all along,
5 which is we want any additional findings made at the time
6 a judgment is filed. Would that help solve the problem of
7 distinguishing between the two, that we're talking about
8 two separate things here? To the extent that a party
9 wants findings, perhaps it could move ahead of time and
10 say, "Look, if you're going to find against me, I'm going
11 to want findings" -- "separate findings of fact," which
12 I'm treating differently as a grounds for termination.
13 MR. ORSINGER: I think that the proposal has
14 a lot of worth, but in a situation where you have a
15 court-appointed representative or a pro se litigant and a
16 managing conservatorship case, we don't want those people
17 waiving their findings because they're ignorant or unable
18 to request them in a timely way. So I feel like in the
19 government sponsored managing conservatorship cases,
20 findings should be required, and if they're not going to
21 be in a judgment then they ought to be required in a
22 separate process, because there's too much waiver. I
23 think.
24 HONORABLE TERRY JENNINGS: But isn't the
25 parent getting -- at least they're getting in the rule --

1 they're getting their ground for termination and if they
2 want to request additional findings.
3 MR. ORSINGER: Well, you're back to
4 termination. I thought you were talking about managing
5 conservatorship.
6 HONORABLE TERRY JENNINGS: No, I'm talking
7 about termination. I'm sorry. We're talking -- again,
8 I'm -- yeah.
9 MR. ORSINGER: Yeah. The idea that there is
10 an optional finding process that stands in addition to the
11 judgment containing findings seems perfectly all right to
12 me as long as we say which one prevails over which in the
13 event of a conflict.
14 HONORABLE TERRY JENNINGS: I hate to say it,
15 but maybe a separate paragraph, one for termination cases,
16 one for managing conservatorship.
17 CHAIRMAN BABCOCK: Justice Patterson, did
18 you have anything else you wanted to add?
19 HONORABLE JAN PATTERSON: I'll let it go.
20 CHAIRMAN BABCOCK: Okay. Now, we've got
21 this next paragraph which is -- deals with judges that are
22 not going to follow the rule --
23 MR. ORSINGER: Okay. So --
24 CHAIRMAN BABCOCK: -- and we'll talk about
25 that until our break, so you guys decide when our break

1 is.

2 MR. ORSINGER: Okay. If I may by way of

3 introduction, this is meant to parallel the existing

4 practice that if you don't have findings you can request

5 them, but it's on an accelerated basis. Obviously you

6 don't need this paragraph if the findings are required to

7 be included in the judgment and you're just going to rely

8 on judgment rules. If the findings are omitted from the

9 judgment then you would have to attack the judgment by

10 some kind of motion to modify judgment rather than filing

11 a reminder.

12 CHAIRMAN BABCOCK: Yeah. Fair enough.

13 Judge Yelenosky.

14 HONORABLE STEPHEN YELENOSKY: Well, again,

15 it's all dependent on needing it, and if the other things

16 go through, we wouldn't, but it's confusing to me -- I'm

17 not sure you mean what you say, because here I am the

18 trial judge, and the first paragraph's told me I have to

19 file the findings with the judgment, right?

20 MR. ORSINGER: Right.

21 HONORABLE STEPHEN YELENOSKY: And so I

22 don't. Day one goes by, day two goes by. My staff

23 attorney says, "Hey, you need to file those findings of

24 fact," and I say, "Oh, yeah, I do," and then comes across

25 my desk a reminder, and it is suddenly giving me an extra

1 15 days. I no longer have the pressure. Why do you want
2 to do that? It seems to me you don't want to extend it by
3 request. You simply want to say after X period of time if
4 a judge has not filed findings of fact then you can ask
5 the appellate court to order him or her to do it, and in
6 the meantime if you want to refer to attorneys sending
7 reminders to judges, that's fine, but it shouldn't extend
8 it.
9 CHAIRMAN BABCOCK: Justice Christopher.
10 MR. ORSINGER: Well, if I can respond, we
11 have to decide whether there is a reminder process at all,
12 and if so, how many days does it take to trigger the
13 reminder, and a lot of people would say that they want a
14 reminder process, not a motion in the appellate court
15 because sometimes it will be inadvertent and the trial
16 judge will fix it for me.
17 HONORABLE STEPHEN YELENOSKY: I'm not saying
18 you shouldn't have a reminder process.
19 MR. ORSINGER: So what's the time --
20 HONORABLE STEPHEN YELENOSKY: I'm saying the
21 reminder should not extend it beyond whatever cut off time
22 you have.
23 MR. ORSINGER: What I'm asking you then is
24 how many days would you suggest that we have to file the
25 reminder?

1 HONORABLE STEPHEN YELENOSKY: No deadline.
2 You just put a deadline saying -- because in the first
3 paragraph you've told me as a trial judge I'm supposed to
4 do this. Then you set a deadline by which if I haven't
5 done it the appellate court can order me to do it. In the
6 meantime if you want to refer to "counsel may send a
7 reminder to the judge that it was supposed to be filed
8 with the judgment," that's fine, but there shouldn't be
9 any deadline for them to remind me nor should their
10 reminder give me more time than I would otherwise have.
11 CHAIRMAN BABCOCK: Justice Christopher.
12 HONORABLE TRACY CHRISTOPHER: I agree. I
13 would eliminate the reminder notice because that
14 eliminates the trap of, well, you forgot to send a
15 reminder notice, so now you don't get your findings of
16 fact. So, you know, if we're going to make something
17 totally different, let's get rid of all of those sort of
18 ridiculous requirements that are in 296 through 299 now in
19 terms of past due notices and you waive them if you
20 haven't done everything exactly when you were supposed to
21 do it.
22 CHAIRMAN BABCOCK: Professor Dorsaneo.
23 PROFESSOR DORSANEO: Yeah, we ditched that
24 in the -- in our last go round for the normal rules.
25 CHAIRMAN BABCOCK: Right. Right. Okay.

1 Justice Patterson.

2 HONORABLE JAN PATTERSON: And my experience

3 is that a lot of courts seem to wait for that second

4 notice, because it does give them -- it does extend their

5 time, and that may be actually where like 50 percent of

6 the litigation is, is, "Well, I requested the judge" -- or

7 you didn't, or the waiver. Very often there's a waiver

8 argument that they didn't make that request, so I think

9 that is a really troubled paragraph, and I've never

10 understood where we got that from, and I wonder if -- if

11 we eliminate that and if we say that -- in the paragraph

12 above that findings of fact may be filed with the clerk so

13 that leaves it open as to whether the findings can be in

14 the original judgment or separate, that we provide that

15 option, but I definitely agree we ought to get rid of the

16 reminder. That's a trap.

17 CHAIRMAN BABCOCK: Okay. Any other comments

18 on this paragraph? All right. We're on a break.

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

20 CHAIRMAN BABCOCK: In the house today is

21 Katie Fillmore, who may be making comments. That's Katie

22 back there.

23 MR. ORSINGER: And Katie is with the Supreme

24 Court --

25 MS. FILLMORE: Commission for Children,

1 Youth, and Families.
2 MR. ORSINGER: Permanent Supreme Court
3 Commission for Children, Youth and Families, and Katie
4 worked on our task force all the way and is really
5 involved in these matters. She passed some very long
6 notes during the morning debate, so we've now authorized
7 her to share her insights with us directly.
8 Before we move on from the last subject
9 matter, Carl Hamilton utilized the break perhaps more
10 industriously than the rest of us, and he has found a
11 provision in the Family Code that may help us on these
12 managing conservatorship cases. It's section 263.403 of
13 the Family Code. It's titled "Monitor return of child to
14 parent," and it has to do with one of those situations
15 where the child has come back up for review and the court
16 can -- rather than either dismissing the case or rendering
17 a permanent judgment the court can issue a temporary
18 order, but if the court issues a temporary order, it's
19 required to, and I quote, "include in the order specific
20 findings regarding the grounds for the order." And they
21 mention that later on, "If the court renders an order
22 under this section, the court must include in the order
23 specific findings regarding the grounds for the order."
24 Now, what would be wrong with borrowing that
25 language for final decrees involving -- appealable decrees

1 involving child managing conservatorship for the state by
2 saying that "Any order that fits that category of managing
3 conservatorship to the state shall include in the order
4 specific findings regarding the grounds for the order."
5 That's language in the Family Code. I haven't heard any
6 complaint that it doesn't work. It follows the debate
7 that we had about termination, but obviously we don't have
8 a statutory checklist that we can require be mentioned,
9 but that's an alternative that seems to me to be very
10 workable, and then the question is just how do you design
11 the Rule 299b so that we have two tracks, one for
12 termination cases and custody cases.
13 MS. SECCO: Can you repeat the section of
14 the Family Code?
15 MR. ORSINGER: Yes. That was section
16 263.403, and it has to do with monitored return of child
17 to parent, and I would like to thank Carl Hamilton for
18 finding that, because Carl doesn't have many of those
19 cases.
20 CHAIRMAN BABCOCK: We all thank Carl and
21 wonder how in the world he did find it, but we'll leave
22 that to another day. Okay, let's go to paragraph (b).
23 MR. ORSINGER: Okay. Now, remember that
24 just because there may be a consensus here that we're
25 going to have all findings on termination cases in the

1 decree that that doesn't foreclose the Supreme Court from
2 having a finding and conclusion process that's
3 independent, so we're going to follow that through. There
4 was a strong feeling we should eliminate the notice of
5 past due findings, and so I don't know whether subdivision
6 (b) really is going to be necessary if we don't even have
7 a reminder process, but somebody should have the right to
8 complain if the court has failed to rule on an affirmative
9 claim or defense that's important to them, and if we --
10 the task force is treating it like it's a separate
11 finding, and we have an ordinary process of amending or
12 requesting additional.
13 If we put them in the decree then we either
14 have to allow a separate rule process for requesting that
15 the findings or conclusions in the decree be amended or we
16 don't have it at all, and we just say if you don't like
17 the decree, including the findings in the decree and
18 including the conclusions in the decree, then Rule 329b
19 let's you file a motion to modify judgment, so go over
20 there and handle it in the judgment arena rather than this
21 fact finding process which we have now discontinued for
22 these kind of cases.
23 So this is -- you will see this is the very
24 same process about additional or amended other than the
25 timetable is accelerated. We have the same issue about

1 serving on the party in accordance with Rule 21a. There
2 was a proposal Justice Christopher made that you ought to
3 be able to hand it to them if they're in court or you
4 ought to be able to e-mail it to them, and there has to be
5 deadlines if there's going to be a -- there must be a
6 deadline to request amended or additional findings and
7 conclusions, and there must be a deadline to respond to
8 them. So I'll open that up, I guess.
9 CHAIRMAN BABCOCK: Okay. Any thoughts about
10 that? Yeah, Professor Dorsaneo.
11 PROFESSOR DORSANEO: Well, on that mailing
12 business, I looked and for -- this may be a slight
13 digression. I don't think so. I think it's within the
14 issues that you're raising, but on the mailing issue the
15 provisions of Rule 306(a) that talk about providing notice
16 of the judgment, provide for mailing by first class mail,
17 you know, in an envelope, not in some other manner. The
18 current rules on findings of fact that have to do with the
19 findings themselves being provided provide for mail, just
20 as your original draft says, and I suppose mail normally
21 meant to most people first class mail and not e-mail and
22 not third class mail. So I would suggest on the mail
23 business that we make -- that we say "first class mail"
24 and then maybe some -- and then maybe some other things,
25 which will make this rule a little bit inconsistent with

1 the -- with the 296 through 299 rules, but we can worry
2 about that later.
3 CHAIRMAN BABCOCK: Okay. Any other
4 comments? Judge Yelenosky and then --
5 HONORABLE STEPHEN YELENOSKY: Are you
6 suggesting that we do require it to be by mail or that we
7 start with that and then list other things?
8 PROFESSOR DORSANEO: Well, I just was --
9 mail is what we -- what -- and I think that means first
10 class mail, is what we go by. We don't use Rule 21a
11 because this isn't exactly a notice or a pleading or
12 something covered by 21a.
13 HONORABLE STEPHEN YELENOSKY: And you're not
14 speaking of the earlier part of the rule where the court
15 sends the findings. We didn't resolve that, I guess.
16 There was some talk about whether that should say "mail."
17 PROFESSOR DORSANEO: No, but to me, saying
18 "mail" there is consistent with the way -- consistent with
19 the way the findings rules operate now.
20 HONORABLE STEPHEN YELENOSKY: And in
21 practice, though, if we fax it nobody complains.
22 PROFESSOR DORSANEO: Yeah, the biggest
23 problem is when you don't fax it or send it, which happens
24 a lot, because then your time runs out to do anything
25 about it.

1 CHAIRMAN BABCOCK: Okay. Justice
2 Christopher.
3 HONORABLE TRACY CHRISTOPHER: Well, I just
4 wanted to say one more thing about the, you know, past due
5 notice. If the Court does decide to keep the past due
6 notice in there, it's unclear for me whether the failure
7 to request a past due notice has any effect and whether
8 you can still ask the appellate court for an order if you
9 haven't done the past due notice. So although I still
10 think we should eliminate it, that seems like it's a hole
11 right there.
12 MR. ORSINGER: Well, I agree totally. We do
13 not want waiver because we can expect poor compliance, and
14 I don't know where you would say that this is the
15 requirement but you don't really have to follow it because
16 it doesn't hurt you if you don't, but maybe we ought to
17 just all agree that we won't affirm based on the failure
18 to comply, but I also --
19 HONORABLE TRACY CHRISTOPHER: But there's
20 old case law that says you're out of luck.
21 MR. ORSINGER: I know. That's why we might
22 need some new case law. I'm hoping we don't need another
23 10 years of all the ins and outs of the Alice In
24 Wonderland of Rule 296 stuff.
25 Let me also point out that the -- we skipped

1 over the paragraph 299b(a) second subdivision, which says
2 that the remedy for the court failing to give you findings
3 is to file a motion with the court of appeals. That's
4 kind of radical. Initially the people on the task force
5 wanted a mandamus, which is unnecessary, and so I think
6 the view was, look, it's a simple fix. The way it's done
7 right now, if you are careful enough to see your deadline
8 and remind the court that they didn't and the court still
9 doesn't give it to you, then typically you put it as a
10 point of error in your brief, and sometimes the appellate
11 court will say it's unnecessary to the appeal, so it's
12 harmless error. Other times they'll say, "We can't decide
13 the appeal so we're going to abate the appeal and remand
14 it to the trial court to forward findings." So then you
15 get to rebrief the whole case.
16 Well, we don't want that. We want it fixed
17 before the finding is filed, and so our thought is, look,
18 if the appellate court has jurisdiction and if the judge
19 isn't playing ball, why don't we just file a motion with
20 the court of appeals and get it ordered and then the judge
21 will play ball, and then you'll find out there was an
22 e-mail that we'll have to discuss at the end of this
23 process that it should state that the motion with the
24 court of appeals must be filed after the notice of appeal
25 is filed, because I don't think the appellate court has

1 jurisdiction of a motion other than ancillary to its
2 appellate jurisdiction, which is triggered by the filing
3 of the notice of appeal. So we'll come to that in a
4 minute, but we've kind of skipped the seriousness of that,
5 but that's a large departure from current practice, is
6 that you just file a motion and complaint and you get an
7 order right away in two or three days, and then the trial
8 judge is going to be held in contempt if they don't give
9 you findings, so we regress there, Chip.
10 CHAIRMAN BABCOCK: Oh, I don't think it's
11 regression.
12 HONORABLE JAN PATTERSON: Why did you reject
13 mandamus?
14 MR. ORSINGER: Because that requires
15 somebody who's probably never handled an appeal, much less
16 a mandamus, to do a mandamus and get it all right.
17 HONORABLE JAN PATTERSON: Okay.
18 MR. ORSINGER: And the first two or three or
19 four or five mandamuses you file you don't get right, and
20 so that means the clerk calls you and says the staff
21 attorney tells you you didn't do this, you didn't do that.
22 Why do we need all that? All we want is some findings
23 from a judge whose job it is to give them to you. So the
24 idea is, look, it's not a big discretionary deal. You
25 don't need a reporter's record to decide. You've either

1 got the findings or you don't. If you don't, you need
2 some kind of letter, order, private telephone call,
3 something from the court of appeals to the trial judge
4 saying "Get with it."
5 CHAIRMAN BABCOCK: Justice Gray.
6 HONORABLE TOM GRAY: Richard, if I
7 understand the timing of the reminder notice and
8 provisions, that's going to have to occur -- the trial
9 court's ultimate failure in that responsibility is going
10 to have to occur more than 20 days after the date the
11 final order was signed, and therefore, the appeal will
12 have to have been perfected by that date because it's an
13 accelerated appeal, notice of appeal due in 20 days.
14 MR. ORSINGER: Okay. So that means if they
15 perfect their appeal on time and don't request an
16 extension or whatever then you're saying it automatically
17 follows that the motion to the court of appeals will be
18 later than the perfection date. Okay. Well, that's --
19 HONORABLE TOM GRAY: It seems to be
20 mathematically impossible to do it otherwise, but --
21 MR. ORSINGER: Okay. Then maybe we don't
22 need that. You'll see. It's not in the task force
23 report, but there was, if you will, an undercurrent of
24 minority view that we should put a little sequence in
25 there. We'll discuss that later, but perhaps it's not

1 necessary.

2 HONORABLE STEPHEN YELENOSKY: But you still

3 need to note that point because the Supreme Court could

4 decide that the numbers should be less than those.

5 MR. ORSINGER: Okay. Well, we have an

6 e-mail on that that I was going to take up later. We can

7 take it up now, but it hadn't been passed out yet.

8 CHAIRMAN BABCOCK: Justice Christopher.

9 HONORABLE TRACY CHRISTOPHER: Well, this

10 particular rule says "after an appeal is perfected." I

11 think the e-mail that you're talking about is in reference

12 to a different motion.

13 MR. ORSINGER: Well, then I withdraw it

14 then.

15 HONORABLE TRACY CHRISTOPHER: So, I mean,

16 this one specifically says "after an appeal is perfected,"

17 so it's not --

18 MR. ORSINGER: Good. I'm glad you pointed

19 that out. I'm wrong. I brought the other debate into

20 this one, and we didn't need it. I apologize. "After an

21 appeal is perfected," which may be unnecessary Justice

22 Gray says.

23 PROFESSOR DORSANEO: Doesn't hurt anything.

24 MR. ORSINGER: No, it certainly doesn't.

25 And this is a recipe for someone that may be doing their

1 first appeal, so --
2 CHAIRMAN BABCOCK: Okay. Justice
3 Christopher.
4 HONORABLE TRACY CHRISTOPHER: Just one other
5 thought. I like the idea of the motion. If you eliminate
6 the past due notice, you might serve a copy of the motion
7 on the trial court judge, just so he knows or she knows
8 that, oh, I have forgotten to do this and I better start
9 working on it.
10 MR. ORSINGER: Well, it certainly is
11 consistent with the view that we should try to fix the
12 error in the trial court before we complain to the court
13 of appeals, and we're sort of giving that up in the
14 acceleration process, but we certainly don't want an
15 additional delay with a judge who is noncompliant in a
16 directive that was not discretionary to begin with. So
17 that's well-taken, that it -- you don't require first
18 notice to the judge, but you require that a copy of your
19 motion to the court of appeals be given to the judge, and
20 that gives them a day or two to comply before they get
21 rebuked by the appellate court.
22 CHAIRMAN BABCOCK: Good point. Okay. Any
23 other comments about this? All right. Now the easy stuff
24 is behind us, let's go to Appendix B.
25 MR. ORSINGER: Okay. So, now, when the

1 Legislature in House Bill 906 says it's going to be an
2 accelerated appeal, that is very meaningful, but there's a
3 lot of implications to that, because there are different
4 kinds of accelerated appeals; and some of them are in the
5 accelerated appeal rule and some of the applicable
6 provisions are not; and accelerated appeals are confusing;
7 and they have different dates; and statutes have different
8 deadlines on different accelerated appeals; and it's not
9 the easiest thing in the world to figure out when to
10 perfect your accelerated appeal, when your motion for new
11 trial is due, when your reporter's record and clerk's
12 record is due, when your brief is due; and it was our view
13 that there will be a lot of lawyers that are looking at
14 the Rules of Appellate Procedure for the first time on an
15 extremely short deadline and the best thing we could do
16 for them would be to create a new subdivision of the
17 appellate rule on accelerated appeals that contains
18 everything they need to know; and if we don't repeat it,
19 we cross-refer to it so they know where to look, because
20 right now, you really do have to look through three or
21 four rules to figure out what all your deadlines are on an
22 accelerated appeal.
23 The first thing that's's mentioned in
24 Appendix B is the mandate, and that's really the last
25 thing we considered, but mandates are issued by the court

1 of appeals if there's no appeal to the Supreme Court or if
2 the Supreme Court denies review. If the Supreme Court
3 reverses or affirms then the mandate comes from the
4 Supreme Court. Somebody correct me if I'm wrong.
5 MS. SECCO: That's right.
6 MR. ORSINGER: Okay. So one of the delays
7 that apparently the courts of appeals have experienced as
8 a practicality is that the mandate does not come out as
9 soon as it could, and that reason for that may vary from
10 court of appeals to court of appeals, but the truth is the
11 judges sign an opinion that states their ruling on the
12 issues and then they remand for further proceedings
13 consistent with this opinion, and then it's somebody else
14 besides an appellate judge has to write a judgment. I
15 think. I've never served on an appellate court, but
16 correct me if I'm wrong, and then after the judgment is
17 written then somebody has to do a mandate which excerpts
18 the controlling part of the judgment, and it's actually
19 the mandate that goes back to the trial court clerk, and
20 the mandate is what they're supposed to follow, not the
21 judgment and not the opinion.
22 And so there's a drafting process that's
23 associated with this, and judgments and opinions are
24 handed down on the same day, in my experience, but
25 mandates always occur later, and there's always a backlog,

1 and there's unnecessary delay. It's just pure
2 administrative delay on the mandates, and there are
3 deadlines on mandates right now, but from what I'm hearing
4 they're not necessarily observed uniformly across the
5 state. So one of the things the task force thought we
6 could do was to really tighten up the mandate delay, and
7 we discussed all these different rules and different
8 dates, and I think that the ultimate conclusion was that
9 all we should do is say the mandate should be issued very
10 quickly and not put in a very specific date deadline.
11 So Rule 18.6 says that "In cases subject to
12 Rule 28.4 the clerk shall" -- that rendered the
13 judgment -- "the clerk of the court that rendered the
14 judgment must issue the mandate on the first date that may
15 be issued under Rule 18.1." And Rule 18.1 then is going
16 to be a general mandate rule, and so we didn't change any
17 timetables. We just reminded everybody that the rule is
18 not the first day when you can send the mandate. It's the
19 last day when you can send the mandate. So that's all
20 there is on that.
21 CHAIRMAN BABCOCK: Okay. Any comments on
22 that?
23 HONORABLE TOM GRAY: There are some
24 different procedures within the courts of appeals on how
25 judgments get written and approved, and they're not all

1 like Richard described, but not that would substantively
2 affect this and --
3 CHAIRMAN BABCOCK: Does that impact how the
4 language of this 18.6(b) should be written?
5 HONORABLE TOM GRAY: No, I was trying to
6 find -- the Court of Criminal Appeals just modified their
7 rule on mandates, and I was -- I don't think I wound up
8 with that here, but I was trying to compare what they did.
9 There's --
10 CHAIRMAN BABCOCK: What rule book is that
11 in?
12 HONORABLE TOM GRAY: Well, it's in the Rules
13 of Appellate Procedure, but they just ordered it I think
14 last week; and what happened, there was a rule that, as
15 y'all may or may not know since most of y'all practice in
16 the civil arena, in the criminal petition process the
17 petitions used to get filed with us and then we would
18 forward that to the CCA; but we had a -- it used to be a
19 30-day and then it changed to a 60-day window in which we
20 could modify the opinion after the petition was filed with
21 the -- with us and before it was forwarded to the CCA; and
22 in changing the rules and the issuance of the mandates,
23 there are -- where the petitions would get filed now with
24 the Court of Criminal Appeals, they don't want us issuing
25 the mandate while the petition is filed or pending at the

1 higher court; and they modified their rule on that; and I
2 don't remember exactly how it would work into this; but I
3 don't think it's going to impact what we're doing here on
4 the mandates.
5 CHAIRMAN BABCOCK: But you're saying the
6 Court of Criminal Appeals amended or supplemented 18.6 of
7 the TRAP rules?
8 MS. SECCO: No, I'm looking at it right now.
9 It's Rule 31.4, stay of the mandate.
10 HONORABLE TOM GRAY: And it's a rule that's
11 particular to criminal cases.
12 MS. SECCO: Criminal cases.
13 HONORABLE TOM GRAY: And also, Richard,
14 there is a provision that it's the -- the mandate requires
15 the lower court to enforce or the trial court to enforce
16 the judgment.
17 MR. ORSINGER: Of the appellate court?
18 HONORABLE TOM GRAY: Of the appellate court.
19 MR. ORSINGER: Okay. Then I misstated that.
20 HONORABLE TOM GRAY: But it doesn't affect
21 what you're proposing as a rule change.
22 MR. ORSINGER: Okay. I got out on thin ice
23 when I was talking about how the courts of appeals -- I
24 just see it from the standpoint of a practitioner.
25 CHAIRMAN BABCOCK: That's okay. We'll pluck

1 you out of that freezing water. Keep going.

2 MR. ORSINGER: I'll try not to go out on

3 thin ice again. Now then, Rule 20 is something that we've

4 already visited because it was part of the September 1

5 proviso, but it has to do with the presumption of

6 indigence, and I don't see any reason to discuss that

7 again unless somebody else has a new insight.

8 CHAIRMAN BABCOCK: Gene. New insight.

9 MR. STORIE: The only thought I had was

10 maybe to say "contested" rather than "challenged," just to

11 match everything up.

12 MR. ORSINGER: Okay. Let's think about

13 that. I don't know if the word "challenged" is there

14 because it's in another rule or because it's in a statute

15 or whether we just picked it.

16 MS. SECCO: I think we used the word

17 "challenge" or the task force used the word "challenge"

18 because it's in Rule 20.1. The current Rule 20.1 on

19 contest to indigence uses challenge when there's a contest

20 to the affidavit, so we just used the same language for

21 the presumption, but that doesn't mean it's the best

22 language.

23 MR. ORSINGER: Or maybe both rules should be

24 changed, but they probably shouldn't be inconsistent.

25 MS. SECCO: Right.

1 MR. ORSINGER: I mean, they wouldn't
2 conflict, but they would not be the same word for the same
3 concept.
4 MR. STORIE: Right.
5 CHAIRMAN BABCOCK: Keep going.
6 MR. ORSINGER: And we furthermore, we call
7 that a contest. Even though it can be challenged, in the
8 next two sentences they're called a contest.
9 MR. STORIE: Right.
10 MR. ORSINGER: You see that, Marisa?
11 MS. SECCO: Uh-huh.
12 MR. ORSINGER: Yeah. So we ourselves in the
13 same rule are describing it differently, and then here in
14 the top of page 15, "The party filing the contest must
15 prove that the parent," so at any rate, there you have it.
16 CHAIRMAN BABCOCK: All right. Keep going.
17 MR. ORSINGER: We will -- let's process on
18 through the rest of that rule because that's all behind
19 us. Now we'll go onto the real --
20 CHAIRMAN BABCOCK: Professor Dorsaneo has a
21 comment.
22 MR. ORSINGER: Oh, you do? Okay.
23 PROFESSOR DORSANEO: I wanted to -- that
24 second paragraph under (e), "The contest must
25 articulate" -- pretty good word there instead of "state"

1 -- "facts showing a good faith belief that the parent is
2 no longer indigent," does that good faith come from -- is
3 that some kind of a statutory requirement or I'm wondering
4 about "good faith" being in there.
5 MS. SECCO: It's not in the statute that
6 provides for this challenge procedure, which is -- I'll
7 have to look at the bill really quickly.
8 PROFESSOR DORSANEO: I looked. I didn't see
9 it myself, but that doesn't mean it's not there.
10 MR. ORSINGER: It may be in the Family Code
11 because originally this contest procedure was described
12 only for the appointment of a trial lawyer, not an appeal.
13 We're just piggybacking on it.
14 MS. SECCO: It's in section 107.103 of the
15 Family Code as amended by -- and it just states that "A
16 parent is presumed indigent unless the court determines
17 that a parent is no longer indigent due to a material and
18 substantial change," but it does not say anything about
19 good faith.
20 PROFESSOR DORSANEO: Well, we're talking
21 about this contest being done by a clerk, a court
22 reporter, a court recorder, you know, some governmental
23 person.
24 MR. ORSINGER: What we were told is that in
25 these kinds of cases the reporter will be paid by the

1 county, so it is unlikely that the reporter would file a
2 contest in this kind of case. I was unclear whether the
3 clerk's record would be paid for independently other than
4 by the same county, and so I think that the feeling was it
5 would likely be the county attorney who was filing the
6 objection to -- pardon me, the contest or was contesting
7 or challenging the continued indigency. So it's likely
8 going to be a representative of the county but not the
9 court reporter.
10 MR. JACKSON: Where does it say --
11 CHAIRMAN BABCOCK: Hang on. David Jackson.
12 MR. JACKSON: Where does it say that in the
13 rules, though, Richard? The only place I can find where
14 anybody else is responsible for the record is Rule 20.02,
15 and that's in criminal cases.
16 MR. ORSINGER: I do not know the answer to
17 that. All I can tell you is that the county attorney that
18 was on the task force said that the county is required to
19 pay for it. Now, if she's wrong then I'm wrong.
20 MR. JACKSON: That's the only place I've
21 been able to find that we get paid by anybody, is in a
22 criminal case.
23 MR. ORSINGER: Well, do you know whether
24 it's a practice that the reporter is paid for these
25 records?

1 MR. JACKSON: Well, that's why it's in the
2 rules that we can object to it. I mean, that's been kind
3 of an issue that's been ongoing for decades in indigency
4 cases.
5 MR. ORSINGER: Well, David, let me be sure.
6 Are you saying that there's a gap in the rules or statute
7 or are you saying --
8 MR. JACKSON: Well, in some --
9 CHAIRMAN BABCOCK: Don't talk over each
10 other. Hang on.
11 MR. ORSINGER: Are you saying that there are
12 instances in which court reporters are not being paid for
13 these kinds of indigency records?
14 MR. JACKSON: Right. If they're truly
15 indigent, the court reporter pays for it. The court
16 reporter pays somebody to transcribe their notes or does
17 it themselves and doesn't charge anyone.
18 MR. ORSINGER: Okay. That's completely
19 contrary to what the task force understood.
20 MS. SECCO: I think that it's in the Family
21 Code --
22 MR. JACKSON: If it's in there --
23 MS. SECCO: -- requiring the county to pay
24 for the record for an indigent party.
25 MR. JACKSON: Can you tell me what rule it

1 is? Because if it's in there, Richard's right, we don't
2 need to have any issue with it.
3 MS. SECCO: Section 109, and Katie Fillmore
4 is here with the children's commission. I just asked her.
5 MS. FILLMORE: 109.003.
6 CHAIRMAN BABCOCK: Of the Family Code?
7 MS. FILLMORE: Uh-huh.
8 MR. ORSINGER: What does it say, Katie, for
9 those of us who don't have it? Can you read it out?
10 Okay. 109.103, "Payment for statement of
11 facts," subdivision (a), "If the party requesting a
12 statement of facts in an appeal of a suit has filed an
13 affidavit stating the party's inability to pay costs is
14 provided by Rule 20, Rules of Procedure" -- "Appellate
15 Procedure and the affidavit is approved by the trial
16 court, the trial court may order the county in which the
17 trial was held to pay the costs of preparing the statement
18 of facts. (b), nothing in this section shall be construed
19 to permit an official court reporter to be paid more than
20 once for the preparation of the statement of facts." So
21 that's a "may." By the way, you don't object to (b), do
22 you?
23 MR. JACKSON: No.
24 MR. ORSINGER: That's a "may" and not a
25 "must," so it may be that it's the county commissioner's

1 decision whether to pay the court reporters and they're
2 not actually required to, but they just happen to in
3 Houston.
4 CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.
5 PROFESSOR DORSANEO: I'm going back. So you
6 said the county is the one that challenges if it's not
7 going to be the court reporter, and I guess if the court
8 reporter is not getting paid in a particular place, the
9 court reporters will challenge, but you said the county.
10 How does the county get the right to contest? Is the
11 county in some way a party?
12 MR. ORSINGER: Well, the county attorney is
13 the lawyer who's prosecuting the case for the Department
14 of Family and --
15 PROFESSOR DORSANEO: Protective.
16 MR. ORSINGER: -- Services.
17 PROFESSOR DORSANEO: Yeah. So -- all right,
18 so you talk the Department of -- I have to look myself --
19 Family and Protective Services, it's talked into making
20 this contest by its attorney?
21 MR. ORSINGER: No, what we are told, and I
22 do not litigate these, so I can't speak from personal
23 experience, but what we were told is that it's the county
24 attorneys that file it if anybody files it because the
25 clerk -- the county pays for the clerk's record no matter

1 who pays for it. The reporter is paid by the county, so
2 it's only the county attorneys that do it, and some
3 counties are aggressive about that, and some counties are
4 not aggressive about that, is what we understood.
5 PROFESSOR DORSANEO: Okay. But in that
6 sentence that I started talking about, I suggest that
7 "good faith" be -- we talk about whether "good faith"
8 should be in there, because "good faith" in this context
9 seems to me a little bit out of place, and it seems to me
10 it ought to be an objective test as to whether somebody is
11 no longer indigent, okay, which ought to involve things
12 that can be added up perhaps, and I also object to the
13 use -- to articulating things because I think that means
14 the same thing as "state," but maybe articulating is a --
15 MR. ORSINGER: What if it's an inarticulate
16 statement?
17 CHAIRMAN BABCOCK: Justice Bland.
18 HONORABLE JANE BLAND: The county appears --
19 the county attorney appears on behalf of the district
20 clerk, and it's often a different lawyer, different -- in
21 a county as large as ours it's a different department of
22 the county attorney's office. It's not somebody
23 representing the DFPS, and often -- or sometimes this
24 contest is a form that they file and -- in which they say,
25 "The affidavit of indigency doesn't comply and it doesn't

1 state specific facts," so to the extent that y'all have
2 recommended the good faith belief, I don't think that's
3 such a bad idea because I know for a while it was just the
4 routine in some sorts of cases in Harris County that if an
5 affidavit of indigency was filed, a contest, a form
6 contest, was automatically filed in response. So to
7 encourage a review and a thoughtful decision about whether
8 or not to contest indigency, I think the "good faith"
9 sentence in there is good.
10 CHAIRMAN BABCOCK: Okay. Professor
11 Dorsaneo.
12 PROFESSOR DORSANEO: Maybe "good faith"
13 means honesty in fact, doesn't it? So is that what we
14 want to litigate, is whether these people are liars?
15 MR. ORSINGER: You know, we gave some
16 consideration to requiring that the contest be under oath,
17 et cetera, et cetera, but this contemplates that there's
18 going to be a hearing with sworn testimony, and so, you
19 know, you could argue that if a contest was filed in bad
20 faith and the evidence made it clear then the court has
21 the sanction power if it wishes, and that good faith may
22 or may not make it any different from what you would have
23 at the end of a hearing where something was advanced in
24 bad faith or without attention to the true facts.
25 CHAIRMAN BABCOCK: Justice Christopher, and

1 then Justice Gray and Justice Patterson.
2 HONORABLE TRACY CHRISTOPHER: Well, I'm
3 hopeful that since we already have a presumption of
4 indigence that these contests will be few and far between,
5 but what I would like is that the rule would say that the
6 contest must state specific facts showing that the parent
7 is no longer indigent. Otherwise, the pleading will say,
8 "The parent is no longer indigent due to a material and
9 substantial change in the parent's financial
10 circumstances." There won't be a single fact in there.
11 MR. ORSINGER: Is it practical that the
12 person who may be making the contest will even have access
13 to the facts?
14 HONORABLE TRACY CHRISTOPHER: Then they
15 shouldn't be contesting it on the grounds that there was a
16 substantial and material change unless they have the
17 facts.
18 MR. ORSINGER: Well, I mean --
19 HONORABLE TRACY CHRISTOPHER: And that's our
20 problem with the boilerplate that happens.
21 MR. ORSINGER: From the court reporter's
22 side, though, if, in fact, court reporters do file these
23 because judges may but are not required to have the county
24 pay, if they, I guess, sat through the entire trial then
25 perhaps they would be aware if they -- if the testimony

1 revealed that they had assets that were more than what the
2 trial court originally thought, but if a court reporter is
3 there for just a few days, didn't hear the whole trial, I
4 mean, requiring a factual predicate in advance of
5 triggering the hearing, does that adequately protect the
6 people whose resources are being called upon, would be the
7 question. That's what we considered.
8 HONORABLE TRACY CHRISTOPHER: Well, there's
9 no discovery in these contests, so basically everybody
10 just shows up and has a contest, and you know, if you
11 don't require them to have some sort of factual showing,
12 they'll contest everything, and then you'll have to have a
13 hearing on every single one, at which point the parent
14 will say, "I have no facts, I have no cash, I have no job,
15 I'm still poor," and the court reporter will say what? I
16 mean, you know, I mean, that's why I think they ought to
17 have the facts ahead of time. They ought to know that
18 she's got a bank account or they ought to know that she
19 has a job or, you know, something. They ought to know
20 those facts ahead of time before they file this.
21 CHAIRMAN BABCOCK: Justice Gray.
22 HONORABLE TOM GRAY: Nice discussion, and it
23 may or may not be something that you can get to, because
24 the contest has to be filed within three days of the
25 notice of appeal, and there's no provision that the court

1 reporter be provided with the notice of appeal, so they
2 may not even know that it's happened. The clerk may get a
3 copy of the notice of appeal, but not necessarily,
4 because -- immediately, because the notice of appeal may
5 get filed with the appellate court instead of the trial
6 court. So it's going to be real easy for that three days
7 to disappear before anybody that wants to contest it is
8 there.
9 The only one of these that I have ever seen
10 successfully contested in our court, the indigent parent
11 tried to negotiate with the court reporter to trade some
12 antique furniture that she had leftover from when she went
13 out of the antique business for the -- for the record and
14 so the reporter contested the indigent status at the
15 appropriate time, and they had found a reference in the
16 county clerk's office to a piece of property. They didn't
17 run the record and see how much the indebtedness on the
18 property was, and this may or may not factor into this
19 notice and contest provision, but the -- it was fairly
20 obvious to me as I wrote my dissent that the parent or
21 previous parent whose rights had been terminated had no
22 present financial ability to pay for the record.
23 Now, we might could have abated the appeal
24 while she sold the antique furniture or sold the piece of
25 property and tried to convert it to cash to pay for it,

1 but it just wasn't there; and so ultimately we wound up
2 abating it for another hearing on indigency, and the new
3 trial judge determined that she was indigent; and it went
4 on, but it -- they don't happen very often; but when these
5 contests occur, they do take up an inordinate amount of
6 time in the appellate process because, as you would
7 expect, the reporter or if it's the court clerk that's
8 doing it, they don't start the record until they get the
9 financing worked out; and this is just a very
10 time-consuming process once you get off into that; and
11 given the unlikelihood of someone recovering from this
12 presumption, I'm with Judge Christopher that anything we
13 can do to make sure that the contest is a real contest we
14 need to do it, because this is a black hole for time on
15 these cases.
16 CHAIRMAN BABCOCK: Justice Patterson.
17 HONORABLE JAN PATTERSON: I agree. We're
18 talking -- the reason we have the presumption is to avoid
19 delay, and this is also a second stage of the indigency
20 analysis, so it should contemplate some material change in
21 circumstances that can be shown by facts and not a good
22 faith assertion, and so I would urge the contest must
23 state facts demonstrating that the parent is no longer --
24 and I think it's going to come out at the trial or there
25 will be some knowledge or -- but it should be -- should

1 have some basis in fact.
2 CHAIRMAN BABCOCK: All right.
3 HONORABLE TERRY JENNINGS: I have a
4 question.
5 CHAIRMAN BABCOCK: Yeah, Justice Jennings.
6 HONORABLE TERRY JENNINGS: Refresh my memory
7 here. Does this new presumption of indigency that's
8 ongoing, the trial court sua sponte can't say, "I hereby
9 find you're not indigent anymore" under the new law? I've
10 seen situations where someone was appointed counsel for
11 trial and then the trial court will sua sponte say,
12 "You're on your own as far as the appeal goes," which I
13 thought was part of the problem the presumption language
14 in the new statute was supposed to get rid of.
15 MS. SECCO: It does say -- the statute
16 specifically says "unless the court after reconsideration
17 on the motion of the parent, the attorney ad litem, or the
18 attorney representing the governmental entity," so it
19 contemplates that there's a motion filed by one of those
20 parties, although --
21 MR. ORSINGER: They don't list the clerk or
22 the court reporter, do they?
23 MS. SECCO: No. Well, they do say "an
24 attorney representing the governmental entity."
25 MR. ORSINGER: Well, but I don't think the

1 court reporter would be covered by that. The clerks might
2 be. What section are you reading?
3 MS. SECCO: Section 107.013. The rule was
4 written in the passive rather than stating who the
5 challenger would be, and I think there was some confusion
6 about who -- you know, who was contemplated to be a
7 challenger.
8 HONORABLE TERRY JENNINGS: I think the law
9 as it is, can't a trial court say -- and I know we're not
10 talking about the appointment of counsel, but under the
11 law as it currently reads can a trial court continue to
12 sua sponte say, "Okay, well, I appointed you a lawyer for
13 trial, but you're on your own as far as appeal goes"?
14 MS. SECCO: Nothing specifically says
15 anything about the court acting sua sponte. I don't know
16 that there's anything in the statute that would prevent a
17 court from doing that sua sponte and just say, "The court
18 determines that parent is no longer indigent." So I could
19 think of a circumstances where the court could still sua
20 sponte determine that the parent is no longer indigent
21 because of a material and substantial change.
22 MR. ORSINGER: As a practical matter, the
23 trial itself, the evidence at a trial may reveal that
24 there's been a change since the original indigency
25 determination, and the way I read the previous existing

1 law was sua sponte motion -- sua sponte ruling by the
2 court would be okay, but under this amended language it
3 appears to be that the presumption can be overcome only
4 upon a motion filed by one of three types of people, and
5 so to me that's much narrow -- much more narrowly drawn
6 than the law before. So that presents the question of
7 whether we can even include court reporters by rule and
8 assuming we intended to.
9 CHAIRMAN BABCOCK: Okay. Any other comments
10 about this? All right.
11 MR. ORSINGER: Okay. The remainder of that
12 presumption of indigence is just to reflect the exceptions
13 that need to be stated in other global statements and then
14 you get down to subdivision (i)(5), which is an
15 accelerated disposition in the trial court. If the court
16 sustains a contest then the unsuccessful party can seek
17 review by a motion filed in the appellate court without
18 advance payment of costs, so I just amend what I just
19 said. This is what you do in the appellate court after
20 you lose a contest, and there was -- the task force was
21 divided on the question of whether the government should
22 even be allowed to appeal a negative ruling on a
23 challenge, and I'd say probably half the people on the
24 task force felt like the government should just take their
25 lumps from the trial court and have no appellate review

1 and the other half felt like there are situations
2 sometimes where trial judges have a record of appointing
3 certain people for these kinds of tasks and whatnot and
4 that if there is an abuse of discretion that the
5 government should be able to appeal and ask the court of
6 appeals to consider that. So this amended rule is written
7 as if either side can appeal, either the contesting party
8 or the noncontesting party, but the task force was divided
9 on that, and I want to present that question here, because
10 our drafting of this was very closely the opposite of what
11 it was.
12 MR. MUNZINGER: Which rule are you talking
13 about right now, Richard?
14 MS. SECCO: (i)(5).
15 MR. ORSINGER: I'm talking about Rule 20.1,
16 subdivision (i), subdivision (5), on page 15 of the task
17 force report.
18 MS. SECCO: I'll just correct Richard
19 quickly.
20 MR. ORSINGER: Please.
21 MS. SECCO: I think right now the task force
22 took out the provision that addressed --
23 PROFESSOR DORSANEO: It's not there.
24 MS. SECCO: Right.
25 MR. ORSINGER: No, I was saying that this

1 report doesn't prohibit the government from appealing.
2 Right?
3 MS. SECCO: Right, but the rule currently
4 doesn't address it. That rule is only the review and
5 order sustaining the contest.
6 MR. ORSINGER: What I'm saying is it could
7 have as easily be drafted to preclude it because about
8 half the task force wanted to do it that way, and the
9 person that drafted this just exercised some editorial
10 prerogative.
11 CHAIRMAN BABCOCK: Would that be you?
12 MR. ORSINGER: Yes, that would be me.
13 CHAIRMAN BABCOCK: Richard Munzinger.
14 MR. MUNZINGER: Well, I think the government
15 ought to have the right to appeal it. These are times
16 when people are very, very concerned about their tax
17 obligations and about the ability of government to pay for
18 itself. If we're honest with ourselves, we know that
19 there are trial courts around the state who have certain
20 predilections and certain attitudes, and why would you
21 deprive the government of the right to appeal to preserve
22 the taxpayers' funds? I think it's short-sided and wrong.
23 CHAIRMAN BABCOCK: Don't get too worked up
24 about this.
25 MR. MUNZINGER: I'm finished.

1 CHAIRMAN BABCOCK: Justice Bland. Justice
2 Bland.
3 HONORABLE JANE BLAND: If the intent is to
4 have any unsuccessful party appeal then the first -- the
5 first part of the sentence, "if the court sustains a
6 contest," that means --
7 MR. ORSINGER: Yes.
8 HONORABLE JANE BLAND: -- if the government
9 entity wins.
10 MR. ORSINGER: Yes.
11 HONORABLE JANE BLAND: So you would have to
12 fix that.
13 MR. ORSINGER: We would.
14 HONORABLE JANE BLAND: As far as taxpayer
15 resources, it's an open question to me whether the cost of
16 preparing a clerk's record and in most instances a pretty
17 short reporter's record is not far, far outweighed by the
18 amount of clerk, lawyer, and judicial resources spent
19 resolving these things at the expense of the delay of
20 resolution of a child's placement in a home. I will just
21 give you the other side of the coin on that.
22 MR. ORSINGER: So I need to amend my
23 introductory statement, as Justice Bland has pointed out.
24 Actually, this is written that it's only the party who --
25 the indigent party who will be appealing under this

1 introductory clause, not the government, so it's the
2 opposite of what I just said then, which is if the court
3 sustains the contest that means that the indigent gets no
4 free record and, therefore, only the indigent will be
5 appealing as this is written. If we want to give the
6 government the right to appeal then we should say "when
7 the court rules on a contest" or make some kind of neutral
8 statement that's not outcome determinative.
9 HONORABLE JAN PATTERSON: And change the
10 title.
11 CHAIRMAN BABCOCK: Justice Gray.
12 HONORABLE TOM GRAY: I may be overlooking a
13 nuance here, but the last sentence doesn't seem to specify
14 the date by which the record to appeal the indigency
15 determination should be filed, and I think it should
16 specify it. That's why I'm talking about these things can
17 become black holes of time.
18 MR. ORSINGER: Could you restate that? I
19 didn't understand that.
20 HONORABLE TOM GRAY: It provides for the
21 filing of the record from the indigency hearing, the last
22 sentence of the rule as proposed.
23 MR. ORSINGER: Right.
24 HONORABLE TOM GRAY: It doesn't say when to
25 file it.

1 MR. ORSINGER: What would you suggest? How
2 much time? Three days?
3 HONORABLE TOM GRAY: I mean, these things
4 are going to be really, I would hope, really short. Three
5 days, five days, maybe three business days if you want to,
6 you know --
7 CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.
8 PROFESSOR DORSANEO: Is there any problem
9 about "after perfection of the appeal" in this first
10 sentence? "The appellant must file the affidavit of
11 indigence in the trial court with or before the notice of
12 appeal." I mean, does that -- it's just not a problem?
13 Is there going to be -- are you contemplating there's
14 going to be a pending appeal? Remember, we talked about
15 before where you put that --
16 MR. ORSINGER: Well, Bill, you know, there
17 may not be a pending appeal if the contest is overruled
18 and the person doesn't have the money to pay for it and
19 doesn't have the free lawyer to do it, but I don't think
20 the appellate court has the jurisdiction to grant a motion
21 unless it has appellate jurisdiction to begin with.
22 PROFESSOR DORSANEO: Unless we just change
23 that.
24 MR. ORSINGER: Well, we better not change
25 that. I mean, there's too much --

1 PROFESSOR DORSANEO: Why don't you put in
2 there "after the perfection of the appeal" in the first
3 sentence?
4 MR. ORSINGER: Where would that go?
5 PROFESSOR DORSANEO: First sentence of --
6 MR. ORSINGER: Where in the sentence would
7 it go?
8 PROFESSOR DORSANEO: After the first part,
9 "the court sustains the contest." "After the perfection
10 of the appeal the unsuccessful party may seek review," or
11 put it there, "of the court's" -- you know, "of the
12 court's order by filing a motion." I don't care. It
13 could go lots of places that it would be all right with
14 me.
15 MR. ORSINGER: We ought to call it "filing
16 the notice of appeal" just so the people who don't know
17 how to perfect it know what to do after filing the notice
18 of appeal. Are you all right with that?
19 PROFESSOR DORSANEO: (Nods head.)
20 MR. ORSINGER: Marisa, I'm afraid that I
21 might have convoluted the record on this issue about the
22 government appealing.
23 MS. SECCO: Yes.
24 MR. ORSINGER: Would you straighten that up?
25 MS. SECCO: Sure. All I wanted to say about

1 the current rule is that it doesn't address when the
2 government -- the government's ability to appeal it. We
3 just took that provision out because the task force
4 couldn't decide on it, so the current rule only
5 contemplates an order sustaining the contest, an appeal of
6 the order sustaining the contest, and we don't -- right
7 now there is just no rule. So we were leaving that up to
8 the advisory committee to make that recommendation, so I
9 just don't want anyone to be confused about why this only
10 says "order sustaining contest." Previously in the first
11 draft that was done by the task force, there was a
12 paragraph (6) which stated that an order -- and I can't
13 remember the language that was used, but, you know, an
14 order that was denying the contest basically would have
15 to -- was not appealable.
16 CHAIRMAN BABCOCK: We haven't voted on
17 anything in a while. I feel a vote coming on. How many
18 people think that the government should have the right to
19 appeal?
20 HONORABLE DAVID GAULTNEY: May I ask a
21 question first?
22 CHAIRMAN BABCOCK: Yeah, question first from
23 Justice Gaultney.
24 HONORABLE DAVID GAULTNEY: Richard, are we
25 just talking about the cost of the reporter's record and

1 the clerk's record? I mean, you're not talking about
2 entitlement to an attorney, are you? Is that something
3 that's being determined by this affidavit as well?
4 MR. ORSINGER: Yes. This is the way you
5 overcome --
6 HONORABLE DAVID GAULTNEY: So that's -- so
7 if the trial judge determines the person is indigent, he
8 gets an attorney, and he doesn't have to pay his -- he
9 doesn't have to pay the appellate court costs. The
10 question is does the government get to appeal not only the
11 court reporter's costs and everything, but the entitlement
12 to an attorney?
13 MS. SECCO: Yes.
14 HONORABLE DAVID GAULTNEY: Is that the
15 issue?
16 CHAIRMAN BABCOCK: Right. That's the issue.
17 Pete.
18 MR. SCHENKKAN: And before we get to the
19 vote on that, it would help me in understanding this if I
20 could get some kind of a feel for what the risk of abuse
21 of giving the government the power to appeal this would
22 be. I'm kind of thinking, without any knowledge of this
23 context, that the risk would be small that the government
24 wouldn't bother with an appeal of one of these things
25 unless they had a pretty strong reason because they're

1 going to make the appellate court pretty mad by taking up
2 some time with a marginal or frivolous appeal of an
3 indigency determination. Is that wrong?
4 CHAIRMAN BABCOCK: Justice Christopher. Are
5 you angered by this?
6 HONORABLE TRACY CHRISTOPHER: I would like
7 to point out that on the criminal side there is no appeal
8 of an indigency finding, so, you know, so that's number
9 one, and secondly, at least in Harris County the -- it was
10 the policy of the county attorney to file a contest to
11 absolutely every affidavit of indigency, period, without
12 knowing anything about the person or their factual
13 circumstances, whether they had assets, et cetera.
14 Despite constant scolding from some judges, they kept
15 filing.
16 CHAIRMAN BABCOCK: Know any people like
17 that?
18 HONORABLE TRACY CHRISTOPHER: And so given
19 that history, I would say that there could be a
20 possibility of abuse.
21 MR. SCHENKKAN: Answered my question.
22 CHAIRMAN BABCOCK: Justice Jennings.
23 HONORABLE TERRY JENNINGS: Well, and that's
24 not really what we're focusing on here, because what we're
25 dealing with is the right to appeal, and we're talking

1 about the right to appeal of indigent persons, and their
2 ability to effect their appeal or bring their appeal
3 forward with a record and hopefully with counsel, and so
4 that's not really the focus here is on the government's
5 point, and Judge Bland's point is very well taken that you
6 have to -- to the extent that you want to bring that into
7 the equation, which I don't know that it's proper to bring
8 it into this equation, but to the extent you want to bring
9 it into the equation you have balancing test of, well, we
10 are trying to do this efficiently and expeditiously
11 because there's a child sitting in limbo. So let the
12 person go forward with the appeal and minimize the time
13 the child's in limbo.
14 CHAIRMAN BABCOCK: All good arguments.
15 Yeah, Marisa.
16 MS. SECCO: And I just also wanted to
17 mention that on state funds, it costs $2,000 a month to
18 keep a child in foster care, and so that -- and these
19 appeals, according to Kin Spain, who was on the task
20 force, can take anywhere between two and six months, so
21 we're talking about extending the time line from two to
22 six months, plus $2,000 a month.
23 HONORABLE TERRY JENNINGS: And I've seen
24 reporter's records in these cases that are no more than 10
25 pages long.

1 CHAIRMAN BABCOCK: Richard Munzinger.
2 MR. MUNZINGER: The only part about allowing
3 the government to appeal as well, if you're worried about
4 delay you can always write into the rule that you go ahead
5 with the appeal and get the record written and you can
6 determine whether it's going to have to be paid for and by
7 whom after the fact and don't let that slow down the
8 appeal, but I made my point earlier.
9 CHAIRMAN BABCOCK: Can we vote?
10 MR. MUNZINGER: Yeah, I'm ready.
11 MR. ORSINGER: If I could just say one
12 thing, Chip. I'm not entirely sure right now that the
13 court reporter won't be involved. I mean, it appears the
14 Family Code doesn't mandate the court reporters be paid.
15 It's just discretionary with the district judge, but the
16 amendment to the Family Code doesn't appear to include the
17 court reporter on the list of people whose motions can
18 trigger this hearing to overturn the original presumption,
19 so I know we're talking here about the government's
20 nickel, but are we sure we're talking about the
21 government?
22 CHAIRMAN BABCOCK: Okay.
23 HONORABLE TERRY JENNINGS: Well, it's the
24 government that's trying to take away the parental rights.
25 MR. JACKSON: If you change "may" to

1 "shall," we're done. We're out.
2 MR. ORSINGER: Yeah, that's in the Family
3 Code, though.
4 CHAIRMAN BABCOCK: We may not have the
5 authority to make that change right here. All right.
6 Everybody who is in favor of permitting the government to
7 appeal an adverse ruling on the issue of indigency, raise
8 your hand.
9 All those opposed, raise your hand. There
10 are 9 in favor, 14 opposed, so the Court will take into
11 account the sense of our group. Professor Dorsaneo.
12 PROFESSOR DORSANEO: I just would like the
13 rule to say something. If the government is going to be
14 able to appeal, say that the order, you know, denying the
15 contest is subject to review on appeal, just something
16 simple, if that's what's going to be the case.
17 MS. SECCO: That was in the previous draft,
18 so we'll just reinsert likely -- if the Court decides that
19 that's the route they want to take, we'll just reinsert
20 what was in the previous task force draft. One sentence.
21 CHAIRMAN BABCOCK: Good.
22 MR. ORSINGER: I think rather than say,
23 "review on appeal" we should say, "review by the appellate
24 court," because this is a little mini-appeal based on a
25 free record, a so-called Arroyo record, on just the

1 evidence on the contest, and that's free. You can get to
2 the court of appeals for free if you're an indigent and
3 you lose this contest, and so it's not really an appeal,
4 Bill, but it's reviewed by the appellate court.
5 PROFESSOR DORSANEO: I was contemplating
6 that it would be for the government.
7 MR. ORSINGER: Well, it's going to be an
8 abbreviated record, because we have to know whether the
9 record is free and whether there's a court-appointed
10 lawyer or not before the brief is filed and before the
11 court reporter types everything up. So this is an
12 accelerated process to have a mini-appeal on a
13 mini-record, which is just the review associated with the
14 contest hearing, and you get that for free. Whether you
15 win or lose you get that review for free.
16 PROFESSOR DORSANEO: I don't think the
17 government needs to find that out until the -- until
18 later. I don't see why they're just not like everything
19 else that would be a part of the appeal if it's the
20 government part.
21 MR. ORSINGER: Well, an appeal at the end of
22 the case that says you should have not had a free
23 appellate lawyer is a meaningless appeal because you'll
24 never get the money out of it, so the question is whether
25 you spend the money, not whether you recover it, and if

1 it's just part of the regular appeal then let's not have
2 an appeal because it's going to be too late. The horse is
3 out of the barn.
4 CHAIRMAN BABCOCK: Okay. Justice Bland.
5 HONORABLE JANE BLAND: Just not to leave
6 Professor Dorsaneo's comment, Richard, about noting
7 somewhere in this provision (5) about something about
8 after timely filing a notice of appeal.
9 MR. ORSINGER: Do you like that? Do you
10 think that's important?
11 HONORABLE JANE BLAND: Yes, and that was the
12 subject of the e-mail that Kin Spain sent around to you
13 and I think to some of the other judges.
14 MR. ORSINGER: And it might be -- actually,
15 this might be the time to --
16 HONORABLE JANE BLAND: It was the exact same
17 comment that Professor Dorsaneo had, and so that will take
18 care of it.
19 MR. ORSINGER: Since this is repeatedly
20 coming up why don't we just go ahead and pass this around.
21 There's three of them there. Only one of them is the
22 current topic.
23 Now, Justice Gray commented before that
24 maybe it wasn't so important before because surely you
25 would have perfected your notice of appeal by the time

1 that this review for the failure to give findings
2 occurred, which may be gone anyway, but I think it's
3 mathematically possible. I don't know, Justice Gray, if
4 you've calculated it yet, but I think it's mathematically
5 possible that this review could proceed the filing of a
6 notice, and for those of us who believe that the notice is
7 essential to court of appeals jurisdiction then we would
8 want it to be after filing.
9 CHAIRMAN BABCOCK: Okay.
10 MR. HAMILTON: What does the motion say?
11 MR. ORSINGER: Well, the motion is an effort
12 to overturn the trial court's ruling on the contest.
13 MR. HAMILTON: Then that's done by a motion?
14 MR. ORSINGER: Well, we want it to be done
15 by a motion because we don't want it to be -- you have to
16 know before the brief is written whether you have a lawyer
17 to write the brief, and so it's got to be done by some
18 accelerated process. It can't be in appellant's brief
19 because this is determining whether the appellant has a
20 lawyer or not and whether they can get a reporter's
21 record, so it's going to be an accelerated process. The
22 name has come up a number of times. I'll just go ahead
23 and put it in the record. It's a Texas Supreme Court
24 decision, *In Re: Arroyo*, A-r-r-o-y-o, decided in 1998 988
25 SW 2d 737. It denied mandamus in one of these indigency

1 appeals on the grounds that an appeal was an adequate
2 remedy, and the adequate remedy they said was you can get
3 relief from an order sustaining a contest to an affidavit;
4 and they outlined an accelerated process here, which, if
5 you will, is a kind of an informal, quick appellate court
6 review of the trial court's decision on indigency; and
7 these so-called Arroyo hearings are -- I think Justice
8 Bland is talking about are a black hole that end up
9 causing a delay in the disposition of the case. Right, or
10 --
11 HONORABLE JANE BLAND: Correct, because
12 they're not quick hearings because they involve ordering
13 up the record from the trial court, and we do have a
14 problem I think Justice Gray was trying to address by
15 asking for a deadline. We have a problem with the
16 reporters getting the record up to us promptly, but most
17 importantly with the -- sometimes when a -- sometimes with
18 pro ses, but not always with pro se, sometimes by
19 represented counsel, when they appeal the contest, the
20 order sustaining the contest to the indigency, the party
21 then thinks they've invoked the appellate court's
22 jurisdiction, and so to put something in provision (5)
23 about a notice of appeal being filed as a reminder, file a
24 notice of appeal and then file your motion with the
25 trial -- I mean, with the appellate court seeking relief

1 from the trial judge's decision in the indigency contest.
2 Otherwise, you've got parties that file -- about the time
3 that they're -- otherwise you've got two things.
4 One is you've got parties that file a -- an
5 appeal from or a motion requesting relief from the
6 indigency contest and are proceeding along with that, not
7 realizing they've never filed a notice of appeal, and I
8 mean, we have rules that would say if you're tending -- or
9 policies that if they're trying to invoke the jurisdiction
10 of the appellate court -- and presumably those would come
11 into play, but I would hate that somebody might lose their
12 appellate rights because they thought they've invoked the
13 appellate court's jurisdiction by filing one of these
14 Arroyo motions, when, in fact, they haven't because
15 they've never filed a notice of appeal.
16 The other issue that comes up is that often
17 the motion seeking relief in the appellate court from the
18 trial judge's order sustaining a contest doesn't get filed
19 in the appellate court until numerous efforts have been
20 made to order the record, and we send out a notice saying,
21 "There's been no arrangement to pay for the record.
22 Accordingly, we are going to dismiss this appeal" within a
23 certain amount of time and then we get for the first time
24 an Arroyo type motion filed in our court, and so that's
25 why this provision (5) is such a good addition, and it

1 would be great if we could add in this idea that the
2 notice of appeal should be filed as well, just to make --
3 just so we don't have Arroyo motions floating around out
4 there that are not married to a notice of appeal.
5 CHAIRMAN BABCOCK: So you're in favor of
6 this addition that Kin is proposing, the 10 days after the
7 notice of appeal is filed, whichever is later?
8 MS. SECCO: That's actually already in the
9 rule.
10 PROFESSOR DORSANEO: It's in there now.
11 MS. SECCO: That's already in the rule.
12 CHAIRMAN BABCOCK: All right. So what about
13 this e-mail is --
14 MS. SECCO: This is not the -- I think that
15 this is an earlier e-mail.
16 MR. ORSINGER: Okay. Then I pulled the
17 trigger on the wrong target this time. Okay.
18 HONORABLE JANE BLAND: No, I think at least
19 the way that he was explaining it is it's filed within 10
20 days after the order sustaining the contest is signed or
21 within 10 days after the notice of appeal is signed, and
22 the idea here is under that first sentence there's no
23 notice of appeal -- that the notice of appeal needs to
24 come out of that --
25 MS. SECCO: Right.

1 HONORABLE JANE BLAND: -- and maybe be how
2 Professor Dorsaneo suggested, somewhere at the very front.
3 MS. SECCO: Right.
4 HONORABLE JANE BLAND: And then have the 10
5 days run however you want it to run, but don't have a
6 standalone provision that allows this without any notice
7 of appeal.
8 CHAIRMAN BABCOCK: Okay.
9 MR. ORSINGER: All right.
10 MS. SECCO: I do want to mention just one
11 thing, that this review of orders sustaining contests does
12 not justify the presumption context, and I think that's
13 probably not apparent to the committee, that this is all
14 orders sustaining contests to indigents, whether or not
15 there is a presumption of indigence or if it's just the
16 usual procedure with an affidavit. So this is not just
17 something that would apply in parental termination cases.
18 It would apply in all cases.
19 CHAIRMAN BABCOCK: Okay. Any other comments
20 on (i)(5)? All right. Richard, should we go to the 28.4?
21 MR. ORSINGER: Yes, 28.4. As I said
22 initially, it was our view that we ought to collect
23 together all of the special rules that apply to these
24 kinds of appeals into one rule, and if there's other --
25 elsewhere in the appellate rules a rule that's

1 well-designed and would function properly we cross-refer
2 to it, but if we're changing it, we're changing it in the
3 context of reading this rule. So if you go to this rule
4 if you're handling one of these appeals, either because of
5 the language under this rule or by cross-referencing you
6 to the appropriate other rule, you will see the rules
7 governing your appeal, and consistent with that the very
8 first thing in this is kind of a preemption clause, Rule
9 28.4(a)(1), "The Rules of Appellate Procedure, including
10 the rules for accelerated appeals, apply to parental
11 termination and child protection cases, except that to the
12 extent of any conflict this 28.4 prevails." That means
13 that this subdivision of 28.4 trumps all of the other
14 contrary rules as well as 28.1, 2, and 3.
15 So it's our effort to make sure that this
16 rule will govern in the event of a conflict with the
17 ordinary appellate procedures, and it was our view that
18 that's very important because these accelerated appeals
19 trigger a bunch of the different Rules of Appellate
20 Procedure. It's hard even for a board certified lawyer
21 that doesn't do them regularly to keep track of it, and so
22 it's an important part in our view to make these things
23 work so that we don't have waivers, is that all they have
24 to do is find this one subdivision and follow it, and
25 they're okay. That's an important philosophical point

1 that somebody may disagree with. I don't know. If we
2 don't do it this way, we have to salt these changes
3 through all the other appellate rules, and people who are
4 not handling these appeals are going to have to see
5 whether they're covered by 28 point -- so it's just our
6 view is this is an isolated area, and let's make the
7 changes in just this area, and let's not affect all these
8 other areas elsewhere.

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

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

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

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

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

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

1 MR. ORSINGER: Well, maybe two sentences,
2 you're saying that this subdivision shall apply to appeals
3 in such-and-such type cases and then a new sentence saying
4 that this rule prevails over any others that conflict?
5 PROFESSOR DORSANEO: Uh-huh. "This
6 subdivision governs" or "notwithstanding" something.
7 MR. ORSINGER: Okay. Then we're ready to
8 move on to (2). These are the definitions that we
9 mentioned at the outset. Because of the way that House
10 Bill 906 refers to the Family Code we've got to cover both
11 termination appeals, both government sponsored and
12 private, as well as managing conservatorship appeals where
13 the government is appointed as managing conservator
14 without termination. So those two categories are given
15 special definitions of "'Parental termination case" is a,
16 quote-unquote, phrase used throughout the rule, and a
17 "child protection case," quote-unquote, is described as "a
18 suit affecting the parent-child relationship filed by a
19 government entity for sole managing conservatorship."
20 So you're going to see that that dual track
21 follows throughout, and the task force report, for
22 whatever historical help it will have, refers to the
23 definition of suit affecting the parent-child relationship
24 in the Family Code. So then you want to move on to (b),
25 Chip?

1 CHAIRMAN BABCOCK: Yes, let's move on to
2 (b).
3 HONORABLE TOM GRAY: I would like to make
4 one comment.
5 CHAIRMAN BABCOCK: Justice Gray.
6 HONORABLE TOM GRAY: That because the
7 Legislature has vacillated on some of the statutes
8 applicable to termination suits, if it is a termination
9 sought by a governmental entity or private termination, I
10 would like to see (2)(a) make the distinction that you
11 made verbally that it applies to those suits if it's an
12 issue whether sought by government or private, otherwise
13 some folks that have been operating in this area may limit
14 it to governmental terminations.
15 MR. ORSINGER: We could do that by going
16 back and -- I mean, it's all implicit if you look at the
17 definition of suit affecting the parent-child relationship
18 and especially -- but we're looking at it in the context
19 of House Bill 906. The ones that are applying it won't,
20 so --
21 HONORABLE TOM GRAY: I'm just thinking about
22 what you just described as the purpose of this new rule,
23 that I'm not entirely comfortable with, but if that's the
24 purpose, I think you need to make sure that folks involved
25 in private terminations -- and we don't see that many of

1 those, but if they get off into that area in this rule,
2 they understand fully that this is for private
3 terminations as well.
4 MR. ORSINGER: What would you think about
5 adding a sentence -- or comma, "including" -- maybe this
6 "without limitation" is a contract term and not a rule
7 term, but "including private terminations" and let's pull
8 out of the Family Code a more accurate term.
9 HONORABLE TOM GRAY: Yeah. I thought what
10 you said on the record, whether sought by government or
11 private or the individual or -- anything like that, just
12 something to flag the nongovernment termination attorney
13 this is where they've got to go.
14 MR. ORSINGER: You said that you weren't
15 sure that you agreed with the concept. Are you saying
16 you're not sure that you agree with having a standalone
17 rule? Is that what you meant? What is your concern about
18 having a separate rule just for these appeals?
19 HONORABLE TOM GRAY: Well, the reason I
20 didn't vocalize it before is it's just a general
21 discomfort of breaking out a rule that tries to pull
22 together all of the other rules that you have to deal with
23 in any appeal and pare it down for this particular rule.
24 For example, I guess, to lead a segue on into (b), (b)
25 doesn't provide anything different. It simply references

1 you back to the two rules on how to perfect an appeal. It
2 doesn't change those rules at all, so it's not unique to
3 this procedure. It simply tells you where to go to
4 perfect an appeal, and that seems -- I mean, all of those
5 other rules, you've already said all those other rules
6 apply, and now you have a rule that tells them where the
7 rule applies, and now this rule trumps those rules, but
8 it's sending you to those rules anyway, and it's --
9 MR. ORSINGER: Let me -- let me say in
10 response to that, that we're aware of that, and the choice
11 is to let these people figure out that they have to look
12 at Rule 25.1 and Rule 26.1(b) and 26.3 and then later on
13 they're going to have other rules that they have to look
14 for, and we can just turn them loose on it, like the --
15 you know, in a rodeo and just have them outrun the bull,
16 or we can give them a recipe to follow. It was our view
17 that the easiest way for the people that we expect to be
18 handling these appeals would be to pull all the provisions
19 into one rule and where they're different we state them
20 and where they're the same we cross-reference them, and if
21 that's -- that's just a philosophical decision on trying
22 to avoid waiver of error, and it may have negative
23 consequences that outweigh the benefits, and I think it
24 ought to be discussed. I mean, the task force made that
25 decision, but as Justice Gray has pointed out, it's not a

1 decision that is frequented out.
2 CHAIRMAN BABCOCK: Yeah, Eduardo.
3 MR. RODRIGUEZ: Well, if we're talking about
4 trying to help people who are not familiar with this area
5 that are going to be appointed to represent some of these
6 parties, why not just put Rule 25.1, 26.1(b), and 26.3
7 right here instead of saying "go back here" and "go back
8 there" and "go back there"? "To perfect an appeal under
9 this rule is perfected by doing the following" and just
10 list them.
11 MR. ORSINGER: We can sure do that. There
12 are -- there will be a lot of repetition that would make
13 the rule lengthy, but that would actually make this rule
14 self-contained.
15 CHAIRMAN BABCOCK: Professor Dorsaneo.
16 PROFESSOR DORSANEO: Actually, with regard
17 to that, an appeal under this rule, that (b) on page 17,
18 for the regular accelerated appeals that same sentence is
19 in there. So to an extent when 28.1 was created it was
20 more explanatory as revised than the way it stood.
21 Previously -- I mean, as this thing evolved the first
22 accelerated appeal rule did explain everything as a
23 standalone rule and then it wasn't and then it's evolved
24 into something that provides specific guidance as to where
25 you will look, and I like the idea of specific guidance,

1 by cross-reference works fine with me where it's fairly
2 clear. I'm not so sure as we move through this that -- as
3 to what the differences are, Richard, and for people
4 familiar with the accelerated appeal procedure with the
5 appeal procedures, you know, that's probably -- that's
6 probably important, too. So I'm less clear once I get to
7 (c), the letter (c), appellate record, how much guidance I
8 want to give.
9 MR. ORSINGER: Okay. Well, we'll take that
10 up when we get there. The task force report tells you a
11 little bit more about what we envisioned when we went
12 through this appellate record paragraph by paragraph, but
13 we'll discuss that today.
14 CHAIRMAN BABCOCK: Just -- oh, I'm sorry.
15 Go ahead.
16 MR. ORSINGER: Subject to Chip's control.
17 CHAIRMAN BABCOCK: Justice Patterson.
18 HONORABLE JAN PATTERSON: Before we leave
19 (2)(a), I would like to suggest that because (2)(b)
20 references "filed by a government entity" that it makes it
21 clear that (a) need not reference that and that it's the
22 broader and that no additional words should be necessary
23 there.
24 CHAIRMAN BABCOCK: Okay. Any more comments
25 on (a)? Any more comments on (b)? Moving on to (c).

1 MR. ORSINGER: Okay. The appellate record
2 purpose here, I think that probably we all agree that
3 other than the period of time that these cases are under
4 submission in the court of appeals, the longest delaying
5 factor in disposition is getting the reporter's record up,
6 and so the overriding purpose is to accelerate the filing
7 of the record and to curtail to some extent the court of
8 appeals inclination to grant delays associated with that
9 record. Subdivision (c)(1), that's Rule 28.4(c)(1),
10 discusses the responsibility for the preparation of the
11 reporter's record, and there's already a requirement in
12 Rule 35.3(c), the appellate rules, which says -- that's
13 not the correct rule reference. There's already a
14 requirement that the trial judge, 35.3(c), "The trial and
15 appellate courts are jointly responsible for ensuring that
16 the appellate record is timely filed." I repeat, "The
17 trial and appellate courts are jointly responsible for
18 ensuring that the appellate record is timely filed."
19 That does not appear to be strong enough to
20 make it happen quickly, so we were trying to bolster that
21 by saying that in addition to having a joint
22 responsibility that the trial court shall direct the court
23 reporter to commence preparation of the reporter's record
24 when the reporter's responsibility to prepare it arises
25 under 35.3(b), and that has to do with making arrangements

1 for payment or proof that you can move forward without
2 paying for it. So the discussion was that court reporters
3 are sometimes late in getting these records filed not
4 because they don't work at night and not because they
5 don't work on the weekends, but because they have to spend
6 their days in court recording hearings and trials, and
7 there's just not enough time left in the court reporter's
8 daily lifetime to get these records out on that quick
9 turnaround, and when you have a trial judge ordering you
10 to transcribe a hearing or a prove up or whatever, that
11 takes you out of your office and away from preparing a
12 record. So the real pressure point here is not the court
13 reporter who has to do what the judge tells her or him to
14 do. The real pressure point here is the trial judge who
15 diverts the court reporter from the important
16 responsibility of getting this accelerated record up to
17 pay attention to the other important responsibility of
18 recording -- reporting ongoing daily activities.
19 So our proposal is that we would say that
20 the trial judge is now responsible to get the court
21 reporter started in this process and that as a practical
22 and political matter that's where the pressure needs to be
23 put anyway, is on the trial judge. Now, there's all kinds
24 of trial judges and appellate judges in here. I hope I
25 didn't offend you again, but what about that?

1 CHAIRMAN BABCOCK: Okay. Justice Gaultney.
2 HONORABLE DAVID GAULTNEY: So the way it
3 arises is we're down the road. Presumably, the way I read
4 the rules, the trial court already under the current rules
5 has this responsibility. If you look at 13.3, priorities
6 of reporters; 13.4, report of reporters; there's a
7 supervision responsibility there. The rule that you cite
8 requires that the trial court is jointly responsible for
9 ensuring that the appellate record is timely filed. So
10 the way I read the rules right now, although one says "in
11 addition to the responsibility imposed," I'm not sure it
12 adds much to what his current -- her current
13 responsibility is.
14 I think so where it comes up is you're down
15 the road, the record is late, and the appellate court is
16 trying to get the record filed, and under this rule the
17 trial court said, "Well, I told the reporter to commence
18 filing it, what else do you want me to do?" So maybe it's
19 at that point that the rule can speak, okay, so and that
20 is, what we would like to see is for the trial court to
21 determine the reasons that the record hasn't been filed
22 and notify the appellate court and, secondly, direct
23 completion of the reporter's record, not commencement,
24 completion, and get it completed and filed at that point
25 because we're down the road past the reporter having gone

1 through the time to file it and we still don't have it,
2 and I agree, and I commend the committee that this I think
3 is a very important part or factor in the delay, so to the
4 extent we can figure out the way to deal with this I think
5 we're making progress.
6 CHAIRMAN BABCOCK: Okay. Professor
7 Dorsaneo, did you have a comment?
8 PROFESSOR DORSANEO: Well, I -- like David,
9 I don't -- I don't see that this (c)(1) is anything but
10 redundant, so -- and as I'm working through a lot of this
11 (c), there are some differences, but pretty much it's the
12 same. The extension of time actually seems to -- maybe
13 that's a concession of reality, but it does -- it does
14 seem to even lengthen the process rather than what's
15 contemplated when we drafted the appellate rules. So I'm
16 not sure -- completely sure what I'm going to think when I
17 think about it for a while, but I would prefer to have the
18 rule look more like 28.1 than to go into just redundant
19 detail putting everything in one place. Maybe a sentence
20 that refers to the rules that need to be examined in order
21 to understand how this appellate record process works, you
22 know, comparable to a sentence like the one in perfecting
23 an appeal. You know, "An appeal under this rule is
24 perfected by filing a notice of appeal in compliance with
25 Rule 25.1." Well, it could say the same thing about the

1 record rules, you know, "in compliance with Rules 34 and
2 35."
3 So I've got the general comment that I don't
4 know that the regular rules aren't -- if people knew what
5 they were, aren't fine in and of themselves, and then
6 you're making some changes in the general rules that maybe
7 even need to be made generally, but I'm not sure about
8 whether they need to be made in these cases or generally,
9 the extension of time and other adjustments.
10 CHAIRMAN BABCOCK: Right. Okay. Yeah,
11 Justice Peeples.
12 HONORABLE DAVID PEEPLES: If -- Richard,
13 if the -- one of the real points of delay is getting the
14 record done, I think it may take better language than
15 you've got in (c)(1), which says, "The trial court shall
16 direct." You might just say the trial court is
17 responsible for making sure that the reporter gets it
18 done, including arranging for a substitute reporter. I
19 mean, there's other places in the rules where we have
20 encouraged, you know, things to be on the record; and I
21 think you're exactly right in what you said earlier, that
22 if the trial judge has his or her reporter out in court
23 all the time reporting what's happening today, that makes
24 it very hard for that reporter to get this record done;
25 and sometimes what it takes is to get a substitute

1 reporter; and I know that's hard out in the country. Most
2 of this happens in big cities anyway, but the more
3 directly you can speak to trial judges and tell them "The
4 buck stops with you," and you might just have something
5 there, you know, "including making substitute
6 arrangements." That might get these cases -- the records
7 there more quickly.
8 CHAIRMAN BABCOCK: David Jackson.
9 MR. JACKSON: It might help a little if -- a
10 court reporter for every hour that we're writing in the
11 courtroom, it takes anywhere from two to three hours to
12 make that into a signed, certified record. So, you know,
13 if you're sitting in court for eight hours on one of these
14 hearings or if in a case where it's a real short hearing
15 where it's only an hour or two, the reporter is going to
16 spend -- if it's an hour he's going to spend two to three
17 hours getting out that record. So you may be able to
18 write a provision where the judge allows the reporter in
19 those cases time to prepare the record, and if it's a case
20 where the county is paying the court reporter to
21 transcribe the record, I'm going to make a lot of
22 reporters mad, but I would suggest that the reporter who
23 has to have a substitute reporter be responsible for
24 paying that substitute reporter while they're making the
25 transcript fee.

1 CHAIRMAN BABCOCK: Justice Patterson. I'm
2 sorry. Justice Gray, I skipped you.
3 HONORABLE TOM GRAY: I yield.
4 CHAIRMAN BABCOCK: Justice Patterson.
5 HONORABLE JAN PATTERSON: I think all of
6 that's a little bit micromanaging and that the change is
7 significant because it leaves it with the trial judge.
8 Always before there was joint responsibility between
9 appellate courts and trial judges, and we actually had a
10 practice at one time where we would send court reporter
11 notices, "Where is the record," "where is the record," and
12 we changed that at some point to also send a copy to the
13 trial judge, and that was very effective in getting the
14 job done. So I think as long as the ultimate
15 responsibility rests with the trial judge, they know how
16 to get it done and can accomplish it. So it's important
17 that it rest with a single person and notice to that
18 person, so I'm not sure that we need to go into how they
19 do it, because they'll know what's appropriate in their
20 county.
21 CHAIRMAN BABCOCK: Justice Gray.
22 HONORABLE TOM GRAY: Three big time periods
23 in these appeals: Getting the record, primarily the
24 reporter's record, briefing, and opinion. I'll address
25 the other two as we get to them, but with regard to the

1 record, we previously -- before the current rules it was
2 the party's responsibility to get the record. That was
3 problematic because they had no control over the trial
4 court or the reporter. Current rules place the
5 responsibility on the appellate court and the judge
6 jointly. The other person that's obviously in the mix is
7 the paying for the reporter. There is nobody that has
8 more control over the ability to get it done other than
9 physically typing it out than the trial court judge. The
10 problem is that in many of these cases that I see from our
11 district they are tried by visiting judges with visiting
12 reporters. They are not the regular court reporters that
13 hear these. Sometimes they're a couple of day hearing and
14 then it's a week finding that reporter again. They're in
15 private practice. It's just a problem. If the
16 responsibility was placed solely on the trial judge to get
17 the reporter's record done, it would help, particularly in
18 the -- where it's the designated or the elected trial
19 court with the official reporter, because they are the
20 ones who can say, "Don't take any other reports or
21 hearings, trials, until you get that done," and get a
22 visiting reporter in here. If we're serious about
23 expediting this process, that's going to be the way to
24 expedite this portion, like David said.
25 If it's the official -- if it's the elected

1 judge and the official reporter, if that reporter can't do
2 anything else until that report is timely done, because
3 I'll just say this now rather than delay it, when you get
4 down to these other provisions and you talk about no more
5 than 60 days cumulative, we've got no nothing when it
6 comes to the appellate court other than the possibility of
7 contempt, which we've used a couple of times, and if you
8 want to dump a case or an appeal over into a real black
9 hole, dump it over to a -- into a contempt proceeding on
10 the reporter to try to get a record. Let me tell you, it
11 doesn't get any worse than that in delay. I mean, we've
12 -- this year we've had to reverse two criminal cases
13 because we just could not get the reporter -- the
14 reporter's record, and so that is not where we want these
15 cases to wind up. The trial judge -- I wish David Evans
16 was here because I'm sure he has an opinion on this, but
17 they are the ones who have -- even over the visiting
18 reporters, they have the ability to say, "You're not going
19 to do anything else until this is done."
20 CHAIRMAN BABCOCK: Okay. Justice Gaultney.
21 HONORABLE DAVID GAULTNEY: I think that's
22 part of the problem and part of the solution. In other
23 words, it's my understanding, at least in our area,
24 and all I know is we don't get the record in a particular
25 case and we try to get it. It's my understanding that

1 you'll have a visiting judge or a cluster court judge who
2 will go with a court reporter to a case. Now, obviously
3 they've got cases to try, they want the court reporter
4 trying the cases that they've got, but there's an existing
5 judge with their own court reporter whose court the case
6 was filed in. It's the visiting judge that's handling it,
7 so but it's my understanding that perhaps that court
8 reporter and that judge don't necessarily view it as their
9 responsibility because there's a visiting judge and a
10 visiting court reporter that actually tried it. Okay. So
11 if you say, "Where's the record?" The response is "It's
12 the visiting judge and visiting court reporter's
13 responsibility," even though the case is in a particular
14 court. All right.
15 So but there is a requirement under 13.4 for
16 the reporter to report monthly to the trial court on the
17 business, on what -- it's the amount and nature of the
18 business pending. So there is the ability of whichever
19 court judge we make the responsibility to ultimately to
20 get this done, to monitor and make sure that this is given
21 priority, if that's what we're trying to accomplish over
22 other business. I think, though, that perhaps
23 copying whichever court we place the responsibility on,
24 and maybe it's the visiting judge first, that copying them
25 on extensions or notices or anything so they know that a

1 problem is arising might be of some assistance.
2 CHAIRMAN BABCOCK: Okay. Justice
3 Christopher, did you have your hand up? No?
4 HONORABLE TRACY CHRISTOPHER: Well, I guess
5 my first question is are we sure that the -- that there is
6 a delay in filing the records, and do we know what the
7 delay is caused by before we go off in this sort of
8 Draconian, "Trial judges, we've got to write a whole rule
9 to make you pay attention to this." You know, I've looked
10 through the Fourteenth Court of Appeals statistics to the
11 extent I can, and it looks like the records are getting
12 filed in three months. Now, you know, maybe we want to
13 make it, you know, 30 days, but it's not going to happen
14 in 30 days. It's going to happen in 60 days, because
15 we've given them 60 days under this rule. So, you know,
16 there's going to have to be a little bit of tightening up
17 if we really, really, really want it all done by 60 days;
18 and, oh, by the way, the clerk's record is taking just as
19 long as the reporter's record according to the statistics
20 I'm looking at; and you know, putting something in the
21 rule of appellate procedure that the trial judges never
22 read is not particularly useful. I'm just going to -- you
23 know, and --
24 HONORABLE STEPHEN YELENOSKY: Speaking as an
25 appellate judge who was a trial judge.

1 HONORABLE TRACY CHRISTOPHER: You know, it's
2 kind of like, "What, there's something in the appellate
3 rules that I have to follow that I didn't know anything
4 about? There's this monthly report. When did that get
5 passed?" You know, I mean, really, I'm just -- I'm being
6 realistic here. So I think we have to think outside the
7 box if we're trying to create a priority system here at
8 the district clerk's office and with the court reporter
9 and with the trial judge, and putting some namby-pamby
10 rule here is just not going to do it. It's just not.
11 MR. ORSINGER: Chip, can I respond?
12 CHAIRMAN BABCOCK: Sarah, could Richard
13 respond?
14 HONORABLE SARAH DUNCAN: Sure.
15 CHAIRMAN BABCOCK: He's been called
16 namby-pamby once too often.
17 MR. ORSINGER: House Bill 906, section 4 of
18 House Bill 906 amends the Family Code to say that "An
19 appeal of the final order rendered under this subchapter
20 is governed by procedures for accelerated appeals in civil
21 cases," and the current rule is that if you have an
22 accelerated appeal the record is due 10 days after the
23 notice of appeal was filed, and that might work for a
24 temporary injunction hearing, but that doesn't work for a
25 two-week jury trial, and so we were -- on the task force

1 we were sensitive to the fact that if we took the
2 Legislature seriously that it was due in 10 days there
3 would be only the most perfunctory termination trials
4 could comply, and so we moved that out to a longer
5 compliance deadline; but a 60- or 90-day turnaround on
6 getting the record filed, if you meant that that applied
7 to termination cases, would be treating this appeal as if
8 it was an ordinary appeal or at least much closer to the
9 deadlines of an ordinary appeal than an accelerated
10 appeal, so --
11 HONORABLE TRACY CHRISTOPHER: Well, what I'm
12 telling you is that's what's happening right now, and it's
13 already considered an accelerated appeal, okay, and I know
14 that our task here is to make it more accelerated, really
15 make it an accelerated appeal, and I just think we have to
16 think outside the box if we're going to do that, because
17 they're accelerated appeals right now.
18 CHAIRMAN BABCOCK: Sarah.
19 HONORABLE SARAH DUNCAN: First, a question
20 of Chief Justice Gray and Gaultney. I don't know if y'all
21 are talking about taking the appellate court out of the
22 equation completely. When I was at the Fourth Court we
23 didn't have a problem. Chief Justice Lopez was on the
24 court reporters in all cases, but particularly in these
25 cases. The report that was filed with the trial judge was

1 required to be filed -- is required to be filed with the
2 appellate court clerk. Chief Justice Lopez made it her
3 personal responsibility to look at those reports every
4 single month. We didn't have a problem with contempt
5 putting it in a black hole. It was remarkably effective
6 at getting records once everybody understood that we were
7 serious.
8 So I agree that it is the trial judge who
9 has the most knowledge of the court reporter's workload,
10 both in and out of court. I actually think the court of
11 appeals can be more effective at getting these records
12 with appropriate procedures than the trial judge. The
13 trial judge is just trying to run his or her court and get
14 cases disposed of; and my understanding, a big part of the
15 problem was that, you know, if court reporters hire -- is
16 it a scopist, to do the records, they have to pay that
17 other court reporter a portion of the fee, and I think
18 it's pretty substantial, isn't it?
19 MR. JACKSON: Pretty good expense.
20 HONORABLE SARAH DUNCAN: And so there's a
21 real tension there between keeping all the money for
22 myself as the court reporter, pleasing my trial judge,
23 pleasing the appellate court, and I -- I'm not sure that
24 putting all of this on the trial judge is really going to
25 resolve the problem because that's where the tension is.

1 CHAIRMAN BABCOCK: Justice Gaultney.
2 HONORABLE DAVID GAULTNEY: No, I agree with
3 you, the appellate court has a responsibility. I'm not
4 saying that, but the -- what I'm going off of is something
5 that I -- frankly, it's been my experience, and that is
6 there's a statement on page seven that the task force
7 believed that much of the delay in this type of appeal
8 results from a conflict between the reporter's duty to
9 report hearings and trials on an ongoing basis and the
10 duty to prepare records for the appeals. I think that's
11 the issue, and the judge who has the most control over
12 that is the trial judge, and the trial judge can set those
13 priorities. Now, yes, the appellate court has a role in
14 it and can be very active and is very interested in doing
15 it, and it -- but there is a limit, absent extraordinary
16 measures, so I think that the -- and as far as the
17 namby-pamby rules --
18 HONORABLE TRACY CHRISTOPHER: I'm just
19 telling you --
20 HONORABLE DAVID GAULTNEY: No, I know what
21 you mean. I know what you mean, but in my experience
22 actually the trial court judges do pay attention when the
23 clerk says, "Well, did you know that this is -- there's
24 this responsibility? Do you know that actually these" --
25 even if they were not originally aware of them, you know,

1 even if they were not originally aware of them, once they
2 become aware of them it becomes a priority. So --
3 HONORABLE TERRY JENNINGS: And then you
4 would have a rule to enforce.
5 HONORABLE SARAH DUNCAN: Once we sent a copy
6 of the show cause order that we had sent to the court
7 reporter to that court reporter's trial judge, we tended
8 to get a record pretty quickly, because that trial judge
9 does not want his or her court reporter, one, to take the
10 time for a contempt proceeding, but they also don't want
11 the negative publicity that's very, very possible. So I'm
12 not saying -- I agree, with all due respect for Mr.
13 Orsinger, this rule isn't going to cut it, but I think we
14 can lay out procedures for the appellate courts and the
15 trial courts to work together to get it within a faster
16 period of time.
17 CHAIRMAN BABCOCK: Justices Bland, Gray, and
18 Jennings.
19 HONORABLE JANE BLAND: Okay. So I agree
20 with the comments that have been made about number (1)
21 here being redundant and really don't serve the purpose of
22 getting the trial judge's attention. I would jettison it,
23 start with number (2), but instead of saying it must be
24 filed within 30 days, say it must be filed within 10 days,
25 as the Legislature instructed us to enact. That will

1 signal to the trial judge and to the court reporter that
2 these records are to go ahead of the ordinary press of
3 business. Then you still have these other provisions,
4 sort of pressure relief valves, that will allow for some
5 extension of time, but by saying that the record is due in
6 10 days, like it appears the Legislature was saying that
7 they thought the record should be due in 10 days, that
8 signals the trial judge and the court reporter that this
9 is a drop-everything, prepare-the-record sort of moment,
10 get it done ahead of everything else, and that is what
11 trial judges listen to. It's what appellate judges listen
12 to. It is -- we all have accelerated everything these
13 days, and so let's just put this to the top of the line.
14 I think that's what the Legislature wanted us to do. That
15 would be my suggestion.
16 CHAIRMAN BABCOCK: Justice Gray. I'm sorry.
17 Justice Gray.
18 HONORABLE TOM GRAY: I think she covered
19 enough of what I was going to say.
20 CHAIRMAN BABCOCK: Justice Jennings.
21 HONORABLE TERRY JENNINGS: You know,
22 exacting in on what she said, maybe we should say in this
23 one, "We really mean it," and also, like the term "good
24 cause," doesn't that have a meaning within the statute? I
25 don't think it's defined, but, for example, in regard to

1 briefing when someone moves to extend time to file a
2 brief, I thought there was something in either the rule or
3 the case law that says, well, good cause means something
4 more than you're really, really busy or you really have a
5 full schedule or you're filing a bunch of other briefs. I
6 thought it had a specific meaning.
7 MR. ORSINGER: Well, the rule ordinarily for
8 briefs says "reasonable explanation," and it was the task
9 force view that "good cause" was a higher showing than
10 just a reasonable explanation.
11 HONORABLE TERRY JENNINGS: I thought in the
12 statute good cause did have -- although it wasn't defined,
13 I thought it had a meaning, and I thought the meaning was
14 something other than you're really busy.
15 CHAIRMAN BABCOCK: Professor Dorsaneo.
16 PROFESSOR DORSANEO: Good cause once was the
17 standard for extensions of time in the appellate rule
18 book, and the Supreme Court interpreted that language to
19 mean good -- the good cause as to why it could not have
20 been done, which was regarded as a very, very tough
21 standard.
22 CHAIRMAN BABCOCK: Not namby-pamby.
23 PROFESSOR DORSANEO: Huh?
24 CHAIRMAN BABCOCK: Not namby-pamby.
25 PROFESSOR DORSANEO: Not namby-pamby, and

1 actually, probably the current appellate rules, 10 days
2 may be too fast for records in accelerated appeals
3 generally, but the current appellate rules, you know,
4 contemplate if you don't get it up there then there's
5 going to be -- you know, there's going to be in relatively
6 short order a notice sent to the trial judge and to the
7 parties that it needs to be done by this time, and if that
8 doesn't happen then we're into -- then we're into big
9 trouble. So, you know, if the good cause standard means
10 what it used to mean you won't be able to satisfy the
11 standard very often, so it's not much of a standard.
12 Reasonable explanation is a better standard for
13 extensions, and we know what -- and we know what that
14 means if we're going to want an extension, but maybe this
15 is a circumstance where we pick a time and say that you
16 just do it.
17 CHAIRMAN BABCOCK: Yeah. Okay. Justice
18 Christopher, then Justice Bland.
19 HONORABLE TRACY CHRISTOPHER: I think if we
20 looked at the delay, a large part of the delay in getting
21 the records done here is payment of the record, all right,
22 either paying the district clerk or paying the court
23 reporter. Okay. The rule that we're writing here deals
24 with both types of cases, one where they're free, one
25 where people are paying. You know, to me if the district

1 clerk knows this is a free record, it ought to be done in
2 10 days. Okay. If the district clerk says, "Well, I'm
3 waiting around for them to, you know, get my money in,"
4 it's going to take a little more time; and the problem is
5 the people appealing who have to pay, you know, maybe
6 they're not indigent, but they don't have a lot of money,
7 and coming up with, you know, a thousand dollars if it's a
8 complicated case for a court clerk record and then, you
9 know, another couple thousand dollars for the reporter's
10 record takes them time. All right. They're not indigent,
11 but most of us, you know, cannot just pull out $3,000 and
12 plop it down on day one so that the record can get done.
13 I mean, that's really the issue.
14 CHAIRMAN BABCOCK: Justice Bland.
15 HONORABLE JANE BLAND: If we start with the
16 10 days as the aspirational rule that the Legislature
17 apparently has said that we should start with, it will
18 help, because what will happen after 10 days is we won't
19 have the record at the appellate court, so now it signaled
20 to us the record has not been filed. We then will send a
21 notice, at which point the court reporter will say, "I
22 didn't know a notice of appeal was filed," or "No one has
23 made arrangements to pay, can I have some extra time to
24 get it done," but instead of all of that happening 30 or
25 60 days out, it happens within two weeks of -- after the

1 10 days is gone, so that I fully understand that we won't
2 get all records filed within 10 days, but what we will do
3 by starting out with the 10 days is that we will start the
4 extensions from that and start to get a handle on what the
5 problem is, whether it's a party not having made
6 arrangements to pay, whether they haven't -- nobody has
7 been informed of the fact that the party is indigent, just
8 some kind of follow-up on the missed deadline, and instead
9 of it being a missed deadline 60 days out, it's a missed
10 deadline 10 days out.
11 CHAIRMAN BABCOCK: Let's take a vote. How
12 about lunch? Everybody in favor, raise your hat hand.
13 MR. ORSINGER: Chip, can I say one thing
14 before we break?
15 CHAIRMAN BABCOCK: Although, the chair of
16 the subcommittee --
17 HONORABLE TOM GRAY: Can we take a vote on
18 that, whether or not he can say anything?
19 CHAIRMAN BABCOCK: Say one thing before we
20 break for lunch.
21 MR. ORSINGER: We need to recognize that
22 under House Bill 906 there will be a continuing
23 presumption of indigency, and so we are going to have
24 situation where there's presumptively going to be a free
25 record and a court clerk or a court reporter saying, "I

1 haven't been paid" doesn't work unless they file a contest
2 that's sustained. So the process with the presumption of
3 continuing indigency is going to put, if you will,
4 constructive notice on the court reporter and the clerk
5 that they're not entitled to be paid. So let's just
6 remember that that excuse that no one has made
7 arrangements to pay me isn't going to work if they had a
8 court-appointed lawyer in the trial.
9 CHAIRMAN BABCOCK: Good point. Good final
10 point before lunch.
11 MR. ORSINGER: Thank you.
12 CHAIRMAN BABCOCK: We'll chew on that over
13 lunch.
14 (Recess from 12:39 p.m. to 1:31 p.m.)
15 CHAIRMAN BABCOCK: As fascinating, Richard,
16 as you've been, we're going to shift gears for just a
17 minute and take up item four on our agenda, which is cases
18 requiring additional resources. The reason we're breaking
19 away from the parental rights termination bill is because
20 we have the distinguished Dickie Hile with us, who was the
21 chair of the State Bar task force on additional resources
22 for complex cases. There is a report, really well done,
23 as would be expected, by that task force and then an
24 Appendix A, which has a proposed rule; and, Dickie, if you
25 wouldn't mind, give us some background about how your task

1 force approached the problem, what you thought your
2 mandate was, and then take us through the rule. I don't
3 think you've ever been in front of this group before, but
4 they will rip the rule to shreds, and don't take it
5 personally.
6 MR. HILE: I think in order to understand
7 where we went and how we got there you need to have a
8 little background history about this particular
9 legislation because it does influence the rule drafting
10 significantly. In 2007 Senator Duncan filed SB 1204,
11 which was a comprehensive court revision bill, which
12 included part 7 or article 7 which was the complex court
13 provision. As originally presented and filed, that bill
14 basically tracked I guess it was either the Georgia or the
15 California complex courts provision, which essentially had
16 a specialized court setup with a panel that would
17 determine whether or not a case met the complex needs and
18 then it was referred from the originating court to the
19 specialized court; and as you might expect that gained a
20 lot of notoriety and a lot of controversy; and so midway
21 through the session there was a working group that was
22 established that was TADC, TTLA, ABOTA, some of the tort
23 reform groups; and they went through and completely
24 revisited that particular section; and as a result of that
25 a committee substitute was filed in the first part of May

1 which eliminated that process in its entirety and replaced
2 it with this new concept of additional judicial resources;
3 and the underlying concept being that the present
4 judiciary could handle the case provided that they had the
5 resources necessary to do so; and so that bill made it
6 through the Senate, failed in the House.
7 That summer the State Bar president
8 appointed a task force to look at that bill in its
9 entirety; and, again, there was a subcommittee appointed
10 that addressed this particular section, the complex court,
11 spent a lot of time, went back and revisited in part the
12 issue of whether or not we should have a specialized court
13 that cases would be referred to and would only handle
14 complex cases. At the end of the day the task force came
15 back with its opinion and recommendations in 2008 that
16 says, no, we believe that the judiciary is capable of
17 handling the cases provided they have the adequate
18 resources, looked at 1204, the committee substitute,
19 tweaked with some of the language and made some suggested
20 changes.
21 '09 the bill came back up. You went through
22 as far as this particular article was concerned. It
23 passed the Senate, and I think it got through the House,
24 but it did not pass the legislation that particular year.
25 In 2011 we came up again. Senator Duncan filed a bill.

1 Jim Jackson filed a companion in the House. The bill got
2 through both houses with a differing version and, of
3 course, was sent to a conference committee. They worked
4 out the language differences, but the committee report was
5 never adopted, so it failed at that point. At that point
6 we went into the first special session and then you had
7 Tryon Lewis pick up the bill, change the caption so it
8 would meet the call requirements, and on the last day of
9 the session, the special session, it passed and was signed
10 by the Governor.
11 Now, the one thing you need to know right
12 off the bat is, of course, there's no funding for this
13 particular bill. The original version of the bill as
14 filed in '11 and as filed -- not in the special, but in
15 '11. It had a 250,000-dollar fiscal note, and of course,
16 once it became apparent that anything with fiscal note was
17 dead, that was removed from the bill and was never
18 inserted again. So we're talking about rules that have
19 nothing -- no funding to be supported at this particular
20 time.
21 The task force, you know, the first issue
22 the task force really addressed was the question of
23 philosophically how do you approach this. You know,
24 you've got HB 274 that came through with the expedited
25 trial process, what I call the 12(b)(6) motions to

1 dismiss, those kind of procedurals and where you were
2 given basically a broad generic instruction to the Supreme
3 Court, "Develop rules consistent with these principles."
4 HB 79 is totally different in the -- there was extensive
5 writing and drafting during the 2007 session. There was a
6 little tweaking of the bill, as I recall, in '09, and this
7 article has basically remained the same in the '11
8 version, 2011 version. It's quite specific. It's very
9 instructive as far as the particular manner in which
10 things are to be addressed, and so the committee as it
11 looked at this particular bill and began its drafting
12 process philosophically had said the Legislature has not
13 really mandated an adoption of particular rules. It has
14 been very specific and instructive, and to the extent that
15 those are proper, we're going to follow those. And so
16 from the get-go, you're going to find that if you were to
17 compare the rules and the legislation there's going to be
18 a number of parts that are going to be identical. I mean,
19 the text has not changed in one iota, so it was just that
20 that particular language was so instructive we felt that
21 it was important that it be followed.
22 Now, and the same thing, for example, to
23 give you two examples of that, the considerations that are
24 to be utilized in deciding whether a case, in fact,
25 deemed or is -- justifies additional resources, that's a

1 verbatim language from the bill. Same thing as regard to
2 the resources that may be provided. It's the same thing
3 that was provided in the bill. Now, once you get into the
4 process and the procedures, you get a little variation
5 because that's when the discretion kind of kicked in and
6 the committee then had to basically decide how we were
7 going to proceed.
8 Now, the first issue I think we kind of
9 addressed philosophically was what kind of process do we
10 want, and at the end of the day, recognizing the limited
11 funds that would probably always be available, that we
12 didn't want a complex process. We wanted a lot of
13 flexibility for the presiding judges as they acted in
14 their capacity as members of this judicial committee
15 rather a very formalized process, and so in that regard
16 flexibility probably was kind of the overriding concept
17 that is utilized in the drafting and in the rules that
18 were actually adopted and are proposed to you today. I
19 can just go through basically -- we talked about, for
20 example, there were six or seven issues we addressed that
21 were not really taken care of in the bill, the first one
22 being where are these rules going to be. You know, you
23 read the legislation, it doesn't say these are going to be
24 Rules of Administration; but you look at them in the
25 language; and it's clear these are not Rules of Civil

1 Procedure; and the appropriate process was to go and look
2 at the inclusion of those in section 16, which in the
3 Rules of Judicial Administration, so that was not a very
4 difficult decision.
5 The second decision was from a procedural
6 standpoint how do you want this flow of orders or whatever
7 you may mandate requesting judicial resources; and we
8 said, well, we don't want to bog down the Supreme Court
9 clerk with additional set of docket filings, because we
10 don't think it warrants that, but we do need some process
11 there where you have a filing clerk who will be accepting
12 all filings, maintaining records, will have some process
13 for archiving documents going forward and basically will
14 have a process for developing some type of budgetary
15 proposals with the Legislature in the following years, and
16 so after looking at I think it's Rule 12, which is the
17 rule dealing with judicial records and access to that, we
18 noted that the Office of the Court Administration
19 basically operates as the clerk or the director of the
20 Office of Court Administration. And we had in our task
21 force 14 members, and I added in the working group Carl
22 Reynolds from the Office of Court Administration; Cory
23 Pomeroy, who was general counsel to Senator Duncan; Ryan
24 Fisher, who was the chief of staff to Senator Jackson; and
25 Kari King, who was the -- now the general counsel to the

1 judiciary committee in the House. So we had those people
2 involved and from the standpoint of trying to decide what
3 was the appropriate way of going forward.
4 So at that point in time began we decided
5 that let's take an informal process. The judicial -- the
6 OCCA will not only provide support to the committee, it
7 will also act as the filing clerk, and that way the
8 informal process will go forward. What you will see from
9 a procedural standpoint, there's very specific language
10 about the process that's to be followed and kind of the
11 gatekeeper function, but basically this is what is in the
12 rules. You may implement or you may seek implementation
13 of the judicial resources by either the parties filing a
14 motion with the trial court or the trial court on its own
15 motion deciding to take this issue up.
16 There is no requirement that there be an
17 evidentiary hearing. It may simply be by conference. All
18 that is necessary is that the court determines that
19 additional resources are necessary, that it enter an order
20 basically describing the nature of the case, the
21 considerations that warrant this case being deemed
22 necessary for judicial additional resources, and to state
23 what resources are actually being sought. Once that order
24 is signed, it's forwarded to the JCAR clerk, who, again,
25 is the OCA director. A copy is sent to the presiding

1 regional judge for that particular trial court, and the
2 process is implemented. The JCAR clerk sends it to
3 the JCAR committee. The presiding judge actually acts as
4 a gatekeeper.
5 If you look at the legislation, the JCAR is
6 the initial gatekeeper. He looks at the bill, he or she
7 looks at the bill or the order and decides first whether
8 or not it has within his resources the ability to address
9 the concerns that have been raised. He may already have
10 the ability to request the appointment of a visiting
11 judge, if that's what's asked, but within his allotted
12 resources he first makes a determination of whether he can
13 basically address the needs of that particular trial
14 court. If he can, he does so, and that's the end of the
15 day. Nothing goes farther.
16 If he thinks additional resources are
17 necessary and it's not within his allotted resources then
18 the case is forwarded to the JCAR committee, which is
19 headed by the Chief Justice of the Supreme Court and the
20 nine presiding judges. They then would evaluate the
21 request. Whether the presiding judge or JCAR enters or
22 decides to act and makes a decision one way or the other,
23 an order is entered either denying the request or granting
24 the request and stating forth what resources would be
25 provided. That's then sent back to the JCAR clerk and

1 then OCA will assist in the implementation of those
2 provisions as well as any other groups that might be of
3 any benefit to the process.
4 Now, a couple of issues, any action taken by
5 the trial court, by the presiding judge, or by JCAR is not
6 subject to appeal. It's not subject to mandamus. That's
7 specifically set forth in the statute, and it's basically
8 reiterated in the rules that are proposed. We did put a
9 time limit -- not a time limit, that's not a correct
10 statement. We did provide that after 15 days the JCAR
11 clerk is going to notify if no action has been taken, and
12 so at least the trial court would know if no action has
13 been taken, or if an order has been entered it would
14 immediately send a copy of the order to the trial court in
15 question so that they would know what's happening, and
16 that's basically the process that goes forward at that
17 point in time.
18 And the reason why, again, we looked at
19 making this informal, you know, we didn't -- you look at
20 some of those administrative rules and you see that
21 there's language about the quorum necessary for the
22 committee, there's language about the specific nature of
23 the pleadings that must be filed. When you've got
24 legislation that you can't even get $250,000 to support,
25 to infuse within that process a lengthy structured process

1 we thought just was not beneficial. It just doesn't -- at
2 the end of the day it doesn't advance the ball down the
3 court; and so that was the reason, overriding reason, we
4 said let's keep it simple, let's keep it flexible, and the
5 presiding judge already has that relationship; and, you
6 know, the question is in the legislation it provides
7 specifically the language which is in the bill about the
8 presiding judge being the gatekeeper; and of course, I
9 think the reason for that is, A, he is or she is most
10 knowledgeable about the needs of the courts within his
11 district; B, you're going to be prioritizing. Assuming
12 you get some type of funding at some point in time you're
13 going to have to prioritize those funds, and he's going to
14 have to make decisions within his own district and within
15 the other districts in which the requests are being made
16 for additional resources about how you're going to try to
17 fund those. And so we said, you know, at that process you
18 just want it simple where he enters an order, and to the
19 extent he can address it with his allotted resources, he
20 does so. To the extent he can't, he forwards it onto the
21 committee.
22 A couple of other issues that it might give
23 you some insight into it, in regard to the right of appeal
24 as they indicated, there is no right of appeal. There was
25 a discussion about did that preclude -- the legislative

1 language that said there is no right to appeal by mandamus
2 or otherwise a decision by these three entities, does that
3 mean that if the presiding judge were to say, "No, I'm not
4 going to give you any additional resources," should there
5 be an appeal of that decision, and the committee discussed
6 it at length and concluded that, no, you shouldn't. Two
7 reasons: A, the lack of funding; B, the fact that you're
8 going to be prioritizing those fundings and to somehow
9 say, you know, you didn't give me this particular resource
10 and, therefore, I ought to be able to go to JCAR and
11 overrule you, it brought in an additional level of tension
12 we thought that didn't really justify the situation in
13 light of the funding abilities that we're going to be
14 facing.
15 A second role that we discussed, there was
16 so much controversy when 1204 was filed about complex
17 cases that everybody got away from the complex case, and
18 they just started talking about certain cases with these
19 particular type of criteria. You know, it was just -- it
20 was almost toxic. You know, you say, well, it's the
21 complex case, you know, panel or something like that, you
22 know. So you'll see in the legislation they talk about
23 certain cases needing additional resources. We went back
24 to complex cases because that's really what you're talking
25 about, but when you get into the factors or the

1 considerations, there was a discussion about should we
2 expand this to include catastrophic events.
3 As the bill was drafted it basically was
4 talking about single shot cases, and there was discussion
5 because, you know, we've gone through two catastrophic
6 hurricanes on the Gulf Coast. We've seen how they've shut
7 down courthouses; and is there a need to have some type of
8 formalized process for getting resources to those areas;
9 and at the end of the day, as you will note in the report,
10 the agreement was, yes, you should seek and we should try
11 to formalize that process so that we don't have to
12 reinvent the wheel every time a hurricane blows up in the
13 Gulf and hits one of these counties. But at the end of
14 the day that issue really was never vetted by any of the
15 legislative processes. It wasn't a part of the discussion
16 during the task force in '07, '08, and so the committee
17 just felt that that was something that really should be
18 left for another date. We did, as reflected in our
19 report, note that, you know, I think it was '09, Justice
20 Hecht, that the Legislature gave the Supreme Court and the
21 Chief Justice certain powers to modify procedures in the
22 event that you have those kind of catastrophic disasters.
23 HONORABLE NATHAN HECHT: Right.
24 MR. HILE: And so that is in place or in
25 part. It might be helpful if somebody took that ball and

1 advanced it down the court and developed more formalized
2 processes similar to what we have here, but again, the
3 committee decided that that wasn't within the mandate that
4 we were given, and therefore, we decided not to act on
5 that particular issue.
6 Funding and the lack thereof, as you'll note
7 in the rules, it specifically states in the legislation
8 and in the rules that the state is to provide these
9 fundings. You cannot tax these as costs for the parties,
10 and there's also language in the particular statute to the
11 effect that you can only -- if there's no appropriations
12 then JCAR cannot commit funds. Of course, it doesn't have
13 anything, but it cannot commit any funds in that process.
14 What concerned the committee -- and you'll see that the
15 language is tweaked with in the end, and that would be
16 somewhere around 16 -- the last two sections. 16.11,
17 provisions for additional resources. It talks about (a),
18 the cost and the fact that that must be paid by the state
19 and may not be taxed. (b) is the appropriation for
20 additional resources, and as I indicated, the legislation
21 says, you know, "Unless funds are appropriated you can
22 take no action by JCAR."
23 The concern that the committee has is if you
24 go back to the FLDS case back in '07, '08, you know, at
25 that point in time there was a confluence of groups that

1 joined together between the Supreme Court and between OCA
2 and between the Governor's office and others. There were
3 grants that were obtained to assist the court down in
4 Schleicher County as it processed those claims. There was
5 funding from another -- from a myriad of sources, and if
6 something was to develop to date, an event that caused a
7 particular case to need additional resources, we wanted to
8 track the language in the legislation that you had to have
9 appropriations, but we added in and we modified that
10 section to the extent that there are funding available
11 through other sources it should not preclude JCAR from
12 acting. You may have it via grants, you may have the
13 Governor's office assisted in that FLDS case.
14 So, again, we kind of modified that to the
15 extent -- and that language comes from the gurus over in
16 budget in OCA because I certainly don't have that ability,
17 but basically says, "Additional resources are subject to
18 availability of appropriations made by the Legislature or
19 as provided through budget execution, authority, or other
20 budget adjustment methods." So there's, as I understand
21 it, a myriad of ways that funds may be transferred within
22 particular situations, and we wanted to leave those
23 avenues open in the event that something developed, and
24 even though we didn't have an exact appropriations like in
25 this particular session that there would be means where

1 JCAR could proceed and maybe assist a court in that
2 particular situation.
3 We did add one final deal that at the
4 conclusion of a case that had JCAR additional resources
5 added that there be a final report submitted and
6 maintained, and that's more for budgetary processes. One
7 of the discussions after the FLDS case was, is that really
8 we had no consolidated method of determining what the
9 actual costs were in that process and if we had something
10 going forward then we would have a basis to go to the
11 Legislature and say, "Look, we know it costs X, Y, Z, for
12 this particular implemental resources provided in a case
13 and if you provide us these then we will have that
14 available." So, Chip, that's just kind of a brief
15 overview.
16 CHAIRMAN BABCOCK: Thank you.
17 MR. HILE: If that's sufficient, I --
18 CHAIRMAN BABCOCK: That is sufficient for
19 now until the barracudas start swarming. A couple of
20 questions, though. First of all, unless I missed it, I
21 don't think "additional judicial resources" is defined in
22 either the rule or the statute, but maybe I missed it, and
23 if it's not defined, what is an additional judicial
24 resource?
25 MR. HILE: Well, if you'll look at -- I

1 guess to the extent that it's defined it's in 16.5, which
2 is the additional resources. That section which tracks
3 the language from the bill basically sets forth what
4 resources may be provided. You know, it gives you (a)
5 through (g), which are specific in nature, and (h) which
6 is more of a kind of a catch-all phrase.
7 CHAIRMAN BABCOCK: Okay.
8 MR. HILE: That's as close to I think what
9 you're asking that we did.
10 CHAIRMAN BABCOCK: Yeah. That's good.
11 Second question, tell us a little bit about the task force
12 members. It looks -- I know many of them, but it looks
13 like -- specifically it looks like both the plaintiffs bar
14 or the defense bar and judges at various levels from the
15 trial to appellate were represented.
16 MR. HILE: Right. You know, the bill
17 required that there be a diverse group, and so Bob Black
18 is the one who appointed the particular committee. It was
19 14 in number. We had sitting court of appeal judges. We
20 had sitting district judges. We had retired district
21 judges, retired court of appeal judges, and then we had
22 plaintiffs bar -- members of the plaintiffs bar and the
23 defendants bar.
24 CHAIRMAN BABCOCK: Okay.
25 MR. HILE: I did -- like I say, I expanded

1 the working group to include Senator Duncan's general
2 counsel and also representatives from -- I mean,
3 Representative Jackson and Representative Tryon Lewis,
4 simply because if you're speaking of legislative history
5 and there were issues and there were some discussions in
6 which we asked them, "Was this particular issue discussed,
7 and if so, is this an appropriate function for us to
8 involve ourselves," specifically the catastrophic events.
9 CHAIRMAN BABCOCK: Right. Richard, hang on
10 for one second. In the past task forces have come before
11 us and there have been -- the history of the task force is
12 there have been sharp divides between plaintiffs lawyers,
13 defense lawyers, and in some cases the court -- the judges
14 are mad about things. We found that when we took up the
15 complex case thing. A lot of judges were irritated by
16 that. Was there any -- was there any of that dysfunction
17 in your task force?
18 MR. HILE: There really was not, and I think
19 that is reflective of the long legislative process that
20 had caused the evolution of this particular bill, and
21 having sat through most of those hearings, most of that
22 had been ferreted out and between that and the task force,
23 you know, had been fairly well narrowed the issues that we
24 were going to be confronted with, so you did have that
25 degree of comfort. The one thing I did do was to include

1 the presiding judges. I mean, there was no presiding
2 judge on our particular committee, so Judge Ables, I did
3 send him a copy and circulated our proposed drafts through
4 that group so they would have some insight, and then with
5 Dean Rucker, I visited with him on a number of occasions,
6 and he proposed some changes in language.
7 So I did want to at least have them since
8 they were the group that was going to have to operate
9 under these procedures, and that's the reason why we
10 didn't go into the more operational aspects of the
11 committee. I mean, you've got a working committee that's
12 got a chair appointed. You know, rather than micromanage
13 their processes, they operate now, and we just said let's
14 stay away from trying to figure out how they should
15 actually handle these issues.
16 CHAIRMAN BABCOCK: Did you have any
17 dissenters? Were there any of these provisions in Rule 16
18 controversial at all?
19 MR. HILE: To be truthful, no.
20 CHAIRMAN BABCOCK: Okay. Well, and truthful
21 is always best.
22 MR. HILE: Yeah, and there were no dissents
23 to the final report or to the rules that were recommended.
24 CHAIRMAN BABCOCK: All right. I hadn't
25 heard any, but that's terrific. That's great. Buddy,

1 anything out there in the weeds? Is this controversial
2 that you've heard? You're the one with the ear to the
3 ground.
4 MR. LOW: Everything he's said is right.
5 I've known him from for a long time. He's from East
6 Texas, so it's gospel. Let's go on.
7 CHAIRMAN BABCOCK: Okay. That's good.
8 Anybody else picked up on any controversy with respect to
9 this? Okay. One final question, on 16.11(a) where you
10 say, "The additional resources provided shall be paid by
11 the state, may not be taxed against any party in the
12 case," what about the situation where the parties agreed
13 to be taxed or charged in some way? Justice Hecht many
14 years ago had an experience with a nuclear power case with
15 Roy Minton and former Chief Justice Hill where the parties
16 actually built a facility to try this massive case.
17 MS. BARON: I worked on that.
18 CHAIRMAN BABCOCK: But they paid for it.
19 Yeah, Pam.
20 MS. BARON: I worked on that at Graves
21 Dougherty.
22 CHAIRMAN BABCOCK: It didn't come out of
23 your pocket, did it?
24 MS. BARON: No, fortunately not.
25 CHAIRMAN BABCOCK: Money was going into your

1 pocket, not out of it. But would this preclude that?
2 MR. HILE: Yes, and that comes specifically
3 from the statute. There was a short discussion about
4 that, but, you know, when the -- that language is from the
5 statute, so --
6 HONORABLE STEPHEN YELENOSKY: But, Chip, it
7 wouldn't preclude them from doing that again, just outside
8 of this process.
9 CHAIRMAN BABCOCK: Just outside of the
10 process --
11 MR. HILE: That's right.
12 CHAIRMAN BABCOCK: -- go to the trial court
13 and say we need to --
14 HONORABLE STEPHEN YELENOSKY: Yeah.
15 CHAIRMAN BABCOCK: -- an airplane hangar for
16 a courtroom.
17 HONORABLE STEPHEN YELENOSKY: Yeah, we're
18 just not going to use -- we're not going to JCAR.
19 CHAIRMAN BABCOCK: Okay.
20 MR. HILE: And with no funding I find it --
21 why would you go to JCAR when you have funding, I mean,
22 unless you're in dire straits, the process is going to
23 probably revert back to the mean, which is going to be the
24 presiding judge can provide something.
25 CHAIRMAN BABCOCK: Orsinger had his hand up

1 first, Frank, and then you. Richard.
2 MR. ORSINGER: I just wanted to note that
3 one of the task force members was Judge Barbara Walther,
4 who was the trial court judge presiding over the Latter
5 Day Saints provision where they had hundreds of children
6 that were removed from home and put in temporary foster
7 care, and so I would assume that that's the kind of
8 situation that might -- this might be suited for --
9 MR. HILE: True.
10 MR. ORSINGER: -- and that her experience
11 with that might have been a valuable resource.
12 MR. HILE: In fact, the very first meeting I
13 asked Barbara to lay out what happened in that case and
14 what the needs were in that case so we could kind of get a
15 grasp of what you actually may be talking about, and I
16 think the most instructive thing she talked about was the
17 first meeting that they had they asked the district clerk
18 to come to Midland and sit down and bring all your
19 computers and let's figure out the docketing, and they
20 walked in with three typewriters, and she said, "I knew
21 right then that we had some problems." They didn't have a
22 single computer in the courthouse. But, yes, she did. I
23 think, you know, the use of -- you're talking about what
24 resources, it may be a case that involves a mineral
25 dispute in a small county. If you can have access to a

1 computerized electronic docket filing, that can
2 significantly advance the process, so, I mean, we
3 considered those kind of situations.
4 CHAIRMAN BABCOCK: Great. Great. Frank.
5 MR. GILSTRAP: 16.11(b) talks about
6 funding -- additional funding. It talks about the
7 possibility of getting funds from grants or donations.
8 Are we talking it could be private individuals or
9 businesses or nongovernmental organizations? Could they
10 be funding this thing?
11 MR. HILE: Frank, in the past they have.
12 Now, I will let Carl -- because he was involved in the
13 process with the FLDS, that was a discussion that you
14 could have that scenario develop. We were really talking
15 more about the grants coming through the Governor's office
16 and everything, but, Carl, you can --
17 MR. REYNOLDS: Yeah, the Governor's office
18 was one thing that happened in the FLDS case, was some
19 money flowing through there, but I have the independent
20 statutory authority to accept grants and donations to
21 advance the purposes of my office, and this would be one
22 of those. The restriction is that I can't get donations
23 from lawyers or law firms, so --
24 MR. GILSTRAP: But if XYZ corporation felt
25 that prosecuting or not prosecuting these cases was in its

1 interest, they could come with some money?
2 MR. REYNOLDS: Well, conceivably. I think
3 we would have to be careful not to create a stinky
4 situation, but there is at least the potential for getting
5 donations to do this or other things that my office does.
6 MR. HILE: Frank, that was an issue that
7 was, you know, discussed at length. There were concerns
8 that private money could influence the process, and I
9 think at the end of the day we said, well, you know, OCA
10 has got to exercise discretion in this process of not
11 taking funds that may be used for that purpose.
12 MR. GILSTRAP: Or particularly maybe, you
13 know, it might be easier to take funds if it's an
14 unpopular thing.
15 CHAIRMAN BABCOCK: Yeah, Richard.
16 MR. MUNZINGER: The statute says, "The costs
17 shall be paid by the state." Section 74.235, page 101 of
18 the handout, "The cost of additional resources provided
19 for a case under this subchapter shall be paid for by the
20 state."
21 MR. REYNOLDS: Once I get funds it's the
22 state's money at that point.
23 MR. GILSTRAP: Doesn't it say it, "It shall
24 be paid by appropriations"?
25 CHAIRMAN BABCOCK: Judge Yelenosky.

1 HONORABLE STEPHEN YELENOSKY: Yeah. I mean,
2 so donate it to the state and flag it for JCAR. The only
3 concern I would have is if they could flag it for a
4 particular case.
5 CHAIRMAN BABCOCK: Right.
6 HONORABLE STEPHEN YELENOSKY: If they give
7 it to JCAR and JCAR committee is making the decision, I'm
8 not so concerned. They can't say, "Here's a bunch of
9 money that we want you to put into this particular case."
10 The second question or point is we all just
11 heard there's no money there, but lest some judge out
12 there who is religiously reading the new rules thinks it's
13 Christmas might we not put a comment that somewhat
14 euphemistically allows them to check for to see if at
15 least any money before they go through this process.
16 MR. HILE: We probably should. And that
17 should be with a directive. Once you have an
18 implementation through y'all's process, I would think that
19 then we need to do that so you don't go through a process
20 for nothing.
21 HONORABLE STEPHEN YELENOSKY: Right. And is
22 there any -- is there somebody you can check with now that
23 you can identify in the comment? If not, could you make a
24 comment that says it's subject to appropriations or
25 something? The best would be if there's a way for judges

1 to first find out if there's even any money there before
2 they go through it.
3 CHAIRMAN BABCOCK: Good point.
4 MR. HILE: And I think that's the reason for
5 using the presiding judge as a gatekeeper in that
6 process --
7 HONORABLE STEPHEN YELENOSKY: Well, that's
8 true.
9 MR. HILE: -- is that he is going to be most
10 knowledgeable about the access to funding and the level.
11 I mean, if you're coming -- even if you get $250,000, I
12 don't know whether that would have been sufficient to
13 really address all the needs in the FLDS cases.
14 MR. REYNOLDS: It would have, actually.
15 MR. HILE: Okay.
16 MR. REYNOLDS: At least from the court's
17 standpoint. The Family and Protective Services sank
18 millions into that case, but it was not our problem.
19 CHAIRMAN BABCOCK: Okay. Any other general
20 comments? Yeah, Professor Carlson.
21 PROFESSOR CARLSON: Are there any other
22 states that are using this type of vehicle for funding
23 cases?
24 MR. HILE: I'm not aware of a formalized
25 process like this, no.

1 CHAIRMAN BABCOCK: Okay. Any other general
2 comments? Okay. Let's quickly go through Rule 16 here.
3 Anybody have any comments on 16.1? This, I believe you
4 said, Dickie, comes pretty much straight out of the
5 statute?
6 MR. HILE: It does, and the only exception
7 being in (c), little (2), grants for local court
8 improvement under section 72.029 of Texas Government Code.
9 Carl has situations where he may have grants that would
10 not be within the JCAR, and that was just simply to say
11 that they wouldn't be subject to the rule. That's the
12 only change.
13 CHAIRMAN BABCOCK: Okay. All right. Any
14 comments about 16.2? Again, did this come out of the
15 statute or was --
16 MR. HILE: No, the JCAR clerk, of course, is
17 something we developed. The presiding officer is straight
18 from the statute as well as the presiding judge. Trial
19 court, we had a little question about that. If you look,
20 it says in (e), "Trial court means the judge of the court
21 in which a case is filed or assigned." We talked about
22 filing and then, of course, you always come back to Travis
23 and to Bexar and to Tom Green, those counties that have
24 that docket where it's really not assigned or it's not
25 filed in a particular court; and we discussed, well,

1 should we actually set the process here of saying how
2 that's going to be decided; and at the end of the day we
3 said, look, let them decide under their local rules how
4 they're going to decide who makes that request rather than
5 us trying to decide it on their behalf.
6 CHAIRMAN BABCOCK: So that's why you have
7 "filed or assigned"?
8 MR. HILE: "Or assigned," right, hopefully
9 to address that issue.
10 CHAIRMAN BABCOCK: Okay. Gene.
11 MR. STORIE: Sorry to back up, but I was
12 going to suggest in 16.1(c) that the statutory references
13 be consistent in form.
14 CHAIRMAN BABCOCK: Say that again, Gene.
15 I'm sorry.
16 MR. STORIE: That in 16.1(c) --
17 CHAIRMAN BABCOCK: Right.
18 MR. STORIE: That the statutory references
19 be consistent in form. Texas Government Code in one. In
20 (2) and sub (3) there is not a code reference. In sub (4)
21 it just says "Government Code."
22 CHAIRMAN BABCOCK: Great point, thanks. All
23 right. Anything else on those two subdivisions? How
24 about 16.3? Oh, I'm sorry. Judge Christopher.
25 HONORABLE TRACY CHRISTOPHER: I'm sorry, I

1 missed the comment on 16.2. I don't see "presiding
2 officer" used anywhere else in the rule, 16.2(c). It's
3 just a minor comment, and then on 16.3, is the JCAR clerk
4 actually filing or just accepting these things?
5 MR. HILE: Accepting.
6 HONORABLE TRACY CHRISTOPHER: All right.
7 Because you have "filed" there in (b), and I would put
8 16.12 under here rather than as a standalone provision
9 because those are all the duties of OCA.
10 CHAIRMAN BABCOCK: Great. Thank you.
11 Anything else on 16.3? All right. 16.4. Any comments on
12 16.4? Considerations?
13 MR. HILE: That is a verbatim restatement of
14 the statute.
15 CHAIRMAN BABCOCK: Verbatim from the
16 statute. So even if there were comments, we would have to
17 reject them.
18 MR. HILE: I think you've got the latitude
19 somewhere, but I don't know.
20 CHAIRMAN BABCOCK: 16.5.
21 MR. HILE: That, again, is a verbatim
22 restatement.
23 MR. BOYD: That -- I'm sorry.
24 CHAIRMAN BABCOCK: Yeah, Jeff.
25 MR. BOYD: Just formatwise, 16.4 has a sub

1 (a) but no sub (b). Is that --

2 MR. HILE: We eliminated a (b). Okay.

3 Thank you, Jeff.

4 CHAIRMAN BABCOCK: Yeah, that should be

5 reformatted. Good point. Okay. Anything in 16.5? 16.6?

6 Yeah, Sarah.

7 HONORABLE SARAH DUNCAN: Use of the word

8 "retired judge," I'm very sensitive to this these days.

9 CHAIRMAN BABCOCK: Why would that be?

10 HONORABLE SARAH DUNCAN: That it's not used

11 consistently in the statutes, and I don't know the sense

12 in which it's used here.

13 CHAIRMAN BABCOCK: We're talking about

14 16.5(a) that uses the phrase "the assignment of an active

15 or retired judge." And I guess there are judges who --

16 HONORABLE SARAH DUNCAN: There are judges

17 who are former judges who have not retired.

18 CHAIRMAN BABCOCK: Right. Richard.

19 MR. MUNZINGER: Is 16.5(a) an exact quote

20 from the statute?

21 MR. HILE: I believe so.

22 MR. MUNZINGER: I was looking quickly, and I

23 couldn't find it quickly.

24 CHAIRMAN BABCOCK: Sarah, how would you fix

25 or how would you supplement?

1 HONORABLE SARAH DUNCAN: I'd have to look at
2 the statute.
3 MR. PERDUE: The problem is the "former" and
4 "retired."
5 HONORABLE SARAH DUNCAN: Right. Because the
6 statutes aren't consistent.
7 CHAIRMAN BABCOCK: Yeah.
8 HONORABLE SARAH DUNCAN: And there's a lot
9 of confusion about it.
10 HONORABLE STEPHEN YELENOSKY: Couldn't we
11 just say "another qualifying judge"?
12 MR. PERDUE: Couldn't you add "former"?
13 HONORABLE SARAH DUNCAN: You could add
14 "former," but I'm not sure the Legislature intended that.
15 MR. ORSINGER: Former is someone that was
16 voted out of office; is that right, Sarah?
17 HONORABLE SARAH DUNCAN: No.
18 MR. ORSINGER: No. What is the judge who
19 was voted out of office?
20 MR. REYNOLDS: There's no special term.
21 HONORABLE SARAH DUNCAN: There's no special
22 term. They're just not eligible to do certain things, or
23 they are subject to strikes; isn't that right?
24 HONORABLE DAVID PEEPLES: It's someone who's
25 got enough years to sit as an assigned judge, but has not

1 chosen to be on retirement yet.
2 MR. HILE: It's on page -- well, and the
3 statute would be 74.254 --
4 MR. MUNZINGER: I found it.
5 MR. HILE: Okay.
6 CHAIRMAN BABCOCK: 74 point what?
7 MR. HILE: 74.254(d).
8 MR. ORSINGER: And this is verbatim?
9 MR. HILE: Yes.
10 HONORABLE SARAH DUNCAN: My hunch is that
11 the Legislature did intend for former judges who are not
12 drawing retirement to be eligible, just because they're
13 eligible to be assigned in a case generally, but I think
14 that needs to be made clear in here. The only way the
15 Legislature can use it inconsistently and it still have
16 meaning, which is what they've done, is they define it in
17 the chapter or subchapter in which it's used.
18 CHAIRMAN BABCOCK: Great point.
19 MR. HILE: So it might include as a
20 definition.
21 CHAIRMAN BABCOCK: Well, either a definition
22 or a comment. Sarah, would a comment suffice?
23 HONORABLE SARAH DUNCAN: I think a
24 definition would be --
25 CHAIRMAN BABCOCK: The definition would be

1 preferable.

2 HONORABLE SARAH DUNCAN: -- preferable.

3 Just me.

4 CHAIRMAN BABCOCK: Yeah. Good point. Yeah,

5 Justice Bland.

6 HONORABLE JANE BLAND: I think since the

7 statute says "active or retired," they didn't intend to

8 include former, and we should just leave it the way that

9 the task force has it, which tracks the language of the

10 statute.

11 MR. HILE: The Legislature has been known to

12 be very -- you know, this has been an issue that's been

13 over there a number of times, and I don't remember during

14 the debate whether that issue was brought up, to be

15 truthful.

16 HONORABLE SARAH DUNCAN: I'm assuming, but I

17 may be assuming incorrectly, that "retired" is not defined

18 anywhere in this chapter or subchapter.

19 CHAIRMAN BABCOCK: I don't see it, unless

20 somebody else does.

21 HONORABLE SARAH DUNCAN: I'm talking about

22 the chapter or subchapter, not just the section.

23 CHAIRMAN BABCOCK: Not the bill.

24 HONORABLE SARAH DUNCAN: It makes me no

25 difference. I just think it should be clarified.

1 CHAIRMAN BABCOCK: Okay. Noted. Anything
2 else about 16.5? Okay. 16.6? Where did this language
3 come from, Dickie?
4 MR. HILE: Part of it I think came from the
5 statute. Let me just -- this is not verbatim from the
6 statute, though, as I recall.
7 CHAIRMAN BABCOCK: Okay. Any comments about
8 16.6? Yes, Sarah.
9 HONORABLE SARAH DUNCAN: Is there a noun
10 missing from subpart (1)?
11 MR. GILSTRAP: Yes.
12 HONORABLE SARAH DUNCAN: (a)(1).
13 MR. GILSTRAP: Subpart (1) could be written
14 better.
15 HONORABLE SARAH DUNCAN: "Involve," noun,
16 "that justify additional judicial resources." There just
17 is a noun missing.
18 CHAIRMAN BABCOCK: Noun missing.
19 MR. BOYD: "Considerations" is the noun.
20 MR. GILSTRAP: "Considerations" is the noun,
21 but certainly (1) could be written better. I don't know
22 what that means.
23 HONORABLE SARAH DUNCAN: I don't either.
24 MR. BOYD: "Considerations that justify
25 additional judicial resources."

1 MR. HILE: Again, I think that was to refer
2 back to 16.4, which is the considerations that are set
3 forth in the statute.
4 CHAIRMAN BABCOCK: Okay. Other comments
5 about 16.6? Frank, did you have your hand up for the same
6 thing?
7 MR. GILSTRAP: No, that was same thing,
8 yeah.
9 CHAIRMAN BABCOCK: Yeah. Sarah.
10 HONORABLE SARAH DUNCAN: I'm a little
11 uncomfortable with the use of the "will" in (a)(2). I
12 would not be comfortable as an attorney basically
13 guaranteeing that additional resources will promote the
14 just and efficient conduct of a case. I would like to say
15 "are likely to," "would tend to," but "will" is
16 definitive.
17 CHAIRMAN BABCOCK: Okay. Other comments
18 about 16.6? Yeah, Sarah.
19 HONORABLE SARAH DUNCAN: Same concern with
20 the use of "should" in (a)(3).
21 CHAIRMAN BABCOCK: And what would you
22 substitute for "should"?
23 HONORABLE SARAH DUNCAN: Giving a court a
24 deadline is foreign to me.
25 CHAIRMAN BABCOCK: It shouldn't be anymore.

1 HONORABLE TOM GRAY: "Are needed."
2 HONORABLE SARAH DUNCAN: "Are needed."
3 CHAIRMAN BABCOCK: Okay. Yeah. All right.
4 Carl.
5 MR. HAMILTON: Just the terminology in
6 16.6(c), "on the trial court's own motion," courts don't
7 make motions. "Court's own initiative" or something like
8 that.
9 HONORABLE SARAH DUNCAN: That's the new
10 modern Brian Garner phrase.
11 PROFESSOR DORSANEO: Actually, it's just to
12 say "own" now.
13 HONORABLE SARAH DUNCAN: Oh, we don't even
14 say "On its own initiative"?
15 PROFESSOR DORSANEO: No, we just say "own."
16 HONORABLE SARAH DUNCAN: Own it.
17 CHAIRMAN BABCOCK: Okay. What else about
18 16.6? Sarah.
19 HONORABLE SARAH DUNCAN: Sorry.
20 CHAIRMAN BABCOCK: No, no, no.
21 HONORABLE SARAH DUNCAN: It's probably just
22 me, but (b), "may request that a case be designated as
23 requiring additional resources," is there not some way to
24 define that? It's just a little awkward. You know, like
25 in Bexar County if you get certified as a complex case

1 then you can have a judge assigned to your case. Could we
2 think of a shorthand way of saying an additional resource
3 case, maybe without -- maybe it's just me.
4 HONORABLE STEPHEN YELENOSKY: Well, not
5 complex case, because that raises the whole -- that raises
6 our --
7 HONORABLE SARAH DUNCAN: I'm not
8 suggesting --
9 HONORABLE STEPHEN YELENOSKY: -- because it
10 suggests that all the other cases aren't.
11 HONORABLE SARAH DUNCAN: I'm not suggesting
12 complex case. It's just that "designated" usually has a
13 noun after it.
14 CHAIRMAN BABCOCK: Uh-huh.
15 HONORABLE STEPHEN YELENOSKY: "A resource
16 intensive."
17 CHAIRMAN BABCOCK: Orsinger, do you have an
18 answer to this?
19 MR. ORSINGER: No, I have a different one.
20 CHAIRMAN BABCOCK: Okay. Well, that's a
21 good point. What's yours, Richard?
22 MR. ORSINGER: On subdivision (d) I'm
23 curious about the concept of the court issuing an order
24 rather than a finding or something, because the trial
25 judge really, of course, has no authority to order

1 anything about this. Really, it's just a request, and so
2 I don't know whether we're asking the court to issue an
3 order or whether we're asking the court to issue a request
4 or a finding. To me I think it's more appropriate to call
5 it a finding and not an order because you're not really
6 ordering anybody.
7 MR. HILE: And at one time we did use the
8 term -- at one time it was "request," and then but you're
9 probably finding, issue findings.
10 MR. ORSINGER: Well, I mean, the question
11 that occurs to me is who are they ordering to do what if
12 it's an order?
13 CHAIRMAN BABCOCK: Yeah. They don't have
14 the authority to order anybody to do anything.
15 MR. ORSINGER: That's why I think either "a
16 request" or "a finding" would be a better way to say it.
17 CHAIRMAN BABCOCK: Yeah, Sarah.
18 HONORABLE SARAH DUNCAN: In (c), second
19 line, "shall," I don't know where we are now with "shall"
20 and "must" and "may," but we're somewhere and --
21 HONORABLE STEPHEN YELENOSKY: Well --
22 CHAIRMAN BABCOCK: Okay. Yeah, Judge
23 Yelenosky.
24 HONORABLE STEPHEN YELENOSKY: And we don't
25 really mean "shall," do we? Somebody files a motion

1 saying, "Judge, we think you need additional resources,"
2 and the judge sits on it because he thinks it's -- or she
3 thinks it's ridiculous, why should I have to rule on it?
4 I mean, right?
5 HONORABLE JANE BLAND: If I don't want to
6 beg.
7 HONORABLE STEPHEN YELENOSKY: If I don't
8 want to beg, why should I have to sign an order saying
9 "denied"?
10 CHAIRMAN BABCOCK: Sarah.
11 HONORABLE SARAH DUNCAN: I would suggest
12 that the requester is entitled to an answer one way or the
13 other, but --
14 CHAIRMAN BABCOCK: Yeah, you're ridiculous.
15 HONORABLE SARAH DUNCAN: I know.
16 CHAIRMAN BABCOCK: That's what Judge
17 Yelenosky would tell you.
18 HONORABLE STEPHEN YELENOSKY: No.
19 HONORABLE SARAH DUNCAN: In the third line,
20 discomfort similar to what I previously stated with
21 "will." "The trial court guaranteeing that will require
22 additional resources" when actually it could settle
23 tomorrow and it won't require any resources.
24 CHAIRMAN BABCOCK: Uh-huh.
25 HONORABLE STEPHEN YELENOSKY: The reason I

1 think it's different from any other request is because
2 it's not an adjudication of anything between the parties.
3 It's a suggestion to the court you might need additional
4 resources, and so maybe it ties back in with what
5 Richard's saying, which is this doesn't end up in an order
6 at all, so I'm asking the judge to enter a finding or I'm
7 asking the judge to ask, you know, is a little different
8 from saying, "I filed a motion to which I'm entitled to an
9 order."
10 CHAIRMAN BABCOCK: Well, the way this
11 sentence reads, it says, "The trial court shall" -- it
12 could be "must" -- "determine whether the case will
13 require additional resources to ensure efficient judicial
14 management." So that leaves it open, I guess, for you to
15 say, Sarah, "No, we're not going to do that because it
16 doesn't need it." Right?
17 HONORABLE SARAH DUNCAN: Yeah. I don't -- I
18 don't understand -- whether it adjudicates an issue
19 between the parties to me is irrelevant. A party has made
20 a request, and I guess to me it's just common courtesy
21 that --
22 CHAIRMAN BABCOCK: Pursuant to a statute.
23 HONORABLE SARAH DUNCAN: Pursuant to a
24 statute that was enacted by the Legislature that we
25 answer. Whether it's "yes" or "no," just answer.

1 CHAIRMAN BABCOCK: That makes sense. Judge
2 Christopher.
3 HONORABLE TRACY CHRISTOPHER: You know, I
4 think we should answer it, and we might want to think
5 about -- even though I know we're going to put a comment
6 in here about we have no money, we might want to think
7 about letting a judge issue such a request even before we
8 have money so that we get a body of knowledge that we
9 could then present to the Legislature and say, "We would
10 sure like funding." Just an idea.
11 CHAIRMAN BABCOCK: Frank.
12 MR. GILSTRAP: The last sentence in part
13 (c), I mean, I know what it says, but there's got to be a
14 simpler way to say it. I mean, you could say, "In making
15 this determination the trial court may direct the
16 attorneys and parties to appear for a conference and in
17 its discretion conduct an evidentiary hearing."
18 CHAIRMAN BABCOCK: I'm trying to think of
19 why the trial court would not believe it had authority to
20 do that.
21 MR. GILSTRAP: Yeah. Yeah. I mean, without
22 saying it.
23 CHAIRMAN BABCOCK: Without saying it. Okay.
24 Yeah, Justice Patterson.
25 HONORABLE JAN PATTERSON: Just before we

1 leave (a)(2), I think that it's fair to ask the parties to
2 state that it will promote the just and efficient conduct.
3 We're not -- I think "promote" is the correct word. We're
4 not saying "will achieve," but that there should be some
5 representation as to the efficacy of the reason behind the
6 motion, so I think that's a fair statement.
7 CHAIRMAN BABCOCK: Okay. What else? 16.6
8 going once. Justice Gray.
9 HONORABLE TOM GRAY: Well, I don't know
10 exactly where y'all came out on (d)(1), whether or not
11 y'all were going to do something with a finding or
12 something instead of an order, but historically I thought
13 courts rendered, clerks enter, and in this context if
14 you're going to do a finding, I would prefer "make a
15 finding" instead of "enter a finding."
16 CHAIRMAN BABCOCK: Okay. Carl.
17 MR. HAMILTON: I'm not sure it's wise under
18 (d)(2) to put an address in there which may change. We
19 don't usually do that on filing with the clerk and give
20 the clerk's address or something.
21 MR. HILE: That came from Rule 12, I think.
22 I think that's the language which is in the --
23 CHAIRMAN BABCOCK: That's in Rule 12?
24 MR. HILE: -- Rule 12 about the judicial
25 records.

1 CHAIRMAN BABCOCK: But we didn't do it.
2 MR. ORSINGER: This is Administrative Rule
3 12, you're talking about?
4 HONORABLE STEPHEN YELENOSKY: You could find
5 it.
6 CHAIRMAN BABCOCK: Maybe we did do it. Who
7 knows. Okay. What else?
8 MR. ORSINGER: Maybe you should refer to
9 that administrative rule in case the address changes.
10 HONORABLE SARAH DUNCAN: I'm sorry, what did
11 you say?
12 CHAIRMAN BABCOCK: He's just babbling.
13 HONORABLE SARAH DUNCAN: Richard, doesn't
14 ever just babble. He frequently makes very good points.
15 What were you saying, Richard?
16 MR. ORSINGER: Maybe they should cross-refer
17 to the administrative rule so that if there is a change
18 the administrative rule could be changed and everything
19 else that refers to it will automatically follow through.
20 HONORABLE SARAH DUNCAN: Just a point of
21 grammar, in (d)(1) describing the nature of -- I'm
22 assuming what is meant is "Describe the nature of the case
23 and identify the conditions that justify the additional
24 resources and the specific additional resources that are
25 needed."

1 CHAIRMAN BABCOCK: Okay. Yeah, Frank.
2 MR. GILSTRAP: One could say the court
3 should -- "The judge should describe the nature of the
4 case and state what additional resources are needed and
5 why."
6 CHAIRMAN BABCOCK: Right. Yeah. Okay.
7 What else? 16.6 going twice. Professor Carlson.
8 PROFESSOR CARLSON: I guess just 16.6(e)
9 needs to be changed however we change (d), to "request" or
10 "order" or whatever.
11 CHAIRMAN BABCOCK: Good point.
12 HONORABLE TOM GRAY: (d)(3) has the word
13 "order" in it, too.
14 CHAIRMAN BABCOCK: Yeah.
15 HONORABLE SARAH DUNCAN: And --
16 MR. GILSTRAP: So does 16.7 has "order" in
17 it.
18 MR. LOW: We're not there yet.
19 CHAIRMAN BABCOCK: Sarah.
20 HONORABLE SARAH DUNCAN: It's just me and
21 grammar. "Notification," what we're really talking about
22 is a notice. Notice to trial court of action. I'm not
23 trying to say what it should be exactly, but it's notice
24 to the trial court of action on the request.
25 CHAIRMAN BABCOCK: Right. Yeah, the

1 caption, if that's what it is, is a little misleading.
2 Okay. Yeah, Carl.
3 MR. HAMILTON: The notice, "JCAR clerk or
4 the presiding judge of the district," is that -- that
5 would be the local presiding judge of that district, and
6 how does that judge get that information? From the clerk
7 or --
8 MS. SECCO: In (d)(3).
9 HONORABLE SARAH DUNCAN: (d)(3).
10 MS. SECCO: In (d)(3), the previous
11 provision.
12 MR. ORSINGER: But I think Carl's talking
13 about a local presiding judge as opposed from a regional
14 presiding judge, aren't you, Carl?
15 MR. HAMILTON: No, it says "administrative
16 judicial region." "Submit a copy of the order."
17 CHAIRMAN BABCOCK: Where are you, Carl?
18 MR. HAMILTON: I'm on (e).
19 MR. HILE: On the bottom.
20 MR. HAMILTON: The order in (d) comes from
21 the trial judge, and he submits a copy of that to the
22 presiding judge. It goes to JCAR and then within 15
23 days JCAR clerk or the presiding judge provides notice to
24 the trial court. Where does the presiding judge get the
25 information from?

1 MR. HILE: The presiding judge is the
2 gatekeeper. If he has allotted resources he can act
3 initially under the rules and say -- he may provide the
4 visiting judge. If it's not something that he has within
5 his power then he refers to the JCAR committee.
6 MR. HAMILTON: Okay. So that means that if
7 he makes the decision he tells the trial court, but
8 if JCAR makes it, they tell the trial court.
9 MR. HILE: Right. Right.
10 CHAIRMAN BABCOCK: Okay. Yeah, Judge
11 Christopher. Justice Christopher.
12 HONORABLE TRACY CHRISTOPHER: I just think
13 (e) is unnecessary and kind of overcomplicated, that JCAR
14 is going to give a 15-day, you know, status report on your
15 motion, you know, even to tell you, "Well, no one's met
16 yet." I mean, you send it to them, you hope to hear from
17 them. If you don't hear from them, you call. I mean, we
18 just don't have to put in this artificial time deadline.
19 CHAIRMAN BABCOCK: Okay. We could put in a
20 rule that just says "call me or I can call you."
21 HONORABLE TRACY CHRISTOPHER: Call. Call.
22 CHAIRMAN BABCOCK: Yeah, Justice Peeples.
23 HONORABLE DAVID PEEPLES: I realize it may
24 come straight out of the statute, but it seems kind of
25 weird to -- the only resource the presiding judge has is

1 the ability to assign a visiting judge. There's no money
2 to help fund this kind of stuff, but there's already a
3 procedure for the trial judge to ask for that, and so to
4 have -- I mean, that exists even without this, and so to
5 add that in here it just seems strange to me.
6 MR. HILE: Well, and there was some
7 discussion about that, because if the request is made
8 today -- or if the rules are implemented and the request
9 is made, is it made under JCAR or is it made under his
10 inherent powers to appoint the -- a visiting judge, and we
11 -- at the end of the day I think we went with the
12 statutory language, but I do think we discussed that, you
13 know, right now if I was going to make a request, I would
14 say, "I'm not asking this under JCAR, just would you send
15 me a visiting judge?" Because he would have the authority
16 in one and he may not have the authority in the other.
17 CHAIRMAN BABCOCK: Okay. Justice Peeples.
18 HONORABLE DAVID PEEPLES: If you've got to
19 start with the trial court, it's got to go through the
20 trial court, if all the trial court wants is a visiting
21 judge, she is going to make a phone call to the presiding
22 judge and say, "I need one." Nobody will do all of this.
23 If you want resources, by definition you want more than
24 the presiding judge can give you, and you'll use this, and
25 so I just see no reason to have the "I need a visiting

1 judge" procedure, which already exists, put into this
2 where it doesn't advance the ball.
3 CHAIRMAN BABCOCK: Sarah.
4 HONORABLE SARAH DUNCAN: And sort of related
5 to that, I don't understand why 16.6(e) talks about the
6 presiding judge of the effective administrative judicial
7 region providing notice when we don't get to the presiding
8 judge being able to decide this request until 16.7. You
9 see what I mean? That -- that "or" clause in the, one,
10 two, three, fourth, and fifth lines doesn't yet have a
11 context to which it would relate.
12 CHAIRMAN BABCOCK: How would you fix that?
13 HONORABLE SARAH DUNCAN: Well, I think part
14 of this will become more clear when we get the order part
15 out of it, because I think that's kind of confusing, but
16 we got a request, and that request is going to go to the
17 trial judge, and the trial judge is going to give a copy
18 of the request to the presiding judge. At that point
19 either the trial judge or the presiding judge can make a
20 request for additional resources; is that correct?
21 MR. HILE: Well, the trial judge has
22 already -- when he sends the request to the presiding
23 judge then that also encompasses the request to the --
24 that would be going to JCAR, and the presiding judge would
25 make the determination, and it is inconsistent with, you

1 know, he already has the power to send that visiting
2 judge, but that's -- and I'm not -- that was the only
3 power that I could determine that exists, but -- or then
4 he makes the decision and sends it to the full committee.
5 HONORABLE SARAH DUNCAN: Right, but I'm just
6 talking about the sequence.
7 MR. HILE: Okay.
8 HONORABLE SARAH DUNCAN: What would fix this
9 for me is if we stayed -- if we're going to have a
10 chronological sequence to this rule, let's stay in the
11 chronology, and what the last three lines of (e) does is
12 jump ahead of section 16.7(a).
13 MR. REYNOLDS: Could I clarify that, Dickie?
14 I think it's not meant to. I think this was sort of a
15 courtesy provision that was put in to say somebody should
16 answer this judge within 15 days even if the answer is "We
17 got it and we're working on it," "We don't have any
18 money," or whatever it is, but before -- possibly before a
19 decision has actually been made someone should get back to
20 the trial judge and let him know what's going on, and that
21 was the idea. It's not really as out of sequence as it
22 appears.
23 HONORABLE SARAH DUNCAN: But we're talking
24 about action.
25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: Why do we call this an order
2 under (d)? It's really just a request, isn't it?
3 CHAIRMAN BABCOCK: Yeah, that's -- findings,
4 request, whatever.
5 MR. HAMILTON: Sort of confusing to call it
6 an "order."
7 CHAIRMAN BABCOCK: Yeah, I think we have
8 concluded that maybe that ought to be changed.
9 CHAIRMAN BABCOCK: Anything else? Justice
10 Peeples.
11 HONORABLE DAVID PEEPLES: Dickie, as I
12 understand this, you've got two gatekeepers. If the trial
13 court says "no," it ends, right?
14 MR. HILE: That's the end. Right.
15 HONORABLE DAVID PEEPLES: And the presiding
16 judge, if the trial court says "yes" and the presiding
17 judge says "no," it ends right there?
18 MR. HILE: Right.
19 HONORABLE DAVID PEEPLES: And so before it
20 gets to the JCAR, the trial court and the presiding judge
21 both have to say "yes." Now, I'm just wondering why -- I
22 can understand why the trial judge would have to be
23 consulted, but if the presiding judge is part of the JCAR
24 why should the individual have that veto power before it
25 can get to the JCAR? I mean, is there a reason?

1 MR. HILE: It was really looking at the
2 statute and trying to discern from the statute. The
3 statute basically keeps that gatekeeper function in there,
4 and we debated that, you know. At one time we discussed a
5 different proposal that would have not allowed that. He
6 would have gone basically through the full committee.
7 CHAIRMAN BABCOCK: Judge Yelenosky.
8 HONORABLE STEPHEN YELENOSKY: Well, sort of
9 the converse of what Sarah was saying, understanding that,
10 then under (d), why do we send it -- or why does the trial
11 judge send it to JCAR at the same time he or she sends it
12 to the presiding judge if JCAR can't do anything until the
13 presiding judge and if the presiding judge blesses it, so
14 why doesn't (d) just say -- (d) not say, part (2), (d)(2),
15 "Forward it to the JCAR clerk," because it may be a
16 nullity, and just leave in "send it to the presiding
17 judge" and go in stairstep fashion and then if he or she
18 approves it then it goes to JCAR because that's the only
19 circumstance --
20 MR. HILE: Well, I wanted it to go to
21 the JCAR clerk, so you had some type of -- you know, at
22 one time the discussion was do it exactly that, send it to
23 the presiding judge, and then you've got nine presiding
24 judges who are basically the filing clerk for those
25 processes, and I wanted a unified process for at least

1 filing. Now, your question could be the JCAR clerk could
2 sit on it until the presiding judge --
3 HONORABLE STEPHEN YELENOSKY: Well, they
4 have to.
5 MR. HILE: Yeah.
6 HONORABLE STEPHEN YELENOSKY: And, I mean,
7 it seems to me we're creating a paper trail. I understand
8 what Tracy said about maybe it's good to create a paper
9 trail to show demand, but other than that we're creating
10 all this procedure which is essentially at the discretion,
11 complete discretion, of the trial judge or the presiding
12 judge, and to me why create a procedure when there's no
13 review?
14 MR. LOW: Was the idea to give them notice
15 that it may be coming?
16 MR. HILE: Well, and it was to give them
17 notice of what type of request for -- I mean, if you have
18 a committee, the thought was the committee needs to know
19 generically what type of requests are being filed. Now,
20 the presiding judge may have said, "No, I don't think this
21 particular court needs that," but we were wanting to say
22 that at least within JCAR they should have some global
23 understanding of what requests are being filed and what
24 types of resources are being sought.
25 HONORABLE STEPHEN YELENOSKY: And maybe for

1 that purpose, but essentially what's been created is the
2 Legislature has said we might put some money in some day,
3 we're creating a board that will decide how that money's
4 to get spent, and the only other thing that seems to need
5 to be done is to tell trial judges who they're supposed to
6 ask and tell presiding judges who they're supposed to ask,
7 and you know, the rest of it sounds like it would be
8 created if you had an adversarial question, but you don't.
9 CHAIRMAN BABCOCK: Pam.
10 MS. BARON: From what I'm hearing it seems
11 like the point of stopping at the presiding judge level is
12 that it's possible the presiding judge could dispense the
13 remedy that the trial court wants, but what I'm hearing
14 from Judge Peeples and from others is that the trial
15 court -- the presiding judge can only appoint a visiting
16 judge, which that administrative judge can do already, has
17 no other resources to dispense, so if you want a visiting
18 judge, you can ask for it now. You don't need to go
19 through this process, so I don't think that the presiding
20 judge really has anything to dispense, so you might as
21 well skip that step.
22 MR. HILE: There is one benefit I think,
23 though, in that process. I think that presiding judge is
24 the most knowledgeable about that court and probably its
25 needs, and that was the discussion. You still by going

1 through that gatekeeper fashion he may say, you know,
2 "I've got two requests. This court is in need of it, and
3 this one's not," so, I mean --
4 CHAIRMAN BABCOCK: Yeah, Richard.
5 MR. MUNZINGER: I agree with Judge Yelenosky
6 about subsection (e). You have a situation where the
7 trial judge says, okay, I think I need additional
8 resources, and he sends it to the presiding administrative
9 judge. The way this is drafted the JCAR has to respond
10 within 15 days, but the administrative judge may not have
11 approved it yet. You're imposing an obligation, it seems
12 to me, on the JCAR where the administrative judge has to
13 act. It takes two to make the -- to get the resources,
14 and that's the trial judge and the administrative
15 presiding judge, but here you've got a duty for the clerk
16 to do things, even though the presiding judge hasn't
17 acted. I think there's a break in the sequence there. I
18 agree with Judge Yelenosky.
19 CHAIRMAN BABCOCK: Buddy.
20 MR. LOW: But did they mean order of the
21 presiding judge? In other words, 15 days after order of
22 the presiding judge, and --
23 MR. MUNZINGER: Well, but it comes right
24 after subsection (d), which talks about the trial court.
25 It's --

1 MR. LOW: I understand.
2 MR. MUNZINGER: -- confusing.
3 MR. LOW: But that would be corrected if
4 it's order of the trial judge, and back to another point
5 that's raised, a presiding judge is additional judicial
6 resource, and if you didn't include it here, they might
7 not even think of that as that. I mean, you can do it
8 otherwise, but if it's not included, I mean, that is an
9 additional judicial resource.
10 HONORABLE DAVID PEEPLES: You know, Chip --
11 CHAIRMAN BABCOCK: Hang on. Eduardo.
12 MR. RODRIGUEZ: Well, it just seems to me
13 like the filing with the clerk could be held to the
14 presiding judge to spur him on to make a decision about
15 whether or not to continue, and to me all the clerk has to
16 do is say, "We received your request, it's in the hands of
17 the presiding judge, and we'll notify you when the
18 decision is made." That letter will go to -- a copy to
19 the presiding judge, and he'll know that it's on the front
20 burner or back burner or somebody's burner, and he needs
21 to do something.
22 CHAIRMAN BABCOCK: It's on a burner.
23 Justice Peeples.
24 HONORABLE DAVID PEEPLES: The more I think
25 about it, in light of this discussion, there are 450 some

1 odd trial judges -- district judges with the authority, if
2 we don't have the PJ in the middle, the authority to go
3 straight to the JCAR, and I think it probably is a good
4 thing to have someone who can say, "Slow down, let's talk
5 about this. Let's see if there's some other way to get
6 what you want" rather than having 450 people with the
7 right to go straight to this. That would probably be a
8 good idea.
9 HONORABLE NATHAN HECHT: 454.
10 CHAIRMAN BABCOCK: 454, to be precise. Not
11 to put too fine a point on it.
12 HONORABLE SARAH DUNCAN: I think Carl has
13 just answered my question about the former judges.
14 74.253(e) on page 101. That is the statutory reference to
15 former judges who were defeated being subject to an
16 objection if they were assigned to sit, so by saying they
17 are not eligible I think the Legislature has used
18 "retired" to mean -- to include former judges who were not
19 defeated at their last election. You see what I mean?
20 MR. HILE: Uh-huh. Uh-huh.
21 CHAIRMAN BABCOCK: Buddy.
22 MR. LOW: It reminds me of something Justice
23 Scalia told me. He said if they don't say it then it
24 doesn't mean anything else. It means what it says.
25 That's what -- they didn't include that, whatever they --

1 you don't try to reach their intent when they say
2 something plainly.
3 MR. HILE: Chip?
4 CHAIRMAN BABCOCK: Yeah, Dickie.
5 MR. HILE: We discussed having a deadline
6 that the presiding judge had to take action by, the
7 committee had to take action by, and at the end of the day
8 we said knowing the limited resources, you don't want to
9 deny this. It may very well be we're going to sit on it.
10 We've got three competing deals in front of us, and we're
11 going to have to figure out which one of those is the most
12 needy and which one of those should get the money, and
13 that was the reason, but at the same time we wanted the
14 trial court to at least get some idea, somebody to respond
15 and say, "It's still under consideration."
16 CHAIRMAN BABCOCK: Okay. Let's go to 16.8.
17 I'm sorry, 16.7. We haven't finished with that yet. Any
18 comments on 16.7?
19 MR. ORSINGER: Chip?
20 CHAIRMAN BABCOCK: Yes, Richard.
21 MR. ORSINGER: Is there a possibility that
22 there may be more additional resources made available to
23 the presiding judge than presently exists, and if that is
24 true then perhaps we should use a general term, but if
25 it's never expected that the presiding judges will have

1 any resources beyond appointing a substitute judge then
2 maybe we should mention appointing substitute judge rather
3 than this vague concept.
4 MR. HILE: I don't know what the legislative
5 thought processes were on that, to be truthful, Richard,
6 whether they envisioned that this might be something we're
7 going to expand on.
8 CHAIRMAN BABCOCK: Well, and I don't think
9 it is limited, Richard, to --
10 MR. ORSINGER: It isn't? Well, I thought
11 that it was discussed that it was. Are there any open
12 appropriations that would give OCA the authority to
13 selectively provide resources to presiding judges or --
14 MR. REYNOLDS: No. We don't even handle the
15 visiting judge money. It goes through the comptroller's
16 office.
17 CHAIRMAN BABCOCK: That wasn't the point.
18 At least maybe I misunderstood your question.
19 MR. ORSINGER: Right.
20 CHAIRMAN BABCOCK: But the statute and the
21 implementing rule here has a whole bunch of things that
22 can be done if there's funding.
23 MR. ORSINGER: By the presiding judge or
24 only by the JCAR?
25 MS. SECCO: By the presiding judge. That

1 language is directly from the statute.
2 CHAIRMAN BABCOCK: It says the presiding
3 judge and the JCAR.
4 MR. ORSINGER: So, for example, name one
5 thing besides appointing a substitute judge that a
6 presiding judge can do without the assistance of the JCAR.
7 CHAIRMAN BABCOCK: I'm not sure.
8 MR. HILE: I think the only thing right now
9 is what Judge Peeples says, that he can send a visiting
10 judge. That's the only thing I'm aware of.
11 CHAIRMAN BABCOCK: Sarah.
12 HONORABLE SARAH DUNCAN: I'm looking at the
13 statute on page 100. It's 74.254(d), as in dog. It only
14 references the committee making additional resources
15 available.
16 CHAIRMAN BABCOCK: Right.
17 MR. ORSINGER: So what my suggestion is,
18 rather than use this oblique phrase "resources previously
19 allotted to the presiding judge" when we mean appointing a
20 substitute judge. Maybe we should say that the presiding
21 judge can appoint a substitute judge or if he feels like
22 more is required then he can go to JCAR.
23 HONORABLE SARAH DUNCAN: I guess that then
24 is something we should talk about. I don't think you
25 should have to go through this process to get a visiting

1 judge appointed by your presiding judge. As Judge Peeples
2 was saying, that's just a phone call.
3 MR. REYNOLDS: That's not the intent.
4 That's not the intent that they would have to go through
5 this.
6 CHAIRMAN BABCOCK: Marisa.
7 HONORABLE SARAH DUNCAN: Then I think we
8 ought to --
9 MS. SECCO: Page 99 --
10 HONORABLE SARAH DUNCAN: -- say that.
11 MS. SECCO: -- of the statute specifically
12 says that "If a presiding judge of the administrative
13 judicial region agrees that, in accordance with the rules
14 adopted by the Supreme Court, the case will require
15 additional resources, the presiding judge shall use
16 resources previously allotted to the presiding judge or
17 submit a request for specific additional resources
18 to JCAR."
19 MR. HILE: Yeah, we were pretty well locked
20 in.
21 MS. SECCO: Right. So it's not --
22 HONORABLE SARAH DUNCAN: It's not a joint
23 thing, though. It's --
24 MR. REYNOLDS: Could I chime in? There
25 might be a reason why that's so oddly worded. There used

1 to be in this bill a provision that would have allowed the
2 presiding judges to employ staff attorneys with the
3 express idea that occasionally a trial court judge out
4 there in the hinterland needs a staff attorney, so we
5 would have a covey of staff attorneys like we have
6 visiting judges that the presiding judges could dispatch
7 when needed. So those provisions were side by side in
8 this bill for a long time. The Governor's office asked us
9 to take that part of the bill out and -- but nothing ever
10 changed in this part, and it just now occurred to me that
11 maybe that's what that's about.
12 MR. ORSINGER: So in the next session they
13 may have more resources.
14 MR. REYNOLDS: They may. I really think
15 that's a promising idea for our court system that so far
16 we're not getting.
17 CHAIRMAN BABCOCK: That's a great point.
18 MR. LOW: Richard, if they did --
19 CHAIRMAN BABCOCK: Eduardo.
20 MR. RODRIGUEZ: I mean, is there anything in
21 the statute that prohibits the court, the Supreme Court,
22 for instance, to try and seek some public funding through
23 some foundation that might fund as, you know, lawyers that
24 can -- staff attorneys that can then be sent to assist in
25 trials such as you may have like in -- when a hurricane

1 comes or as a result of a catastrophe? I mean, is that
2 prohibited in the statute from going to a foundation -- a
3 public foundation to seek funds to assist the justice
4 system?
5 CHAIRMAN BABCOCK: I wouldn't think so, no.
6 MR. RODRIGUEZ: Well, then, I mean, those
7 are extra resources that could possibly be used by this
8 committee should that occur.
9 CHAIRMAN BABCOCK: Yeah. Great. Good
10 point, Eduardo. Anything more on 16.7? Yeah, Professor
11 Carlson.
12 PROFESSOR CARLSON: I had two things I
13 wanted to raise. One, Justice Peeples, you were talking
14 about district courts, but I see this also applies to
15 statutory county courts and probate courts.
16 MR. HILE: Yes.
17 PROFESSOR CARLSON: And was that part of the
18 statute, or where did that come from, if you know?
19 MR. REYNOLDS: It's not part -- may I help
20 with that? It's not part of the statute, but the statute
21 says what it applies to, and it applies to cases that come
22 up before county court at law judges.
23 PROFESSOR CARLSON: Okay. And the second
24 thing, I noticed looking at the statute that, again,
25 responding to Judge Peeples, it does require that the

1 presiding judge sign off as the gatekeeper before it goes
2 further.
3 MR. HILE: Yeah, we debated that.
4 HONORABLE SARAH DUNCAN: Where is that?
5 PROFESSOR CARLSON: Page 99, halfway down
6 the page after (c)(1).
7 CHAIRMAN BABCOCK: Do you have anything
8 else, Elaine?
9 PROFESSOR CARLSON: No.
10 CHAIRMAN BABCOCK: Okay. Professor
11 Dorsaneo.
12 PROFESSOR DORSANEO: After listening to
13 everybody about that 16.7(a)(1), "use resources previously
14 allotted," I mean, it wasn't -- I wasn't convinced that
15 that language ought to stay in here because if it meant
16 something before the legislation got modified that it no
17 longer means then people are going to try to figure out
18 what it means, and it doesn't really mean anything at this
19 point. It may mean something eventually.
20 CHAIRMAN BABCOCK: But it is in the statute.
21 PROFESSOR DORSANEO: So what? It doesn't
22 mean anything in the statute either.
23 CHAIRMAN BABCOCK: Well, not necessarily.
24 PROFESSOR CARLSON: You could put "if any."
25 MR. HILE: The staff attorney was a big

1 issue, and that -- you know, in the discussions, and I've
2 forgot how many we requested. Was it three for each?
3 MR. REYNOLDS: Way back it was three for
4 each. We whittled it down to one apiece and then got rid
5 of it altogether.
6 MR. HILE: Yeah, but that was one of the
7 things that in the discussion with Judge Walther was the
8 fact that the greatest need she had was a staff attorney
9 to assist her in that FLDS case.
10 PROFESSOR DORSANEO: It clearly doesn't mean
11 appoint a visiting judge, that you have to do that. It's
12 not about that.
13 HONORABLE SARAH DUNCAN: I'm not sure that's
14 right. Look at 74.253(d), as in Dogatopia, on page 100.
15 PROFESSOR DORSANEO: What is Dogatopia?
16 HONORABLE SARAH DUNCAN: That's where my
17 dogs are today. "Additional resources the committee may
18 make available include the assignment of an active or
19 retired judge."
20 PROFESSOR DORSANEO: Huh. Wrong again.
21 HONORABLE SARAH DUNCAN: I'm not saying
22 that -- it sounds like an onerous procedure to get a
23 visiting judge to me.
24 MR. REYNOLDS: I think one reason for that
25 is in the FLDS case, which is the one thing that all of us

1 had in mind, that was one of the things that Judge Rucker
2 was helping Judge Walther with, was Judge Specia coming in
3 as a visiting judge. I think there were some others at
4 one point, so that was one of a sort of arsenal of things
5 that was in play.
6 CHAIRMAN BABCOCK: Yeah. Okay. Well, that
7 mystery's solved. Richard, and then Justice Gray.
8 MR. ORSINGER: The fact that probate judges
9 are included in this, if I understood under the statute,
10 is that right? Probate judges are included? Our
11 definition of trial court doesn't make it clear to me that
12 probate judges are included, but --
13 CHAIRMAN BABCOCK: 18 probate judges, by the
14 way.
15 MR. ORSINGER: But the probate judges have
16 their own presiding judge system that are not part of the
17 administrative judge system, so what are we going to do
18 about a probate judge who makes his request to the emperor
19 of probate judges, and it's not one of the -- I think
20 they're very defensive about that.
21 HONORABLE SARAH DUNCAN: Who would agree
22 with your classification.
23 CHAIRMAN BABCOCK: I want to take a vote on
24 how many people other than you knew that they have their
25 own emperor.

1 MR. ORSINGER: Let me tell you something,
2 the probate judges and particularly the emperor of probate
3 judges, they are very sensitive about this issue. I mean,
4 if anyone around here knows better than I do, so I think
5 that their administrative protocols are to the presiding
6 judge over all of the probate judges, which wouldn't fit
7 with our geographical structure, and do we -- do we want
8 to do something about that before the probate judges get
9 this delivered to them as a rule?
10 CHAIRMAN BABCOCK: Great point. Thanks.
11 Justice Gray.
12 HONORABLE TOM GRAY: Assuming this order
13 becomes a request and to be consistent with the JCAR, I
14 would suggest that RFAR would then be the appropriate
15 acronym, request for additional resources. Thank you, I'm
16 glad somebody got it.
17 CHAIRMAN BABCOCK: I got it anyway.
18 HONORABLE TOM GRAY: I appreciate it. The
19 16.7 reiterates what the additional resources needs to be
20 for, so I think that just needs to be dropped, so this is
21 starting at the top of page five, "determination that a
22 case needs additional resources, the presiding judge
23 shall," and then you've got subsection (1); and then
24 subsection (2), if I'm reading this correctly, that refers
25 to a potential request made by the presiding judge, not

1 the trial court judge, and -- if I'm understanding that
2 right. Am I reading that correctly?
3 MR. HILE: I think that's correct.
4 HONORABLE TOM GRAY: And so I think that a
5 better way to express that is if the presiding judge
6 believes that the additional resources are needed they can
7 either submit the request, the RFAR, or the modified
8 request, which would be their own request that they think
9 is needed for that specific case to JCAR.
10 MR. HAMILTON: That would be a MARLAR.
11 CHAIRMAN BABCOCK: This is getting out of
12 control. Buddy.
13 MR. LOW: But wouldn't the initial request
14 be a request, and wouldn't his request be a request?
15 Either one of them would be a request.
16 CHAIRMAN BABCOCK: They're both requests.
17 MR. LOW: That's all they say.
18 CHAIRMAN BABCOCK: Justice Christopher.
19 HONORABLE TRACY CHRISTOPHER: With respect
20 to (c), we have the "filing" word in there instead, and
21 I'm not sure who's filing what since this is not really --
22 belongs in a file and then we have the problem of the
23 ruling by JCAR being an order now, and I'm not really sure
24 that that would be appropriate either.
25 CHAIRMAN BABCOCK: Okay. Richard.

1 MR. ORSINGER: Are we on 16.8 yet or --
2 CHAIRMAN BABCOCK: No.
3 MR. ORSINGER: Okay. I'm going to hold
4 back.
5 CHAIRMAN BABCOCK: Sarah.
6 HONORABLE SARAH DUNCAN: Speaking of filing,
7 shouldn't these things have to be public records?
8 MR. HILE: Well, I think they are public
9 records when they go with --
10 HONORABLE TRACY CHRISTOPHER: When they go
11 to JCAR.
12 MR. HILE: Yeah.
13 HONORABLE SARAH DUNCAN: So they are
14 actually filed in the case, and a copy goes to --
15 MR. HILE: I mean, I envisioned that a
16 docket would be there, and there would be a filing that
17 would list all of the pertinent actions in regard to a
18 case or request, what we would now call a request.
19 HONORABLE SARAH DUNCAN: So really just a
20 copy would go to the presiding judge or to the committee?
21 Because we're not going to send the record that's with the
22 clerk, that was filed with the clerk.
23 CHAIRMAN BABCOCK: Yeah.
24 HONORABLE SARAH DUNCAN: Right? The motion.
25 CHAIRMAN BABCOCK: Yeah, great point.

1 HONORABLE SARAH DUNCAN: Just a picky point.
2 CHAIRMAN BABCOCK: Okay. Anything else on
3 16.7? All right. Richard, go, with 16.8.
4 MR. ORSINGER: All right. I'm a little
5 concerned that 16.8 puts the duty to cooperate without
6 saying that it requires first the determination from JCAR
7 that additional resources are required, so I would propose
8 something along the lines of if the JCAR -- "If the JCAR
9 determined that additional resources are required then the
10 presiding judge and the Office of Court Administration
11 shall cooperate."
12 CHAIRMAN BABCOCK: Okay. Anything more on
13 16.8? 16.9? Is this statute language or is this --
14 MR. HILE: Yes, pretty much so.
15 CHAIRMAN BABCOCK: Any comments on 16.9?
16 16.10.
17 HONORABLE DAVID PEEPLES: Back to 8.
18 CHAIRMAN BABCOCK: Justice Peeples.
19 HONORABLE DAVID PEEPLES: Dickie, does that
20 mean the original trial court still has jurisdiction? If
21 the original trial judge disagrees with something that
22 this new judge does, does he have jurisdiction to
23 countermand?
24 MR. HILE: I don't think that we discussed
25 that, to be truthful. Let me see.

1 HONORABLE DAVID PEEPLES: And if -- the
2 filing of a motion certainly shouldn't take away
3 jurisdiction, but once another judge is on the case, if
4 that happens, that's a different matter. But this is just
5 a motion itself, it's not --
6 CHAIRMAN BABCOCK: Okay. Yeah, Richard
7 Munzinger.
8 MR. MUNZINGER: I was looking for the
9 16.9(b), as in boy. Did you say that was part of the
10 statute?
11 MR. HILE: I thought it was. I will have to
12 go back and look.
13 HONORABLE SARAH DUNCAN: Yes. 74.256 on
14 page 101.
15 MR. HILE: Yes.
16 HONORABLE SARAH DUNCAN: "No stay or
17 continuance pending determination."
18 CHAIRMAN BABCOCK: Okay. All right. 16.10.
19 HONORABLE SARAH DUNCAN: Wait a minute. I'm
20 sorry. I'm belated here. I understand this is the
21 statutory language. I do understand that.
22 CHAIRMAN BABCOCK: But?
23 HONORABLE SARAH DUNCAN: But if a motion for
24 additional resources is being considered seriously by the
25 committee and part of the consideration is bringing in an

1 additional judge or bringing in law clerks or -- my mind's
2 not creative enough to think about all the things it could
3 possibly be, but the fact that that request hasn't yet
4 been acted upon might be a very good reason to stay the
5 case pending its resolution because otherwise you could
6 have somebody proceeding in a manner that would be
7 inconsistent with or preclude the additional resource
8 being considered. So even though it's statutory language,
9 can we just leave it in the statute and not put it in the
10 rule?
11 CHAIRMAN BABCOCK: Well, you're only going
12 to have two situations. The judge is in favor of this,
13 and he's requesting it, in which case he'll just reset the
14 case. I mean, he's not going to put it to trial if that's
15 being -- if he's in favor of it. Now, the other side is
16 he's not in favor of it, but he felt like he had to pass
17 it along anyway, and in that instance I think the
18 Legislature would get to make a decision about whether or
19 not it's going to be stayed or not. And they say "no."
20 HONORABLE SARAH DUNCAN: Well, I understand
21 there's -- it's not the stay I'm concerned about. It's
22 the grounds. I should be able to file something that's --
23 if we're in Harris County and a judge has any number of
24 cases on his or her docket and is not -- it's not all
25 about me and my case there, I should be able to say,

1 "Judge, you might want to consider staying this case
2 because you've agreed with us it's going to require
3 additional resources, the presiding judge has agreed with
4 us, and it's gone to the committee, and we actually got
5 some funding so this actually might happen." I mean, it's
6 kind of a First Amendment thing.
7 MR. GILSTRAP: It's a First Amendment thing?
8 You have free speech.
9 HONORABLE SARAH DUNCAN: Why can't I say
10 that something is a ground for a stay?
11 CHAIRMAN BABCOCK: Well, you can say it.
12 It's just that the other side says, "Wait a minute, look
13 at what the Legislature said." Their speech outweighs
14 yours. Maybe.
15 MR. GILSTRAP: Free speech in the courtroom.
16 CHAIRMAN BABCOCK: Yeah. Buddy.
17 MR. LOW: But just the filing is not the
18 ground, and if I'm the trial judge and the gatekeeper and
19 I want it continued, I'll find some other basis for it.
20 CHAIRMAN BABCOCK: Continue it on your own.
21 MR. LOW: I'm not going to be stupid enough
22 to say, "Well, this is then filed," so --
23 CHAIRMAN BABCOCK: Gene.
24 MR. STORIE: I thought that was kind of an
25 odd provision, too, but I wonder if the trial judge's

1 agreement that this is an appropriate case for additional
2 resources could be a ground, even though just the filing
3 of a motion wouldn't be.
4 HONORABLE SARAH DUNCAN: That's what I was
5 just working out in my mind.
6 CHAIRMAN BABCOCK: Good point. Okay.
7 16.10.
8 MR. GILSTRAP: Chip.
9 CHAIRMAN BABCOCK: Yeah, Justice Gray, and
10 then Frank.
11 HONORABLE TOM GRAY: I don't know that I
12 would have thought about this if there hadn't been all the
13 discussion from Judge Peeples about do we want to do this
14 for the routine assignment of judges, but if active and
15 retired and former creates all of this problem, we
16 certainly have a procedure now where if a judge gets
17 appointed that the parties don't think should be appointed
18 they can attack that by mandamus, and according to this,
19 if they went under this procedure to get that appointment
20 from the presiding judge, presumably based on 16.10 that's
21 been removed. I don't think that's what was intended, but
22 that would be my concern.
23 CHAIRMAN BABCOCK: This is the statutory
24 language, isn't it, Dickie?
25 MR. HILE: Yes.

1 CHAIRMAN BABCOCK: Precisely.
2 MR. HILE: Pretty sure.
3 CHAIRMAN BABCOCK: Okay, Sarah.
4 HONORABLE SARAH DUNCAN: I would just
5 suggest that's an internal conflict within the statute
6 which must be harmonized to give meaning to all parts.
7 HONORABLE TOM GRAY: Well, I mean, it comes
8 right back to what Judge Peeples was talking about. You
9 know, are we going to force all this -- what's otherwise a
10 phone call up under Administrative Rule 16, is sort of the
11 question. But -- and I obviously don't think it should be
12 because I think they still need the ability to do it
13 freely, quickly, by phone, but if it does fall out of this
14 process under 16 then it looks like they would be barred.
15 CHAIRMAN BABCOCK: Well, if they do it by
16 phone call, who's going to complain?
17 HONORABLE TOM GRAY: That's what I mean.
18 It's --
19 HONORABLE SARAH DUNCAN: If they do it by
20 phone call and they assign someone as a visiting judge who
21 was defeated in her last election, I have the right to
22 object to that under the objection to assigned judge
23 statute --
24 CHAIRMAN BABCOCK: Right.
25 HONORABLE SARAH DUNCAN: -- and under this

1 statute, and that's reviewable by mandamus, and that's why
2 I'm saying this is internal conflict that to give all
3 parts meaning I think you would have to say, well, right,
4 in the usual case it's not subject to mandamus, but given
5 that there is another statute or court decision
6 specifically saying that this is reviewable by a mandamus,
7 you've got to harmonize them.
8 HONORABLE BOB PEMBERTON: That might be a
9 specific controls over the general on that one.
10 CHAIRMAN BABCOCK: I think he's ruling
11 against you, but purely in an advisory way.
12 HONORABLE BOB PEMBERTON: For what it's
13 worth.
14 CHAIRMAN BABCOCK: Okay. 16.11.
15 MR. GILSTRAP: Did we skip over 16.10?
16 CHAIRMAN BABCOCK: Well, we didn't. We had
17 a comment on it, but it's right out of the statute.
18 MR. GILSTRAP: It's in the statute, 74.257
19 on page 101 and 102.
20 CHAIRMAN BABCOCK: Right.
21 MR. GILSTRAP: I just -- you know, our job
22 is to be picky, and I guess is the Legislature implying
23 that it is reviewable by writ of prohibition or
24 injunction? Prohibition would be proper.
25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE STEPHEN YELENOSKY: I bet you can
2 find that in the legislative history.
3 CHAIRMAN BABCOCK: Eduardo.
4 MR. RODRIGUEZ: And I'm sorry I'm going
5 back, but, you know, this statute and these administrative
6 rules do give the parties the opportunity to seek
7 additional resources that they -- we may not have now by
8 just asking the court, and the courts may feel that with
9 this now they have some ability to request additional
10 resources when they may not feel as comfortable for
11 whatever reason in asking right now. I think this gives
12 the court some opportunity that may be overwhelmed for
13 whatever reason to request additional resources that they
14 may not feel comfortable seeking otherwise. I think it's
15 beneficial to the parties also who may -- who may be
16 involved in a case that's sitting in a court without any
17 discovery going forward or whatever because the resources
18 aren't there because the court is, you know, in a capital
19 murder trial, for instance, that's taking two or three
20 months.
21 CHAIRMAN BABCOCK: Yeah. Yeah. Justice
22 Peeples.
23 HONORABLE DAVID PEEPLES: Dickie?
24 MR. HILE: Yes, sir.
25 HONORABLE DAVID PEEPLES: As I think about

1 this, is it possible that it would work this way? The
2 trial court says, "I need additional resources, and I'd
3 like, you know, technology and staff attorney." Is the --
4 and it goes through -- the PJ says "yes." The JCAR, is it
5 limited to granting the items that the trial judge asks
6 for, or can it go further? And not -- you know, if the
7 trial judge doesn't ask for a visiting judge, can one be
8 granted if he asks for other things, and if he says, "I'd
9 like for Judge Jones to come in," but they get him
10 somebody else, and he hasn't consented to that?
11 MR. HILE: Right.
12 HONORABLE DAVID PEEPLES: He's said, "I need
13 help."
14 MR. HILE: Well, you know, what we
15 envisioned is that JCAR would be limited to those
16 activities or resources that were requested.
17 HONORABLE DAVID PEEPLES: And if that were
18 not the case then the trial judge is going to be thinking,
19 "I don't want to open Pandora's box and ask for a couple
20 of little things and get removed from the case and" --
21 MR. HILE: That was the other reason --
22 excuse me -- that we didn't want to put a 15-day rule that
23 they've got to rule within because we said a lot of this
24 is going to be fluid, what their demands -- they may be
25 submitting up an amended request, saying that, you know,

1 "I only requested A, B, and C, but conditions have
2 changed. I now need D and E," so we viewed it as kind of
3 a fluid deal, and we didn't want to have -- I know res
4 judicata is not the word, but a final ruling out of them
5 that would foreclose something necessarily, if it was
6 still available.
7 HONORABLE DAVID PEEPLES: And just to follow
8 up, I can foresee this happening maybe, if it's ever
9 funded. Trial judge is willing to take judge A or judge
10 B, but judge A and judge B are not judges of excellence,
11 they're not really right for a complex case, and the JCAR
12 is thinking, you know what, this case does need help, but
13 we're not willing to put our names on the line for judge A
14 or judge B. Then you have to negotiate with the trial
15 judge. I mean --
16 MR. HILE: But, Judge, wouldn't that --
17 because that's coming under the presiding judge, what's
18 allotted to him, I mean, that's almost foreclosed. He's
19 made that decision. He's not going to reference that
20 to JCAR, as I kind of view it.
21 CHAIRMAN BABCOCK: Doesn't it say in here
22 that the trial judge has to consent?
23 MR. MUNZINGER: Yes.
24 HONORABLE DAVID PEEPLES: Well, where does
25 it say that? And he certainly has to ask for resources.

1 HONORABLE STEPHEN YELENOSKY: It's in the
2 statute. It's in the statute.
3 MR. MUNZINGER: Page 100, subject to
4 subsection so-and-so, "The assignment of an active or
5 retired judge under this chapter subject to the consent of
6 the judge of the court in which the case for which the
7 resources are provided is pending." If that's not
8 explained by the rule further, it seems to me that the
9 judge can say, A, "I don't need a judge," or, B, "I need a
10 judge and I want Judge Orsinger, and I won't accept
11 anybody but Judge Orsinger." That's presuming he's
12 psychologically imbalanced, but --
13 CHAIRMAN BABCOCK: You mean the requesting
14 judge?
15 MR. MUNZINGER: I don't think anybody has
16 the authority to change that the way this is written.
17 MR. HAMILTON: Emperor Orsinger.
18 HONORABLE DAVID PEEPLES: That's in the
19 statute. Is it in the rule?
20 MR. HILE: It's not.
21 HONORABLE TRACY CHRISTOPHER: Yeah, it is.
22 16.5(a).
23 HONORABLE DAVID PEEPLES: Yeah. That's
24 right. It is.
25 CHAIRMAN BABCOCK: Okay. All right. 16.11.

1 Any comments? We've got to move on, so we've got four
2 minutes to talk about 16.11. Judge Yelenosky.
3 HONORABLE STEPHEN YELENOSKY: Well, I was
4 just trying to follow-up on that, so if you're off of that
5 and going on to 16.11 --
6 CHAIRMAN BABCOCK: We're on to a frolic of
7 our own. 16.11. If anybody has any comments other than
8 what's been discussed, just talk to Marisa about it, and
9 she'll get it straight. 16.11.
10 Who does? Carl. Angie called on you, Carl.
11 MR. HAMILTON: Changed my mind.
12 CHAIRMAN BABCOCK: She just wanted to hear
13 your voice again, I think.
14 CHAIRMAN BABCOCK: Okay. Anything on 16.11?
15 Yeah, Professor Carlson.
16 PROFESSOR CARLSON: 16.11(b) is limited to
17 other budget -- I mean, funds made available by grant or
18 donations to the OCA. Is that what that means? Or made
19 available by grants or donations to whom?
20 MR. HILE: That was the only discussion, was
21 OCA, but the grants could actually be to the Governor's
22 office.
23 PROFESSOR DORSANEO: Could be the state,
24 could be anybody.
25 PROFESSOR CARLSON: Anything to the state,

1 any office.
2 CHAIRMAN BABCOCK: Yeah, Richard.
3 MR. MUNZINGER: You may want to put
4 something in the rule that will allow the parties to be
5 the donors of the grants or donations. For example, in a
6 case, let's pretend Chevron is one of the parties, and
7 they know it would help them, and they want to make a
8 donation. Are they precluded by doing so because they're
9 a party to the case? That could raise questions about
10 favoritism. It could raise questions about whatever.
11 There may be a need here to say that the parties could
12 make a donation if all parties to the suit consented or
13 otherwise, but that was the question that I raised
14 earlier, and he said, "No, we can accept donations." If
15 the parties to the case may realize it would save us a lot
16 of money and a lot of time in the long run and be a whole
17 heck of a lot cheaper if we ourselves made the
18 contribution because the state doesn't have the money.
19 But could they do that as parties to the litigation? Does
20 it raise questions of the propriety of a litigant making a
21 donation when other litigants don't make a donation or
22 don't consent to the litigation?
23 CHAIRMAN BABCOCK: Well, and I raised that
24 earlier --
25 MR. MUNZINGER: Yeah.

1 CHAIRMAN BABCOCK: -- and because there's
2 another example, where it's a lengthy trial, the jurors
3 are getting creamed because their employers aren't paying
4 them, and so the judge, trial judge, goes to the parties
5 and says, "Hey, you've got to supplement the jurors' pay."
6 MR. GILSTRAP: You want to pay the jurors?
7 You want to pay the jurors?
8 CHAIRMAN BABCOCK: Yeah. That happened.
9 HONORABLE TRACY CHRISTOPHER: There's a
10 statute that allows that.
11 MR. GILSTRAP: That really happened?
12 CHAIRMAN BABCOCK: That happened.
13 Absolutely it happens. David.
14 MR. JACKSON: There was a case early on in
15 Dallas when realtime was just getting started where the
16 parties came in and paid to set up a courtroom in Dallas
17 with realtime with computers and screens, and both sides
18 were involved in it, so I mean, it couldn't be prejudicial
19 to any one side. They all kind of agreed to that.
20 MR. MUNZINGER: Well, but this rule is
21 silent on the parties agreeing to donations by the parties
22 themselves, and when I raised the question earlier I was
23 told, "Don't worry about it because we can accept
24 donations and what have you," but that doesn't address the
25 parties to the litigation be the donors, sources of the

1 extra resources, and they are a very likely source for
2 that, it would seem to me.
3 CHAIRMAN BABCOCK: Sure.
4 MR. HILE: The only prohibition is in regard
5 to you can't do it as taxable costs.
6 MR. MUNZINGER: I agree with that. It
7 cannot be taxed against them, which is another reason why
8 I raised the question. It didn't say they couldn't donate
9 them, but you still have the appearance of impropriety
10 there and whether all parties have to consent, and the
11 rule is silent on that issue.
12 CHAIRMAN BABCOCK: Richard Orsinger, and
13 then Professor Dorsaneo.
14 MR. ORSINGER: Yeah, I wanted to confirm
15 that. I had a five-week jury trial in a rural county
16 where the parties agreed to pay the jurors better than
17 minimum wage, and the judge paid them at the end of the
18 week. It was a five-week trial. Secondly, in Dallas a
19 number of litigants on the plaintiffs and the defense side
20 raised money to computerize some of the district
21 courtrooms up there so that they would have Power Point
22 capability and computer capability at the counsel table,
23 and that was privately raised funds that were just donated
24 to the county for use in all cases. So it's not
25 unprecedented that the parties might subsidize their

1 particular case or even subsidize cases generally.
2 And then the third thing that occurs to me
3 is that there may be Federal money in disaster situations
4 that might provide supplementation for what the state is
5 capable of doing, and I don't know whether those monies go
6 only to the state or whether they're administered through
7 a Federal agency to individual recipients, but I don't
8 think we should foreclose ourselves from the possibility
9 that the Federal government might subsidize some costs of
10 litigation, and this appears to require that everything go
11 through the budgetary process, and, you know, if I was the
12 least bit inclined to help some particular disaster, the
13 last thing I would do is just give the money to the Texas
14 Legislature to spend. So I think we have to have a -- I
15 think a flexibility there to allow outsiders to provide an
16 infrastructure that adds onto what the court can afford,
17 the state can afford, I mean.
18 CHAIRMAN BABCOCK: All righty. Yeah,
19 Professor Dorsaneo.
20 PROFESSOR DORSANEO: Maybe it's just me, but
21 I'm still a little bit unclear about who -- who makes the
22 pivotal decisions. You've got a request to the presiding
23 judge, and then in 16.5 the presiding judge makes findings
24 about one or more of the following resources should be
25 available, so the presiding judge actually decides and not

1 only are additional resources would be a good idea but it
2 would be good to do this. Then when I get over to JCAR
3 I'm not altogether clear to me from the administrative
4 rule what JCAR's role is. In 16.7(b) and (c) we have "if
5 additional resources requested by the trial court include
6 resources not previously allotted, JCAR shall determine
7 whether additional resources are required." I don't know
8 whether that's talking about money or about doing
9 particular things with that money, and then (c) is also a
10 little bit vague to me. So I guess my question is,
11 is JCAR making the decisions about what needs to be done,
12 or is it -- or is it just ruling on what the presiding
13 judge thinks is appropriate?
14 MR. HILE: I think it's ruling on what the
15 presiding judge thinks is appropriate.
16 PROFESSOR DORSANEO: Well, I think that --
17 if it's no clearer than it is in this rule in the statute
18 then I think the rule needs -- for me at least, maybe it's
19 just me -- needs to kind of indicate, you know, who's
20 deciding what. Is JCAR just deciding, "Yeah, we think
21 that's a good idea, go for it," or would JCAR decide,
22 "Well, we think part of what you want is a good idea, but
23 we're not going to do some of the other things that you
24 want"?
25 MR. HILE: Well, I think that's clearly

1 within -- you may grant A, B, that's all we have the funds
2 for, and while we would like to do C and D, we can't.
3 PROFESSOR DORSANEO: Well, that's different.
4 I want to know whether JCAR can say, "We have plenty of
5 money, but we think some of your ideas are stupid."
6 MR. HILE: I think that was -- yeah. That
7 may need to be fleshed out there, because that's my
8 understanding, is that JCAR is not bound to say, "If you
9 request A, B, C, and D, I've got to give you all four, I
10 can't give you two of them."
11 PROFESSOR DORSANEO: I suggest a little more
12 work on 16.7 to make that clear.
13 CHAIRMAN BABCOCK: Richard.
14 PROFESSOR DORSANEO: I think now we're
15 thinking there is no money so we don't have to worry what
16 it's going to be spent on.
17 CHAIRMAN BABCOCK: Richard.
18 MR. MUNZINGER: See, when I read the statute
19 that if the administrative -- presiding administrative
20 judge and the trial court ask for A, B, JCAR may not send
21 A, B, C, D. They are restricted to what the two other
22 judges have asked for. That's the converse of what you
23 just said. It would seem to me they must have the
24 authority to say, "We're not going to A, B, C, and D, but
25 we'll give you A, B," but I don't see the converse of that

1 under the statute.
2 CHAIRMAN BABCOCK: If anybody has any more
3 comments about this, direct them to Marisa in a timely
4 fashion, and in the meantime, Dickie, thanks so much for
5 being here today and reacting to the questions and
6 comments, all of which are in the spirit of trying to make
7 this better --
8 MR. HILE: I understand.
9 CHAIRMAN BABCOCK: -- and clearer and of
10 more use to everyone. And please, if you would, tell your
11 task force that we so much appreciate what they've done.
12 Terrific work product. We'll be in afternoon recess.
13 (Recess from 3:19 p.m. to 3:41 p.m.)
14 CHAIRMAN BABCOCK: Richard, I understand
15 that we're now onto 28.4(d), appellate briefs.
16 MR. ORSINGER: Yes.
17 CHAIRMAN BABCOCK: If you and Katie will
18 quit collaborating there.
19 MR. ORSINGER: Come on up here. She's going
20 to sit at the table here.
21 CHAIRMAN BABCOCK: She's going to sit at the
22 table.
23 MR. ORSINGER: Okay.
24 HONORABLE TOM GRAY: Chip, may I before he
25 begins explain where we all got this concept of findings

1 within termination orders? May I read a passage in from a
2 case?
3 CHAIRMAN BABCOCK: Yes, you may.
4 HONORABLE TOM GRAY: It comes from case
5 authority. This particular one is from *Vasquez vs. TDFPS*
6 at 221 SW 3d 244. The court stated, "Of course, any
7 number of implied findings of fact may support a trial
8 court's parental termination order. However, as noted
9 above, the order must state the ground or grounds upon
10 which the trial court relies in terminating parental
11 rights," and it cites Family Code 161.206. "For example,
12 evidence that a child is born with narcotics in his system
13 may support an implied finding of ongoing parental
14 narcotic use that is germane to more than one statutory
15 ground for termination, but pursuant to the statute, the
16 trial court must articulate the statutory grounds for
17 supporting its termination of parental rights," and when
18 you look over at the statute, in fact, it doesn't -- it
19 doesn't say what this case says it does, but that's why I
20 think so many of us had that thought in our mind that
21 there was a requirement that the termination order
22 actually specify the grounds for the termination to be
23 granted.
24 CHAIRMAN BABCOCK: Was that a Waco court of
25 appeals case?

1 HONORABLE TOM GRAY: It was not.
2 MR. LOW: It was written by him.
3 HONORABLE TOM GRAY: Actually, it was from
4 one of the Houston courts, and it's on another e-mail
5 here. First Court.
6 HONORABLE STEPHEN YELENOSKY: Well, it may
7 have been legally incorrect, but it was morally correct.
8 HONORABLE TOM GRAY: There are a lot of
9 courts that have said it. I'm sure we probably have said
10 it, but it's kind of one of those things that gets started
11 in the case law, and --
12 CHAIRMAN BABCOCK: Yeah. And has a life of
13 its own, and Justice Bland is not even here to defend
14 the --
15 HONORABLE JANE BLAND: I'm here.
16 CHAIRMAN BABCOCK: Oh, no, you are hiding.
17 HONORABLE JANE BLAND: And Judge Jennings
18 and I were on that panel, if I remember, and Judge Taft
19 wrote the opinion.
20 CHAIRMAN BABCOCK: And you were what?
21 HONORABLE JANE BLAND: Judge Jennings
22 dissented, but not about that.
23 HONORABLE TOM GRAY: I did not look that
24 deeply into it.
25 CHAIRMAN BABCOCK: Justice Christopher.

1 Would you like to spring to defense of your sister court?
2 HONORABLE TRACY CHRISTOPHER: No, no, no. I
3 had something else that I wanted to add before we move on.
4 CHAIRMAN BABCOCK: Okay.
5 HONORABLE TRACY CHRISTOPHER: If that's
6 okay.
7 CHAIRMAN BABCOCK: Yeah.
8 HONORABLE TRACY CHRISTOPHER: So we were
9 talking during one of the breaks about part of the
10 problems with the records is getting notice to the
11 reporter and trying to impress upon anyone that this is a
12 free record and so not to wait for money getting paid. So
13 my suggestion was to put in 25.1, in the notice of appeal,
14 to state, "If the appeal is a parental termination or
15 child protection case as defined in 28.4, state the
16 following: 'This is an appeal of a parental termination
17 or child protection case as defined in 28.4. The party
18 appealing has been/has not been declared indigent. The
19 clerk's record and the reporter's record are due at the
20 court of appeals in 10 days. These records have priority
21 over other records in progress. If the party has been
22 declared indigent, these records are to be prepared at no
23 cost to the party.'"
24 And, I mean, if the purpose behind our
25 working on these rules is to really tell everybody, "We

1 really, really, really want you to put this at the top of
2 the line," we have to tell them that. Then I would add to
3 28.4(b), "A copy of the notice of appeal must also be
4 delivered to the court reporter and the trial court
5 judge," and then I would say, "If a party has not been
6 declared indigent, the party must make immediate
7 arrangements to pay filing fee for the appeal, the fee for
8 the clerk's record, and the fee for the court's record.
9 Failure to pay for all of these items will result in the
10 dismissal of the appeal."
11 Just so that, you know, that's way out there
12 right at the beginning. Especially, I mean, we do get pro
13 ses trying to make an appeal, and they might get the
14 notice of appeal filed and then all of the sudden they're
15 hit with all of these costs associated with their appeal,
16 and sometimes it gets to the point where they'll pay one
17 of them and then they just can't pay the next one, and six
18 months later they give up, and the case gets dismissed. I
19 just think we need to, you know, let them know what
20 they're in for right at the beginning in terms of making
21 immediate arrangements, especially if we keep this 90-day
22 deadline in here that's further on in the rule.
23 CHAIRMAN BABCOCK: Mr. Munzinger.
24 MR. MUNZINGER: Rule 35.3(b) as presently
25 written says that the court reporter is not required to do

1 anything about the transcript until the decision or fact
2 of payment is determined. Those are -- that's my
3 paraphrase, but it's all in the conjunctive, "The official
4 or deputy reporter is responsible for preparing,
5 certifying, and timely filing the reporter's record if,"
6 subdivision (3), "the party responsible for paying for the
7 preparation of reporter's record has paid the reporter's
8 fee or has made satisfactory arrangements with the
9 reporter to pay the fee or is entitled to appeal without
10 paying the fee." So there has to be a determination of
11 the indigency before the court reporter is required to
12 prepare the record.
13 CHAIRMAN BABCOCK: What rule are you talking
14 about?
15 MR. MUNZINGER: Rule 35(b)(3), Texas Rules
16 of Appellate Procedure.
17 MR. ORSINGER: Let me follow that up that
18 during the break Katie Fillmore that's assisting us here
19 actually made the suggestion, broad-based suggestion, that
20 all of these appellate timetables need to be held in
21 abeyance until we have a decision by the appellate court
22 on the appeal -- the Arroyo appeal on the entitlement to a
23 free record, because we can't be having the court reporter
24 furiously preparing within 10 days the reporter's record
25 when there's been an adjudication that they're not

1 indigent and are not entitled to a free record, and we
2 can't have the appellant's lawyer preparing a brief before
3 there's an -- a reporter's record. So we haven't covered
4 that in here, but I think that it's a legitimate complaint
5 or suggestion, which includes yours, Richard, which is
6 that all of these briefing deadlines probably need to be
7 held in abeyance until after the conclusion of the appeal
8 on the Arroyo -- the Arroyo appeal on the denial of
9 indigency.
10 CHAIRMAN BABCOCK: Professor Dorsaneo.
11 PROFESSOR DORSANEO: The Arroyo appeal is
12 the problem. Is there anything we can do about that
13 problem?
14 MR. ORSINGER: We can shorten it. We can't
15 avoid it, because you need -- contrary to the suggestions
16 that were done before, you can't just carry it along with
17 the case because if you carry it along with the case,
18 somebody is preparing a free record, so you really need to
19 know in advance whether the record is going to be free or
20 not because if it's not then the court reporter says, "I'm
21 not going to give you my record until I'm paid or
22 necessary arrangement, satisfactory arrangements have been
23 made," so the court reporter needs to know before the
24 record is prepared whether they're entitled to require
25 payment or not. So we have to have a decision about

1 indigency made by the trial judge before the record is due
2 or even started, before the record is started, and if
3 that's appealed we need an adjudication by the appellate
4 court whether that determination is affirmed or reversed
5 before the record is started. And so in my view all we
6 can do is accelerate the process. Does that make sense?
7 PROFESSOR DORSANEO: Once -- during one
8 point in our history we required the court reporter to
9 work on the record when the request for it was made, with
10 the idea being that there would be payment or not later.
11 At one point we said, "Okay, you get started and worry
12 about payment later" instead of making arrangements for
13 payment being a prerequisite to starting, and I don't
14 know -- I suppose we changed that idea under the influence
15 of somebody, but I wonder if -- you know, what would be
16 wrong with going back to that? Just a bad idea?
17 MR. ORSINGER: Gosh, Bill, I've been here
18 for 15 years or something. I don't remember when you
19 didn't have to arrange to pay for the record.
20 PROFESSOR DORSANEO: It was a while back.
21 MR. ORSINGER: Yeah. I don't think --
22 CHAIRMAN BABCOCK: 1938.
23 PROFESSOR DORSANEO: I'm not that old.
24 MR. MUNZINGER: Wait a second, that's the
25 year of my birth.

1 CHAIRMAN BABCOCK: Let David have a say.
2 MR. JACKSON: And it was before 18 years ago
3 when I came on, too. One suggestion, too, might be if the
4 provision that allows the court to order the county to pay
5 it, in that instance where the county is going to pay it
6 the court reporter should be obliged to go ahead and start
7 on it regardless of payment if the county is going to be
8 good for it.
9 MR. ORSINGER: So the Family Code says
10 "may."
11 MR. JACKSON: "May."
12 MR. ORSINGER: But if the trial court says
13 "will," "shall"?
14 MR. JACKSON: If the trial court orders it
15 then, yeah, the court reporter starts to work on it.
16 MR. ORSINGER: Okay. So in the case where
17 the judge does choose to require the county to pay then
18 there's no reason to delay the preparation of the
19 underlying reporter's record.
20 MR. JACKSON: Right.
21 CHAIRMAN BABCOCK: Carl.
22 MR. HAMILTON: Does the district judge have
23 the power to order the county to pay?
24 MR. ORSINGER: Under the Family Code I
25 believe he does. We established earlier it says, "The

1 court may require."

2 MR. HAMILTON: What if the commissioner's

3 court says, "We don't want to. We don't have any money?"

4 MR. ORSINGER: You know, that sometimes

5 happens in those rural counties, and I don't remember if

6 they solve that out behind the courthouse with guns or

7 what. They have the same problem with appointing visiting

8 judges. There are some county judges -- county --

9 district court judges in rural counties that tell me

10 there's no money in the budget for them to appoint a

11 visiting judge, and yet -- and yet there's authority for

12 the administrative judge to do that. So what happens if

13 you do that, David, and then the county won't pay for it?

14 HONORABLE DAVID PEEPLES: Well, there's

15 state funding for the salary of the -- in a district

16 court, the salary of a visiting judge, but if they've got

17 to travel somewhere that's paid by the county, and that

18 may be what you're referring to that they don't

19 appropriate money for.

20 MR. ORSINGER: And have you ever had a

21 situation where you ordered it and the county wouldn't

22 pay, and then who pays the bill?

23 HONORABLE DAVID PEEPLES: I have not had

24 that myself.

25 CHAIRMAN BABCOCK: Okay. How about

1 subparagraph (d), appellate brief? Any comments?
2 MR. ORSINGER: Well, we can't skip that
3 fast. We're back on (c)(2) and moving to (c)(3).
4 CHAIRMAN BABCOCK: Well, you can't blame me
5 for trying.
6 MR. ORSINGER: Unless you're telling us you
7 know something we don't.
8 CHAIRMAN BABCOCK: No, I'm not telling you
9 that at all.
10 MR. HAMILTON: What rule are we on?
11 MR. ORSINGER: We're on 28.4(c)(3), and for
12 those of you who, like Buddy, are counting the numbers,
13 even though there's no (c) -- even though there's no 24.3
14 in the rule book, the Supreme Court has recently adopted a
15 Rule 28.3, which makes this a 4, and so this is a correct
16 number. You just can't tell by looking in any books you
17 have or even at the integrated rules on the Supreme Court
18 website. You just have to know the rules attorney.
19 MR. LOW: You couldn't read between the
20 lines.
21 MR. ORSINGER: Okay, so --
22 CHAIRMAN BABCOCK: 28.3 is a double secret
23 rule.
24 MR. ORSINGER: 28.4(c)(3) is extensions of
25 time. Now, all of you appellate lawyers and judges listen

1 closely because I'm sure that I'm not going to get this a
2 hundred percent right. I believe that we decided to
3 abandon the process of requesting an extension of time
4 when we took the responsibility away from the appellant to
5 deliver the record to the appellate court. The extensions
6 were kind of out. There was a deadline. The reporter
7 misses the deadline. The rules require them to send them
8 a nice letter that gives them an extra 30 days. If they
9 miss that 30 days then they get another letter that's not
10 so nice and then that deadline is not prescribed, and if
11 they miss that then they start getting threatening
12 letters, but there's no extension, nobody files a -- or do
13 they?
14 HONORABLE JANE BLAND: They do.
15 MR. GILSTRAP: Yes.
16 MR. ORSINGER: They do? Okay. Well, I
17 don't think there's a procedure for --
18 PROFESSOR DORSANEO: No, and they're not
19 supposed to.
20 MR. ORSINGER: Yes, okay. So this is
21 another one of those situations where the rules we passed
22 are not being observed, and that creates a problem for us
23 because we're amending rules that no one is following.
24 PROFESSOR DORSANEO: They're supposed to
25 send a nasty letter, right, say you have -- not to start

1 the deadline over again, not to say, "Oh, we didn't mean
2 that first deadline. Here's the real deadline."
3 MR. ORSINGER: It's not a nasty letter. I
4 see them all the time. They say, "We notice that you
5 didn't get it in. You've got another till X day to do
6 it." I've got one case where they didn't send the letter
7 until the record was 90 days overdue, and now it's been
8 ignored for another 60 days, but I represent the appellee
9 so I'm okay with all that. But I don't know what to do
10 about the fact that we don't have an extension of time
11 anymore, but what we're trying to do -- what the task
12 force was trying to do was to tell the appellate courts,
13 "Don't extend the deadline for filing," but I don't know
14 if we call it in the granting of an extension, because
15 there's no rules for -- if you see what I'm saying, no
16 rules for extension.
17 PROFESSOR DORSANEO: What you're saying is
18 your research indicates there is an automatic extension of
19 time built into the interpretation of the rule that was
20 never meant to --
21 MR. ORSINGER: No, it doesn't. The Rule
22 actually says --
23 MS. SECCO: 37.3(a)(1)
24 MR. ORSINGER: All right. 37.3(a)(1). I
25 have it on the authority of the rules attorney.

1 37.3(a)(1), "If the clerk's record or reporter's record
2 has not been timely filed the appellate clerk must send
3 notice to the official responsible for filing it, stating
4 that the record is late and requesting that the record be
5 filed within 30 days in an ordinary restricted appeal or
6 10 days in an accelerated appeal." And then "If the clerk
7 doesn't receive the record within the stated period, the
8 clerk must refer the matter to the appellate court, and
9 the court must make whatever order is appropriate to avoid
10 further delay and preserve the parties' rights."
11 CHAIRMAN BABCOCK: So are you advocating
12 that we accept the language in (c)(3) as the task force
13 wrote it, or are you saying that it should be something
14 different?
15 MR. ORSINGER: I'm here to advocate the task
16 force recommendation, but I have been having private
17 conversations as well as listening to all of this debate,
18 and so I'm just calling everyone's attention to the fact
19 that we are talking about a term "extension of time" that
20 really doesn't exist under the rule, and what does exist
21 under the rule is that some kind of notice is supposed to
22 issue giving them 10 more days. What the task force said
23 is, you know, they're already 30 days -- well, let's see.
24 They're 10 days out, because assuming we hold to the
25 10-day requirement, because we didn't have a 10-day

1 requirement we suggested a 30-day requirement, but
2 assuming we're to the 10-day requirement, then this rule
3 over here, 37.3(a)(1), then if it's not on time, they have
4 to send a letter saying it's due on the 10th day after the
5 day it was originally due. Filed within 10 days. No, 10
6 days after the letter is issued.
7 MS. SECCO: Yeah.
8 MR. ORSINGER: So anyway, the idea here is,
9 is that no matter how polite or tolerant the court of
10 appeals wishes to be, they should never allow this process
11 to be extended out more than 60 days.
12 PROFESSOR DORSANEO: 60 more days. You said
13 60 more days there.
14 CHAIRMAN BABCOCK: Absent extraordinary
15 circumstances.
16 MR. ORSINGER: That would be 10 days plus 60
17 days the way I guess I see that.
18 CHAIRMAN BABCOCK: Okay. Hang on. So are
19 you or anybody else advocating that (c)(3) be changed from
20 this language here? Start with you.
21 MR. ORSINGER: I'm not going to advocate any
22 changes. I want to simplify this and get this all out and
23 approved. I'm advocating that we put in (3), but there's
24 already been an unopposed consensus to return under (2) to
25 make the appellate record due in 10 days, so already we're

1 off track or at least off of the original track.
2 CHAIRMAN BABCOCK: Okay. Justice Jennings.
3 HONORABLE TERRY JENNINGS: The statute says
4 10 days, right?
5 MR. ORSINGER: No, the Rules of Procedure
6 say 10 days. The statute doesn't say. It just says
7 accelerated rules apply.
8 PROFESSOR DORSANEO: Which means 10 days.
9 MR. ORSINGER: Which means 10 days.
10 HONORABLE TERRY JENNINGS: Which means 10
11 days.
12 MR. ORSINGER: Yes.
13 HONORABLE TERRY JENNINGS: Why don't we just
14 say, (2), change "30" to "10 days," and eliminate (3)
15 altogether?
16 CHAIRMAN BABCOCK: Professor Dorsaneo.
17 PROFESSOR DORSANEO: Because if we're going
18 to do -- if we're going to do something like that then why
19 not just use the language that we used in 28 point -- 28.1
20 at the end of records and briefs, "The deadlines and
21 procedures for filing the record and briefs in an
22 accelerated appeal are provided in Rules 35.1 and 38.6."
23 With the one being -- we're only talking about the
24 records, so it's just -- just cross-reference to the
25 appropriate rule, unless we want to create just an

1 alternative system altogether for these kinds of cases.
2 MR. ORSINGER: Well, the task force wanted a
3 limit that is firm and doesn't exist right now, because
4 all we know right now is that if you miss your deadline
5 you get some kind of letter giving you another X number of
6 days, and it should have been 10 days plus 10 days, but
7 it's really 10 days plus the delay associated with getting
8 the letter out plus 10 days.
9 CHAIRMAN BABCOCK: What are the consequences
10 if there's not compliances with this task force deadline?
11 MR. ORSINGER: It's a progressive thing.
12 The letters become more and more firm until they become
13 threatening and then ultimately, ultimately they -- and
14 this is probably some, you know, mother, who's --
15 PROFESSOR DORSANEO: Right. It's like my
16 wife dealing with the children.
17 MR. ORSINGER: Ultimately they threaten to
18 put them in jail, and, I mean, you know, there's a legend
19 around about the court reporter that was sent to jail with
20 her machine and a typewriter, you know, not to be released
21 until she finished the record. I don't know if that's
22 true or not.
23 HONORABLE TRACY CHRISTOPHER: It's not a
24 legend.
25 CHAIRMAN BABCOCK: David Jackson says it's

1 true, and he would know.
2 MR. LOW: It happened in Beaumont, a girl
3 named Barbara Marshall.
4 MR. ORSINGER: Okay. We even have a name in
5 the record, Barbara Marshall.
6 MR. LOW: She's dead.
7 CHAIRMAN BABCOCK: Sarah.
8 HONORABLE SARAH DUNCAN: Some people, court
9 reporters, still file what they classify as motions, or at
10 least they did five years ago, but regardless, the court
11 simply extends. It doesn't grant an extension. It
12 extends the time to file a record, and I'm not going to
13 say what the number should be because I'm sure that would
14 be very controversial, but (3) could just say, "The
15 appellate court may extend the time to file a record upon
16 a showing of good cause for no more than X number of
17 days," but if we want to ensure, with an E, that these
18 cases are processed like interlocutory appeals are
19 supposed to be but not all courts are processing, then I
20 do think we should say, "No more than X number of days,"
21 and if it's 10 days, it's 10 days, if it's 15 days, if
22 it's 30 days, if it's five days.
23 MR. ORSINGER: And what happens, by the way,
24 if it's not filed at the ends of that time? We don't say.
25 We just at some point --

1 HONORABLE SARAH DUNCAN: I think we have to
2 assume that courts of appeals know they have the authority
3 to hold a court reporter in contempt.
4 CHAIRMAN BABCOCK: Frank.
5 MR. GILSTRAP: What happens in the real
6 world is the court reporter starts getting these letters,
7 and the court reporter sends a motion or letter to the
8 court and says, "Look, I can't get it out within that
9 time. Here's why. Give me more time." That's what
10 really happens. Now, you know, but I think Sarah's
11 approach is -- that makes sense.
12 MR. ORSINGER: The task force, if you don't
13 mind me interrupting, we've allowed extraordinary
14 circumstances because what if the -- what if there's a
15 capital murder case going on and the court reporter can't
16 be substituted for? I mean, there should be an out, I
17 think, before we just drop into the zone of the death
18 penalty on the court reporters, so we put one in there for
19 there should be a showing of good cause to get extensions,
20 there should be a time limit on the total number of
21 extensions, and there should be an extraordinary
22 circumstance exception for those situations that we just
23 can't anticipate and can't really blame on anyone.
24 CHAIRMAN BABCOCK: Professor Dorsaneo.
25 PROFESSOR DORSANEO: Are these the only

1 kinds of cases that are causing a problem, or is it just
2 the whole system is not working?
3 HONORABLE TRACY CHRISTOPHER: The whole
4 system.
5 HONORABLE DAVID GAULTNEY: What do you mean
6 not working?
7 PROFESSOR DORSANEO: Not working as
8 designed.
9 HONORABLE TRACY CHRISTOPHER: The whole
10 system is slow.
11 CHAIRMAN BABCOCK: Justice Gray.
12 HONORABLE TOM GRAY: The most success that
13 I've had across the board with this problem, whether it's
14 the elected judge, an assigned judge, one of the cluster
15 judges, whether it's the official reporter or the visiting
16 reporter, is to communicate with the trial judge; and I
17 think this could be in the form of a rule where there
18 would be something like this: "The trial court working
19 with the court reporter must notify the appellate court
20 the date the record will be filed, which date cannot be
21 more than," blank, whatever the committee chooses,
22 whatever the Court chooses; and when the trial court and
23 the reporter come up with a date and the schedule, they're
24 looking at the things that are impacting their calendar;
25 and if you can -- obviously you would have to follow this

1 up with, "and the trial court or the reporter will notify
2 the appellate court of that date"; and what we do when we
3 are successful in getting that date, we then turn around
4 and order the record filed by that date; and I will say
5 that probably 95 percent of them meet that date when they
6 have established it; and that's the best mechanism we have
7 found to get the cooperation of the court reporter and the
8 trial judge. You tell us when you can get it done.
9 Here's -- you know, in this case we would want a maximum
10 out there, but mechanically it works for us.
11 CHAIRMAN BABCOCK: David.
12 MR. JACKSON: There's an issue that we
13 haven't really talked about here today, if we could figure
14 out a way to address, would probably resolve a whole lot
15 of the problems that court reporters face right now, and
16 that's the Wage and Hour Commission won't allow a court
17 reporter to work on a transcript during the day. When
18 their judge is not on the bench and nothing is happening,
19 they're still not allowed to work on transcripts because
20 they count that as they're being paid by the county to be
21 a court reporter in the courtroom; and if the judge isn't
22 working on the bench, it doesn't matter, you can't be
23 working on a case that you're billing somebody else for at
24 the same time. So we need to work out a mechanism, and I
25 wouldn't have a problem, especially on an indigent case

1 where you're working for free, if it does fall back on the
2 court reporter and the county is not going to pay for it,
3 that the court reporter be allowed to work on it during
4 business hours, so that at least they're getting their
5 salary from the county for doing their court reporting
6 services and working on that transcript during those times
7 when the judge doesn't require them to be on the bench.
8 But it's sort of a juggling act that court reporters have
9 to play, and they do have to do transcripts at night and
10 they do have to do transcripts on the weekend because
11 that's the way the Wage and Hour Commission looks at our
12 job.
13 PROFESSOR DORSANEO: State Wage and Hour
14 Commission?
15 MR. JACKSON: Well, it's Federal or state.
16 They just came around and said we're not allowed to be
17 doing that.
18 HONORABLE JAN PATTERSON: So even where the
19 county is paying for a transcript and they're paying the
20 salary of that person, that person cannot work on that
21 transcript?
22 MR. JACKSON: They're not supposed to be.
23 MR. ORSINGER: So that increases the cost to
24 the county.
25 HONORABLE JAN PATTERSON: How can that be?

1 HONORABLE SARAH DUNCAN: Why isn't that a
2 part of the job description?
3 MR. JACKSON: Our job description is to make
4 a record of everything that happens in the courtroom. The
5 transcript is a byproduct of that, if somebody needs it
6 transcribed and on paper so they can take it up on appeal,
7 but our job that we're hired for is to make a record of
8 every word that's said in the courtroom. So that's what
9 we get paid for as a court reporter, is making that
10 record, and that's why some judges are trying cases all
11 day everyday and in court all day everyday and if somebody
12 needs an appeal it's up to that court reporter to work on
13 those appeals at night and on weekends if they're going to
14 bill the parties for that separately. They're not
15 supposed to be working on those transcripts during the
16 day, you know, any time during the day that they're being
17 paid by the county to be a court reporter.
18 CHAIRMAN BABCOCK: Justice Patterson.
19 HONORABLE JAN PATTERSON: Bill, I do think
20 this is a problem in lots of cases, but the reason it's a
21 particular problem here is because the district courts
22 generally do such a fine job of scheduling these cases,
23 and they are on a tight time frame until they get to
24 appeal, and then they tend to lag on appeal, and I suspect
25 that all the clerks offices handle these differently and

1 that there are certain extensions that are granted by
2 clerks before they even get to the judges, and this is
3 a -- an important time and an important rule because this
4 is where a lot of the slippage occurs, and here, you know,
5 we have sort of two levels. We have a good cause and
6 extraordinary circumstances, and kind of a possibility of
7 90 days here. So there's a great deal of slippage that
8 occurs here, which in and of itself might not be bad if we
9 didn't have a lot of slippage through the appellate
10 system. So it tends to slow down and there tends to be
11 unaccounted for time before it even gets to the judges and
12 the clerk's office and certain extensions that are given
13 then. So this is a particularly important area, and I
14 agree with Sarah that perhaps some specific time
15 limitation and maybe just one standard might be
16 appropriate, but this is a critical part of this rule I
17 think.
18 CHAIRMAN BABCOCK: Okay. Any other comments
19 about this? Yeah, Justice Jennings.
20 HONORABLE TERRY JENNINGS: After hearing
21 some of these comments I'm thinking maybe the better
22 practice would be for the courts to have flexibility to
23 handle this on a case by case basis where they know
24 certain court reporters and they know certain court
25 reporters have certain habits or trial judges that the

1 court reporters work for have certain habits, because once
2 you say 60 days, they're going to say, "I want my 60
3 days." And someone at the appellate court may know that
4 court reporter or they may know that trial court judge,
5 and they may know they don't really need the 60 days, and
6 so, again, I would recommend just not even addressing it
7 and eliminating (3) and giving -- leaving that flexibility
8 to the appellate court or the clerk at the appellate court
9 who may know who they're dealing with.
10 CHAIRMAN BABCOCK: Justice Christopher.
11 HONORABLE TRACY CHRISTOPHER: It appears
12 that if you just look at the -- in kind of the normal
13 course of business, the clerk record and the reporter's
14 records, at least in the last two years I've looked at,
15 are being filed three to four months after the date of
16 filing. There's no Arroyo appeal, nothing complicated,
17 people are paying, it's three to four months. That's
18 doing nothing. It's three or four months. So the
19 question is do we want to do something to make it shorter
20 than three or four months, and it's currently an
21 accelerated appeal. It's currently subject to the 10-day
22 time frame, and the, you know, just kind of, oh, extension
23 here, extension here, sort of thing because it's an
24 accelerated appeal right now. A third of our cases are
25 accelerated appeals or mandamuses, so a third of our cases

1 are supposed to be coming in on this 10-day time limit,
2 and they're not. They're coming in on the three to
3 four-month, you know, time frame.
4 So the question is if we want to cut that
5 number down in these type of cases in particular we have
6 to shake up the system. The thing that Justice Gray was
7 talking about where you get the trial judge involved and
8 the court reporter, that happens generally when the three
9 months is gone and we start saying, "Where's the record?
10 Where's the record?" We're sending the nasty letters now.
11 "Where's the record? Where's the record?" Then you
12 finally have to drag the trial judge into it. I don't
13 really know how to make the system change to get this
14 class of cases bumped to the top, but that's what we're
15 aiming for presumably, and I don't think putting in this
16 60 days is going to do it.
17 HONORABLE JAN PATTERSON: And isn't that the
18 question, though, that perhaps this ought to be a class of
19 cases that should be bumped to the top?
20 HONORABLE TRACY CHRISTOPHER: Well, I
21 thought that was the purpose of the statute was to --
22 CHAIRMAN BABCOCK: Right.
23 HONORABLE TRACY CHRISTOPHER: -- do
24 something different.
25 CHAIRMAN BABCOCK: So the objective is to

1 make this thing sing.
2 HONORABLE TRACY CHRISTOPHER: Right.
3 CHAIRMAN BABCOCK: The question is what tune
4 are we going to call it. Justice Hecht.
5 HONORABLE NATHAN HECHT: But the statute,
6 until it was repealed, called for the record to be filed
7 within 60 days. Even though it said it was accelerated,
8 the 263.405(g) or (h), one of the provisions that's gone,
9 called for 60 days, so that even though it said
10 accelerated, it was kind of protracted. I mean, the
11 Legislature gave and the Legislature took away, and they
12 had this file these expedited motions for new trial and
13 statement of points on appeal, but then they had this
14 record that's stuck way out there. But, of course, one of
15 the reasons for the record to be delayed, as we'll come to
16 when we get to (6) here, because there's another statute
17 that affects that, too, but the question -- one question
18 in my mind is, you know, 60 -- if 60 was getting extended,
19 10 will look preposterous, but is that something we should
20 do anyway because the statute says "accelerated" and
21 accelerated is 10? But I think as a practical matter if
22 it's a two-day trial, it's going to be very difficult for
23 the court reporter to file the reporter's record in 10
24 days.
25 HONORABLE TERRY JENNINGS: A lot of these

1 aren't really that long.

2 HONORABLE NATHAN HECHT: Well, if they had

3 trouble with 60, surely they're going to have trouble with

4 10.

5 MR. JACKSON: If they were allowed time to

6 do it, it would be very possible. You know, I edit 200

7 pages a day. In the freelance business you've got to have

8 a completely different mindset. You know, if I take a job

9 Monday, it's out by Friday, and that's bad delivery for me

10 if it takes that long, but if you give these reporters

11 time to work on it without leaving them in court day after

12 day after day on other matters, and you get one of these

13 cases and you say, okay, we finish this case and get the

14 record out, if it's 10 pages they can do it an hour.

15 There's no reason why they can't, unless their judge says,

16 "No, you can't work on it during court hours," and they

17 have to work on it at night. Well, that's a little

18 different. If they were allowed to stop what they're

19 doing, get that record out, you could have turn around in

20 a week, no problem.

21 HONORABLE TERRY JENNINGS: Is it -- is the

22 problem more the trial courts not allowing them that time?

23 PROFESSOR DORSANEO: I think some trial

24 courts -- I know there are courts that allow their

25 reporters to work on records when they're not on the

1 bench. I mean, they do it anyway, and those court
2 reporters stay up a lot better than the ones --
3 HONORABLE TERRY JENNINGS: But there are
4 obviously some judges who are in trial all the time.
5 MR. JACKSON: Right.
6 HONORABLE TERRY JENNINGS: And there are
7 some judges who are rarely in trial.
8 MR. JACKSON: Right.
9 HONORABLE TERRY JENNINGS: If you're in
10 trial all the time that's obviously very problematic. Is
11 there any way to craft a rule or a remedy directed to the
12 trial court to give the court reporter that time off they
13 need to get it done so that they're not perpetually
14 building in a further backlog?
15 MR. JACKSON: That would be a way to solve
16 it.
17 CHAIRMAN BABCOCK: But how does that work?
18 If I'm a trial judge, I've got my own reporter, and I know
19 that he's got to get a record out, but I've got a trial
20 going on, so what do I say, "Hey, go over there and do
21 it," and what do I do for a court reporter then?
22 HONORABLE STEPHEN YELENOSKY: Get a
23 substitute court reporter.
24 CHAIRMAN BABCOCK: Justice Peeples.
25 HONORABLE DAVID PEEPLES: Here's some

1 thinking outside the box. If someone were to come to me
2 and say, "I'll give you $5,000 if you'll" -- "if you'll
3 get this record filed on time," the last thing I would do
4 would be to draft a bunch of rules and deadlines. The
5 first thing I would do would be to come up with somebody
6 to bird-dog that case, that record. Maybe what we need to
7 do is to figure out some actor in the legal system and
8 give them some powers and say, "Your job when there's
9 going to be an appeal is to get the record filed quickly"
10 and give them some powers. You know, Sarah Duncan
11 mentioned that Chief Justice Lopez, when she was the chief
12 in San Antonio, got these done on time because she made
13 phone calls. She was the chief justice. I don't know if
14 she called judges or the court reporters, but Sarah said
15 that they got filed on time.
16 HONORABLE SARAH DUNCAN: She frequently had
17 one of the clerks doing it, but same thing.
18 HONORABLE DAVID PEEPLES: If you were to put
19 out some money saying come up with something that works,
20 nobody would say, "Here's what will work, 10 days, 60
21 days, file the motion." I mean, I think you get some
22 actor to be responsible for this, and you need to give the
23 person some powers and tell them to get it done.
24 CHAIRMAN BABCOCK: Judge Yelenosky.
25 HONORABLE STEPHEN YELENOSKY: Well, maybe,

1 but what if the problem is, as they said, the judge says
2 you've got to work. I don't understand why you can't get
3 a substitute court reporter. My court reporter, if he has
4 a deadline coming up, will get a substitute court reporter
5 at his expense and take that time to finish the record. I
6 don't know why that can't be done.
7 CHAIRMAN BABCOCK: Yeah. Justice Bland.
8 HONORABLE JANE BLAND: I think records of
9 this nature can be filed in 10 days. They are usually not
10 jury trials. They're usually a few witnesses, and we get
11 records -- I think Richard pointed out temporary
12 injunction hearings, all kinds of cases, some mandamus
13 type things where there's been hearings, and we get
14 records in those cases expeditiously. I know that 10 days
15 is not going to be possible for every parental termination
16 record, but it would then trigger that mindset of you've
17 got to get this one done first ahead of other things, and
18 we do have -- in answer to Judge Peeples suggestion, we do
19 have -- we have somebody in our clerk's office, and I'm
20 sure other appellate courts do, too, who do nothing but
21 bird-dog these records. We have somebody who makes --
22 everyday is calling court reporters about where are
23 records, and the problem with that is it starts much
24 further out because we give them a bunch of time on the
25 front end and then we start bird-dogging. If we could

1 start that process sooner, I think we could get these
2 records filed sooner.
3 HONORABLE JAN PATTERSON: How about a
4 10-10-10 plan?
5 HONORABLE JANE BLAND: But the reality is
6 the reporters know that our only real power is contempt
7 power.
8 HONORABLE STEPHEN YELENOSKY: Yeah.
9 HONORABLE JANE BLAND: The reporters know
10 that we're very, very reluctant to exercise that power,
11 and so it's kind of a dance to ask them nicely, as Richard
12 pointed out. We try to ask them nicely to please put our
13 work ahead of all the other work that they have going on
14 until it becomes such a problem that we don't ask them so
15 nicely anymore, but that's really the -- that's really
16 what we're facing, and unless we say these records are
17 special records that need to be done quickly, they just
18 fall into the same hole as every other 39 percent of our
19 docket that's accelerated falls into.
20 CHAIRMAN BABCOCK: Professor Dorsaneo, then
21 Sarah.
22 HONORABLE JANE BLAND: But these involve
23 children and they need to be done faster.
24 CHAIRMAN BABCOCK: Professor Dorsaneo, then
25 Sarah.

1 PROFESSOR DORSANEO: If the time frame is
2 going to be different from a regular accelerated appeal
3 and if -- because what's happened, the accelerated
4 appeals, the numbers of interlocutory orders that -- and
5 types that can be appealed has increased dramatically.
6 The ones, you know, just were talking about orders
7 granting or denying temporary injunctions, orders
8 establishing receiverships, and then class action
9 determinations that got added, and now we have whole bunch
10 of things including -- including some final judgments, and
11 the 10 days probably doesn't work anymore at all. It
12 probably was principally driven by thinking about the need
13 to get on with it if we have a temporary injunction or we
14 don't have one. Huh?
15 Probably can't fix everything, but I would
16 be inclined to have the appellate rules subcommittee at
17 least look at the idea of extending the time in the -- in
18 the -- in both appellate Rule 35.1 and in -- and the
19 doubling up time in 37.3 from 10 to something else. So
20 maybe that won't work for temporary injunction orders, but
21 it probably will work better for most things, and for
22 these -- for these types of orders that you're talking
23 about parental termination -- termination of parental
24 rights orders, would 60 days be too much? 30 and 30?
25 Would that be too much? Would it not be enough? If we're

1 going to have to pick numbers, I would rather pick numbers
2 than just say let it happen on a case by case basis, and I
3 don't like the idea of a motion for extension of time
4 request because you might as well just -- you might as
5 well, just as 37.3 does, just add -- add 30 more days, or
6 however many more days, but what with the reporter being
7 told we don't mean to add it so that you can ask for more
8 time after that time expires.
9 CHAIRMAN BABCOCK: Sarah.
10 HONORABLE SARAH DUNCAN: Well, one, I don't
11 see -- I would be the first to agree that these are among
12 the most important cases on a court of appeals docket.
13 They involve children, human lives, but so do a lot of
14 other cases on the court's docket, and I don't really see
15 anything in the statute that says we're now -- we, the
16 Supreme Court, we're supposed to recommend to the Supreme
17 Court, that it start distinguishing between and among
18 various types of interlocutory appeals. I mean, I think
19 that can be done and the Court may want to do that, but I
20 don't see anything in this statute that says these are the
21 number one priority on a court of appeals docket ahead --
22 you know, above sovereign immunity, above media defendant,
23 above injunctions, above receiverships, above all these
24 other things. I don't see it in there. Maybe it should
25 be. Maybe the Legislature ought to prioritize. You know,

1 criminal cases have statutory precedence. My
2 understanding is that most of the courts of appeals don't
3 treat accelerated appeals in an accelerated fashion. So
4 I'm not sure we're gaining anything by any of these rules.
5 If the courts of appeals aren't treating accelerated
6 appeals as accelerated, what the hay?
7 CHAIRMAN BABCOCK: Justice Jennings.
8 HONORABLE TERRY JENNINGS: I couldn't
9 disagree more. This -- the importance of these cases I
10 think is implied by the very nature of them. Yes, we're
11 dealing with children in limbo, but not only are you
12 dealing with children in limbo, you're dealing with a
13 parent who's claiming "My parental rights to my child were
14 wrongfully terminated. I cannot see my child," and under
15 those circumstances, being a parent, you know, every day
16 I'm away from my child and I think my child has been
17 wrongfully taken from me is an eternity. So, yes, I think
18 there is a very valid reason for putting these cases A-1
19 priority, and to me the problem is a matter of will power,
20 are we willing -- are the courts willing to bird-dog them
21 and keep them moving, and part of the problem has been a
22 mindset within the courts themselves of treating these
23 just like any other cases when they're not. They're just
24 not.
25 CHAIRMAN BABCOCK: Justice Bland.

1 HONORABLE JANE BLAND: We do accelerate
2 accelerated appeals. I just want to -- and so does the
3 Fourteenth Court, and to my knowledge so does every
4 appellate court now.
5 HONORABLE SARAH DUNCAN: Now.
6 HONORABLE JANE BLAND: Right. I can't talk
7 about years ago, but I think right now I think everybody
8 puts those cases first, but as you've pointed out and
9 Judge Christopher just checked with her clerk, 39 percent
10 of the Fourteenth Court's docket is accelerated, and I'm
11 not asking that we give these -- that we change the time
12 for filing record in this case to anything more than what
13 the Legislature intended, and if we want to enforce the
14 10-day rule on every accelerated appeal, fine, but in
15 particular we're focusing on these sorts of appeals today,
16 and this is the -- this is the time line that was
17 suggested, and I don't think it's unworkable as a starting
18 point for a record being due in what is generally a short
19 bench trial, and the real issue is how do we make people
20 prioritize these cases when they are not financially
21 lucrative to get the record to the court of appeals, and
22 the only way we can do that is put something in the rules
23 that will allow our clerks when they call to say, "Hey, by
24 the way, this record is really one that has to go to the
25 top. It's got a quick due date on it. It's got a quick

1 trigger."

2 CHAIRMAN BABCOCK: Richard, in a second, but

3 we're going to have to move along a little bit. I think

4 we've talked about this issue pretty completely, and this

5 rule has got to get out in this meeting, and we have some

6 important things to do yet, including tomorrow. So,

7 Richard, make whatever comment you want, but then let's

8 move on to (c)(4) and (5) and talk about those to the

9 extent we need to, but hopefully not overtalk them and

10 then get to the rest of the rule.

11 MR. ORSINGER: House Bill 906, section 3

12 talks about termination appeals, and section 4 talks about

13 the managing conservatorships, and what they say about the

14 termination appeals in subdivision (a) of section 3, "An

15 appeal in a suit in which termination of the parent-child

16 relationship is an issue shall be given precedence over

17 other civil cases and shall be accelerated by the

18 appellate court." So in termination cases this is the

19 most important civil case that they've got. On the

20 managing conservatorship cases, they don't say that. The

21 Legislature says that "They shall be governed by

22 procedures for accelerated appeals in civil cases under

23 the Texas Rules of Civil Procedure." So there is no

24 statement that the managing conservatorship cases have

25 priority over all other civil, but there is for the

1 termination cases.
2 HONORABLE STEPHEN YELENOSKY: Well, lots of
3 statutes say that.
4 MR. STORIE: They do.
5 MR. ORSINGER: Well, they all say "over all
6 other civil cases"?
7 HONORABLE STEPHEN YELENOSKY: Not all, but
8 lots. I mean, you accelerate everything, you accelerate
9 nothing.
10 HONORABLE SARAH DUNCAN: That's what the
11 problem is.
12 HONORABLE TRACY CHRISTOPHER: That's the
13 language.
14 MR. ORSINGER: Okay. So there are too many
15 things that have given precedence over other civil cases
16 so you can't really assign priority to those, so then it's
17 I guess up to the Supreme Court to decide if we have a
18 separate track for these kind of appeals, whether we're
19 going to stick with the 10 days, because the Legislature
20 thought an accelerated appeal was 10 days. They didn't
21 say 10 days. They said the Rules for Appellate Procedure
22 for accelerated appeals, and we can change those rules
23 even after the statute was enacted and still be in
24 compliance with it, but I think Justice Bland is correct
25 that they anticipated that it's a really, really

1 accelerated timetables that are in the current rules,
2 which is 10 days plus short extensions.
3 CHAIRMAN BABCOCK: Yeah, Pete.
4 MR. SCHENKKAN: Is it generally the case in
5 these other appeals that are accelerated by statute, you
6 know, ahead of other civil cases generally that we don't
7 have the practical problem we have here, that the parties
8 are in a position to pay the court reporter to speed up
9 the transcript to get it done? That this is -- if what's
10 special about this case is there's a problem paying for
11 the reporter's record? Is that relatively distinct? I
12 mean, I assume that's not the media cases that pay for it,
13 the sovereign immunity cases can pay for it, the receiver
14 cases somebody can pay for it. I don't know what else is
15 in this category, but is that what's distinctive about
16 this, is just getting it paid for?
17 MR. ORSINGER: I don't know, and I think the
18 rates of the court reporters are the same. David's having
19 a private conversation over there. David, do you know if
20 -- are the court reporters allowed or is it a practice
21 that they will give somebody a more accelerated delivery
22 for a higher fee? Can you get an expedited record for a
23 higher fee?
24 MR. JACKSON: I'm sure they can. I mean,
25 when it gets outside that job description of making a

1 record, yeah, I mean, I know we do, in our side of it, the
2 freelance side. If somebody wants the transcript
3 tomorrow, I'll stay up all night and get it out, but I'm
4 going to charge them more for that.
5 MR. ORSINGER: Well, Pete, that may suggest
6 that if you have a really big injunction appeal and lots
7 of money that can you get a priority on that by paying for
8 an accelerated delivery of it.
9 MR. SCHENKKAN: That's my impression, and
10 that's what I'm saying, is maybe that's what we need to
11 focus on here. If that's the problem, let's solve the
12 problem.
13 HONORABLE STEPHEN YELENOSKY: Just pay.
14 CHAIRMAN BABCOCK: David.
15 MR. JACKSON: At the same time you're
16 talking about an accelerated transcript, you're also
17 talking about doing it for free, so you're going the other
18 way with the incentive.
19 HONORABLE TRACY CHRISTOPHER: That's the
20 problem.
21 MR. SCHENKKAN: That's the problem.
22 CHAIRMAN BABCOCK: Any other comments?
23 MR. ORSINGER: Okay. Then we move on. (4)
24 and (5) can be discussed in tandem because they both have
25 to do with what the appellate court does when all the

1 deadlines are busted, and basically the concept is the
2 same as it is under current Rules 35.3(c) and 37.3, which
3 is that if it's not the appellant's fault then you don't
4 dismiss the appeal, but if it is the appellant's fault
5 that this record has not been put in by whatever ultimate
6 deadline is set, then if it's the clerk's record that
7 doesn't get timely filed under existing rules for all
8 appeals, the appellate court may dismiss, but they have to
9 give notice and an opportunity to cure first. That's if
10 the clerk's record is not filed. They may dismiss, but
11 they have to give notice and an opportunity to cure. If
12 it's the reporter's record and the clerk's record has been
13 filed but the reporter's record has not been filed, and
14 it's the appellant's fault, then they can submit the case
15 on the clerk's record. They don't dismiss because they've
16 got the clerk's record. They just don't have any evidence
17 to review, so they review only error you can tell from the
18 clerk's record, which is tantamount to an affirmance, and
19 again, the existing rules say it's after notice and an
20 opportunity to cure.
21 So after going back and forth quite a bit,
22 the task force was of the view that we should have some
23 deadline. We picked 90 days. That sounds like that may
24 be way too long for our discussion today, but if the
25 record -- if the clerk's record under subdivision (4) was

1 not filed by the 90th day after the notice of appeal
2 because the appellant failed to pay or arrange to pay and
3 wasn't entitled to appeal for free then the appellate
4 court must dismiss after notice and an opportunity to
5 cure. So there's yet more delay after the 90 days, but
6 it's notice and you've got another 10 days, 15 days or
7 whatever. If you don't make it you must dismiss, not may
8 dismiss, absent ordinary circumstances.
9 So it's an effort to move the appellate
10 court may dismiss to must dismiss, but it preserves the
11 notice and an opportunity to cure, and the penalty is only
12 visited on someone who's at fault for not getting it filed
13 on time, and so to me the core issues in light of the
14 waning hour is do we like the 90th day or was the task
15 force being way too generous to do that? Do we want
16 notice and an opportunity to cure before we put somebody's
17 appeal in the trash can, and do we give -- do we move the
18 appellate court from a "must" to a "may," and do we still
19 allow exceptional circumstance exception from all of these
20 timetables? Those are the debatable issues.
21 CHAIRMAN BABCOCK: Any other comments?
22 Justice Hecht, or was that just a --
23 HONORABLE NATHAN HECHT: No.
24 CHAIRMAN BABCOCK: -- involuntary spasm?
25 HONORABLE NATHAN HECHT: Yes.

1 CHAIRMAN BABCOCK: Carl.
2 MR. HAMILTON: If the record is not paid
3 for, reporter's record, would an extraordinary --
4 extraordinary circumstance be the appellant says, "I don't
5 have any money to pay for it," and then is he entitled to
6 proceed at that point to declare himself indigent so that
7 he doesn't have to pay for it at that point?
8 MR. ORSINGER: Well, now, understand that
9 there's a presumption of indigency in some of these cases,
10 so if they had an appointed lawyer at trial, there's a
11 presumption of indigency. If it's not challenged, it
12 continues, and they'll get the free record.
13 MR. HAMILTON: So he wouldn't have to pay.
14 MR. ORSINGER: Right.
15 MR. HAMILTON: So it wouldn't be a problem.
16 MR. ORSINGER: So your question will come up
17 when somebody either never originally established
18 indigency or their presumed continued indigency was
19 challenged and overruled.
20 MR. HAMILTON: Right.
21 MR. ORSINGER: And if their presumed
22 continued indigency was challenged and overruled then your
23 question is can you come in after the challenge is
24 overruled and make another indigency plea based on changed
25 circumstances since the last hearing? That's kind of what

1 you're asking.

2 MR. HAMILTON: Not necessarily changed, but

3 suppose there hadn't been any determination of indigency

4 at all up to that point and then they say, "Now I can't

5 pay for the record. That's why it's late."

6 MR. ORSINGER: Well, they should have done

7 that by the deadline. Now, Marisa, help me here. When

8 you don't have a presumption of indigency isn't there a

9 deadline for requesting indigent status for purposes of

10 the appeal?

11 HONORABLE TOM GRAY: The affidavit of

12 indigence is supposed to be filed at or before, but the

13 Wal-Mart case and --

14 MS. SECCO: "With or before the notice of

15 appeal."

16 HONORABLE TOM GRAY: -- the Hood case from

17 the Supreme Court have determined that because it's a

18 nonjurisdictional issue the deadline is not

19 jurisdictional, and whenever the affidavit is filed it has

20 to be considered.

21 MR. ORSINGER: So the answer to your

22 question is if you don't already have a negative

23 adjudication on your indigency you can wait until your

24 notice period after all the deadlines have been busted and

25 file your affidavit of indigency and then you're entitled

1 to a hearing on it, constitutionally, right?
2 HONORABLE TOM GRAY: That's the way I
3 understand it to work from the cases that have been
4 decided.
5 CHAIRMAN BABCOCK: Yeah, Professor Dorsaneo.
6 PROFESSOR DORSANEO: I don't see that
7 these -- that (4) and (5), other than the 90-day
8 requirement or the 90-day standard, that they differ
9 materially from 37.3(b) and (c). They look pretty close,
10 except you have this extraordinary circumstances
11 conditional matter.
12 MR. ORSINGER: You change "may" to "must,"
13 the appellate court must rather than may dismiss. After
14 notice and an opportunity to cure under 37(b)(3) the
15 appellate court may dismiss. Under this rule they must
16 dismiss.
17 PROFESSOR DORSANEO: Okay.
18 MR. ORSINGER: Or they must submit -- if
19 it's the reporter's record, they must submit on the
20 clerk's record only, which means no evidentiary review.
21 So that's the real distinction here, 90 days, "must"
22 versus "may," and if you're going to "must" it, if you're
23 going to put the "must" in there, there needs to be the
24 safety valve for the extraordinary situation like the
25 court reporter is in the hospital or something. You see

1 what I'm saying?
2 PROFESSOR DORSANEO: Yes.
3 MR. ORSINGER: Those are the differences.
4 PROFESSOR DORSANEO: See, 90 is way too
5 long.
6 MR. ORSINGER: I agree in light of today's
7 discussion with Judge Bland over there on 10 days is too
8 long. I think that 90 days is way too long.
9 HONORABLE JANE BLAND: I'm okay with it.
10 MR. SCHENKKAN: These are people who are not
11 entitled to proceed without payment of costs. This is a
12 different category from the rest of what we've been
13 worried about.
14 MR. ORSINGER: You're right.
15 MR. SCHENKKAN: And to me that's what's
16 driving this whole thing, and we do not have that problem
17 here. If -- I don't even see why it's important that the
18 court must dismiss instead of "may" when you don't really
19 mean "must." We mean "must" absent extraordinary
20 circumstances, which we don't define, when we're talking
21 about people who can pay. It seems to me that this set of
22 (4) and (5) is not where our problem is.
23 MR. ORSINGER: If I could follow-up, Sandra
24 Hachem, who was the government attorney on our task force
25 said that many, many, many of her cases are cases with

1 people that have been adjudicated nonindigent, and they
2 keep saying they're going to pay, and they never arrange
3 and they never arrange and time goes on, and you're out
4 there months and months and months, and they never do end
5 up paying, so they eventually get dismissed anyway.
6 MR. SCHENKKAN: And my point is why don't we
7 leave that to each individual appellate court to decide
8 how hard they want to press those?
9 MR. ORSINGER: Because it's taking too long
10 to get to the point where they dismiss the case or submit
11 it on the clerk's record.
12 MR. SCHENKKAN: But your standard of too
13 long is what? Too long for --
14 MR. ORSINGER: Well, I mean, months.
15 MR. SCHENKKAN: -- the appellate court
16 having to decide it? It's not too long if the appellate
17 court doesn't think it's too long.
18 CHAIRMAN BABCOCK: Justice Bland, and then
19 Justice Christopher.
20 HONORABLE JANE BLAND: I think that 90 days
21 is reasonable because presumably by this point you have
22 ferreted out that there's a problem with either making
23 arrangements to pay the record or with the court reporter
24 providing for a record that there has been an arrangement
25 made to pay for it, and at this point we're talking about

1 the finality of the parent's termination of their right to
2 see their child, and it seems to me like 90 days is about
3 the time to say, "Okay, we've tried. There were record
4 problems. They've never been resolved. We've given the
5 opportunity to cure. Now it's time to dismiss." I don't
6 have a problem with 90 days.
7 CHAIRMAN BABCOCK: Justice Christopher.
8 HONORABLE TRACY CHRISTOPHER: I actually
9 think it's longer than what we're doing right now. I'm
10 looking at our dismissals and how long it takes us to
11 normally dismiss. Most of our dismissals are for not
12 paying the filing fee, and that will happen within 30 to
13 40 -- three months to four months after the filing date,
14 and that's with giving them several notices before we
15 finally dismiss them for not paying. With this you've got
16 90 days plus notice and opportunity to cure. You're at
17 least at four months here, when the first thing that they
18 don't pay is the actual filing fee. I just don't think we
19 need this in here. I think we get rid of it at the filing
20 fee stage.
21 HONORABLE TERRY JENNINGS: Well,
22 theoretically there's the possibility that somebody has
23 paid their filing fee and then they've had a car accident
24 or something like that.
25 HONORABLE TRACY CHRISTOPHER: Then the

1 regular rules will kick in to dismiss if we want to.
2 CHAIRMAN BABCOCK: Yeah.
3 HONORABLE TERRY JENNINGS: They may not make
4 court reporter arrangements.
5 CHAIRMAN BABCOCK: Justice Gaultney.
6 HONORABLE DAVID GAULTNEY: I would argue in
7 favor of retaining the "may" and not the "must." This is
8 really dealing with someone, as Pete said, who has the
9 ability to pay, and if they haven't paid at this stage,
10 it's indicative of an abandonment of the appeal. That's
11 the type of thing that you're looking at. If, in fact,
12 there are other circumstances then I think the appellate
13 court should have some discretion. I guess "must" seems a
14 little arbitrary since you're dealing with someone who at
15 this stage the court has probably concluded is not going
16 to make arrangements to file the record, but there might
17 be other circumstances that don't amount to extraordinary,
18 but, you know, the court of appeals ought to have some
19 discretion.
20 CHAIRMAN BABCOCK: Okay. Any other comments
21 about (4) and (5)? Okay, let's move on to (6).
22 HONORABLE SARAH DUNCAN: I'd like to say one
23 thing.
24 CHAIRMAN BABCOCK: Yeah, Sarah.
25 HONORABLE SARAH DUNCAN: It seems to me that

1 part of what the Legislature may be looking for is more
2 uniform treatment around the state of these types of cases
3 by saying that they're to be treated as an accelerated
4 appeal, and I don't doubt that the First and Fourteenth,
5 the Fourth, quite a few courts, are accelerating them, but
6 if what we're looking for is more uniform treatment around
7 the state then maybe we should look, Richard, at their
8 procedures.
9 HONORABLE TOM GRAY: Well, just so it
10 doesn't go --
11 HONORABLE SARAH DUNCAN: And Waco. I'm
12 sorry.
13 HONORABLE TOM GRAY: -- without being on the
14 record --
15 HONORABLE SARAH DUNCAN: Of course, the
16 Tenth Court is accelerating.
17 CHAIRMAN BABCOCK: It's that Eastland court.
18 Just kidding about that, by the way.
19 MR. ORSINGER: We'll go on to subsection
20 (d). In the letter of assignment to the task force from
21 Justice Hecht to the rules committee, look at Chapter 13
22 of the Civil Practice & Remedies Code. We did, and
23 there's a problem. Chapter 13 of the Civil Practice &
24 Remedies Code says that a court reporter shall provide
25 without cost the statement of facts and the clerk a

1 transcript, which really means reporter's record, only if
2 there's an affidavit of inability to pay and the trial
3 judge finds that the appeal is not frivolous and the
4 statements of facts and the clerk's transcript is needed
5 for the appeal, and in determining if it's frivolous the
6 judge can consider whether the appellant has presented
7 substantial questions for appellate review.
8 So that, if you will, it requires a trial
9 judges determination that it's not a frivolous appeal or
10 maybe even is a meritorious appeal. However, the
11 directives on this statute don't have any kind of merits
12 test to the availability of indigency, so that it's the
13 task force view that we need to override this provision
14 that the trial judge be convinced that the appeal is
15 meritorious, and, therefore, we're suggesting that in
16 subsection (6). However, I think that that requires a
17 special notice, but I think that the Legislature has
18 empowered the Supreme Court to override specific statutes
19 as long as they give notice of the statutes that are
20 overridden, and I don't know if there's a time delay for
21 that or not, Marisa, or --
22 MS. SECCO: No, it's just in section 22.004
23 of the Government Code that the Court has to specifically
24 list any statute that is modified or repealed by rule.
25 MR. ORSINGER: So that's perhaps not

1 controversial. I mean, the idea is, is that we're getting
2 rid of the merits-based analysis of whether someone should
3 get a free record and also, by the way, a free lawyer in
4 compliance with this directive from Rule 906. Okay.
5 There's nothing on that, then it moves us to the --
6 HONORABLE SARAH DUNCAN: There is.
7 CHAIRMAN BABCOCK: Sarah.
8 MR. ORSINGER: There is.
9 HONORABLE SARAH DUNCAN: I don't think we
10 can do that. The two can exist side by side.
11 MR. ORSINGER: Okay. Then argue why, if you
12 believe that that's true, then what's the policy in
13 leaving --
14 HONORABLE SARAH DUNCAN: It's a question of
15 what record do they get, and what we held is that they are
16 entitled to a record of the hearing at which the court
17 made the merits-based determination of the -- of the
18 merits of the appeal or frivolity, but not necessarily a
19 record of the trial at which parental rights were
20 terminated.
21 MR. ORSINGER: Okay. So it's your view that
22 it's a practice -- do you think it's a good practice that
23 we should continue or that it's just a legislative
24 practice that we don't have the authority to override?
25 HONORABLE SARAH DUNCAN: I'm sorry, "it"

1 refers to?
2 MR. ORSINGER: The idea that you have to
3 have a merits test in front of the trial judge before you
4 find out whether you get a free record or not.
5 HONORABLE SARAH DUNCAN: Well, I would never
6 defend that statute. Ever. But I would follow it if it
7 were the law, and I would make a, I hope, rational
8 determination of whether it could coexist with this
9 statute.
10 MR. ORSINGER: Well, if we're going to have
11 that merits determination, which is somewhat akin to the
12 old requirement that you state your appellate points
13 within 10 days of the trial that -- you know, as a
14 predicate for your appeal, we haven't built in a timetable
15 for the hearing on the merits.
16 HONORABLE SARAH DUNCAN: I know.
17 MR. ORSINGER: We have to have a period of
18 time for the appellate lawyer to decide what the appellate
19 points are going to be and then they have to be filed and
20 then there has to be a hearing and then there has to be a
21 ruling on the hearing and then we have to have an
22 Arroyo-type free appeal of that determination, and in a
23 sense I think we've destroyed the at least -- at least the
24 goal behind eliminating the preliminary requirement that
25 you set your appellate points out as a condition to a free

1 appeal. Actually, to any appeal. Now we've substituted a
2 hearing on the merits of your appeal for a listing of your
3 appellate points. We've introduced at least another 20
4 days.
5 HONORABLE SARAH DUNCAN: Well, there has
6 been a hearing. There has been a --
7 MR. ORSINGER: Plus there has to be an
8 appeal of the denial.
9 HONORABLE SARAH DUNCAN: There has been a
10 hearing before on the existing statute of whether the
11 appeal was frivolous, and what --
12 MR. ORSINGER: But, now, the hearing is
13 going to be a hearing after the judgment is signed. Would
14 you agree?
15 HONORABLE SARAH DUNCAN: It could be before
16 or after.
17 MR. ORSINGER: All right. Well, there's
18 nothing built into the timetable we discussed today for
19 there to be this hearing with the trial judge and an
20 Arroyo-type appeal of the decision that your appeal is
21 frivolous so you get no record.
22 HONORABLE SARAH DUNCAN: I know. That's
23 what I was just looking up on my phone. I was looking for
24 provisions that incorporated that procedure, and I -- I
25 would not defend the statute, but I --

1 MR. ORSINGER: Okay. Let me say that
2 Katie --
3 HONORABLE SARAH DUNCAN: -- I have a hard
4 time attributing to this Legislature --
5 MS. FILLMORE: Do you want me to --
6 MR. ORSINGER: Yeah, would you, please?
7 MS. FILLMORE: If you look at House Bill
8 906, the changes to Family Code 263.405, they struck out
9 the language in the Family Code that said that "the trial
10 court shall hold a hearing and determine whether the
11 appeal is frivolous as provided by section 13.003." They
12 also struck the requirement that appellant file a
13 statement of points if he intend -- if the parties --
14 HONORABLE SARAH DUNCAN: Okay, so that whole
15 procedure is gone.
16 MS. FILLMORE: Correct. But just to make it
17 clear for the purposes of this rule, we wanted to
18 specifically reference the Civil Practice & Remedies Code
19 because that is still there, and it -- I guess it still
20 applies in other cases, but it was the Legislature's
21 intent to make it not apply to this, which is why we made
22 the specific reference that it doesn't apply in the draft.
23 HONORABLE SARAH DUNCAN: Wait. I'm hearing
24 two different things. They struck the merits -- listing
25 your points and the merits --

1 MR. ORSINGER: From the Family Code. They
2 struck it from the Family Code, but there's still a
3 general provision in the Civil Practice & Remedies Code
4 that hasn't been struck.
5 HONORABLE SARAH DUNCAN: I understand that.
6 But there's nothing in this statute that says this type of
7 appeal isn't subject to Chapter 13; is that right?
8 MR. ORSINGER: That's correct. That's just
9 an inference you could draw from the fact that they struck
10 it that maybe they didn't want it to apply, but they
11 didn't specifically say it.
12 HONORABLE SARAH DUNCAN: I wouldn't draw
13 that inference.
14 MR. ORSINGER: You wouldn't?
15 HONORABLE SARAH DUNCAN: I'm not sure I
16 wouldn't get rid of that --
17 CHAIRMAN BABCOCK: Sarah's point is somebody
18 could have easily said, "Why do we need to put this in the
19 statute? It's already in Chapter 13 of the Civil Practice
20 & Remedies Code."
21 HONORABLE SARAH DUNCAN: No, that's not my
22 point. My point is what they got rid of is having to list
23 your points and get a determination, a hearing and a
24 determination, on whether your appeal was frivolous before
25 going forward.

1 MS. FILLMORE: Well, they got rid of several
2 things, including the hearing to determine indigence for a
3 second time for the purposes of appeal and appointing a
4 new attorney. They wanted to get rid of all of those
5 procedures that take up time between the trial and the
6 appeal, and this was one of them that they -- I mean, I
7 think the Legislature's intent was to get rid of these
8 things because they took up a lot of time, and the
9 testimony at the hearings on this bill specifically spoke
10 about how long this takes.
11 HONORABLE SARAH DUNCAN: But you can have a
12 Chapter 13 hearing on frivolity, and the appeal still be
13 decided in an expeditious manner. The two aren't mutually
14 exclusive is my point.
15 CHAIRMAN BABCOCK: Okay. Well, the Court is
16 going to have to sort this out.
17 HONORABLE NATHAN HECHT: Could we have a
18 vote on that?
19 CHAIRMAN BABCOCK: You want a vote on that?
20 HONORABLE NATHAN HECHT: Yeah, please.
21 CHAIRMAN BABCOCK: We need a vote on this,
22 and the vote is going to be whether to leave subparagraph
23 (c)(6) in the rule or to strike it. Will that be the
24 vote? All in favor of leaving (c)(6) in the rule, raise
25 your hand.

1 All those opposed? It is unanimous with the
2 Chair and others not voting. 19 people voted in favor of
3 leaving it in the rule, so a fairly strong expression of
4 support.
5 HONORABLE NATHAN HECHT: Well, the Court
6 doesn't do this very often, and we haven't done it in
7 years, and it is an important power, but one that is
8 carefully exercised. I just want to be sure that the
9 committee thinks it's a good idea.
10 CHAIRMAN BABCOCK: You've got plenty of
11 cover from this committee, I tell you.
12 HONORABLE NATHAN HECHT: For now.
13 CHAIRMAN BABCOCK: But only for now.
14 HONORABLE NATHAN HECHT: I wasn't there.
15 MR. ORSINGER: Well, the bill has a sponsor
16 in the House and the Senate, and they might concur that --
17 HONORABLE NATHAN HECHT: Yeah.
18 MR. ORSINGER: -- this is the appropriate
19 time to exercise that power.
20 CHAIRMAN BABCOCK: Let's go to (d) quickly.
21 MR. ORSINGER: Okay. (d) has to do with
22 appellate brief deadlines, and the deadline in ordinary
23 appeal I want to say the brief is due in 20 days. Yes.
24 Appellant's brief is due 20 days after the clerk's record
25 is filed or after the appellate record is filed, and the

1 appellee's brief is due 20 days thereafter, and what this
2 is proposing is not to change that, but to curtail the
3 idea that a party can extend their deadline more than 40
4 days. It's a 20-day deadline. It's not changed, but
5 there's an effort here to say, oh, two things really.
6 This task force report suggests that we require good cause
7 rather than just a reasonable explanation for the need for
8 an extension to file the brief.
9 PROFESSOR DORSANEO: And you don't want to
10 refer to 10.5(b) which has -- that's where the reasonable
11 explanation standard is.
12 MR. ORSINGER: But there are a lot of other
13 parts of 10.5(b) that we like procedurally about what --
14 you know, motion and the communication obligation,
15 certificate of communication, all of that.
16 PROFESSOR DORSANEO: It's still
17 contradictory.
18 MR. ORSINGER: I don't think it is, but
19 perhaps the words could be written so that it isn't, but
20 the important issue to grasp here in the remaining five
21 minutes is that the difference between the existing rule
22 and this rule is that this requires good cause, not just a
23 reasonable explanation, and that this limits cumulative
24 extensions to 40 days after the record is filed. So those
25 are the issues for us to decide.

1 MR. HAMILTON: 40 days maximum or 40 plus
2 the original 20?
3 MR. ORSINGER: 40 total cumulatively,
4 meaning including the first 20.
5 MR. HAMILTON: I don't think it says that.
6 MR. ORSINGER: You don't?
7 MR. HAMILTON: It says "extensions of 40
8 days," so that would be 20 plus 40.
9 MR. ORSINGER: The extensions may not exceed
10 40 days cumulatively is intended in the briefing rule as
11 well as in the appellate record rule to mean that by the
12 time everything is added up, the normal stuff plus all the
13 extensions, it cannot exceed X. That's what that's meant
14 to say. If it doesn't, we need different words, but it's
15 meant to mean that no matter how you get there it can't be
16 any more than 40 days after the record was filed.
17 HONORABLE TERRY JENNINGS: I have a
18 question. So if I'm a parent and I have a court-appointed
19 lawyer and my court-appointed lawyer can't get the brief
20 done in 40 days, where am I?
21 MR. ORSINGER: You're in trouble. You
22 better have extraordinary circumstances or else --
23 CHAIRMAN BABCOCK: Or else.
24 MR. ORSINGER: Or else you have no brief. I
25 mean, basically that means that you've given a notice of

1 appeal, you've got your appellate record, you got no
2 brief, that means you get dismissed. Don't y'all dismiss
3 for failing to file a brief?
4 HONORABLE TERRY JENNINGS: No.
5 MR. ORSINGER: You don't affirm, do you? Do
6 you affirm or do you dismiss?
7 HONORABLE TERRY JENNINGS: Well, in a
8 criminal case if this were a court-appointed lawyer and
9 they kept asking for extensions and they didn't get it
10 done, I would abate the appeal and for the appointment of
11 new counsel.
12 MR. ORSINGER: Okay.
13 HONORABLE TERRY JENNINGS: You know, you
14 have to remember this is a case with constitutional
15 implications.
16 MR. ORSINGER: Well, this wouldn't preclude
17 that if what you're going to do is bail out of the whole
18 process.
19 HONORABLE TERRY JENNINGS: Yeah, but the
20 understanding -- I mean, the understanding is, you know,
21 after 40 days if my court-appointed lawyer doesn't get a
22 brief filed for me, my case is dismissed. I think that
23 has some serious constitutional implications there because
24 your lawyer is basically per se ineffective for not
25 getting the brief timely filed.

1 CHAIRMAN BABCOCK: Sarah.
2 HONORABLE TERRY JENNINGS: But you've lost
3 your parental rights forever.
4 MR. ORSINGER: This proposed rule does not
5 require a dismissal. It does not comment on what happens
6 after the 40 days has run. It just means you can't extend
7 it out beyond 40, and so if you're going to pull the plug
8 on the lawyer and replace him maybe then you do that at
9 the end of 40 days.
10 CHAIRMAN BABCOCK: Sarah.
11 HONORABLE SARAH DUNCAN: The other purpose
12 of the hearing is to determine if the appellant wants to
13 continue to pursue the appeal, and those records are
14 frequently, in my view, very helpful.
15 HONORABLE TERRY JENNINGS: Right.
16 HONORABLE SARAH DUNCAN: Because you do find
17 out if someone really does want to appeal, and you find
18 out what efforts the lawyer has made to get the brief
19 filed and what efforts haven't been made. I, frankly,
20 think 40 days is too long. You know, you add up all these
21 time periods, and we're talking about a child who has been
22 in limbo, we're getting pretty close to a year, but can we
23 just start with a number of how long we want these appeals
24 to last and then work backwards? I'm serious.
25 CHAIRMAN BABCOCK: Buddy.

1 MR. LOW: I think Carl is right. If --
2 Richard, didn't you say that everything running shouldn't
3 exceed 40 days? The original time plus extensions.
4 MR. ORSINGER: On briefs, yeah.
5 MR. LOW: Well, you don't say that. You
6 don't say the total time.
7 MR. HAMILTON: It says "accumulated."
8 MR. LOW: You say "the extensions may not,"
9 so that tells me I've got the time over here, but I've got
10 then an extension of up to 40 days, so you don't say that.
11 MR. ORSINGER: Let me ask Marisa. Do you
12 believe this was supposed to be 60 days total or 40 days
13 total?
14 MS. SECCO: The way I read it is 60 days,
15 and I wasn't aware that the task force was trying to --
16 MR. ORSINGER: All right. Well, then that
17 was just one little task force person's perspective on the
18 discussion.
19 PROFESSOR DORSANEO: Because that's what it
20 says.
21 MR. LOW: If you meant 60, you've said it,
22 but if you meant 40, you didn't.
23 CHAIRMAN BABCOCK: Richard Munzinger.
24 MR. MUNZINGER: I agree with Justice
25 Jennings that you're taking somebody's child potentially

1 away from them, and these cases do have constitutional
2 implications. I don't find any solace in the fact that
3 the rule does not say you can't abate the appeal and
4 appoint a new lawyer. The rule says you've got 40 days,
5 or whatever it says here, and can't be extended except
6 under extraordinary circumstances. That concerns me a lot
7 in a situation where you have a fellow who, for whatever
8 reason, can't afford a lawyer and may lose his child or
9 her child. Serious business. Serious, serious business.
10 CHAIRMAN BABCOCK: Can't say it any better
11 than that. Any other comments before we quit for the day?
12 Yes, Justice Gaultney.
13 HONORABLE DAVID GAULTNEY: I would be in
14 favor of one 20-day extension. As far as the not getting
15 the brief filed, I think it's probably the practice around
16 the state to abate and remand for appointment of new
17 counsel if they don't file a brief for someone who has a
18 statutory right to counsel. So we can put that procedure
19 in here pretty easily, but in my experience the -- if it's
20 an accelerated case, and we accelerate our cases, you
21 accelerate the number of -- or you shorten the number of
22 extensions as well that you might be willing to give, and
23 one extension of 20 days should be sufficient.
24 CHAIRMAN BABCOCK: Yeah. Yeah. Okay.
25 Here's the plan. We've got to finish this rule at this

1 meeting, and we also have the security details -- we have
2 two other matters on our agenda. My proposal is to get
3 the security details talked about first thing because of
4 Professor Dorsaneo's schedule, and then go back to this,
5 to this rule, and take it -- and finish it, and we're not
6 going to get to constitutional challenges tomorrow,
7 although we have another month to do that. So that's not
8 as critical as this one. Justice Patterson was here all
9 day, but I don't see her here now. Angie, if you could
10 shoot her an e-mail and just let her know we're not going
11 to get to her topic tomorrow, in case that means anything
12 to her. Judge Yelenosky.
13 HONORABLE STEPHEN YELENOSKY: If it helps,
14 we've talked about it, and I think we'll probably propose
15 no rule at all, but I know you'll still want to discuss
16 that.
17 CHAIRMAN BABCOCK: Judge Patterson's?
18 HONORABLE STEPHEN YELENOSKY: Yeah, that
19 committee.
20 CHAIRMAN BABCOCK: Yeah, and I need to talk
21 to Justice Hecht about it because the Court may want a
22 discussion about it anyway. So we'll get to that.
23 Well, if there's nothing else, thank you so
24 much for all your hard work. I know this is frustrating,
25 but we'll -- wait for the handouts. Angie's got handouts.

1 (Adjourned at 5:02 p.m.)
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 *

2 **REPORTER'S CERTIFICATION**
MEETING OF THE
3 SUPREME COURT ADVISORY COMMITTEE

4

5 *

6

7

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 21st day of October, 2011, 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 $1,995.50.
15 Charged to: The Supreme Court of Texas.
16 Given under my hand and seal of office on
17 this the 7th day of November, 2011.
18

19 D'Lois L. Jones
D'LOIS L. JONES, CSR
20 Certification No. 4546
Certificate Expires 12/31/2012
21 3215 F.M. 1339
Kingsbury, Texas 78638
22 *(512) 751-2618*

23

24 #DJ-316

25