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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

January 8, 2005

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 8th day of January, 2005, between the hours of 8:55 a.m. and 11:58 a.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: Thanks, everybody, for coming, and for those of you who weren't here yesterday, we're going to change the agenda around a little bit and take up Bill Dorsaneo's issues, which are Items 9, 10, and 11 on the agenda.

MS. SWEENEY: He's got more issues than that.

CHAIRMAN BABCOCK: That's true. We'll stipulate to that. And if anybody hasn't seen Richard Orsinger's shoes, be sure to take note of them. They go quite well with his socks, I might add. All right. So --

MR. GILSTRAP: But he's a straight guy.

CHAIRMAN BABCOCK: Should we take certificate of conference first or --

HONORABLE TOM GRAY: Chip, could I put one thing on the record first?

CHAIRMAN BABCOCK: You bet.

HONORABLE TOM GRAY: I made a mistake yesterday in my discussion about the notices on the exhibits. I had said that there was a notice requirement that we did to the clerks that is done later, but actually, it's Section 51.204 of the Government Code; and on the issuance of the mandate in each case, the clerk shall notify the attorneys of record in the case that

exhibits submitted to the court by a party may be withdrawn by that party or the party's attorney of record; and then the second part is that they will be destroyed three years later. So it's actually in a notice to the attorneys, not a notice to the clerk that I was trying to analogize to, so I just wanted to clear that up since I had misspoken on the record.

CHAIRMAN BABCOCK: Great. Thanks, Justice Gray.

Bill, certificate of conference or something else?

PROFESSOR DORSANEO: Certificate of conference will be fine.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Chief Justice Sherry Radack of the First Court of Appeals sent a letter on June 2nd, 2004, to Justice Hecht, and you only want me to deal with the certificate of conference part, right?

CHAIRMAN BABCOCK: Sure.

PROFESSOR DORSANEO: And in that letter she respectfully requested the Supreme Court to revisit appellate Rule 10.1(a)(5). I actually think it's 9.1(a)(5), but somebody who has a rule book can check.

Well, maybe I'm wrong on that, let's say 10.1(a)(5), certificates of conference on motions. In our

experience requiring a certificate of conference on motion for rehearing is unnecessary and unproductive. And I think it is 10.1(a)(5) now that I think about it.

CHAIRMAN BABCOCK: It is 10.1(a)(5).

PROFESSOR DORSANEO: Yeah. And this went before the subcommittee at some point back. I'm not completely sure what the vote was, but I believe the members of the subcommittee thought that motions for rehearing certificates of conference were unnecessary and unproductive, but I'm not sure it was unanimous.

HONORABLE SARAH DUNCAN: It was.

PROFESSOR DORSANEO: Huh?

HONORABLE SARAH DUNCAN: It was.

PROFESSOR DORSANEO: It was unanimous? And I know the Supreme Court on other occasions when we've suggested to them that these conference certificates are not a good idea has required us to --

HONORABLE SARAH DUNCAN: We've said it to them twice, or three times.

PROFESSOR DORSANEO: -- do it any way.

MR. ORSINGER: I might add, though, that I've heard that as a matter of practice they don't require these. Do you know anything about that, Judge?

HONORABLE NATHAN HECHT: Well, I think it's required in our Court. I haven't monitored it.

HONORABLE SARAH DUNCAN: I don't think the Supreme Court enforces it.

MR. ORSINGER: Yeah. I think the clerk's office isn't requiring it, although maybe I shouldn't say that outloud.

PROFESSOR DORSANEO: So in terms of the committee, that's my recollection of the committee vote, too. I guess I will move to modify 10.1(a)(5) to eliminate the necessity of a certificate of conference on a motion for rehearing, because there they are unnecessary and unproductive.

HONORABLE SARAH DUNCAN: I'll second that motion.

CHAIRMAN BABCOCK: Okay. Any discussion on that?

HONORABLE TOM GRAY: Are you sure you want to limit it to just motions for rehearing?

CHAIRMAN BABCOCK: Well, what would you add to the list?

HONORABLE TOM GRAY: I generally find that people don't agree to sanctions motions or to dismiss their appeal for lack of some procedural compliance; and while Richard is correct in the enforcement mechanism used at the various courts I think you will find varies dramatically, if it's there in the rule book as a rule I'm

inclined to endeavor to enforce it; and it creates a certain amount of problems if it's there and not enforced or selectively enforced.

CHAIRMAN BABCOCK: Okay. Any other comments? Well, let's stay focused on what's in front of us, which is whether we're going to eliminate it for motions for rehearing. It's been moved and seconded. Anybody want to say anything else about it? Frank.

MR. GILSTRAP: Every time I've dealt with this issue, for example, the local rules on eliminating a certificate of conference for summary judgments, sometimes judges have a different view, and I just wondered how the judges -- I mean, I think from a practitioner's point of view, it's pointless. I mean, why on earth would anyone agree to the motion for rehearing? But maybe judges have a different view, I don't know.

HONORABLE BOB PEMBERTON: Well, I'll chime in too both as a former practitioner and as a judge. As a former practitioner, you do have the occasional case where the court makes a misstatement somewhere or an error that both parties agree just got bollixed up, and you know, I've actually had where we had agreed motions for rehearing in one appellate court. It's rare, admittedly, but it might happen, and it might -- there might be some benefit conceivably compelling the parties to make that

phone call and see if they can fix it. Might apply one percent of the time. That would be just one observational experience I had.

As far as how we enforce it, I've never turned in a motion for rehearing to see if the certificate is signed, if there is one, and, you know, I would suspect that most judges would not find a motion to strike a motion for rehearing for failure to contain a certificate of conference.

HONORABLE SARAH DUNCAN: The problem, I think, is not judges. It's clerks. As Chief Justice Gray says, if it's in the rule book they feel compelled to enforce it, and they will kick a motion for rehearing back because it doesn't have a certificate.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Paula and I were just joking about I used to say I guess in seven years I never had anybody agree to an MSJ against them, but she kind of, you know, played devil's advocate and there was one time when she for tactical reasons -- there was one defendant she wanted out, so maybe it happens in one third of one percent of the cases, but I never saw anybody agree to a dispositive MSJ against them.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: And just by

eliminating the requirement of a certificate of conference in a motion for rehearing doesn't mean you can't have an agreed motion for rehearing.

HONORABLE BOB PEMBERTON: Right.

HONORABLE SARAH DUNCAN: It just means you don't have to put the certificate of conference in there.

CHAIRMAN BABCOCK: Justice Hecht, do you want to comment?

HONORABLE NATHAN HECHT: Well, I was going to echo what Bob said. I think it's more than one percent, but frequently in our Court after opinions have issued someone will file a motion and say, "You've got it completely wrong, but No. 2, change this sentence; No. 3, change that sentence; No. 4, you should take this cite out"; and frequently the other side will agree to some or all of that; and it's useful to know that, although you can call for response, of course, but I guess we always would. But it's not completely useless because you're not always just asking the other side to agree to the opposite result, but probably frequently you are.

CHAIRMAN BABCOCK: Okay. Jane, what do you think?

HONORABLE JANE BLAND: Well, I think they're unnecessary. I don't think that -- if there are going to be substantive changes to the opinion then it's likely

that you would ask for a response and get it hashed out that way, and it's one step that apparently the Bar has some problems completing, and I just think it's superfluous.

CHAIRMAN BABCOCK: Okay. Any other comments? Yeah, Nina.

MS. CORTELL: We did have a situation where there was something that needed to be corrected in a Texas Supreme Court opinion, and both sides came together on an agreed motion for rehearing. I suspect that would have happened without the requirement, either in the way that Jane just mentioned, which is one party does it, then the other comes back, or you just call. So even though I've seen it and been a part of it, I don't know that we need a rule for it. I think that would have worked its way out anyway.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Sullivan.

HONORABLE KENT SULLIVAN: Some of the appellate judges that I've talked to seem to have a very strong opinion about it. I have personally been told not to return to Houston unless this gets changed.

CHAIRMAN BABCOCK: If it is changed or is not changed?

HONORABLE KENT SULLIVAN: No, if it doesn't

get changed.

HONORABLE TOM GRAY: See, now I changed my vote if I don't want you to go back to Houston.

HONORABLE KENT SULLIVAN: I do wonder if we want a rule that everyone seems to agree -- in other words, they really require in every case this be done, this be done whenever it seems to agree it is the extraordinary and very unusual case, which is infrequently used.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And Pam Baron is not here yet, is she? At the appellate section conference last June this topic came up during a panel of Supreme Court justices, and there was quite a dialogue between the audience and the Court, and the justices who were there kind of said, "Well, you know, you don't -- we don't really see why we" -- you know, and just the sense that I got from the room was that the practitioners felt like it was unhelpful and, you know, added an extra step, and I think that --

HONORABLE STEPHEN YELENOSKY: Speak of the devil.

HONORABLE JANE BLAND: Pam, were you there at the appellate practice conference last June when the thing about motions for rehearing came up, the certificate

-- I'm sorry, the certificate of conference on motions for rehearing?

MS. BARON: I know I was there. You know, I've heard so many conversations about that subject.

HONORABLE JANE BLAND: Well, because I was trying to convey a sense of what the appellate Bar thought of it, and I just said my impression from the room is not much, from the room at that conference was not much.

MS. BARON: That's absolutely correct, because in 99.9 percent of the cases it's a meaningless gesture. It requires you to take an extra step to file a motion for rehearing, which you already have only 15 days to file. Counsel, I've never had anybody agree to a motion for rehearing that I have filed to change the judgment of a court of appeals. It's very unlikely it's going to happen; and if they, in fact, agree with some small problem you have with a court of appeals opinion, they can write a letter and tell the court, "Well, maybe you should fix that" in response to motion for a hearing.

So all those issues can get resolved another way, and it has been a problem for many people in that the court of appeals feel that they are obligated to not file the motion for rehearing if it doesn't have a certificate of conference, and it slows many cases down.

CHAIRMAN BABCOCK: Okay. Stephen.

MR. TIPPS: I simply want to note for the record that this seems to me to be so obvious that it simply proves that this group can debate anything for at least 15 minutes.

CHAIRMAN BABCOCK: Well, we haven't quite got to 15 yet, but I know we can get there.

MS. BARON: I think last time we treated it as so obvious that we didn't need to debate it, and we did recommend it to the Supreme Court, and it was not included in the rules, so...

CHAIRMAN BABCOCK: Well, we're back.

HONORABLE SARAH DUNCAN: It was twice.

MS. BARON: So this time we want to try extra especially hard.

MR. LOPEZ: Called "padding the record."

CHAIRMAN BABCOCK: Yeah, Justice Patterson.

HONORABLE JAN PATTERSON: I'm very sorry I'm late because I agree with Pam wholeheartedly on this issue, and that was exactly the problem last time, is that people viewed it as sort of a nonissue that it didn't affect anybody. If it affects anybody, it's -- and I apologize if I'm repeating this, but the clerks. It causes a lot of extra calling and paper work and follow-up on behalf of the clerks. They would like to get rid of it. It's entirely unnecessary, and I really do urge the

Supreme Court to change it. It's important to practitioners and our court clerks.

CHAIRMAN BABCOCK: Okay. Are we ready to vote on this? Keep it under 15 minutes, so if anybody wants to say anything more.

There we go. Now we're talking. All right, Bill.

PROFESSOR DORSANEO: Maybe we ought to suggest that it's possible for it to be done differently in the court of appeals than in the Supreme Court in order to avoid what appears to be Supreme Court hostility to eliminating the certificate.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Well, that's very ironic because my understanding is that in the Supreme Court you can actually file a motion for rehearing without a certificate of conference. That's not true? That was my understanding.

CHAIRMAN BABCOCK: Okay. So that approach would be laced with irony.

PROFESSOR DORSANEO: Well, at least the suggestion is on the record, and that's probably sufficient.

CHAIRMAN BABCOCK: Okay. Anything else? Okay. The proposition is to amend TRAP Rule 10.1(a)(5) by

deleting the requirement that a certificate of conference be contained in the motion for rehearing. So everybody in favor of deleting that requirement from that rule raise your hand.

In a rare showing of unanimity, 24 to 0.

HONORABLE NATHAN HECHT: You didn't call for the nays.

CHAIRMAN BABCOCK: Yeah, because everybody had their hand up.

HONORABLE JAN PATTERSON: I think Stephen intimidated the vote, actually.

MR. TIPPS: It was 9 to 14.

HONORABLE TOM GRAY: Chip, can I make one observation, that since Rule 49 specifically deals with motions for rehearing, that it might be a better place to put it there, is simply that the motion for rehearing does not require a certificate of conference as opposed to trying to create an exception over under Rule 10.

CHAIRMAN BABCOCK: But then you're going to have two rules in conflict.

HONORABLE TOM GRAY: And we clearly know that the one that is more specific deals with the problem.

MR. LOW: Clearly?

HONORABLE TOM GRAY: I never use that word.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: This has to be drafted, and I think looking at 49 would be a good idea. Maybe we could work it together.

CHAIRMAN BABCOCK: Okay. Here is something that can get our blood racing, court of appeals transfers, precedent from the transferring court.

PROFESSOR DORSANEO: Can we save that one until last?

CHAIRMAN BABCOCK: Sure.

PROFESSOR DORSANEO: Because I think that you may find out that that is more exciting than you anticipate.

CHAIRMAN BABCOCK: No, no. I wasn't being facetious. I do think it will be a good discussion.

PROFESSOR DORSANEO: I would prefer to go to the revisions -- proposed revisions of Rule 25 related to Civil Practice and Remedies Code section 51.014(d) through (f), and I did a memorandum that's dated December 30, 2004, building on the work that we did at the August 2004 meeting. Does everyone have a copy of that? I think there are some on the table over there if you don't, but to refresh your recollection, in 2001 the 77th Legislature adopted a number of provisions at the end of Civil Practice and Remedies Code section 51.014 providing a procedure for a permissive appeal of an interlocutory

order that's not otherwise appealable.

The mechanics of the statute are not completely clear on the face of the statute, although the statute does provide that you get a district court order for the interlocutory appeal, but the parties must agree to that order and then within 10 days after that order is made, the district court order authorizing the interlocutory appeal, the court of appeals is requested to permit the appeal to be taken from that order. So pretty much all the participants in the process need to agree that this appeal is appropriate.

There have been a number of cases, probably seven or eight at this point, where counsel has attempted to take an appeal under these provisions, and I don't think anyone has been successful at least on the first attempt, because the procedure does not appear in the statute as to how you get permission from the court of appeals, what you file, and how that process works.

I think many courts of appeals have said that we need a rule to explain the procedure so that the statutory language can be made, you know, meaningful. In August of this year I presented a draft to the committee which needed considerable remedial work as a result of what I learned at the August 2004 meeting, and this memorandum dated December 30, 2004, is a byproduct or a

result of me going back through the transcript and following what this committee directed me to do at that meeting.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: And I think we can go through it pretty quickly, although I shouldn't say that because that's probably the kiss of death, but the first thing I'll say is please turn to Rule 12.1, and I don't know whether this one is controversial. It's on page one. Rule 12.1 is --

CHAIRMAN BABCOCK: Bill, before you do that, let me just for the record clarify that the Civil Practice and Remedies Code provision that we're dealing with is section 51.014.

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: There is a typo both in the agenda and --

PROFESSOR DORSANEO: My title, yes.

CHAIRMAN BABCOCK: -- on the title of the memo. So it's 51-014.

PROFESSOR DORSANEO: Thank you, Chip. 12.1 which provides for docketing the case in the court of appeals doesn't yet talk about a petition for permission to appeal, and I think Chief Justice Gray suggested that 12.1 needed to be amended to provide for the petition for

permission to appeal, so the suggestion is, assuming that we go with the title "petition for permission to appeal" in order to facilitate the appeals, permissive appeals, under 5.104(d) through (f), is suggested to be added to 12.1.

"Upon receiving the copy of the notice" -- it should say "of appeal" -- "the petition for permission to appeal the petition for review, the appellate court clerk must endorse on the document the date of receipt," and basically docket the case. And I apologize for it saying "notice on appeal," but I think that shouldn't have distracted anyone too much.

So I don't know whether we need to take a vote on that, Mr. Chairman. I don't necessarily think we do. It seems to follow if we go ahead and do the rest of it.

CHAIRMAN BABCOCK: Yeah. Anybody want to discuss it or opposed to it?

MR. MUNZINGER: I don't want to discuss it. I just want to ask a question because I don't have the statute in front of me. Are the words "petition for permission to appeal," is that what it is denominated in the Civil Practice and Remedies Code?

PROFESSOR DORSANEO: No. No. In the Civil Practice and Remedies Code 51.014(f) talks about an

application made to the court of appeals that has appellate jurisdiction. It talks about an application much in the same manner as many model acts call things applications, and we could call this an application. That wouldn't really offend me very much. It tends to be called a petition in the Federal system, and it looks a lot like a petition for review in the way that it would be formulated, or would look that way.

My suggestion is to call it a petition rather than an application for those two reasons. One, that whenever a statute says "application," it's kind of not really saying you should call it an application. It's leaving the matter up to someone else to decide what to call it, and it looks more like a petition than anything else, and why add in some other kind of thing. Jeff Boyd said he wanted to call it an application, too, at one point.

MR. MUNZINGER: I'm not lobbying for either word. I'm just trying to make it clear to the practitioners who don't spend their lives in the appellate courts that we now have this procedure for a permissive appeal and that that's what this language refers to, and that's why I asked if it was a word or term of art. It might want to say "the petition for permissive appeal." I just want to be sure that we don't cause confusion with

the language, and I don't want to spend a lot of time on it, but --

PROFESSOR DORSANEO: The language is the same language that I proposed to be used in 25.2, which talks about a petition for permission to appeal. I don't think there could be too much --

MR. MUNZINGER: That's fine.

PROFESSOR DORSANEO: This is for clerks anyway, and I don't think there could be any more confusion than there normally would be.

MR. MUNZINGER: You've answered my question. Thank you.

CHAIRMAN BABCOCK: Well, you know, as someone who does this sometimes, I mean, you do want to know what to call it. You know, when you're filing something in court, what are you going to put in the caption, and petition for permission to appeal is as good as anything else.

MR. MUNZINGER: Sure.

CHAIRMAN BABCOCK: Is there any contrary label that is in -- I haven't seen one in 51.014, but --

MR. BOYD: Chip, I'll comment. This 51.014(d), (e), and (f), no offense intended to our friends at the Legislature, it's just very confusing, not well written, particularly when you talk about when it

refers to "the order," because it's very unclear which order they're talking about, the one to be appealed, the one from the district court allowing appeal.

I think this is going to cause a lot of confusion if we don't give clarity in this rule, and my view is in order to provide the most possible clarity, we ought to track what the statute says as long as it doesn't add to the confusion. So, for example, the statute says that -- the statute refers to it as an application made to the court of appeals for this order permitting the interlocutory appeal. I think it's just clearer if we call it an application for permission to appeal and track the language of the statute.

CHAIRMAN BABCOCK: Sarah. Justice Duncan.

HONORABLE SARAH DUNCAN: I agree, because I can see somebody out there having the statute in front of them and having the rule in front of them and saying, "Okay, the statute tells me to file an application. The rule tells me to file a petition, so I'm going to file both." So why not just call it what the statute calls it, an application?

PROFESSOR DORSANEO: I don't really care that much, although I would wonder about such persons. Part of the reason to take --

CHAIRMAN BABCOCK: That's a nasty dig.

PROFESSOR DORSANEO: Part of the reason for the language is it's monkey-see-monkey-do the Federal language, which talks about petition for permission to appeal, and I think many people would look to the -- in a sense, to the Federal body of law that deals with this in trying to work their way through it. Well, maybe not in every part of the state they wouldn't, but --

CHAIRMAN BABCOCK: No, I'm sort of with Sarah on this one. You're going to look to your own statute; you're not going to look to the Federal statute.

PROFESSOR DORSANEO: Well, this would be our own rule, which is as good or better than the statute.

CHAIRMAN BABCOCK: Yeah. Okay. Richard.

MR. ORSINGER: Are we prescribing any page limitations or anything like that?

PROFESSOR DORSANEO: Yes. Let's do this petition/application thing and then we'll get onto the rest of it, if you don't mind me being slightly rude.

MR. ORSINGER: If we are going to treat this like we do other petitions with the page limits and the contents that are required then I think it's helpful to have the name "petition" so that it takes the practitioner to the concept of what the petition is for an original proceeding or a petition for review from the Supreme Court.

If it's not going to be a petition that has the same kind of contents and page lengths then I think that it may confuse people to use the word "petition" here if we're thinking of application as much briefer and doesn't contain the normal sequence of subparts.

PROFESSOR DORSANEO: Okay. I understand your point now. The provisions of this proposed rule operate independently f1rom everything else. So in a sense it doesn't need to be called "petition," but on the other hand, what it really ends up looking like is a petition, particularly a petition for a review. I don't think this is a huge issue, whether it's called petition or application and would just as soon see --

CHAIRMAN BABCOCK: Move onto the others.

PROFESSOR DORSANEO: Yeah, get my direction whether to cross out one word and add another and just go on.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I'm in favor of calling it petition, and I'd ask the Court to just ask the Legislature to change the statute since they're about to reconvene. I mean, it's that simple to have consistency.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: How is this -- what are the procedures in line, and that just shows my ignorance on

the appellate process, but where you agree -- you know, there was a statute before this where you and I can agree that we should appeal, and the court -- you know, we've got a question of law and neither one of us want to go forward until that's decided and by agreement. What do you call that, and are there rules in our present rules that say when things are due, and does the court of appeals have to take that? Where the parties can agree.

MR. ORSINGER: That is this procedure, Buddy. We are writing those rules for the first time.

MR. LOW: Okay. Because I did that, and that wasn't the first time I didn't know what I was doing, but it wasn't real clear. We got it to the court of appeals and they took it, but --

MR. BOYD: Interlocutory without a statute?

MR. LOW: No. There is a statute that says if both parties agree you can petition the -- it's been there for several years.

HONORABLE JAN PATTERSON: It's not well publicized.

HONORABLE SARAH DUNCAN: That's this statute.

MR. ORSINGER: We're trying to write those rules.

MR. LOW: I thought this statute was one

where only one party can do it.

PROFESSOR DORSANEO: No.

MR. ORSINGER: No. We are doing now what you said needs to be done.

MR. BOYD: We're doing now what you said you did years ago.

PROFESSOR DORSANEO: Maybe I should correct my statement to nobody has done this successfully to say that no one in a reported case has done it successfully, but Buddy Low has.

MR. TIPPS: Tracy and I have done it successfully.

CHAIRMAN BABCOCK: Okay. Let's get 12.1 out of the way. Are we going to call it petition or application?

MR. GILSTRAP: Vote.

CHAIRMAN BABCOCK: Or both?

MR. GILSTRAP: Vote.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I was just going to suggest maybe we should just go through all the rules so that people would know what the procedure is going to be.

PROFESSOR DORSANEO: Uh-huh. That makes sense.

HONORABLE SARAH DUNCAN: And then --

CHAIRMAN BABCOCK: Then come back?

HONORABLE SARAH DUNCAN: Yeah. I think that would answer some of the questions that have been asked.

CHAIRMAN BABCOCK: Yeah. Okay, Bill, let's go to the next. Let's go to 25.

PROFESSOR DORSANEO: Well, the first issue is where to put this animal, and it appears in the Federal rule book as a separate rule, standalone rule. Our rule book could treat the appeal by permission that way, but it seemed mechanically better to me to try to load the appeal by permission into Rule 25, and I don't feel strongly about that, and that's more of a mechanical thing, but that's where I put it.

Now, that requires a small change to 25.1 and current 25.2. The change to 25.1, as indicated on page two of the memorandum is to identify in 25.1 that we're talking about appeals that don't require permission, appeals to the courts of appeals as of right; and the adjustment is made by adding that language to the subheading or the heading for 25.1.

Now, when I looked at 25.1(a) and I compared 25.1(a) to the Federal rule book from which it was taken to begin with, it seemed to me that it would also make sense to add the words that are underlined at the end of the first sentence to make 25.1 parallel in the sense that

it talks about timing with new 25.2. So I added the words "within the time allowed by Rule 26." That language, I don't know if that was in our original draft of the rules or not, but it's in the Federal rules, and it seemed to me to make sense independently.

Now, of course, neither of these two things are necessary, and they are preliminary, but these two little changes are made in order to fit the appeal by permission into the Texas rule book and make it look like it's not what it is, which is a kind of latter day wing added onto an architectural design that didn't contemplate such a procedure to begin with, and I don't know whether that needs to be anything more than introduction, and I'll just kind of go on.

The meat of the coconut is 25 point -- I will add there is a 25.2 now, and that's criminal cases, and my suggestion is to change 25.2 criminal cases to 25.3. I don't know whether the Court of Criminal Appeals would have trouble moving down in Rule 25 to .3 from .2; and, frankly, 25.2 as proposed could be not only in a separate rule, it could be in a separate subsection of 25. Being a civil lawyer, I'm not too concerned about current 25.2, so I moved it down to 25.3, and I don't know whether that's an issue or not.

HONORABLE TOM GRAY: You keep looking at me.

As far as my preference is not to mess with the numbering on 25.2 because we have a tremendous volume of cases --

PROFESSOR DORSANEO: Okay.

HONORABLE TOM GRAY: -- dealt with under that rule, and I would prefer not to mess with that.

HONORABLE SARAH DUNCAN: I agree. I also want to ask the question, by putting "within the time allowed by Rule 26" in 25.1(a) doesn't that mean we're going to have to also amend Rule 26?

PROFESSOR DORSANEO: No. Because 25.1 only deals with appeals as of right.

HONORABLE SARAH DUNCAN: Right. Okay. Never mind. You're right.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Will 25.2 ever be governed by Rule 26?

PROFESSOR DORSANEO: Only by cross-reference, so the answer really is no.

MR. GILSTRAP: Okay. Okay.

PROFESSOR DORSANEO: That's part of the architectural problem.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I favor having a separate rule for this. This is kind of a hybrid between an appeal and an original proceeding. It's not something you do as

a matter of right. It's something you have to have the permission of the appellate court, and to me the Rule 25 on perfecting appeal suggests that you're talking about something that happens as a matter of right, and this is just the procedure you do to make the right mature and to give you all the entitlements that are accompanying it.

I don't see that you're perfecting this appeal. I think you're making a petition for permission to do something, and it's not -- it's sufficiently distinct from appeal as a matter of right that I would prefer to put it in its own rule and then we can eliminate the issue about renumbering the criminal section.

PROFESSOR DORSANEO: That makes sense, but in our Garnerized system, I think what's contemplated for the addition of new rules is to add a new subsection 25, or whatever number you're using, point something or another into the structure rather than going and making a Rule 25a, point 1, et cetera. I'm not sure about that.

Justice Hecht, what do you think about the design structure? And when I did the original appellate rules I left some numbers, number gaps. I don't know if we have any number gaps anymore, but I left some number gaps where you would go from one section of the rules and there would be some numbers not used, held in reserve until you went to the next section.

I don't think that's the structure anymore. The idea is that you're going to add a point something else, and I don't mind adding this point something else at the end of 25. Instead of 25.2 it could be 25.3. That's not a big issue if there are other concerns as expressed by the -- by Justices Duncan and Gray. I mean, that's not a big problem. Although it doesn't look as pretty to me that way, it will be fine.

HONORABLE NATHAN HECHT: I think in answer to that question, I think it would be better to put it as 25.3. I think it would be -- even though logically it would be two, I think we ought to try to disturb the numbers as little as possible.

I have another question, too, which is, architecturally I think we should not disrupt or be any more different from the current procedure than we -- than is necessary so that everything we're doing is somewhat familiar within the current scheme of things, and so I was thinking about in a direct appeal to the Supreme Court we follow -- you don't have that as of right, and so the parties appeal as if they -- as if appealing to the court of appeals and then they file a jurisdictional statement, and the Court may or may not take the appeal either because we don't think we have jurisdiction or because we just don't want to take the appeal and we think the court

of appeals should look at it first, and I wonder if this isn't -- if this new procedure isn't as similar enough to that that it wouldn't be advisable to have the party file a notice of appeal accompanied by a motion to allow the appeal, and therefore, leave most of 25.1 like it is and add something to 26 that says you've only got this much time to do it in these kind of cases and draft it on that way rather than a separate section.

PROFESSOR DORSANEO: I thought about doing it that way, and I didn't really go through and examine doing it that way. If I had a reason, if I can make up one now, it would be because of the trial court mechanics that require an order from the district judge authorizing the appeal to begin with, so you would be -- if you started it with a notice of appeal then you'd have to have the notice of appeal be somewhat different from an ordinary notice of appeal, and I don't know how much you save by reversing the order of the request to the court of appeals being the first document that's filed or a notice of appeal, but it certainly could be drafted that way. That would be feasible.

HONORABLE NATHAN HECHT: Well, the advantage is you would file a notice of appeal just like you always do on a different time frame, but then you would add on and say "but the notice must be accompanied" or "must be

followed by" or whatever, a motion or petition or application that sets out this stuff. I'm just wondering about that.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: What about putting this under Rule 28 for the accelerated appeals rule? Because this is an accelerated appeal. It's just a special brand of accelerated appeal, and the rest of the rules of accelerated appeal will apply once it's granted, and it's a more logical place to look because that's where you're looking for the appeal of interlocutory orders anyway, and wouldn't this be a better fit if it were a component of the rule on accelerated appeals rather than a component of the rule for final judgments?

PROFESSOR DORSANEO: That's a possibility, too. Now, first of all, Rule 28 says very little about accelerated appeals. Okay. I mean, it doesn't really talk about how you perfect those appeals. It contains almost no useful information, frankly; and if you wanted to do that, I would change Rule 28 to talk about how you perfected an accelerated appeal and remove some of that material from 25 and 26 where most of that information appears. And the other issue that we had, which I don't know whether it was completely voted on at the August meeting, is to whether this would be an accelerated appeal

or whether it would be an ordinary appeal with respect to the balance and the timetables.

In this draft I put it down as an accelerated appeal, but I'm not sure that that issue was really ever resolved by the committee as to whether it ought to be an accelerated appeal under an accelerated timetable, slightly faster than the ordinary appeal.

MR. LOW: And under 12 it's a discretionary appeal.

CHAIRMAN BABCOCK: Justice Duncan and then Justice Patterson.

HONORABLE SARAH DUNCAN: I think that might not be a bad idea to put it under 28 because we've had a lot of trouble with 28 and the paucity of procedural provisions for procedural appeals. I just had a case the other day where I think I ended up disagreeing with a whole bunch of courts on whether you could have a motion for extension of time to file a notice of appeal in an accelerated appeal. So it might not be a bad idea to just put it under 28 and fix 28 now.

PROFESSOR DORSANEO: Yeah, and I think I could fix 28 with a day's work, but it frequently turns out that it takes more than that.

CHAIRMAN BABCOCK: Justice Patterson and then Frank.

HONORABLE JAN PATTERSON: The other advantage of that approach, that is putting it in 28 as Judge Duncan also recommends, is that it avoids elevating these interlocutory appeals to another category of civil, criminal, and interlocutory; and I think that there's an advantage to that because it's not as though we want to elevate its status, encourage it, avoid all of our other procedures. So I think atmospherically or architecturally, as Bill says, I think there is an advantage there as well.

PROFESSOR DORSANEO: I think I could put it in 28. I think that would be a good idea. This is not a big deal, and it's stuck right here in the middle as if it is a big deal. So putting it in 28 makes sense and could be done, but I think more would need to be done to 28.

CHAIRMAN BABCOCK: Frank, then Stephen.

MR. GILSTRAP: Well, I think it is a good idea, but I like also the idea you floated with it of taking the information out of 26 about interlocutory appeal where it's kind of buried and putting it over into 28 where it's accessible and we can find it.

I also like the idea of clarifying this problem that Justice Duncan raised in the case she had and the conflicting case out of Dallas, I think *In re: DB* that the rules involving interlocutory appeals apply to all

interlocutory appeals, even the statutory ones that are so much of a problem, and also clarify whether this really is -- do the rules involving interlocutory appeals apply to this procedure. I mean, it seems like we could -- it's more than a day's work, but it seems like that would really be a healthy thing to do to resolve those problems by making this amendment.

PROFESSOR DORSANEO: Well, Mr. Chairman, the only thing we need to know is whether the committee thinks that this 51.014(d) through (f) should be an accelerated appeal rather than an ordinary appeal. If the committee thinks that, then moving it to 28 makes perfectly good sense, although it will require a little more work to be done.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Well, I like the way Bill has done it for a couple of reasons. One, because I think this basically tracks the way the Federal Rules of Appellate Procedure address the issue; and the Texas statute, while somewhat different from the Federal statute, is clearly modeled on the Federal statute; and I also like it because it seems to me that what we're talking about here is simply a different way of perfecting an appeal.

Typically you perfect an appeal because you

have a right to take an appeal by filing a notice of appeal, and the big ambiguity here is that, well, you can't really -- you're not entitled to file a notice of appeal because you first have to get the appellate court's permission; and so it just seems to me logical to draw a distinction between an appeal as of right on the one hand and an appeal by permission on the other and simply to clock in the middle of Rule 25 the explanation for how you first go about asking for and securing permission from the court of appeals to appeal; and then once you have secured that permission you then fall into the -- your appeal becomes a normal appeal and you file the notice of appeal and the briefing schedule is the same and that sort of thing. So I like the way this is proposed.

HONORABLE JAN PATTERSON: But why wouldn't it always have some accelerated features, Stephen?

MR. TIPPS: I mean, I think whether it's accelerated or not is a separate question.

HONORABLE SARAH DUNCAN: Well, but --

CHAIRMAN BABCOCK: Go ahead, Justice Duncan.

HONORABLE SARAH DUNCAN: It is a separate -- I agree with you, Stephen, that it is a separate question, but it's sort of architecturally the question, because once we decide it is accelerated we would know where to put it. Once we decide it's not accelerated we know where

to put it. So maybe we should just take an up or down vote on is this going to be an accelerated appeal, and I would like to make it a pitch as -- you-all all know how much I hate accelerated appeals, but I would like to make a pitch that the whole purpose of this statute is to accelerate the process in the trial court, so as much as I hate it, I think it ought to be accelerated.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, it's also interlocutory appeal. I mean, clearly it's that. It is an appeal of something other than a final order, and the Federal courts don't have that. They handle the interlocutory appeals under this collateral order docket, so --

PROFESSOR DORSANEO: No, that's not right, Frank.

MR. MUNZINGER: 1292(b).

PROFESSOR DORSANEO: Yeah. And 1292(a) is like our law generally with taking temporary injunctions and the like.

MR. GILSTRAP: Okay. It seems me to make sense to put it in here where we already deal with an appeal of interlocutory orders in 28. Now, whether it's an accelerated appeal or not, that seems to me to be less important as it's an interlocutory appeal and ought to be lumped in with all the others under 28.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: Well, that's what I was just thinking, was maybe -- I'm sorry. I'm having trouble seeing today. Maybe part of the problem is that 28 is entitled "Accelerated appeals in civil cases." Maybe 28's title should be "Interlocutory appeals in civil cases."

PROFESSOR DORSANEO: Well, there are a lot of Rule 28 issues, including the one we talked about last time potentially about termination of parental rights, whether they're final orders or they're not final orders; and there may be more to be done on 28; but, myself, if this is going to be treated as an accelerated appeal, it ought to be treated in the accelerated appeal rule; and maybe I didn't get that far in my mental process when I was working on this before the end of last year; but that's what I think today, that it would make better sense to put it over in 28.

CHAIRMAN BABCOCK: Well, 28.1 says, "An appeal from an interlocutory order when allowed will be accelerated," so that doesn't admit to any exceptions, does it?

PROFESSOR DORSANEO: 28 needs to be redrafted.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: Okay. But it wouldn't be that huge of a deal. Like that sentence.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: I don't know how helpful that is, that sentence.

CHAIRMAN BABCOCK: Well, but on the issue of whether or not the permissive appeals under 51.014 are going to be accelerated or not, this language would seem to cover that, wouldn't it? I mean right now, today.

No?

PROFESSOR DORSANEO: But I don't know if that language is very meaningful because you need to go and read the other rules to figure out what it is you're supposed to do. Okay. We have a lot of statutes that say that things are supposed to go faster than other things, and that doesn't necessarily mean anything.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Isn't every appeal an appeal from an interlocutory -- every permissive appeal. If it's by right it's by final judgment, so if it's first it's discretionary. That's got to be from an interlocutory order. If it's interlocutory then it's an accelerated appeal by 28, and why wouldn't it go there? I mean, it just follows.

PROFESSOR DORSANEO: That makes sense, and

51.014 is about nonfinal orders from top to bottom.

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, certainly from a trial judges's point of view when they're asking for our permission to appeal from an order, you would want it to be accelerated because you don't want the case to sit there for the normal length of an appeal. You would want a faster decision to the question that you've agreed to have them appeal.

CHAIRMAN BABCOCK: Okay. Richard Munzinger. Sorry.

MR. MUNZINGER: The way Bill has drafted this he has -- I think, and I don't spend a lot of time in the appellate rules, but you have different timetables and brief, number of pages, and what have you for an appeal by permission than you do for other appeals; is that correct?

HONORABLE SARAH DUNCAN: Yeah.

PROFESSOR DORSANEO: Yes and no. I mean, once it gets to be -- once you get permission then it should be looking just like any other accelerated appeal. Once you get permission, but there is this process built in to do briefing --

MR. MUNZINGER: To get the permission?

PROFESSOR DORSANEO: -- to get the

permission.

MR. MUNZINGER: And it's in the appellate court and then it's treated like any other appeal.

PROFESSOR DORSANEO: Right.

MR. MUNZINGER: All right. Thank you.

CHAIRMAN BABCOCK: Orsinger.

MR. ORSINGER: If I'm not mistaken, I haven't done one of these in the last year or two, but the process of getting the record and the process of briefing is accelerated for an accelerated appeal, but the process of disposition, the setting for oral argument and the writing of the opinions is ordinary. Is that right, Judge Gray, or is there an accelerated disposition once you get everything? There is an accelerated disposition?

HONORABLE SARAH DUNCAN: Yeah.

MR. ORSINGER: What does that mean? Are you entitled to get scheduled for oral arguments earlier than somebody who has been waiting a few months?

HONORABLE JANE BLAND: Yes.

MR. ORSINGER: All right. Well, then this --

CHAIRMAN BABCOCK: I'm not sure the record is clear on that. Justice Bland says you're entitled to an earlier position.

PROFESSOR DORSANEO: But the appellate rules

aren't clear on that.

HONORABLE JANE BLAND: The appeal is accelerated, and if it's an accelerated appeal, it moves to the top of the submission calendar as soon as it is at issue.

MR. ORSINGER: Is that true on the San Antonio court, Sarah?

HONORABLE SARAH DUNCAN: Yes.

MR. ORSINGER: And the Waco court?

HONORABLE TOM GRAY: No.

PROFESSOR DORSANEO: The rules don't require that or that would make perfect sense.

MR. ORSINGER: Well, I guess my point is --

HONORABLE JANE BLAND: It would require that the appeal be accelerated. I don't know --

MR. ORSINGER: Well, apparently it depends on the court, but be that as it may, not only do you have an accelerated record deadline and an accelerated briefing deadline, but in some courts of appeals you have an accelerated submission and maybe a quicker turnaround on the opinion, which to me is salutary if what you're trying to do is stop a case in the trial court until you get a question of law resolved. We would rather have that answer in 3 or 4 months than in 9 or 12 months.

HONORABLE JANE BLAND: Whoa, whoa. I didn't

say that. We don't get the briefing at issue in three or four months.

MR. ORSINGER: Well, on an accelerated appeal you should be.

HONORABLE JANE BLAND: We should be, but --

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I just go back to the comment that I made in August and I won't belabor the point that we've got a tremendous number of places in the statutes, the rules, the Constitution, interpretations of what cases get what priorities; and every time you throw another one of these in here with the label of "accelerated" you are affecting the ability of an intermediate appellate court or other courts to deal with their dockets in the fashion of balancing a lot, and I do mean a lot, of competing factors.

When does an accelerated appeal in a case for money judgment take precedence over determination of parental rights, over a mandamus, over a criminal case in which someone has been -- is currently incarcerated versus a criminal case in which somebody is out on appeal bond? You've got a tremendous number of factors that you are trying to balance when you are working on any particular case and then there's three different chambers working on that.

At least in Waco I can tell you that labeling it in one place or another will not materially affect the time frame, but it will at least cause pressure to be applied to move it around; and as I said in August, I ask for fewer of those impositions on my ability to determine what I work on first as opposed to more, and so I don't like the label "accelerated appeal."

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: In this case I don't see that these issues are quite as critical because everybody has to agree before the appeal can take place. If the trial judge thinks that he doesn't want to wait, you know, nine months for the First Court to rule, he just won't certify it. If the Tenth Court says, "Well, we're already loaded up now; we don't need any more of these," they just won't take it.

That's what the Federal courts do. The Fifth Circuit just won't take your case, and they don't take that many. So I don't see that it's that much of a problem with this type of thing where everyone has to agree.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I agree with Frank that it's the exception that we're going to have everybody agreeing to an interlocutory appeal; but if everybody does agree

and the trial court agrees, then I agree with Judge Christopher that it should be labeled and given precedence or priority as a accelerated appeal; but I will also say that my anecdotal experience is that you're only really talking about a month or two earlier in disposition as a general matter. I don't think you can get -- it's not like you get immediate turnaround, but I still would be in favor of treating it as accelerated.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: These last few comments caused me to think that the rule should include a provision for the trial judge to withdraw his or her permission and to have the case come back, and there are a number of reasons why you might want to do that. Let's say another state has a similar statute and a court of that state has construed it. That is but one reason I can think of; and if you're in Waco and it's -- or rather in the First Court and they're just not -- they haven't set a date for hearing, quit mucking with my case and give it back to me, you know. So I think there ought to be a provision to say, let's stop, bring it back to the trial court.

CHAIRMAN BABCOCK: Judge Bland. Justice Bland.

HONORABLE JANE BLAND: Levi, can't the

parties if they think this is a fruitless effort can dismiss it?

HONORABLE LEVI BENTON: Well, what if the parties don't think it's frivolous, but --

HONORABLE JANE BLAND: Fruitless.

HONORABLE LEVI BENTON: Fruitless, but you would still like to get the case disposed of. I mean, you can have disagreement amongst the trial judge and counsel. I mean, if you'll just respond to that one example, let's say Florida has a similar statute and finally the Florida Supreme Court weighs in on it. It may not be four corners, but close enough where you have some guidance to give you an opportunity to go forth, get a trial record, and go on.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I would be very reluctant to give a trial court the ability to take the case away from the appellate court after I had spent a tremendous amount of my client's money to get the case before the appellate court to resolve a definitive question. There's no -- in my opinion, and respectfully, I don't think it's fair to the parties who once have obtained permission of the trial court judge to spend all that time and money, to make adjustments in their business activities or whatever it is. It may not be an automobile accident case. It may be

a trademark case. It may be a case that requires market changes and what have you. It could have some far-reaching effects, and to then suddenly have the rug pulled out from underneath you, spend all that money, and have made your business judgments because the judge says the Florida Supreme Court ruled something I think is not wise, in all due respect, Judge.

HONORABLE LEVI BENTON: You're overruled.

HONORABLE SARAH DUNCAN: And you're reversed.

HONORABLE JANE BLAND: If you look at how we look at all appeals, there are often changes in the law, Supreme Court, Texas Supreme Court decisions that apply to pending cases and sometimes pending cases that are on appeal. We don't typically stop everything and do a do-over because there is some change in the law. The appeal continues, and the appellate court rules, and the chips fall where they may, wherever the case happens to be in the process, and I don't think you want to keep going back to square one. You know, once you've already gone down the road and the train has left the station, you don't want to, you know, backtrack. Overruled.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I actually disagree with Levi, too, because the few times I

have tried to get lawyers to agree to this, that's usually -- first of all, that's usually unsuccessful. It's usually something that I would like to have a decision on.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: And so I'm urging the lawyers to agree to this procedure, and I've only been successful once in getting the lawyers to agree to the procedure, and that was because at the time we were going to appeal. They had a right to do an interlocutory appeal on another order I was making, so it made perfect sense to everybody to take both of those issues up at the same time, so you have that first line of defense, Levi. You don't have to agree to send it up to begin with. So --

CHAIRMAN BABCOCK: Justice Gray and then Mike Hatchell.

HONORABLE TOM GRAY: Unless 29.5 is being tinkered with in this proceeding the trial judge has that right. "While an appeal from an interlocutory order is pending, the trial court retains jurisdiction and may make further orders including one dissolving the order appealed from."

HONORABLE JANE BLAND: Except --

HONORABLE TOM GRAY: "Except as provided by law."

HONORABLE JANE BLAND: No, there's underneath --

HONORABLE TOM GRAY: "And if permitted by law may proceed with a trial on the merits, but the court must not make an order inconsistent with any appellate court temporary order or interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought whether it may be granted on appeal."

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: That raises a whole other set of issues as to when jurisdiction transfers and what jurisdiction there is. That's interesting, but I was going to say on the question that Levi raised it seems to me that since this is an appeal by permission, the court of appeals would certainly have the right at any time to say that that permission was improperly granted, and I would think because the judge is part of the process, Levi, that you could write a letter expressing why you think they should exercise such a right.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: The statute has in (e) this language, "An appeal under subsection (d) does not stay proceedings in the district court unless the parties agree and the district court, the court of appeals, or a judge in the court of appeals orders a stay of the

proceeding," so it's kind of meant to keep going, although in my experience parties under these circumstances tend to agree or frequently agree --

MR. LOW: Right. That's what it comes up generally, I mean, like a question of law. The one I had is Louisiana says a certain agreement is unenforceable; Texas says it is. Well, which law is going to apply? We didn't want to take a whole bunch of depositions and go to Hong Kong and all that, so generally they do agree, the lawyers agree to stop everything waiting on that.

PROFESSOR DORSANEO: But it requires the district court, the court of appeals, or a judge of the court of appeals to order a stay.

MR. LOW: To order it, right.

PROFESSOR DORSANEO: I don't know whether that's a requirement that's going to matter much if the parties agree, because they're just not going to do anything.

MR. LOW: Right.

PROFESSOR DORSANEO: And if the judge just acquiesces, that's going to be the normal -- probably the normal deal. I just wanted to point out that the statute tries to deal with this subject in maybe not a very informed way.

HONORABLE JAN PATTERSON: I think this

paragraph is directed to those instances such as an appeal of an injunction or some procedure that one party may be seeking a further delay and seeks an appeal either incident to that or for that reason, and so the other party wants to keep it going, but here you're going to have by agreement, and presumably that's going to be part of the deal by which they will structure their litigation below, but theoretically it keeps moving. That's a newer provision. I can't remember when that came in, but it's meant to keep things going and to avoid the delay incident to an interlocutory appeal.

CHAIRMAN BABCOCK: So, Bill, what do you think? Where are we?

PROFESSOR DORSANEO: Well, we're still trying to decide, I think, on the question about whether this would be an accelerated appeal or an ordinary appeal.

HONORABLE NATHAN HECHT: I guess I had not noticed that it's limited to the district court.

PROFESSOR DORSANEO: I think that's an accident, but that's what the statute says.

HONORABLE NATHAN HECHT: Which creates another wrinkle here.

MR. TIPPS: Can't hear you, Judge.

HONORABLE NATHAN HECHT: It's limited to the orders from the district court, the statute is.

CHAIRMAN BABCOCK: 51.014(e).

HONORABLE NATHAN HECHT: And so if you take that literally, which maybe we have to, although --

PROFESSOR DORSANEO: It's (d).

HONORABLE NATHAN HECHT: -- to look at the history of it, it creates an additional wrinkle because all these other rules apply to any trial court order, and this would apply to only the district court.

MR. MUNZINGER: It raises a real problem in El Paso because we have -- all our county courts at law have essentially coextensive jurisdiction of the district courts, and the cases are filed and assigned to county courts at law even though they're filed with the district clerk. We at one time were unique in that. I don't think we are anymore.

HONORABLE NATHAN HECHT: You're not unique in that there are other counties where the county courts have coextensive jurisdiction of the district court. I think -- but I think you are unique in that the filing system just randomly files cases with the district court or the county court.

MR. MUNZINGER: Yeah.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, I mean, that problem existed before. I think the statute involving

interlocutory appeals of receivership orders used to apply only to district courts, and -- although I don't know that that's going to make a difference in what we do today. You see what I'm saying? In other words, I think we've still got this same problem; and, you know, Bill, you say it's going to be an ordinary appeal or an accelerated appeal. I mean, the only type of ordinary appeal is an appeal from final judgment.

PROFESSOR DORSANEO: No, I think of ordinary appeals as having a track, okay, or two tracks; and then I think of accelerated appeals as being on a different track; and I think in terms of the rule book that whether the track is different after briefing depends upon what the court of appeals does with it.

MR. GILSTRAP: Well, isn't it true that all appeals from final judgments are on one track and all appeals from interlocutory orders are on another track under the rules?

PROFESSOR DORSANEO: Well, I think it's more properly thought of as accelerated appeal is under an accelerated track, and those are usually appeals from interlocutory orders, but not always, and that what I call an ordinary appeal is governed by the ordinary tracks, you know, which we have a dual track system, stupidly, in order to complicate things for -- you know, for people

generally.

CHAIRMAN BABCOCK: There's a ringing endorsement of the system. Justice Duncan.

HONORABLE SARAH DUNCAN: But I think the Legislature has at least implied that it is accelerated by stating that the application has to be filed not later than the 10th day after the date an interlocutory order under (d) is --

PROFESSOR DORSANEO: It clearly intended for it to be, but the difference between accelerated and not accelerated is a matter of months. It's not a big deal. I mean, it's like --

HONORABLE SARAH DUNCAN: It is in our court.

PROFESSOR DORSANEO: Well, if you treat it that way, it is, and I guess your other cases just kind of sit there.

HONORABLE SARAH DUNCAN: That's right.

PROFESSOR DORSANEO: Which is debatable about whether you're treating it the right way.

HONORABLE SARAH DUNCAN: Well --

PROFESSOR DORSANEO: Maybe not in your chambers it's debatable.

CHAIRMAN BABCOCK: It's a one-sided debate in her chambers.

PROFESSOR DORSANEO: Yeah.

HONORABLE SARAH DUNCAN: In our court if it is an accelerated appeal or any other one of a number of other precedential type cases it gets different treatment.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: It seems that I may be the only one here that's arguing against labeling it accelerated, and I just say move on if I'm the only one that's said anything about it.

PROFESSOR DORSANEO: I labeled it accelerated.

HONORABLE TOM GRAY: There's at least one other.

MR. MUNZINGER: Doesn't Rule 28 mandate, 28.1 mandate that it be considered an accelerated appeal by definition? First sentence.

CHAIRMAN BABCOCK: That was the point Buddy made.

MR. MUNZINGER: It says, "An appeal from an interlocutory order when allowed will be accelerated." I don't think there is any choice about it unless you amend Rule 28.1.

MR. GILSTRAP: Which we may do. We may do that. That's what we're talking about.

PROFESSOR DORSANEO: Okay. Let's put it in 28 and just go onto what it is that we're talking about.

MR. LOW: Okay.

CHAIRMAN BABCOCK: Is everybody okay with that? That makes sense to me.

PROFESSOR DORSANEO: All right. So that takes us to whatever we're going to call it, petition for permission to appeal, application for permission to appeal. 25.3, 28 point something. Okay. It's on page four, and just put outside of your mind whether it's going to be 25.2, 25.3, or 28, but I'm going to draft it to put it in 28, so it will be 28 something, and I guess we'll have to decide whether it's a petition or an application.

CHAIRMAN BABCOCK: An "appition."

PROFESSOR DORSANEO: Huh? What?

CHAIRMAN BABCOCK: An "appition." Combining the two words.

PROFESSOR DORSANEO: Yes, thank you for that. (a)(1). Now, we talked about this a lot last time, and I recrafted (a)(1) to make it plain that we're talking about any party to the trial court proceeding being able to file this thing. It's called a petition here for permission to appeal with the clerk of the appellate court that has appellate jurisdiction over the action.

Jane Bland I think suggested that kind of language. That language also with respect to the appellate court or the court of appeals that has

jurisdiction over the action is taken from the statute verbatim, and to me the issue remains, although we voted on it last time, as to whether we're going to let any party to the trial court proceeding seek permission to appeal even if that person won or whether we're going to restrict it to losers.

I mean, if you don't want to debate that again or talk about it again, that's fine with me. I was in the minority on that. I don't think anybody should be able to do it, but arguably the statute without addressing the question permits that. It just says "if application is made to the court of appeals." It doesn't say "by somebody aggrieved," and who knows whether the Legislature meant that anybody could do it or whether the normal principles would apply.

CHAIRMAN BABCOCK: Tipps has got a comment on that.

MR. TIPPS: Well, I have a comment on that, but before I get there, I would suggest a change in some of the language, Bill, just because I think the way that it's written is a little confusing in that this first introductory material suggests maybe that you have an appeal as of right under section 51.014(d), which I know is not the case.

To get to the point, I would suggest that we

replace the words "that is not otherwise appealable as of right in accordance with," with the words, "pursuant to," so that we're simply saying to request permission to appeal an interlocutory order pursuant to section 51.014(d)(f). That's what we're talking about, and I just found when I first read it I was confused by the language, though I know you took that out of the statute.

PROFESSOR DORSANEO: Yeah. That's fine with me. I took it out of the statute on the assumption that that would provide clarity rather than confusion. If it provides confusion rather than clarity I would certainly agree with the change as you suggest as a change --

MR. TIPPS: No, it doesn't change the subject. I just found that to be an improvement. With regard to the substantive question that you've raised, I agree with you that it seems odd that a winning party would have the right to perfect a permissive interlocutory appeal and that while some court someday may well come to the conclusion that that's possible, I think it's probably wrong for us to prejudge that issue by using the word "any party" in this rule; and I would suggest that we replace the word "any" with the word "a" and simply leave open for decision by a court at some later day whether or not a winning party has the right to perfect an appeal. I mean, and I say that knowing that we voted before that a winning

party should have the right to do that, but I think we should revisit that.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN PATTERSON: I second that, and did we actually have a vote on that issue? Because I think that is the type of issue that may have unintended consequences. I could see how it could influence, extend proceedings, and if you don't agree with me to appeal I'm going to appeal anyway, and it's going to be a --

PROFESSOR DORSANEO: There was a vote on it.

HONORABLE JAN PATTERSON: There was a vote?

PROFESSOR DORSANEO: And it was relatively close, but I think it was something like 14 to 10.

HONORABLE JAN PATTERSON: Well, I think the Saturday group is particularly devoted and conscientious and inciteful, and I would urge that we revisit that.

CHAIRMAN BABCOCK: I think it happened on Saturday last time.

PROFESSOR DORSANEO: But she means this Saturday.

HONORABLE JAN PATTERSON: It was a small Saturday, though, when all the judges were gone, wasn't it? That was the conference.

CHAIRMAN BABCOCK: That may be it. Richard and then Judge Bland.

MR. ORSINGER: I would endorse Stephen Tipps' recommendation on saying that to request permission under the provision fixes it because I'm concerned there may be some statute somewhere that permits an accelerated appeal that's not mentioned in the --

PROFESSOR DORSANEO: There is not.

MR. ORSINGER: There is not?

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: As one of the vigorous dissenters to that last vote, I think that Stephen's suggestion is great because that leaves, I guess, the argument, how untenable it may be, that the winning party could perfect the appeal, so we're true to our earlier vote, but we don't incorporate it into the rule that any party can appeal, win or lose.

PROFESSOR DORSANEO: I'm happy to change it, and I will assume that the change means that only the winning party can appeal, for the record.

HONORABLE SARAH DUNCAN: For the record, I don't think that's what it says, as one of the people with that untenable position. The statute says it's passive. It says "application must be made."

PROFESSOR DORSANEO: True.

HONORABLE SARAH DUNCAN: And let's just leave it open and let the courts decide.

MR. GILSTRAP: I wasn't here for that debate, but what difference does it make since everybody has to agree?

HONORABLE JANE BLAND: Right.

MR. GILSTRAP: It seems like it's kind of a pointless debate.

CHAIRMAN BABCOCK: And one could imagine, I would think, a circumstance where everybody agrees, the parties agree and the judge agrees, and for whatever reason, let's say the losing party has got limited resources on a contingency fee, and then to say to the winning party, "Hey, you know, you're getting paid by the hour. You know, you've got the big bucks, why don't you take the laboring oar on this thing" and --

HONORABLE JANE BLAND: "You be the appellant"?

CHAIRMAN BABCOCK: Huh?

HONORABLE JANE BLAND: "You be the appellant"?

HONORABLE JAN PATTERSON: The applicator.

CHAIRMAN BABCOCK: "You be the applier." "You be the applicant." And you would say somewhere in your briefing that, "Hey, we won in the court below, but we need to know whether this is right because we agree with the losing party below that the case will be

materially advanced if you decide this question for us."

PROFESSOR DORSANEO: Is everybody happy with "pursuant to section" blah-blah "a party"? I'm happy with it.

MR. BOYD: Here, here.

MR. MUNZINGER: Yes.

PROFESSOR DORSANEO: Next subsection? The next subsection, the 10-day requirement comes from the statute. 51.014(f) says that the application must be filed not later than the 10th day after the date an interlocutory order under subsection (d) is entered, and I think it's clear enough when it says, "The petition must be filed not later than the 10th day after the date a district court signs a written order granting permission to appeal" because that's what subsection (d) is about.

One court of appeals, the Dallas court of appeals, I believe, in DB concluded that the 10 days would run from the interlocutory order rather than from the order granting permission to appeal the interlocutory order. That seems clearly wrong to me on the face of the statute, and I think all of the other courts of appeals have interpreted the statute correctly to say that it runs from the date of the subsection (d) order, and that's what this (a)(2) is talking about without itself mentioning subsection (d). And I think it's clearer not to mention

subsection (d) than to mention it, but --

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: The next sentence, which is not on the face of the statute, really, I think -- and Justice Duncan can speak to this -- comes from the Stolte case, the idea that an appellate court can grant an extension of time for filing this petition, which I think the Dallas court ruled otherwise, and I think at the committee discussion last time, you know, at least the vast majority of people concluded that if you file this petition late that you ought to be able to move for an extension of time under the ordinary rules.

Now, the ordinary rules don't exactly work by cross-reference here, because 26.3, where the ordinary rules appear, talks about a notice of appeal only; and it was my judgment to just put it right here rather than to cross-refer to 26.3 and to amend 26.3. Otherwise, this is, I believe, identical to 26.3 because the language was copied from 26.3, with the only change being to file the petition rather than to file the notice of appeal. So that's my recommendation for the timing of the filing of the petition or application for permission to appeal.

CHAIRMAN BABCOCK: Okay. Yeah, Pam.

MS. BARON: Bill, is this a larger issue beyond this particular appeal?

PROFESSOR DORSANEO: Always.

MS. BARON: Well, I think that the Dallas court of appeals in a number of different kinds of contexts has said that if a -- there is a deadline in a statute for an appeal, that you cannot get an extension under the civil -- under the appellate rules. Is that correct?

PROFESSOR DORSANEO: DB says that, yes.

MR. GILSTRAP: That's what I was referring to. When we rewrite 28 we need to make it clear that we need to overrule those cases where if it's a -- no, I mean it. If it's a statutory appeal where you only get 10 days to appeal a termination or something like that and the Dallas court says, "We're not going to give you an extension," that needs to be changed, and we can do that in rewriting that rule.

PROFESSOR DORSANEO: Well, we discussed that last -- in August at least in talking about these termination cases where game is over after the accelerated timetable runs, 20 days runs.

MR. GILSTRAP: Yeah, 20 days. Yeah.

PROFESSOR DORSANEO: I looked at that, and I planned to try to draft that, but I had too much else to do and was not able to get that done, so I apologize for not working on that some more. Maybe that's part of the

next project.

MS. BARON: Yeah. I don't think we have to resolve it now, but I think we need to -- it is a problem for a lot of people.

PROFESSOR DORSANEO: If anybody wants to volunteer to do a draft of that and send it to me I would be perfectly happy to take the second leg of the race on that.

CHAIRMAN BABCOCK: Sounds like Pam wants to do that.

MS. BARON: I'll do that.

CHAIRMAN BABCOCK: Jeff.

MS. SWEENEY: That will teach you.

MS. BARON: Yeah.

MR. BOYD: It seems to me that the question of the right to permissive appeal under this statute and proposed rule is not a question of the right -- not so much a question of the right of the parties as it is a question of the power of the court to hear -- to have jurisdiction over an interlocutory appeal; and you know, if somebody takes an interlocutory appeal when there's no right to do so, it's a lack of jurisdiction that keeps the appellate court from hearing it; and the courts only get the jurisdiction under the Constitution and the statutes, all of which is to say I think that if the statute says

the appellate court may permit an appeal, but only if application is made within 10 days, then we can't by rule extend that period. I think the statute governs, and the rule is not going to trump the statute.

CHAIRMAN BABCOCK: No, I think that's right. And I think Frank's point was that the Dallas court of appeals opinion, which had shortened time under the rule, and --

MR. BOYD: But what I'm saying is what we've said in this rule is that the appellate court can extend the time --

CHAIRMAN BABCOCK: Oh, I see what you're saying.

MR. BOYD: -- for 15 additional days.

HONORABLE SARAH DUNCAN: He's agreeing with the Dallas court's opinion.

MR. BOYD: And I'm agreeing with the Dallas court's opinion. I haven't read it, but --

PROFESSOR DORSANEO: Oh, you would like it.

MR. BOYD: I think it's really a separation of powers issue, and I think if the Legislature says you have jurisdiction for an interlocutory appeal if an application is made that meets these requirements and is submitted within 10 days, the court doesn't have power to say, "You know what, it wasn't within 10 days, but we'll

go ahead and assert jurisdiction."

CHAIRMAN BABCOCK: I see. I misunderstood.

MR. LOW: But that's not true. Anything that -- under the Government Code if we pass something that's inconsistent with a state statute and the Legislature does not do something within, what, 60 days, then what we do trumps the statute.

HONORABLE BOB PEMBERTON: You can -- that's right. You can specifically overrule procedural statutes, if you want to get them mad at you.

MR. LOW: Well, now, wait. Now, wait.

HONORABLE BOB PEMBERTON: That's kind of been our experience.

MR. LOW: Wait. We did it not long ago. I've forgotten, on something, but you go to them first.

CHAIRMAN BABCOCK: We thought about doing it. We haven't done it yet, but we went to the Legislature and told them and asked them if that was okay.

MR. PEMBERTON: But, Buddy, you left about 6:00 p.m. that night. Alex and I and some others were there 'til about --

MR. LOW: Well, and maybe I went to deer horn after that, too, but we have -- usually the process is to go to the leaders in the Legislature and feel them out, and they don't care about that, just --that can be

done.

CHAIRMAN BABCOCK: It should be done sparingly, though.

HONORABLE BOB PEMBERTON: Right. That was my --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I'm not sure whether we need to debate it that hard in connection with this appeal since everyone is agreeing to the appeal. You can even ask the trial judge "Don't sign the order for a few days, give me time to get my paper work ready." I mean, in this context it's really not that big a deal.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: That was my point in the Stolte opinion --

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SARAH DUNCAN: -- is, okay, fine, we say, as the Dallas court did, that you don't get a motion for extension of time to file your notice of appeal. So you didn't do it timely. We're going to dismiss your appeal. You go back to the trial court, who will sign a new order, and you will come back up, and that to me just seems absurd.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR DORSANEO: I think the Federal circuits are kind of split on whether you can do that or not, but if we don't put it in here, we're just going to leave --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- this for court determination, and I think if anything the courts of appeals are asking the Supreme Court to provide a rule that will keep them from having to mess with all of these details.

HONORABLE NATHAN HECHT: Well, I think it's worthwhile since the Legislature is about to convene, to ask them to amend these provisions to include county courts like the rest of 51.014 applies to and to provide for an extension of time.

HONORABLE SARAH DUNCAN: If that's going to be done, I think it would be helpful to get these on -- if they are going to be accelerated, to get these on the same track in terms of perfection that other -- because right now we've got three tracks. We've got ordinary appeals, accelerated appeals from other 51.014 orders, and then this 10-day track, which is not in -- and then we've got termination cases. I mean, that's a bigger project than they want to take on, I'm sure, but if they could just get the 51.014 appeals on the same track or let us put them on

a track.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: You could finesse the jurisdictional issue by giving the appellate court the power in this rule to amend -- to allow amendments or supplementation of the petition with good cause or without good cause, and that way you finesse the 10-day time period, but you've allow the appellate court to allow full briefing, et cetera, and you've not run into the constitutional jurisdictional question which Jeff raises which I think is right on. I think it's very clearly a separation of powers issue.

HONORABLE SARAH DUNCAN: The problem is that nothing was filed within 10 days, so there is nothing to amend.

MR. BOYD: The appellate court can't do anything.

MR. MUNZINGER: I'm not sure that that would be true, though.

HONORABLE SARAH DUNCAN: Well, I'm just talking about my case. Nothing was filed in the 10 days. It was filed like on the 12th day, I believe.

MR. MUNZINGER: Yes, but for this rule to apply to allow an extension there would have to have been an original motion filed, an original petition filed.

HONORABLE TOM GRAY: But the original petition could be filed in days 11 through 25 with a motion for extension --

MR. BOYD: Right.

HONORABLE TOM GRAY: -- and then be considered timely back to the first 10 days, is the way the mechanics of it have gone.

CHAIRMAN BABCOCK: Sarah, what was the excuse for not filing it timely in yours?

HONORABLE SARAH DUNCAN: These were just ordinary people who were not Bill Dorsaneos or Chip Babcocks, who were not overly familiar with the statute, and they --

CHAIRMAN BABCOCK: Just missed the time.

HONORABLE SARAH DUNCAN: They thought it was just like an accelerated appeal, I think, but I don't really know what they were thinking.

CHAIRMAN BABCOCK: They didn't try to justify it. They just said, "Here we are, and it's within 20 days," and you said "No, 10 days."

HONORABLE SARAH DUNCAN: I said we're going to imply a motion for extension for time under Berber.

MR. GILSTRAP: That's what often happens in these cases with short dates, like termination cases. You don't get appellate specialists, you get regular lawyers;

and in cases like, say, termination the consequences could just be awful.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: I mean, we need to -- if we can fix that, we need to try.

CHAIRMAN BABCOCK: Jeff's right, though. I mean, the statute does say "appellate jurisdiction." I mean, it's not fuzzy about it. It says "appellate jurisdiction." Well, this is making my head hurt. Let's take our morning break and be back in 15 minutes.

(Recess from 10:25 a.m. to 10:44 a.m.)

CHAIRMAN BABCOCK: Bill, because the Court wants some instruction on the other agenda item, which is the precedential effect of decisions in appeals that are transferred, we've only got about 15 minutes to go through this stuff, so let's focus on what we have not already agreed on before, and then we also need to spend five minutes talking about Chief Justice Radack's other request about harmonizing the TRAP rules and the civil procedure rules on certificate of service, and that's maybe not as clear an issue as we might have thought, but --

PROFESSOR DORSANEO: Let me go onto (b) then, putting aside this issue as to whether we can grant an extension of time or whether that's by the board. I think the Court already appreciates that issue in (a)(2).

We went through the contents of the petition at the August meeting, and that didn't prove to be very controversial at that meeting, but what I did in this draft is to simplify that a little bit. (A), (1)(A) and (B), come from the notice of appeal, the companion notice of appeal provisions, if you look at 25.1(d), and you could see the comparable provisions there.

(C) talks about identifying the district court's order granting permission to appeal, stating the date of the order and attaching a copy. (D) says that the petition itself should state that all parties agree to the district court's order. (E) identifies the written order sought to be appealed by stating the date of that order and attaching a copy.

(F) was the subject of a vote at our August meeting, and it more closely tracks the Texas statute than the alternative Federal language that we took up at that time, but there was a vote to adopt this (F) language, which more or less mirrors 51.014(d) without getting into difficulties with respect to what orders we're talking about. So the contents of the petition provision, which I don't think is controversial, just gives a road map to the parties as to what should be in the petition.

One issue that we did have last time that may be a subject of at least minor discussion here is how

long this petition should be, and in (c), form of papers, number of copies, it's provided that unless the -- a court rules otherwise except by the appellate court's permission, a petition or response or a cross-petition may not exceed 10 pages, exclusive of pages as we normally do.

Last time around we had from the committee, really from me based on discussions at the -- with committee members, and maybe we did have a committee vote, we had "may not exceed five pages." There was a suggestion that we should go with the Federal approach, which a paper may not exceed 20 pages, and we ultimately ended up compromising at 10. I don't know if that's an issue that needs to be debated at this point, but that's the explanation.

Mechanically, if any party timely files a petition, any other party may file a response. It says "or a cross-petition," and I took that from the Federal rule. I'm not completely sure what somebody who agreed to this order would say in a response or what they would say in a cross-petition, but I think we want to leave open the opportunity that somebody would want to say something back that perhaps would anticipate the merits of the appeal. At any rate, this works mechanically.

(d) is new, "Submission of petition; Appellate court's order," and I copied this from the

Federal rule, which provides that the petition and answer will be submitted without oral argument unless the court of appeal orders otherwise. It says, "Unless the court of appeals orders otherwsie, the petition and response or cross-petition will be submitted to the appellate court without oral argument." I think that the appellate judges would need to speak to that as to how they would want this submission to work.

The next sentence simply provides that a copy of the appellate court's order must be served on all parties to the trial court proceedings. I contemplate that the order would grant or deny permission to appeal, dismiss the petition, or tell somebody to do something else as in the -- as in some of these opinions and perhaps in the Stolte case; and I may not have gotten that completely right; but that seemed to me to cover the waterfront; and I more or less gratuitously added "No motion for rehearing may be filed," which you may want to put in there, may not want to put in there. That's not something we discussed at all.

The (e) part is the important part of our discussion in August. Justice Duncan and a number of other people wanted me to change the earlier draft, which said that you don't need to file a notice of appeal, to something like this: "Within 10 days after the entry the

appellate Court's order granting permission to appeal, in order to perfect an appeal" -- and in my mind this is the first time that an appeal would be perfected. That other stuff is just preliminary. "In order to perfect an appeal under these rules, any party to the trial court proceeding" -- and I think it may be better to say "may" rather than "must," although I don't think it's a big deal.

"May file a notice of accelerated appeal with the district clerk or the clerk of the appellate court in conformity with Rule 25.1 together with a docketing statement as provided in Rule 32." And I added here specifically "The provisions of 26.3 apply to such a notice," indicating that you could seek an extension of time to file this notice of accelerated appeal in accordance with 26.3. There may be some controversy about whether you can extend the time to file a notice of accelerated appeal, but that's how it's drafted.

There's an alternative (e) with the idea of each one of these being that after permission to appeal is given then there's a notice of appeal that needs to be filed within some time period and we're back on track without having to rewrite everything about the balance of this proceeding into this rule. "After perfection of the appeal, the appeal may be prosecuted in the same manner as

any other accelerated appeal," and that pretty much -- that pretty much covers my suggestion.

The alternative (e) is not really different from the first (e) except it breaks things down. It may be clearer, may even be better, but given our time constraints we're not going to go through that and just leave it for you to look at.

Is that sufficient, Mr. Chairman?

CHAIRMAN BABCOCK: Yeah. Yeah. That's great. The only thing that -- in the time we have that we might want to talk about a little bit is about this "no motion for rehearing may be filed." How does everybody feel about that?

HONORABLE TOM GRAY: I like motions for rehearing. A lot of times they focus the issue that we may have missed, so I have no objection to one at our level.

CHAIRMAN BABCOCK: Okay. Munzinger.

MR. MUNZINGER: Originally I thought I agreed with Bill, but having listened to what he just said, what's the problem?

MR. LOW: What was the reason for that, Bill? I mean no motions. I mean, it just moves it along faster?

PROFESSOR DORSANEO: I had two reasons, move

it along faster and if a motion for rehearing can be filed then if it's -- then if it's silent, it's unclear, and what rules govern it. And, you know, I suppose we could go to, you know, appellate Rule 49 and say that governs it, but it doesn't really govern it.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: So I'm off -- it was easier to have no motion for rehearing than to build in a rehearing procedure, and it also seemed to me that maybe one would be not desirable.

MR. MUNZINGER: Can you appeal this from an appellate court to the Supreme Court?

MR. LOW: No.

MR. MUNZINGER: Because of the statute?

MR. LOW: Uh-huh.

MR. GILSTRAP: If it's an interlocutory appeal you may be able to.

HONORABLE TRACY CHRISTOPHER: Only after permission, right?

MR. ORSINGER: Doesn't there have to be a dissent or a conflict in this appeal?

MR. LAMONT JEFFERSON: Are we going to be getting opinions?

HONORABLE TOM GRAY: At this stage you're only talking about the --

CHAIRMAN BABCOCK: Permission for appeal.

HONORABLE TOM GRAY: -- permission.

PROFESSOR DORSANEO: I think that's game over if you don't get a mandamus.

HONORABLE TOM GRAY: Because the appeal of the actual disposition of the issue would then be like you were talking about under the traditional rules involving interlocutory appeals, whatever they are.

MR. ORSINGER: Well, we're assuming that we're just going to get a letter or a postcard or something denying, not some kind of written opinion, right?

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: I mean, everyone is anticipating that. What's the point in filing a rehearing if you don't know what the court's reasoning is and you're just saying "Would you look at our petition again?"

HONORABLE TRACY CHRISTOPHER: Right. No motion.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: One quick editorial point. From time to time you say "district court" and then you say "trial court." Because the courts in El Paso treat county courts at law as district courts I would suggest that it would be better if you always said "trial court,"

and that would leave the question up as to whether some other court -- I know the statute I believe says district court, but I'm not sure that the Legislature intended to preclude county courts at law in El Paso from having the same jurisdiction as a district court given our practice and the statutes that authorize that practice, which I understand have been upheld by the Texas Supreme Court.

CHAIRMAN BABCOCK: I think Justice Hecht wants to ask them to change to it "trial court."

MR. ORSINGER: Well, see, if we say "trial court" and then they modified the statute then we don't have to amend our rule.

MR. MUNZINGER: And that's part of the reason why I'm making that recommendation.

PROFESSOR DORSANEO: Do you anticipate doing something with this, Justice Hecht, before then?

HONORABLE NATHAN HECHT: I do.

PROFESSOR DORSANEO: Well, I'd rather just put the district court in as few places as possible.

MR. MUNZINGER: Well, that's my point.

PROFESSOR DORSANEO: I could change it to "trial court."

MR. ORSINGER: Why don't you?

MR. MUNZINGER: I think if you change "district" to "trial" you've not affected the substance at

all, but you've accommodated a subsequent change in the statute and left the issue up to the courts were it to arise.

PROFESSOR DORSANEO: You want me to do that? That's fine.

CHAIRMAN BABCOCK: Yeah, that makes sense to me. Okay. And is the consensus that we're going to leave the sentence in here about "no motion for rehearing may be filed"?

MR. GILSTRAP: Yes.

CHAIRMAN BABCOCK: Is that pretty much what everybody thinks? Sarah.

HONORABLE SARAH DUNCAN: I don't know what everybody thinks.

CHAIRMAN BABCOCK: No, I mean is that what you think?

HONORABLE SARAH DUNCAN: I don't see a point for motion for rehearing on this, on whether to give permission to appeal.

CHAIRMAN BABCOCK: Yeah. Okay. That's good. Thanks, Bill.

The issue that was skipped over, and it's my fault, I misunderstood what Bill said, Chief Justice Radack's -- well, before we go to that, Bill, you're going to bring this back on the agenda next time, and we'll just

finish the whole thing or -- because you've got some more drafting to do on this, right?

PROFESSOR DORSANEO: Yes, I need to make these changes that you suggested and move this over into 28.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: But I think this part of 28, I mean, I'm going to regard as a completed and at least tacitly approved work product.

CHAIRMAN BABCOCK: When we get the redraft and put it into 28 people can look at it. We'll put it on the agenda for next time, and if, you know, something pops out at somebody and they say we should have talked about it, then we'll talk about it. Jeff.

MR. BOYD: But before we leave that issue, there was one discrete issue. The statute talks about 10 days, about the application has to be filed within 10 days after the trial court's order is signed. The rule says after the order is entered.

HONORABLE SARAH DUNCAN: No. That's backwards. I think the statute says "entered" and the rule says "signed."

MR. BOYD: Yeah. I'm sorry.

CHAIRMAN BABCOCK: Uh-huh.

MR. BOYD: We ought to be consistent with

that, and I'm not sure -- I mean, there is a difference. Technically, I guess, a judge can sign an order one day and actually be entered a week later.

CHAIRMAN BABCOCK: That's true.

MR. BOYD: But I would think we ought to be consistent.

CHAIRMAN BABCOCK: We ought to stick with the statute, shouldn't we?

MR. GILSTRAP: We ought to stick with signed.

HONORABLE TRACY CHRISTOPHER: No, with signed.

MR. GILSTRAP: We ought to stick with signed. I mean, everything runs from the date it's signed. There's all this law out there about the difference between signing and entering, but in all the appellate rules it always starts from the date it's signed. That's something that was settled a long time ago, and we don't need to tamper with that if possible.

HONORABLE SARAH DUNCAN: Trying to figure out when an order was entered, I mean, in Federal court entered is it.

MR. BOYD: Signed.

HONORABLE SARAH DUNCAN: But in state court signed is it, and one reason that signed is it is because

it's knowable easily.

PROFESSOR DORSANEO: I'm going to change (e) to say signing, too.

CHAIRMAN BABCOCK: Okay. Hatchell.

MR. HATCHELL: I would like to note for the record just so we don't have a great debate about this later on that the concept of marrying a cross-petition with the notion that this proceeds as in a regular appeal has a tendency to exacerbate the briefing process enormously and implies that every party gets to be an appellant and file an opening brief and an -- and then they have to file an appellee's brief and everybody files responses. I think our court of appeals judges ought to at least think that through and decide whether or not you really want a multiple track system in this agreed motion.

HONORABLE SARAH DUNCAN: I don't. I would specify between -- the more I think, I just want a response.

PROFESSOR DORSANEO: The simple thing for the court to do would be to just say "response" and strike out "or cross-petition."

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: Just to follow-up on the "signed" and "entered" then, if we're going to the Legislature and recommend changes to this, that would be a change to

include on our list.

CHAIRMAN BABCOCK: I think it's already been noted. Richard.

MR. ORSINGER: Don't we have the authority if we specify a change to a statute, do we have the right to change or override it?

HONORABLE NATHAN HECHT: If it's procedural, yes.

MR. ORSINGER: And so this question of signing versus entry is one that would be procedural, and so maybe -- I would be uncomfortable that the rule of procedure uses a date that is inevitablely shorter than the statutory date because then there is going to be a lurking issue in the record on something that's perfected on the 11th or the 12th day; and I would prefer if we're going to do that and we don't get a fix out of the Legislature but we do a repealer, which I think requires us to specify this statute and invoke that authority, right?

CHAIRMAN BABCOCK: Okay. What else? Anything else?

PROFESSOR DORSANEO: No. Let's go onto the next. I've got three things.

CHAIRMAN BABCOCK: The one thing that was my fault, I misunderstood Bill, but Chief Justice Radack had

asked us to look at harmonizing TRAP Rule 9.5 regarding certificate of service with the Rules of Civil Procedure service requirements; and apparently practitioners, at least in the Houston court of appeals, some practitioners are filing certificate of services that does not comply with TRAP Rule 9.5 because they're used to doing it under the Rules of Civil Procedure; and that's causing consternating, so Bill has looked at that and has a recommendation.

PROFESSOR DORSANEO: Well, actually, our committee looked at it, and when we discussed -- and I think we discussed it in the full committee before, and I don't think Chief Justice Radack is taking a position on which rule book contains the information that should be included in the certificate, but 9.5(d) is a certificate that can actually contain information. The date of service, the method of service, hand delivery or whatever, the name of each person served, the address of each person served; and if the person served isn't the party's attorney, the name of the party represented by that attorney.

That language does not appear in civil procedure Rule 21a, but it should, and if we're going to conform the certificate of service in the trial courts with the certificate in the appellate courts, I think the

better route of approach would be to use the certificate that appellate Rule 9.5 calls for. That was done in the recodification draft, I believe, but we never really quite got around to getting that project accomplished, so maybe we can make one small step in that direction and modify Rule 21 or 21a, whichever one is appropriate, probably 21a, and I believe this is a subcommittee recommendation, not just my own view.

CHAIRMAN BABCOCK: Okay. Justice Bland, what do you think, going the direction of the TRAP rule and conforming 21a to the TRAP rule as opposed to the other way around?

HONORABLE JANE BLAND: Well, I'm open to persuasion either way. I just agree with Chief Justice Radack that the two ought to be the same.

CHAIRMAN BABCOCK: Okay. So even though she asked you to carry the water on this, you don't think that they necessarily need to be harmonized?

HONORABLE JANE BLAND: No, I absolutely think they ought to be harmonized. I just am open to persuasion whether they ought to be harmonized with the TRAP rule being the one that is the rule that is in both or the civil procedure rule being the rule in both, but I absolutely agree with Judge Radack that they ought to be the same.

CHAIRMAN BABCOCK: Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: In the effort to save paper and space in our courthouses and/or on our computers, I ask that we maintain 21a and not list the names of the parties, because in a complicated case where there are -- for example, I have a case where there are a hundred defendants. Listing the names of all 100 defendants on a certificate of service strikes me as an incredible waste of effort, time, money, paper, computer space.

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: Well, I think that is the big difference, is that the appellate courts say that when you serve an attorney you need to say who they represent.

HONORABLE JANE BLAND: And their name and their address and the method of service.

MS. BARON: Yeah, I think it's the name --

HONORABLE JANE BLAND: There's a lot of information that's required that's not required by Rule 21a.

MS. BARON: Well, I think that where the appellate court -- I mean, everybody when they have a certificate of service, or at least my experience is that you list the attorney they're serving and their address.

PROFESSOR DORSANEO: Not in Harris County

they don't. It's not really a certificate of anything other than "I complied with the rules."

MS. BARON: Is that right?

PROFESSOR DORSANEO: Yeah. But that's an anomaly. That's not statewide practice. So when you say 21a means what you think it means, it's what it means in Harris County.

HONORABLE JANE BLAND: And in Harris County it's usually "I served by hand delivery," comma, "certified mail," comma, "and," slash, "or facsimile transmission."

MS. BARON: To all parties?

HONORABLE JANE BLAND: "To all parties of record."

HONORABLE TRACY CHRISTOPHER: It's just like a verification that you complied with the rule.

HONORABLE JANE BLAND: It's just saying you complied with the rule by one of the means of service that is allowed by the rule but doesn't specify the means, to whom, much less their address or whom they represent.

MS. BARON: I didn't realize that.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: On filings at the court of appeals in Waco we frequently get the one that has just been referred to, "I certify this was served in compliance

with." Also, from pro se individuals particularly we get a lot of stuff filed that simply says something on the order of "I certify that this was" -- and this is even when there's no certificate of service initially and we threaten to strike the brief if they don't file a certificate of service in compliance with the rule, they will come back and say, "I certify that I hand-deliverred or mailed a copy of this to the clerk of the Tenth Court of Appeals," period, and doesn't say who else.

So I don't take a position one way or the other on which is the better practice. I just will tell you on the anecdotal evidence that by requiring the information we frequently know for a fact that the other party has not been served with a copy of the document.

CHAIRMAN BABCOCK: David Jackson, then Frank, then Richard.

MR. JACKSON: You know, just for my two cents worth, I get a lot of information off the certificate of service before the deposition ever starts. I can plug in the parties that are going to be at the deposition before they get there. So I use all that. In Dallas they put all that stuff in there, and it's very helpful to the court reporter ahead of time to get the style all set up, the appearances all set up, and then as the lawyers come in you're not wasting a lot of time

trying to get all that information.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: My question was what's the purpose of putting the information in the certificate and it's been answered.

HONORABLE STEPHEN YELENOSKY: Meaning what?

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I'd favor identifying who was served and how they were served. I frequently get certificates of service that say that "I've given notice as prescribed by the rules to all parties," so I don't know from looking at the certificate of service what my responsive deadline is and neither does the court, and the other side isn't really taking a position on what it is, and frequently people --

CHAIRMAN BABCOCK: Are you talking about the trial court level or the --

MR. ORSINGER: Trial court level, and so I would prefer in the trial court that the lawyer who's seeking the relief or triggering the deadline will put in the certificate of service enough information that they're certifying what timetable applies, and that works for the respondents who have deadlines running against them, and it's also a representation that for a starting point the court can rely on.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But one of the reasons for it in multiparty cases sometimes there's a breakdown as to, you know, who really -- or who has answered and answers may cross in the mail, so one doesn't know that another one's in, and I guess that way you can truly tell. I look at it to see, you know, that I have and when I see the names and so forth in multiparty cases, so I think it would be more needed in multiparty cases so there wouldn't be a breakdown and somebody is not properly served.

CHAIRMAN BABCOCK: Okay. Let's just give Bill some direction here. How many people think that --

HONORABLE TRACY CHRISTOPHER: Well, Chip, can I say one more thing? I think we have a heavy contingent of appellate lawyers here that perhaps like the rule the way it is with all that information in it, and I really think it would be an incredible waste of paper and effort to put that in on a daily basis on every motion, on everything that gets filed in a trial court level. I mean, even at the appellate level in your brief itself you've got to list all the parties and their addresses and all that information in your briefs all the time. Why do you have to repeat it in the certificate of service?

MR. LAMONT JEFFERSON: Yeah, I was just going to say about the same thing. At least at the trial

court level you don't need it for everything. I mean, you do need -- I don't know if this is the appropriate place to address it, but you do need a master list and everybody goes by a master list of who is representing who when --

CHAIRMAN BABCOCK: Right.

MR. LAMONT JEFFERSON: -- and if there's a change everybody changes it on their word processor, but why you have to certify that every time you issue a deposition notice or send discovery and list everybody out, I mean, that does seem to me to be --

HONORABLE TRACY CHRISTOPHER: And then your cover letter turns into a five-page document instead of a one-page document, and your two-page response to a pleading turns into an eight-page response and --

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE TRACY CHRISTOPHER: -- it's unnecessary.

HONORABLE STEPHEN YELENOSKY: Are you talking about the listing of the parties represented by the attorney or just the listing of the attorneys?

HONORABLE TRACY CHRISTOPHER: The listing of everybody.

HONORABLE STEPHEN YELENOSKY: Okay. So you find it cumbersome even to list the attorneys served. If the attorney is representing a hundred people, obviously

you only have to name that attorney if you drop out No. 3 of the TRAP rule, right? You just name the address of each person, name and address of each person.

HONORABLE TRACY CHRISTOPHER: I'm just talking about multiparty cases. I mean, if you have one attorney for a hundred plaintiffs -- but sometimes you have a hundred defendants with a hundred attorneys.

HONORABLE STEPHEN YELENOSKY: Well, I guess in those instances, though, you could arrange, as you said, to have a master list. I'm a little bothered by certificates of service that don't tell you anything at all. They just say, "I complied with the rules," and I'm sure that's pro forma, and so it doesn't tell me anything when I see those.

CHAIRMAN BABCOCK: Well, if I have a certificate of service on my pleading that says, "I hereby certify that I have served all of the parties of record by hand-delivery this first day of April 2005" that --

HONORABLE STEPHEN YELENOSKY: But some of them don't even say the manner as -- what's your name, Mr. Orsinger -- as Mr. Orsinger just pointed out and, therefore, you really don't know.

MR. ORSINGER: So you get discovery that's due in 30 days, but they really sent it by certified mail, so it's really 33 days, and so you have to go hunt down

the file and figure out from the cover letter or the envelope or something how you received it. It's just aggravating.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Since we're about to get off of this and I just want to mention one other difference, under 21a I think you have to have certified mail and under the appellate rules it's regular mail. So that's another difference we'll have to -- if we're going to make the two the same we're going to have to talk about.

CHAIRMAN BABCOCK: Yeah. Judge Christopher, I don't think we're going to decide anything today, so this vote is not binding in the sense of a consensus. We'll rally all the trial judges to the next meeting.

MS. BARON: Can I add one more point?

CHAIRMAN BABCOCK: Yeah, Pam.

MS. BARON: It may be that the difference is not so much the problem, but the appellate clerk's reaction to the failure to comply with the certificate requirement in the appellate rules may be the problem.

CHAIRMAN BABCOCK: Well, I think there may be some judges on the courts of the appeals that think that the rule is the rule and if you don't comply with the rule then out you go. And that -- that's a problem because, you know, because you didn't do some technical

thing on the certificate of service your whole appellate timetable is going to be affected, which is going to slow down the appeal, it's going to cost a lot of money, you know, so anyway.

Several questions. One, should they be harmonized or should they be, you know, the trial court has one method and the TRAP rules have another? How does everybody feel about that?

HONORABLE STEPHEN YELENOSKY: We like harmony.

CHAIRMAN BABCOCK: We like harmony. Everybody who thinks that it ought to be harmonized raise your hand.

HONORABLE TRACY CHRISTOPHER: It's going to go the wrong way.

HONORABLE LEVI BENTON: It's a conditional vote for yes.

CHAIRMAN BABCOCK: Everybody who thinks they ought to be separate raise your hand.

MR. LAMONT JEFFERSON: I don't know about ought to be separate. Are separate.

MR. MEADOWS: How about can be?

MR. LAMONT JEFFERSON: Can be.

CHAIRMAN BABCOCK: Can be.

HONORABLE JANE BLAND: Take the other vote

first.

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: What's the other vote?

HONORABLE JANE BLAND: About --

HONORABLE KENT SULLIVAN: 21a or the TRAP rule.

CHAIRMAN BABCOCK: Everybody that thinks that 9.5, which is the TRAP rule, is preferable raise your hand.

MR. JACKSON: Tell me which one that is.

CHAIRMAN BABCOCK: That's the more complicated.

MR. JACKSON: The more complicated.

CHAIRMAN BABCOCK: That's the one you like.

MR. JACKSON: The one I like.

CHAIRMAN BABCOCK: You vote for this, okay.

HONORABLE SARAH DUNCAN: We just voted that they should be different.

MR. GILSTRAP: Assuming they're the same.

MS. CORTELL: Is there a middle ground where --

(Multiple speakers at once.)

THE REPORTER: I can't get all this.

MR. GILSTRAP: She's having trouble here.

THE REPORTER: I can't get all of this.

CHAIRMAN BABCOCK: One at a time. One at a time. Orsinger first.

MR. ORSINGER: For the trial purposes I don't feel that an address is necessary, but I would like to have the lawyers and the parties they represent and the manner of service individually listed. I don't care whether the address is in there, and maybe that makes Judge Christopher feel better, but I do want to know how people were served and when their deadlines are.

CHAIRMAN BABCOCK: Okay. The vote was 13 to 11 on that.

HONORABLE SARAH DUNCAN: It was that close.

CHAIRMAN BABCOCK: That close on whether or not they can be different or they ought to be harmonized, so we'll take this up next time, Bill, and I don't think we have much direction for you. We just have to discuss it more. Judge Bland.

HONORABLE JANE BLAND: Let me just say, no matter what your opinion is about a certificate of service, that certificate of service serves the same needs for a trial court as it does for an appellate court; and to have inconsistent rules in the trial court and the appellate court is confusing to practitioners; and until we get one rule for both courts that serves the same purpose and the same needs we're going to have

certificates of service all over the map; and depending on how you as a judge feel, either in the trial court or the appellate court, you know, enforcement of those rules is going to be difficult; and it's going to trip things up, so, you know, I -- please, you know, we ought to try to achieve agreement about what the certificate of service should look like; but just because you're afraid that your version might not carry the day on what it should look like, please don't throw out the need for harmony because really we should have harmony in the two rules.

CHAIRMAN BABCOCK: So we'll sleep on it for a couple of months and I'm sure we'll achieve harmony by the time we get back. Justice Duncan.

HONORABLE SARAH DUNCAN: Picking up on what Pam said and also what Judge Bland said, the appellate rule says, "The clerk may permit the document to be filed without proof of service, but will require the proof to be filed promptly." "May be," and I'm just throwing this out. We don't need to discuss it today, but maybe we need to think about changing that to "must file it, but will require prompt proof."

PROFESSOR DORSANEO: If I'm going to be working on this I'd like to ask the judges who are in favor of or who recognize that there is a problem in big cases to try to think of some way to deal with those big

cases that would not kill so many trees that wouldn't just be a charade.

HONORABLE TRACY CHRISTOPHER: Well, okay. Well, let me just posit this to you. If defendant is sending interrogatories to the plaintiff, it would be important to state the plaintiff's name and address and method of service, but it wouldn't matter that he had sent a copy of those interrogatories to a hundred other defendants, or you know, in terms of other than he sent them. He's supposed to send them, but it wouldn't matter when those other defendants got it for the certificate of service point of view. Only the person who has to respond to something would care when they got it or how it was served on them.

CHAIRMAN BABCOCK: Nina and then Munzinger and then we're done.

MS. CORTELL: Can't we just include a clause that says "unless the court otherwise provides" so that when you have these mega cases like a royalty dispute or whatever where you have 200, 300 parties, and the court in that case can establish a protocol for the certificate of service? I think we could work around it by giving the trial court some latitude.

PROFESSOR DORSANEO: That's what I had in mind for somebody to tell me, is how to fix the trial

court rule to deal with these complex cases which may not be extraordinary in Harris County, but they are certainly not typical of cases generally.

CHAIRMAN BABCOCK: Richard Munzinger, last comment.

MR. MUNZINGER: I would only just say that I don't think we should have differing requirements for service in the trial court based upon the nature of the pleading or instrument served. That's not simple. It's not something that practitioners can follow easily, and it seems to me that Richard Orsinger's observation that the key point is when was service accomplished and how was service accomplished is what is important to courts and practitioners because that determines when responses are due and holds the person making the service to his promise, which is prima facie proof under the rules. It makes it enforceable.

CHAIRMAN BABCOCK: Chief Justice Johnson from Amarillo raised an issue to Justices Jefferson and Hecht about whether there should be a rule requiring a court of appeals that has had a case transferred to it from another district court of appeals to apply the precedent of the transferring court to the extent it is different than the law of the court to which it is transferred.

So if I have a case in Houston where there is a case on point that was dispositive to the trial judge in the court below and the case is transferred to Amarillo and Amarillo has either no law on the subject or a law that conflicts with the dispositive Houston decision, that the Amarillo court would be required to apply the Houston precedent. And Justice Hecht has to talk to the Chief Judges tomorrow maybe and would like some of our thoughts on this subject. Bill.

PROFESSOR DORSANEO: Well, we don't have a rule on this subject at all at this point, and it may be advisable for us to study it to see whether we need a rule that talks about that and perhaps some other things, and I don't know whether in the conversations that have been held so far whether this is some sort -- this would certainly apply to transferor court's interpretation of a particular statute or consider that court's interpretation of a particular statute rather than going by, you know, what maybe the rule in the court of appeals district where the transferee court is.

My own view is that both courts of appeals that are just working on cases that haven't been transferred to them and ones that receive transfers need to take into account both their own precedent and the precedent of other courts of appeals on particular issues,

such as what the sue and be sued language in the local Government Code means with respect to waiver of sovereign immunity, and that's what makes the most sense to me.

I don't think these issues come up all that much to begin with, but I do think that it would be better to deal with it carefully in a rule than to leave it to the Legislature to try to figure out, you know, on its own on the basis of testimony or whatever. That would be my strong view about whether it should be a rule or a statute.

CHAIRMAN BABCOCK: Okay. So that's the issue of whether or not it would be a rule or a statute. On the substance it does seem to me to be odd that you file a motion for summary judgment in, just to pick, the Harris County trial court and you rely upon a Houston court of appeals decision from the First or the Fourteenth which says, "Hey, summary judgment is appropriate here" and the trial judge in reliance on that, feeling bound by that decision, makes that decision. Then the case gets transferred to some other district, and that court of appeals says, "Well, we don't think so, because out here we approach that point of law differently," so they reverse the trial judge, and the trial judge, I would think, would feel aggrieved as would maybe at least one of the parties.

PROFESSOR DORSANEO: That may be an anomaly, but the law in Texas is not different in different places. It's the same. It may well be that there are disagreements about what that same law is.

CHAIRMAN BABCOCK: I'm not talking about statute. I'm talking about case law.

MR. ORSINGER: No, he's talking about justice. He's talking about law in the absolute sense. He's a positivist.

CHAIRMAN BABCOCK: Judge Sullivan.

HONORABLE KENT SULLIVAN: The practical problem is one of predictability in my view and certainty; and the parties would have expected the Houston rule, in your hypothetical, the Houston rules to apply; and it seems to me completely inefficient and unfair to suddenly inject a rule that would not have been predicted or expected by anyone. I mean, you may as well for the purpose of workload equalization transfer the case to Alabama and let some Alabama court apply Alabama law, I mean, because it is equally unpredictable in the contest of the hypothetical that you've given. I just think it's unworkable.

PROFESSOR DORSANEO: The trial court should have considered Amarillo law, too, not just Houston law because Houston is not a separate country.

MR. MUNZINGER: Well, I don't know what happens if Houston and Amarillo are different on the same point. And that happens. It happens fairly frequently.

HONORABLE KENT SULLIVAN: And that was the hypothetical.

MR. MUNZINGER: I understand, and the point -- Mike Hatchell and I were in a case together some years ago; and he, I thought, very persuasively made an argument to the court that if the law is different in Corpus Christi than in El Paso, you have parties who are confused as to what the law of the state is; and so here I'm a litigant in El Paso, Texas, and I file a motion. I go up to the court. The court transfers me to Dallas, and the Dallas court applies the Dallas rule. I'm not being treated the same as other litigants in El Paso, and other litigants in El Paso are confused as to the value of the precedent within the Eighth Circuit jurisdictional points. It's a very serious -- I won't say it's a very serious problem. It is a real problem and not something to be laughed at or pushed aside, in my opinion.

CHAIRMAN BABCOCK: Carlos and then Frank and then Justice Pemberton.

MR. LOPEZ: I'm assuming that Linda Thomas -- well, I guess it won't be the court of appeal justices' view on this, but I remember when I was on the district

court in Dallas it was pretty -- I don't know if it was unanimous, but it was pretty well the majority view that it was very frustrating that you didn't know if your -- and back then they were transferring more often than perhaps now, but, you know, it's pretty frustrating as a trial judge to get reversed by the Eastland court of appeals under Eastland law when you were right under Dallas law, and it's not a hypothetical. That's real.

It didn't happen to me. It happened to another judge, but she was pretty upset about it. It didn't happen very often, but if I were the litigant, I mean, if it's fixable, why not fix it.

Now, if I'm the court of appeals in Eastland I'm not real thrilled to have to learn -- you know, go back and do this sort of due diligence about applying Fifth Court law, so I could see both sides of it, but philosophically to me it doesn't make sense. Unless you completely agree with Professor Dorsaneo that philosophically the law is the law. If you disagree with that then it doesn't make much sense to have, you know -- or maybe there is a way to let the people know where their case is going, and then you know --

CHAIRMAN BABCOCK: Ahead of time.

MR. LOPEZ: And the lawyers can brief it.

CHAIRMAN BABCOCK: Before there is an

appeal. Frank.

MR. GILSTRAP: The practical problem is a real one, and it's worse on the criminal side. There's a case out of Waco, I think, Jaubert. Am I saying it, right, Judge? Jaubert against state in which a 60-year prison term, depending on which court the defendant wound up was transferred to, but the fix that we're talking about is a real problem. We're assuming that courts of appeals, they often follow their own precedent, but there is no rule of law requiring a panel in the Fourteenth Court of Appeals to follow a prior panel opinion.

In the Federal courts where they have dealt with this problem it's different. Let me give you an example. And the circuits don't transfer cases, but the district courts do. If I have a case that's filed in the central district of California, governed by Ninth Circuit law, transferred to the Northern District of Texas, governed by Fifth Circuit. It goes up on appeal. The Fifth Circuit is going to have a rule as to which law it applies, and it may well apply Ninth Circuit law, but it can know what Ninth Circuit law is because the Ninth Circuit, and I think all the Federal circuits, are strict stare decisis courts. A panel in that court cannot overrule a prior panel decision.

If I go to New Orleans and I have a case and

I have a 1995 opinion and I cite it to the court and the other attorney pulls out a 1926 memorandum opinion that everybody has overlooked and cites it, the Fifth Circuit must follow the 1926 opinion or it's got to go en banc; and if it doesn't, it's got to give a good reason why. It's a big deal. It is not a big deal in state courts. As far as I know, and I may be wrong on this, state courts generally don't go en banc to reconcile panel --

PROFESSOR DORSANEO: Except in San Antonio.

MR. GILSTRAP: What's that?

HONORABLE SARAH DUNCAN: I was going to say, we do.

HONORABLE JANE BLAND: We do, too.

MR. GILSTRAP: Well, I haven't seen much of it, and surely I don't think anyone will say there is any rule of law that says that panel A in the Thirteenth Court has to follow a 15 year-old decision of panel B, and until we have that rule it makes no sense to say, well, when you transfer that case to the Tenth Court you've got to follow the precedent of the Fourteenth Court because the Fourteenth Court doesn't have to follow its own precedent. Until we fix that problem it makes no sense to impose the rule on the transferee court.

CHAIRMAN BABCOCK: Justice Pemberton.

HONORABLE BOB PEMBERTON: We jumped a little

bit beyond where I was, but I was just going to point out this transfer and the law changing, lack of predictability, comes up and has happened to us as a practitioner in appeals after a remand. You go up in court of appeals A. You go down and you come back up in court of appeals B, and arguably they conflict, and you have law of the case issues, and so it's a real problem for practitioners on predictability of the law.

While there -- to respond to what Frank said, while there may not be a rule of law that one panel on a court follows another, I would suspect most courts like ours have strong traditions or just practices of following their own opinions and such that I think it would make sense despite the lack of that limitation to have some kind of clarity.

CHAIRMAN BABCOCK: Okay. I think Orsinger has had his hand up for a long time. Buddy and Stephen has and then Judge Benton and then Justice Duncan unless, Justice Duncan, you have something that kind of fits right here.

HONORABLE SARAH DUNCAN: Well --

CHAIRMAN BABCOCK: You want to yield to Sarah here, Richard?

MR. ORSINGER: Sure.

HONORABLE SARAH DUNCAN: Well, just two

points. One, our motion for en banc reconsideration actually contemplates --

MS. SWEENEY: Can't hear you.

HONORABLE SARAH DUNCAN: Our motion for reconsideration en banc I think implicitly contemplates that panels will disagree because it says one of the reasons for en banc reconsideration is a conflict between panel opinions.

No. 2, I actually have had this case, and my views on it are in my dissent, so I'll shortcut that. I think it's terribly unfair to the litigants. We reversed -- it was a --

HONORABLE JANE BLAND: Metro.

HONORABLE SARAH DUNCAN: -- contort question on --

MR. GILSTRAP: IBM case.

HONORABLE SARAH DUNCAN: The IBM case, and the trial judge was actually a Galveston case, was the trial judge in the Delaney case in the Supreme Court on contort issues, so he knew exactly what he was doing. He had been upheld in a similar -- on a similar issue, a similar kind of reasoning, and the parties had no idea that they were going to go to San Antonio and briefed it for the Houston courts. Our court had disagreed with the Houston courts on that issue, and it wasn't even a San

Antonio judge. It was a visiting judge that wrote that opinion.

I think it's terribly unfair. I think it's terribly unfair to the litigants, but I would also add that from everything I hear from lawyers and other judges and from legislators, there is an accountability question. People feel like we elect our judges. We like what they're doing, we re-elect them. We don't like what they're doing, we unelect them, but we have no control in Houston as a voter who you-all are going to get in San Antonio, and we wouldn't re-elect those people because we didn't like what they did in the IBM case. So it's not just fairness, which I think is paramount, but I think there's also an accountability problem.

CHAIRMAN BABCOCK: Richard.

HONORABLE SARAH DUNCAN: Thank you, Richard.

CHAIRMAN BABCOCK: Then Buddy.

MR. ORSINGER: This problem is not escapable with the First and the Fourteenth Court and you have random assignments between those two courts, so we are going to have to live with this problem occasionally when those two courts disagree with each other.

We also have a case -- we have one personal injury lawyer in Corpus Christi who has an arbitration clause in his plaintiff's PI contract that the Corpus

Christi court of appeals says is not enforceable, but the identical contract has been held enforceable by the San Antonio court of appeals, so that lawyer has a contract that's enforceable in the Thirteenth District and not in the Fourth District, and there's nothing he can do about that until the Supreme Court grants review and clarifies that.

There seems to me to be an anomaly -- well, I do not believe as a matter of jurisprudence that one court of appeals is bound by the ruling of another court of appeals, and I think probably most judges would agree, although if they don't, I'd like to hear about that. I think that the whole idea of 14 courts of appeals with one Supreme Court, particularly with our constitutional and statutory history that the role of the Supreme Court is to resolve conflicts between court of appeals, is that we expect conflicts to develop and that we expect our Supreme Court to resolve those conflicts and that Bill's view -- and I admire Bill greatly and respect all of his opinions. I think his view of the law being one thing is outvoted. I think that 150 years ago that was the prevailing view. I think this is a philosophical issue as to whether there is one law that we all see or whether we're all developing the laws as we see it from our own respective viewpoints.

And let me say that the anomaly to me of a

court of appeals saying on a case we got out of El Paso the law applies in this way, on a case we got out of Houston the law applies this way, but in our opinion the law is really something different on a case we get out of San Antonio, so now you have one court of appeals that says the law is two or three different things; and to me that is also an anomaly; and I frankly think that making a judge sign an opinion and decide the case on the basis of law that they don't believe when they are courts of equal jurisdiction is as offensive or perhaps to me more offensive than offending the expectation interests of the trial judge and the litigants.

MR. GILSTRAP: The feds do it all the time. The Federal courts do it all the time.

PROFESSOR DORSANEO: Yeah, but the Federal system is a completely different system that's not a system. It's an aggregation of different units masquerading as a system. But we do have a system, and there are two practical points from my perspective. One, courts of appeals should conscientiously reconsider their own views whenever another coordinate court has come to a different viewpoint and not just simply say, "Those people are in El Paso and we don't really count them as part of this place anyway." I think that if it's some sort of a shortcut to coming to a particular conclusion, we've

already been through that, that that's bad judging.

No. 2, in a state as big as Texas if we start thinking that the law is different in different places and that's all right unless and until the Supreme Court resolves the problem then that's just a bad thing. It's bad for the public that may be involved in litigation out in El Paso for the rules to be different in El Paso than they are in Dallas or Houston when the parties may not be from El Paso or have any other connection with El Paso than some particular business interest.

I think it's not just some old time religion that the law should be the same everywhere. It's a fundamental concept of having one unified state with a system of laws that is applicable generally, and if I have to I'll say it's Saturday morning and there aren't enough people here to give this the right kind of consideration, if that will work, because it would be a terrible thing to do what you're suggesting.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I totally agree, because each judge is sworn to uphold the laws of the state of Texas. Now, in Beaumont we've got four new judges. Say there's an opinion and they philosophically are different from the judges we had before. Now, you take an opinion that was written by some of their predecessors and they don't like

that, they don't think it's the law of the state of Texas, are they bound to follow that opinion when it's some judges they didn't agree with?

The Supreme Court, if they have written a decision and I go up there, can I rely that the Supreme Court cannot overrule a prior decision of the Supreme Court? I mean, nobody can guarantee what a court ought to do other than what those three judges feel should be and is the law and the right thing to do.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Well, my two cents are that I think the paramount interest here is the interest of the litigant, and the litigant pays lawyers and makes decisions at the trial court level with the expectation that, with the exception of the two Houston courts, he knows where the case is going to go on appeal, and it's really the system that's letting the litigant down when cases get transferred because for whatever reason our system can't accommodate the litigant's reasonable expectations.

And while there's obviously some anomaly involved arising from the fact that at any given point in time we may well have the Waco court thinking that the law is one thing and the Tyler court thinking that the law is another thing; but it seems to me that the right

resolution here is to protect the legitimate expectations of the litigant; and if the litigant has a ruling that would be affirmed in Dallas and the case gets transferred to El Paso, then I think the El Paso ought to think like a Federal court thinks and realizes it's sitting in that particular situation as though it were the Dallas court and it ought to follow the Dallas court's precedence.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I agree with what Stephen said, but I think there is another solution. When the Supreme Court transfers cases for work equalization purposes they don't really care what case it is, and what we ought to do is --

HONORABLE NATHAN HECHT: Let me just tag onto that and say every effort is made to be sure that cases are not selected.

HONORABLE LEVI BENTON: Right.

HONORABLE NATHAN HECHT: It's completely random, after the fact.

HONORABLE LEVI BENTON: Right. Okay. So for that reason why not have a provision that lets the parties represent to the transferee court that your law and the law in the transferor court are in conflict. To protect the reasonable expectation of the litigants, transfer the case back and ask the Supreme Court to select

another case.

HONORABLE NATHAN HECHT: Well, I suspect that will be the new rule rather than the exception.

MR. LOW: Yeah.

HONORABLE LEVI BENTON: I mean, they would have to -- excuse me, Justice Hecht, but they would have to set out in the papers it's case X and case IBM which are in conflict, and these issues are implicated in this case.

HONORABLE NATHAN HECHT: The transfer I don't think is favorable of the litigants, is my sense of it. They would always rather go where they live. Now, when they're litigating in opposite sides of the state maybe that's not true.

HONORABLE LEVI BENTON: Well, but, I mean, if a lawyer signs a paper that represents that these are -- these are the issues at issue and these are the cases in conflict, one would hope that that would be a candid and truthful statement. I mean, there are consequences for signing papers that are not truthful. I mean, that to me is an easier solution than the debate we've had these last 30 minutes about what to do because it's just the equalization is not -- there's not an interest in a specific case. Let's just equalize the workload.

CHAIRMAN BABCOCK: Yeah. Where are we? I think Munzinger had his hand up. Do you still want to talk?

MR. MUNZINGER: Not really. Stephen said what I want to say. I was speaking in response to Richard Orsinger. I'm sensitive to judges and their oaths, but it is the litigants' substantive rights that are affected by the judgment of the court. This is a free country, and people who come to court by God are entitled to have the law enforced and their rights respected regardless, and it troubles me that we might adopt rules that say, well, we're going to worry about the judge more than we worry about the litigants. Stephen is correct.

CHAIRMAN BABCOCK: Gilstrap.

MR. GILSTRAP: There is another solution, and that is for the Supreme Court to take more of these cases in which there is this type of conflict, and there has been a reason in the past why the Supreme Court I think may not have been able to do that, and that is because while we've had -- there is a jurisdictional provision that talks about giving the Court jurisdiction when there is conflict between -- in the courts of appeals that also is applied to interlocutory appeal, and we've got a 50-year history of construing that statute very narrowly so the Court doesn't have to take interlocutory

appeals.

That was changed in House Bill 4. Now conflict jurisdiction is very broad under House Bill 4, and it seems to me -- and that old law is no good anymore. Now, I don't know what that's going to do to interlocutory appeals, but it seems to me it opens the door now for the Supreme Court to take a look again at conflict jurisdiction and make that one of the prime indicators or one of the prime things they look at when they decide to grant a petition.

That's how almost every Supreme Court in the United States works. If you've ever made it to the United States Supreme Court you find that the reason you probably got there was conflict among the circuits. That ought to be the law in Texas, and I think with the new law that could be the law in Texas. In Jaubert, the Court of Criminal Appeals intervened and fixed the problem. I think the Texas Supreme Court can now come in and fix some of these problems when it might not have been able to do so in the past.

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: I think this discussion demonstrates that people have very strongly held beliefs on this particular issue. In talking with judges from other states, other states have rules telling

judges, you know, you can't -- one panel can't disagree with another, one coordinate court can't disagree with another, or they have a method for getting cases in which the opinions conflict to the Supreme Court other than through a petition for discretionary review.

So given all of that, I would strongly recommend that the Court undertake to look at how other states are dealing with the problem. In some states, for instance, all of the court of appeals judges, wherever they may be in the state, are a part of one court of appeals rather than different courts of appeals. That in and of itself would, I think, cause the law to develop differently when there are disagreements.

PROFESSOR DORSANEO: Our differences are accidental, not because they are meant to be different courts of appeals.

HONORABLE SARAH DUNCAN: And that's what I'm saying. Maybe we should just be one court of appeals, and maybe there should be a rule. I'm not advocating this because I don't think it's my view, but I've heard it expressed around the table. Maybe somebody, maybe a majority, would say there should be one court of appeals and no panel of that court of appeals can disagree with another panel of the court of appeals that has to go en banc. That is the way it is I think in California, is the

state that does that.

But I think all this discussion and all this emotion says we do need rules on this. We need guidance on this because it shouldn't depend on what three judges you randomly pool from which court of 14 in a state the size of Texas on issues that are as significant as the issues in which this frequently arises, and I will second what Frank said. It is more serious in criminal cases because we're talking about people's right to appeal or their liberty.

CHAIRMAN BABCOCK: Lamont.

MR. LAMONT JEFFERSON: I totally agree with Richard and Bill's comments. I think it's absolutely unworkable to think that we should try to manage litigants expectations based upon the panel that they're assigned to. There is just one law of the state. It's like as a litigant in a trial court. If I get assigned to Judge Mireles I might have certain expectations different than if I'm assigned to Judge Peden, but the fact that I get moved from one district court judge to another district court judge, even though it changes my expectation shouldn't give me any substantive rights. I mean, they're both doing the best they can to enforce the law of the state. Whether it's a panel in Dallas or a panel in San Antonio or El Paso or wherever, everyone is doing the best

they can to enforce the law of the state. That's what they're sworn to do.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, but I think this is getting to a really fundamental point, and Sarah touches on it. I mean, what's the philosophical justification for requiring a trial court judge to follow the appellate court of that area when there's another appellate court that has an opposing view directly on point? If there's one law in the state of Texas, what's the justification for that?

PROFESSOR DORSANEO: There is no justification.

MR. LAMONT JEFFERSON: That's not the law.

HONORABLE STEPHEN YELENOSKY: Well, I mean, you're saying that within that jurisdiction this is the law and within the other jurisdiction that's the law.

PROFESSOR DORSANEO: No, I'm saying that the law is in doubt. There are two coordinate courts of equal precedential value wherever a trial judge sits in the state --

HONORABLE STEPHEN YELENOSKY: Right.

PROFESSOR DORSANEO: -- that have different views, so that makes it a hard one for you.

HONORABLE STEPHEN YELENOSKY: Okay. But

you're saying within that appellate jurisdiction --

PROFESSOR DORSANEO: No, I'm not.

HONORABLE STEPHEN YELENOSKY: -- that you're going to get a ruling one way and within another appellate jurisdiction you're going to get a ruling another way.

CHAIRMAN BABCOCK: Could I butt in here for a second? Bill, what if I'm litigating in Houston and I say to Judge Sullivan, "Judge Sullivan, there is a First District decision that is right on point and you are bound by this decision."

PROFESSOR DORSANEO: You have just told him something false.

CHAIRMAN BABCOCK: Well, that's what my question is. You know, "I recognize that there is an Amarillo decision that's 180 degrees opposite, but really, Judge Sullivan, you ought to follow the Houston court." That's not true?

PROFESSOR DORSANEO: No, not true. False.

CHAIRMAN BABCOCK: Not true.

PROFESSOR DORSANEO: As a practical matter it might be true, but it's not true as a matter under the law.

HONORABLE LEVI BENTON: What's the authority?

HONORABLE STEPHEN YELENOSKY: But you'll get

reversed. You know you're going to get reversed.

HONORABLE LEVI BENTON: Bill, what's the authority for that, because that comes up a lot, and I agree with you, but I've never -- what's the authority for it?

PROFESSOR DORSANEO: There is no readily ascertainable authority for it.

MR. ORSINGER: It's his philosophical opinion.

HONORABLE LEVI BENTON: The law is the law.

MR. LAMONT JEFFERSON: Exactly.

PROFESSOR DORSANEO: That's the authority for it.

HONORABLE LEVI BENTON: Okay.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Chip, in that situation you're basing your ammo on Judge Sullivan's belief, right or wrong, that when the case goes up his reviewing court is going to apply this law or the other law; and so you're trying to convince Judge Sullivan, I think, or trial courts generally with success, because most of them tend to believe this, that the -- that they're going to be reviewed by the Fifth Court and that the Fifth Court in reviewing them is going to apply what the Fifth Court has done in the past.

So your ammo with the trial judge is "Judge, you're more likely to get reversed if you go with Amarillo than if you go with the First District."

CHAIRMAN BABCOCK: Well, is it just ammo or is it more fundamental than that?

MR. LOPEZ: I have been looking. I thought I had seen -- I thought somewhere in the Government Code there was a provision that talks about it. I don't know what it says, but I remember hearing it one time, and I thought it was strange, that talked about what you're supposed to do there, and I can't find it now, so I'm looking.

MR. LOW: In the Federal court you see the Fifth Circuit say, "We're Fifth Circuit bound." I've never seen an opinion that says "We're First Court of Appeals bound" or Waco court. Now, there are a lot of them I haven't read and a lot of them I don't understand.

CHAIRMAN BABCOCK: That's a slightly different point than the one I was raising. My raising was you've got a superior court that is the court of appeals in whatever district and then you've got an inferior court that is the district court. Does the district court have to follow the precedent of its superior court?

MR. LOW: You've got two equally superior

courts.

CHAIRMAN BABCOCK: Huh?

MR. LAMONT JEFFERSON: That's right.

MR. LOW: You have two equally superior courts, and the district court should not worry whether he will be reversed. He should worry about whether he did the right thing as he's sworn to do.

MR. LOPEZ: But the right thing is -- some trial judges believe in their philosophy that the right thing is to do whatever the reviewing court thinks you should do.

MR. LOW: If they believe that then that's what they have to do.

MR. LOPEZ: There are other trial judges that think I'm going to do whatever I think is right. If I get reversed --

PROFESSOR DORSANEO: Carlos, I once argued a Dallas case to you when you were sitting --

MR. LOPEZ: I know.

PROFESSOR DORSANEO: -- in Dallas, and you didn't follow the Dallas court of appeals decision that was just handed down. You followed the other decision from the other court, and you were right as it turns out.

CHAIRMAN BABCOCK: The Dallas case was distinguishable, but --

MR. LOPEZ: I was persuaded by able counsel, but --

CHAIRMAN BABCOCK: It does seem to me that it's somewhat fundamental as to whether or not in this state the district judges within the appellate district are bound to follow their appellate district's court of appeals decisions.

MR. GILSTRAP: You're not going to find a case saying that.

CHAIRMAN BABCOCK: Well, is there a case saying the opposite?

MR. GILSTRAP: No.

HONORABLE SARAH DUNCAN: What I'm saying, we don't have any rules.

MR. LOW: The law of Texas.

HONORABLE SARAH DUNCAN: In some cases it's a question of efficiency.

CHAIRMAN BABCOCK: Yeah. I don't know who had their hand up.

HONORABLE LEVI BENTON: I want to go back to what I thought was my excellent idea that got no traction.

PROFESSOR DORSANEO: No, it did. It's being remembered.

HONORABLE LEVI BENTON: All right. Very well. I was just worried because I thought it was a great

idea because, I mean, it's just an equalization. It doesn't matter what case it is. Thank you very much. I thought it was a great idea.

MR. GILSTRAP: It's too practical. It's too reasonable.

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: I've probably spent weeks of man hours on this issue in various -- attacking it from various points of view; and I have stayed out of the discussion intentionally to see what some of the other comments were; and given that the purpose of this is largely to give Justice Hecht a background from this group to respond to the chiefs' inquiry next week, my comments are mostly addressed to the rest of the group that there seem to be two different premises that you-all are approaching it from, either that the law is or ought to be the same across Texas versus the premise that the reality is that the law is different in different parts of Texas; and whether you want to accept that and whether or not that causes you trouble at night in sleeping, I can tell you that it is a fact that rules will be applied differently across the state.

And, in fact, it would be my argument that the Supreme Court has recently validated that position when they've enforced venue selection clauses because if

people can select the venue in which they're going to try a case, they have inherently determined that that venue offers them something that they want to be bound by as opposed to randomly wind up somewhere else; and I would suspect that if we don't do something about this we will see venue selection clauses with regards to appellate court decisions as well.

As far as -- I believe it was Stephen Tipps made a comment that only in Houston do we have this problem. That's not entirely true. In northeast Texas we have several overlapping counties. You do not know what court you're going to, whether it's the Sixth, the Fifth, or the Twelfth, until after the case is over with. There is currently pending some efforts to authorize exactly what was commented upon, is a preselection of the appellate court for resolving this very problem.

With regard to Levi's comment on the court sending it back, actually, now there is no prohibition against filing a motion to transfer the case back with the Supreme Court, but the constitutional jurisdiction for that transfer rests solely with the Supreme Court. That's where the motion would need to be filed.

The problem is that -- and I have a specific example with Jaubert being the case in which I was in the dissenting opinion and described this problem, and I think

Sarah Duncan and I have probably written on the issue the most in the state. In that case it was the identical issue coming out of Fort Worth. They had decided the case. A majority of our court -- our court had never addressed the issue, and a majority of our court decided that the Second Court was wrong and refused to follow the Fort Worth court.

The Court of Criminal Appeals actually had this issue. They granted review on it and then because, as is inherent in these problems, once they decide the issue it is no longer a conflict and, therefore, they did not address which law should apply. We had not decided it. So the parties would have been unable to brief the issue and presented it to the CCA that there was, in fact, a conflict between the two courts.

With regard to stare decisis and whether or not I am bound by a prior decision of my court or philosophically if I was on a court that had a panel decision, I will have to confess ignorance. Today was the first day that I thought in any way, shape, or form that I was not bound by prior decisions of my court or that if I had been a panel on a court that I would not have been bound by another decision of that court absent an en banc review because of the common law principle of stare decisis with which I certainly feel bound because that is

the law.

There are very -- there are some very good case authority on what it takes to change stare decisis, that it was, you know, wrong or situations have changed. It was wrongly decided or the situation has changed or the decision previously made was proven to be unworkable. So, I mean, there is a lot of case law on that concept.

And in closing, I guess I will remind everybody or suggest to everybody this is a problem that, except for the overlapping jurisdictions, is caused by a unequal workload at the courts of appeals, and there is a -- for those of you-all that are interested in studying the issue, there is a House committee on redistricting, Texas House of Representatives interim report 2004. Joe Crab was chairman, and it is an effort to equalize the workload.

One of the things involves additional funding for the heavily overloaded courts of the First, the Fourteenth, and the Fifth, included in -- because the whole concept of that redistricting is to try to equalize the workload, we anticipate that there will be fewer of these transfers required, and, therefore, the last proposal in this -- the chiefs presented to Joe Crab's committee a redistricting proposal which included this additional funding, and because we anticipate the number

of these cases to be drastically reduced, it was the opinion of the chiefs as contained -- and I'll just read it -- "In the rare instance that an appeal is transferred from one court to another, the Supreme Court shall determine which law is to be applied in addressing potential conflicts between outcome determinative precedent in the transferring and transferee courts and include such determination in the transferring order. It is proposed that the precedent to be used be that of the transferring court's last jurisdiction."

CHAIRMAN BABCOCK: Okay.

HONORABLE TOM GRAY: Thank you.

CHAIRMAN BABCOCK: We've got to go because the people on my flight left 20 minutes ago, which is making me nervous, but, Bill, the Court --

PROFESSOR DORSANEO: I think we need to study the other jurisdictions and see what they do before we do anything.

CHAIRMAN BABCOCK: Yeah, and the Court would like us to continue working on this and come up with a rule or a proposal, so we will take that up at the next meeting, and thanks, everybody, for coming.

MS. SWEENEY: I want the record to show I've been here all morning even though I haven't spoken. Otherwise my --

CHAIRMAN BABCOCK: And before we go off the record I'd like to note that twice in this meeting Judges Bland and Christopher have disagreed with each other.

(Adjourned at 11:58 a.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 8th day of January, 2005, Saturday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $1050.00.

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 23rd day of January, 2005.

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