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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 MARCH 18, 1994
10 AFTERNOON SESSION
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18 Taken before D'Lois Lea Nesbitt,
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 18th day of
21 March, A.D., 1994, between the hours of 1:30
22 o'clock p.m. and 5:40 o'clock p.m., at the
23 Texas Law Center, 1414 Colorado, Austin, Texas
24 78701.
25

ORIGINAL

MARCH 18, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta, Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela S. Baron
Honorable Scott A. Brister
Professor Elaine Carlson
Professor William V. Dorsaneo
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Joseph Latting
Gilbert I. Low
John Marks
Russell H. McMains
Harriet E. Miers
Richard R. Orsinger
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Honorable Ann T. Cochran
Michael T. Gallagher
Anne Gardner
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable F. Scott McCown
Robert E. Meadows
Honorable David Peeples
David L. Perry

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Honorable Paul Heath Till
Bonnie Wolbrueck

Paul N. Gold
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Carl Hamilton

SUPREME COURT ADVISORY COMMITTEE

MARCH 18, 1994, Afternoon Session

INDEX

Rule	Page(s)
TRAP 12 & 56	1435-1444
TRAP 41(a)	1444-1482
TRAP 45	1444-1481
TRAP 53(d)	1483-1506
TRAP 74	1508-1549
TRAP 75	1549-1554
TRAP 84	1554-1561
TRAP 101	1561-1591
TRAP 45	1591-1600
TRAP 121(a)(2)(a)	1601-1603
TRAP 11, 12 & 18	1603-1629
TRAP 121	1629-1663
Rule 132(a)	1667-1671

1 CHAIRMAN SOULES: Both
2 Ms. Lange and Ms. Wolbrueck, the clerks that
3 we have here, are pretty -- they have given
4 some thought to this transcript thing and
5 whether or not it's better to just leave it
6 the way it is and make copies and send the
7 copies. In other words, no change in the
8 present practice as far as the transcript is
9 concerned. Bonnie, why don't you give us your
10 view?
11 MS. WOLBRUECK: Sure.
12 CHAIRMAN SOULES: Doris spoke
13 about it a moment ago.
14 MS. WOLBRUECK: Originally when
15 I heard this I thought this was an excellent
16 idea until I really gave some thought to it;
17 and several reasons. If we send up the
18 original documents, No. 1, if the original
19 judgment has gone up to the appellate court
20 there has been no supersedeas bond filed. The
21 trial court clerk still has the responsibility
22 of issuing executions. We will not have that
23 judgment on file in our office in order to
24 issue an execution on that.
25 HONORABLE C. A. GUITTARD:

1 Don't you have it in your minutes?

2 MS. WOLBRUECK: We could. It

3 depends upon -- yeah. They would probably be

4 kept in the minutes, but even at that the

5 other problem with that being -- is certifying

6 to it. We can certify out of the minutes, but

7 I would think that having the originals would

8 still benefit the trial court clerk and the

9 like. I realize what you are saying, Judge.

10 I had forgotten about the minutes of the

11 Court.

12 Family matters could evolve the same way.

13 Many times we have many people doing research

14 on files. We may have a divorce decree that

15 what is in -- what is going up on appeal is

16 possibly property, and child support matters

17 continue, visitation matters continue. People

18 want to view those files for those matters.

19 We have a lot of title company people and

20 research people into our offices all the time

21 that want to see what has happened in certain

22 documents within the file.

23 The other thing that I realized in

24 looking at this initially, thinking that

25 sending up the original papers would be a good

1 idea, is that actually the time and effort in
2 doing a transcript is not in running the
3 copies through the copy machine. It's
4 actually pulling out whatever documents need
5 to go into the transcript, putting those into
6 transcript form and indexing them. Running
7 them through the copying machine is actually
8 the least of the effort involved in preparing
9 a transcript, and I am concerned that possibly
10 it may evolve into extra work on both clerks,
11 the appellate clerks and the trial clerks, in
12 that whenever they return those originals to
13 us we have to put them back into the file into
14 proper order and the like for continuation of
15 the file.
16 Those are just some of the concerns and
17 the thoughts that I had in regards to the
18 possible originals. Like I said, initially I
19 thought that it may be a good idea until I
20 really put some thought to it as far as the
21 clerk is concerned.
22 MR. HERRING: How is it done
23 now in the Federal system? Don't they send
24 almost everything?
25 MS. DUNCAN: It goes up on the

1 original papers, and the entire file goes.

2 MR. HERRING: What if you kept

3 the judgment decree in the family case? Are

4 there a lot of other documents that people

5 come in to search?

6 MS. WOLBRUECK: You know, I

7 can't even -- occasionally there are. It

8 depends on what has happened, and the problem

9 is that, you know, I can think in a real

10 simplistic matter of just talking about a

11 judgment, but many times there are other

12 orders and the like that have been entered

13 that somebody may want and, you know, other

14 orders that don't pertain to what has gone up

15 on appeal.

16 HONORABLE SCOTT A. BRISTER: A

17 lot of times when they are split mandamuses I

18 keep going on this while a mandamus goes up,

19 interlocutory appeals of government official

20 summary judgments, or media defendant summary

21 judgments on first amendment. We have got a

22 growing number of interlocutory appeals. Who

23 gets the file if I don't have the file or

24 copies of the file?

25 MS. DUNCAN: On an original

1 proceeding you are not going to go up on a
2 transcript from the clerk's office anyway
3 generally. You are either going to go up on
4 certified copies that were later put together
5 or on sworn copies, copies that have been
6 sworn to by an attorney. In Federal Court, I
7 mean, it seems to me if the burden if you want
8 to get a writ of execution on a judgment and
9 no supersedeas bond is on file it seems to me
10 that the burden should be on the applying
11 party to get the certified copy from the Court
12 of Appeals and take it to the trial court or
13 the clerk to have whatever process or have
14 whatever dispute resolved that they want to
15 get resolved. I mean, that seems to me to be
16 fairly simple.
17 HONORABLE SCOTT A. BRISTER: Is
18 the reason for this just cost-saving? We are
19 spending too much making copies?
20 MS. DUNCAN: Legibility.
21 MS. WOLBRUECK: I would suggest
22 in the Rule possibly to make sure that -- and
23 possibly in the order on the form of the
24 transcript or something to make sure that the
25 copies are legible.

1 MS. DUNCAN: It's said that for
2 years, and it hasn't helped.
3 MS. WOLBRUECK: Yeah. It needs
4 to be -- well, sometime the originals aren't
5 either. That's the problem.
6 MS. LANGE: I was going to say
7 sometimes the originals we can't read.
8 MS. DUNCAN: Well, and
9 sometimes they are just difficult to copy.
10 MS. LANGE: Especially on field
11 notes. The attorneys keep making copies, and
12 we get almost daily instruments that we put a
13 clerk's note on it's not legible when it came
14 to us.
15 CHAIRMAN SOULES: Of course,
16 the clerks charge the appellant for the
17 transcript, right, and they pay for it? So to
18 that extent you get some of your cost back
19 directly from the party you are performing
20 services for.
21 MR. ORSINGER: Well, what would
22 you charge for it? You used to charge a
23 dollar a page to copy it or whatever the
24 charge was, but if you are not copying
25 anything now, you still would charge a dollar

1 a page to bind it?

2 MS. WOLBRUECK: No. But I'm

3 sure --

4 CHAIRMAN SOULES: But the point

5 is they are getting some of their --

6 MS. WOLBRUECK: Yeah. I'm sure

7 that there will be some fee because actually

8 the labor cost is not in the actual copying.

9 It's in preparing the transcript, pulling the

10 documents out, doing the index, and putting

11 it -- bounding it and the like. That's where

12 the labor cost actually is.

13 CHAIRMAN SOULES: But you are

14 recovering some of that now at least by

15 getting fees for the copies.

16 MS. WOLBRUECK: That's right.

17 CHAIRMAN SOULES: There is some

18 revenue in the clerk's office coming from this

19 to help offset the cost of their work in

20 support of an appellant's appeal.

21 MS. WOLBRUECK: And I feel that

22 there would probably be somewhere a cost for

23 preparation of a transcript or something, if

24 there was not a copying cost.

25 CHAIRMAN SOULES: Okay.

1 HONORABLE SCOTT A. BRISTER:
2 And so on post-judgment --
3 CHAIRMAN SOULES: Judge
4 Brister.
5 HONORABLE SCOTT A. BRISTER:
6 Post-judgment motions where the file has gone
7 up then you would get a copy and send a copy
8 back down?
9 MS. DUNCAN: You just attach --
10 MR. ORSINGER: Would you need
11 anything more than the judgment ever?
12 HONORABLE SCOTT A. BRISTER:
13 Well, I am trying to think. I don't know.
14 MS. DUNCAN: Well, let's say
15 you --
16 HONORABLE SCOTT A. BRISTER:
17 All I know is there are a lot of times after
18 the appeal has started when I am still in
19 there messing with the file.
20 MS. WOLBRUECK: And that seems
21 to happen a great deal, I mean, actually. I
22 realize that also, and I can't think of a
23 particular incident. But what would you do on
24 temporary orders or summary judgment or
25 something? There seems to be a great deal

1 that continues in the trial.

2 MR. ORSINGER: Actually the

3 trial court's preliminary power goes until the

4 105th day, and if you have a transcript going

5 up sooner than that it's not due until the

6 120th day if there is a motion for new trial

7 made. You just have to request it back.

8 MR. LOWE: What's broke about

9 what we have? Wasn't it that we just thought

10 we could simplify it like the Federal people

11 do and just send the original record? That

12 was the reason, but there are probably not

13 many Federal divorces, so they have a little

14 different type practice. So wasn't that the

15 main reason we wanted to do it?

16 CHAIRMAN SOULES: I think so.

17 MR. LOWE: And she has already

18 stated reasons why it wouldn't work, so why

19 isn't it working -- why don't we leave it like

20 it is?

21 CHAIRMAN SOULES: Okay. Motion

22 to leave it like it is. Those in favor show

23 hands.

24 HONORABLE SAM HOUSTON CLINTON:

25 You are talking now about the transcript?

1 CHAIRMAN SOULES: Yes, sir.

2 Those opposed? Okay. We will leave that

3 like it is. That's unanimous in favor of

4 leaving it like it is. Next?

5 PROFESSOR DORSANEO: Please

6 turn to page 40.

7 HONORABLE C. A. GUITTARD:

8 In the ancient English practice you had law of

9 equity. You had the review of trial court

10 judgment, and common law you had a writ of

11 error in equity after you had appeal. That

12 archaic distinction still persists to some

13 extent in our present Rule 45 which has to do

14 with appeal by writ of error, which is now

15 limited to the parties that did not

16 participate in the appeal. The problem with

17 it is that the courts keep saying that a writ

18 of error is limited to error apparent on the

19 face of the record. Now, what in thunder is

20 the face of the record?

21 Some courts say, well, you can consider

22 the statements of facts. Well, then if you

23 consider the statement of facts, well, how is

24 that different from any other appeal? In a

25 different context in McKenna against Edgar the

1 Supreme Court held that the jurisdiction of
2 the non-resident defendant must appear from
3 the face of the record, and that does not
4 include oral testimony, the statement of
5 facts. So it seems very odd the face of the
6 record means something in one context and
7 something different in another.
8 So the proposal is that if there is no
9 real difference in the review and in order to
10 avoid confusion and in order to simplify the
11 process that we simply provide that as we do
12 here in proposed Rule 41(a)(3) on the top of
13 page 40 that "A party to the final judgment
14 who did not participate in person or by
15 attorney in the actual trial of the case shall
16 file a notice of appeal within six months
17 after the judgment is signed, whether or not a
18 motion for new trial is" -- or "a motion to
19 modify, correct, or reform the judgment is
20 made." In other words, just give them the
21 same kind of six months appeal as he would
22 have by a writ of error. "Such a notice shall
23 contain a certificate by the attorney that the
24 appellant did not participate in person or by
25 attorney in the actual trial of the case." So

1 that would considerably simplify our practice
2 in those cases. So, Mr. Chairman, I move that
3 that be adopted.
4 MR. LOWE: I would second that.
5 CHAIRMAN SOULES: Motion has
6 been made and seconded. Is this just a writ
7 of error by a different name?
8 MR. LOWE: Yeah.
9 HONORABLE C. A. GUITTARD:
10 Well, except that it doesn't come within those
11 decisions which talk about the face of the
12 record, which I think originally meant in a
13 common law review that the judgment ruled and
14 the old clerk wrote out as distinguished from
15 the testimony, but now since the confusion
16 comes in when the Supreme Court has said and
17 other courts have said you do consider the
18 oral testimony. So although they say it's the
19 face of the record, it's not the face of the
20 record in that sense.
21 MR. ORSINGER: Luke, I'm sorry.
22 From a procedural standpoint -- I'm sorry.
23 CHAIRMAN SOULES: Rusty, you
24 have had your hand up, then I will get to
25 Richard.

1 MR. MCMAINS: Well, one of the
2 questions I have, if you basically are, quote,
3 abolishing the writ of error practice and
4 substituting a notice of appeal where are
5 the -- where do you have any rights to attack
6 that you haven't preserved? I mean, if you
7 weren't at the trial you obviously didn't make
8 an objection and you obviously most likely did
9 not file a motion for new trial. You didn't
10 do any of these other things by definition.
11 So if you haven't done any of those things,
12 you haven't presented any complaints for
13 review.
14 The writ of error practice by and large,
15 you know, historically was the reason I always
16 viewed the term "on the face of the record" as
17 being a good thing rather than a bad thing in
18 your view; that is, it allowed you to attack,
19 for instance, defects in service, et cetera,
20 which is what it is primarily designed to do,
21 but there weren't any preservation
22 requirements. If you convert this to an
23 ordinary appeal, how do you immunize it from
24 the preservation requirements that are
25 throughout the rest of our Rules?

1 HONORABLE C. A. GUITTARD:
2 Well, isn't it immunized now since the courts
3 have said the standards of review are the
4 same? At least that's confusing. Whether or
5 not you have different preservation
6 requirements with respect to a party that
7 didn't participate in the appeal -- in the
8 trial is a question we need to talk about. If
9 we think that the party that didn't
10 participate ought to have different
11 preservation rights or different standard
12 review or ought not to be subject to the same
13 preservation requirements as one that did,
14 then we ought to say that expressly and not
15 have some confusing other procedure called a
16 writ of error that would allow you to get
17 around the regular preservation rules. We
18 ought to write that expressly.
19 PROFESSOR DORSANEO: We did
20 make an attempt to revise Appellate Rule 52
21 partially in response to Justice Hecht's memos
22 and what I will referral to as the Wilson vs.
23 Dunn problem, which is the problem of the
24 default judgment appellant seeking to
25 challenge the default judgment on some basis

1 of the type you mentioned.
2 Frankly, that drafting may not be
3 finished, but I agree with Judge Guittard that
4 that's the proper place to deal with the
5 issues that you raise such that regardless of
6 whether it's an ordinary appeal or what
7 previously had been referred to as a writ of
8 error appeal, you either do or don't have to
9 move for a new trial or otherwise preserve a
10 complaint about service or evidence
11 sufficiency or whatever.
12 HONORABLE C. A. GUITTARD: Now,
13 most writ of error appeals are default
14 judgment cases, and it has -- the face of the
15 record thing has certain and some probability
16 there because you don't have any -- you may
17 not have a statement of facts. You are just
18 looking at whether the service, the record of
19 service, is complete and that sort of thing,
20 but you could still do that with a six months
21 appeal under our proposed Rule 41(a)(3). It
22 would have the same effect in that respect.
23 MR. LOWE: Judge, there is no
24 rule now, appellate rule, that speaks of writ
25 of error anyway, is it?

1 HONORABLE C. A. GUITTARD: Oh,
2 yeah. Rule 45.
3 PROFESSOR DORSANEO: 45.
4 MR. LOWE: 45 now is?
5 HONORABLE C. A. GUITTARD: Rule
6 45.
7 MR. LOWE: So in other words,
8 all that would be changed would be the time
9 limit, but other requirements of ordinary
10 appeal wouldn't be changed, just as would be
11 followed if you had participated, is what you
12 are saying.
13 HONORABLE C. A. GUITTARD:
14 Right.
15 PROFESSOR DORSANEO: Right.
16 HONORABLE C. A. GUITTARD: Rule
17 45 requires you to file a petition and then a
18 bond.
19 MR. LOWE: Okay.
20 CHAIRMAN SOULES: Richard
21 Orsinger.
22 PROFESSOR DORSANEO: It's kind
23 of like a notice of appeal frankly.
24 MR. LOWE: Right.
25 MR. ORSINGER: Is there not

1 mention of the writ of error appeal in the
2 Civil Practice and Remedies Code?
3 PROFESSOR DORSANEO: Yes.
4 MR. ORSINGER: I have looked at
5 it briefly. We are going to have some
6 dangling legislation I think.
7 HONORABLE C. A. GUITTARD:
8 That's another point that I note here. If we
9 repeal the writ of error practice then perhaps
10 the Supreme Court ought to list that
11 particular provision of the code as repealed.
12 PROFESSOR ALBRIGHT: I didn't
13 understand --
14 CHAIRMAN SOULES: Alex
15 Albright.
16 PROFESSOR ALBRIGHT: I did not
17 understand Bill's answer to the question about
18 the preservation of error problem, or was
19 there an answer?
20 PROFESSOR DORSANEO: Well, my
21 technical answer would be that -- all right.
22 The Supreme Court two years ago in DSC vs.
23 Moffitt held, I think quite correctly --
24 that's presumptuous to say, but I think quite
25 reasonably that the face of the record in a

1 writ of error appeal includes the statement of
2 facts as well as the transcript. I was the
3 petitioner's counsel, so I find that a
4 particularly favorable decision.
5 But it could be the case that once upon a
6 time that that language "on the face of the
7 record" also spoke to the issue of
8 preservation. I think Rusty is probably
9 right, but my answer would be that whatever
10 the preservation rules are for people who are
11 defaulted they ought to be the same whether
12 those people appeal in one month or six
13 months, whether it's a writ of error appeal or
14 an ordinary appeal, and that's not how the
15 problem should be handled about whether they
16 should get some ruling from the trial court
17 about anything.
18 PROFESSOR ALBRIGHT: So it just
19 needs to be that when a defaulter is appealing
20 it's clear that they couldn't have preserved
21 error so you are looking for these --
22 PROFESSOR DORSANEO: Right.
23 PROFESSOR ALBRIGHT:
24 -- jurisdictional type errors.
25 PROFESSOR DORSANEO: I wouldn't

1 require them to do anything to make the
2 complaint about service or insufficiency of
3 the evidence to support an unliquidated, you
4 know, damage claim.
5 PROFESSOR ALBRIGHT: Well,
6 would you have the same review, like new trial
7 review, like you would in Craddock vs.
8 Sunshine?
9 PROFESSOR DORSANEO: Yes. And
10 you would miss that boat if you waited.
11 PROFESSOR ALBRIGHT: Okay. But
12 you have gone beyond the 30 days. So you
13 haven't filed your motion for new trial.
14 PROFESSOR DORSANEO: So you
15 don't have an equitable motion for new trial.
16 PROFESSOR ALBRIGHT: So you are
17 saying there is no error in failing to grant
18 the motion for new trial, but now it's
19 after -- it's between 30 days and six months,
20 and I am appealing because it's not that it
21 was --
22 PROFESSOR DORSANEO: They
23 served some kind of gas station.
24 PROFESSOR ALBRIGHT: Yeah. Not
25 that it wasn't abuse in discretion but there

1 is some kind of jurisdictional problem here.
2 There was some gross error that appears from
3 these records.
4 HONORABLE SCOTT A. BRISTER:
5 Fundamental error.
6 PROFESSOR DORSANEO: Well, it
7 could be a service problem, typically a
8 service problem. In many default judgment
9 cases it's a problem of the sufficiency of the
10 evidence to support the damages.
11 PROFESSOR ALBRIGHT: Right.
12 Okay. But it will be something that appears
13 in the entire record?
14 PROFESSOR DORSANEO: Yes,
15 ma'am.
16 HONORABLE C. A. GUITTARD: Now,
17 if as Rusty suggests the term "face of the
18 record" gives a broader review than an
19 ordinary appeal would, which is contrary to
20 what the cases have said, but if that's true,
21 then we ought to say that in connection with
22 our Rule concerning preservation of appellate
23 complaints.
24 MR. MCMAINS: Well, basically
25 it's --

1 CHAIRMAN SOULES: Rusty.

2 MR. MCMAINS: I am not
3 advocating particularly either way. I guess
4 one of the things I am curious about is we now
5 have Supreme Court law, U.S. Supreme Court
6 law, that basically says if it's a no service
7 case they are going to win on a bill of review
8 anyway, and we have law that says if you don't
9 get notice of a judgment within a certain time
10 then you don't have any obligation to do
11 anything up to a period virtually -- what is
12 it? 180 days? Is that our max now? As long
13 as this is double it I am just wondering why
14 if you are going to do away with the writ of
15 error practice why do we keep it at all, and
16 why do you need six months, a six-month writ
17 of error, anyway if you are going to subject
18 everything back to what the Rules are that are
19 applicable to everybody?

20 HONORABLE C. A. GUITTARD:
21 Well, that's just one provision of a current
22 law that we didn't propose to change. I guess
23 it's based on the idea that if a person has
24 a -- say, is a default defendant then he ought
25 to have more time to have an opportunity to

1 know what's happened to him, and he ought to
2 not be held to the strict time requirements
3 that an ordinary appellant would.
4 MR. MCMAINS: Okay. If you are
5 talking about a default judgment, then that's
6 a particular carved out deal, but this is not
7 limited to default judgments.
8 HONORABLE C. A. GUITTARD: And
9 it would apply to anybody who didn't
10 participate in the trial.
11 PROFESSOR DORSANEO: The
12 Lawyers/Lloyds case takes the position -- I
13 mean, the logic is that if you didn't
14 participate in the trial you need more time to
15 find out what happened than the time allotted
16 by the ordinary Rules. I frankly think that
17 that's a peculiar solicitude for defaulted
18 defendants that is represented in our Rules in
19 several places, and I would like to see it
20 abolished.
21 MR. MCMAINS: Well, the problem
22 I have is the way the Rule is read now as
23 proposed to be amended is basically it says if
24 you didn't participate in the trial. It
25 doesn't say that it wasn't your fault that you

1 didn't participate. The point is if it's not
2 your fault, you have all the remedies in the
3 world under a bill of review practice. There
4 is no real reason for a six-month writ of
5 error to correct a default that ain't your
6 fault, but you can walk away. You can get
7 notice of the trial setting and not come and
8 be entitled to appeal under this Rule, and I
9 am saying I don't think that makes any sense.
10 HONORABLE C. A. GUITTARD:
11 Well, if the committee wants to abolish the
12 six-months appeal, well, that's a question
13 that our committee didn't really address. So
14 if you want to make that decision, that's
15 fine. I mean, that's not contrary to what we
16 have said, but if you want to preserve that,
17 well, this is not quite as radical a proposal
18 as Rusty is suggesting.
19 CHAIRMAN SOULES: Well, it's
20 used. There are half a dozen cases in the
21 last year in the advance sheets on writ of
22 error, so if we start taking this away, it's
23 something that's active in the current
24 practice. There are half a dozen reported
25 decisions in the last year.

1 MR. MCMAINS: But look, if I
2 can respond to that, the reason that's there
3 is because the caselaw right now on bill of
4 review is if you don't take a six-month writ
5 of error then you are going to be barred from
6 doing a bill of review. If you take the
7 six-month writ of error away, every single
8 problem that you have with regards to no
9 notice in terms of notice of the entry of the
10 judgment or whatever is taken care of in our
11 Rules up to 180 days, and if you are outside
12 the 180 days, then you could do a bill of
13 review, and the only thing you lose is another
14 three months. That's all I am getting at. If
15 you have got a -- it's only a three-month
16 difference.
17 HONORABLE C. A. GUITTARD: But
18 you can complain, for instance, on a six-month
19 appeal on a writ of error since the face of
20 the record just means the whole record you can
21 complain of the sufficiency of the evidence to
22 support the damages, for instance, and some of
23 those cases do that, and well, perhaps you
24 shouldn't have the right to do that, but if
25 so, let's be sure what we are deciding here

1 about that.

2 MR. LOWE: Judge, I have one

3 question.

4 CHAIRMAN SOULES: Buddy Lowe.

5 MR. LOWE: I think that on bill

6 of review the burden is on you showing that it

7 wasn't your fault.

8 HONORABLE C. A. GUITTARD:

9 Right.

10 MR. LOWE: Under this six

11 months you don't have to prove. You have no

12 burden of proving that.

13 HONORABLE C. A. GUITTARD:

14 That's right.

15 MR. LOWE: You just prove

16 records, so I am not saying that's a big step,

17 but that is a difference. I mean, you know,

18 maybe that is a burden that's in this six

19 months. That's why they had to rule like

20 that. In the six months you just have to

21 prove by the face of the record, but they

22 thought then on the bill of review you ought

23 to go further and have to put the burden of

24 proof on that person that it wasn't their

25 fault, and sometimes that becomes an issue.

1 So they are not -- that might be a difference.
2 It doesn't make a difference, but there is a
3 difference.
4 PROFESSOR DORSANEO: Buddy,
5 probably in a no service case you make your
6 proof of, no, it wasn't my fault by proving no
7 service, no duty, no obligation, no fault. So
8 probably in a no service case not only do you
9 not need to show a meritorious defense, and
10 you don't have to show extrinsic fraud in no
11 service case because the Supreme Court has
12 already held that, our Supreme Court.
13 Probably all you have to show is no service in
14 a bill of review case when it's no service.
15 MR. LOWE: But there might be
16 other situations. I don't know. Plus the
17 fact that even in those, what if you you get
18 into the question, well, you know, you knew
19 they were looking for you. Was it your fault
20 that you didn't appear when the sheriff was
21 supposed to come, and therefore, the sheriff
22 has called you? Do you have to do that? Do
23 you get into those issues? I am saying you
24 get into more issues in a bill of review than
25 you do the writ of error.

1 CHAIRMAN SOULES: Shelby.

2 MR. SHARPE: Did the committee
3 find some glaring problem with the current
4 writ of error practice that spawned this rule?
5 If it did, I would like for you to articulate
6 that. Otherwise, I recommend that this writ
7 of error practice does not seem to be broken,
8 so therefore, I don't think it needs fixing,
9 and I would, as we did on the transcript,
10 recommend we just leave writ of error practice
11 alone unless there was something that you saw
12 as a bad deficiency in writ of error practice.

13 HONORABLE C. A. GUITTARD:
14 Well, as I suggested before, and I have this
15 more fully discussed in the memorandum, No. 3
16 I think it is, attached to the explanation.
17 The problem is using the term "face of the
18 record" in two different senses and the
19 confusion that that causes, and there is still
20 some cases that hold that in a writ of error
21 you can't go into the oral testimony, and
22 there will be that kind of confusion
23 continuing if we continue the writ of error
24 practice with this face of the record
25 requirement.

1 MR. SHARPE: Well, it would
2 seem to me, Judge, that the best thing to do
3 would be to take our current writ of error
4 practice and just make that one minor
5 clarification and just leave writ of error
6 practice alone as it currently stands.
7 CHAIRMAN SOULES: Okay.
8 Richard and then Sarah.
9 MR. ORSINGER: Another
10 distinction between the bill of review and the
11 writ of error is that there is no right to
12 supersedeas in the final court of review. The
13 only possible relief you have of execution of
14 judgment as I understand it would be to get a
15 writ of injunction issued by the Court that
16 issued the judgment against the execution of
17 the writ.
18 MS. DUNCAN: There is caselaw,
19 however, you can't get that if you did not
20 supersede the writ of error.
21 MR. ORSINGER: There is? I
22 will have to get that. I have got that in a
23 case right now. So there is a big difference.
24 You can supersede this judgment by filing a
25 supersedeas bond, but you can't supersede a

1 bill of review. That's a distinction that
2 would make a real difference to some
3 defendants, and I would also say that I have
4 done some research in the area. There are
5 some courts of appeals that say if you don't
6 preserve error by failing to show up, you
7 cannot complain on appeal. There is others
8 that say if you weren't at trial, you can't be
9 held to the preservation requirement.
10 Whereas most defense to me is where you
11 have incompetent evidence that comes in
12 without an objection in a prove-up on a
13 default such as rank hearsay or even
14 speculation, no objection to it or anything
15 else. Can you bring in written statements of
16 people, hearsay, inadmissible, no hearsay
17 objection? If it comes in without an
18 objection of substantive evidence, we have the
19 potential for the real abuse of proving up the
20 damages on a default if we don't let defaulted
21 defendants raise complaints about the
22 sufficiency of the evidence without having
23 weighed at least their hearsay complaint, that
24 the hearsay is incompetent. So I think that
25 if we do move from the writ of error practice

1 into the appellate practice I would want to
2 say something about the preservation so that
3 we don't lose the favorable caselaw that we do
4 have. As Rusty said, I think we run the risk
5 of losing it if we move it from writ of error
6 to appeal and say nothing about preservation
7 requirements.
8 HONORABLE C. A. GUITTARD: You
9 want it to say something about the
10 preservation requirements?
11 CHAIRMAN SOULES: Sarah.
12 MS. DUNCAN: Just a note that I
13 think one of the other reasons that this was
14 done, if you will look at Rule 45 on pages 41
15 and 42, the Rule as it now stands says how you
16 perfect an appeal by writ of error and no
17 more, and it doesn't tie in with any of the
18 rest of the Rules on briefing schedules or
19 brief contents or anything else. So that was
20 part of as I remember the motivation for
21 incorporating the writ of error practice into
22 the regular appellate practice.
23 CHAIRMAN SOULES: I'm sorry. I
24 didn't understand what you said. There is no
25 briefing schedule on the --

1 PROFESSOR DORSANEO: You jump
2 over, jump back into the regular rules as soon
3 as you get the writ of error perfected.
4 MS. DUNCAN: Maybe you do.
5 PROFESSOR DORSANEO: Well, the
6 other rules talk about appeal or writ of
7 error, appeal or writ of error, appeal or writ
8 of error.
9 MS. DUNCAN: Now they do.
10 PROFESSOR DORSANEO: I don't
11 like the writ of error practice because I
12 don't think somebody should get this extra
13 time. It's as simple as that. Now, I have
14 used the writ of error appeals successfully.
15 Almost every time I have used it I was very
16 happy to have the extra time, but it always
17 was the result of somebody not doing what they
18 otherwise should have done that I really
19 couldn't have justified on any kind of a fair
20 basis, I mean, not showing up for the trial
21 and also not perfecting the appeal after
22 getting notice of the judgment. If the time
23 is long enough for ordinary defendants who are
24 diligent in protecting their rights to perfect
25 an appeal, why give these other people,

1 assuming they have been served and everything
2 else, why give them extra time? I don't see
3 the point in it from the standpoint of the way
4 our system operates.
5 CHAIRMAN SOULES: Rusty.
6 MR. MCMAINS: Well, the other
7 problem I have is that everybody's
8 justification thus far for the preservation of
9 the writ of error assumes that you are talking
10 about a default case. There is no such
11 limitation, and therefore, what this says is
12 that when you have a trial setting and the
13 other side doesn't show up, even if you have
14 conclusively proved they had notice, even if
15 they are at the courthouse and they just don't
16 come, that they are going to have extra time
17 to appeal and perhaps even if you want to
18 change the Preservation Rule to make it easier
19 not even have to object to evidence that is
20 otherwise incompetent. They just don't have
21 to show up.
22 Why should a person who doesn't show up
23 be improved in their appellate position? That
24 makes no sense at all to me. Particularly in
25 a non-default context. Now, that's -- and I

1 guess that's the biggest problem that I have
2 with it right now, is it just says "didn't
3 participate." It doesn't have anything to do
4 with whose responsibility it was for not
5 participating.
6 MR. LOWE: But Rusty, don't you
7 think that most people who, I mean, you know,
8 have a lawyer and so forth are not going to
9 just say, "Well, you know, I am not going to
10 participate," and they have taken a big
11 disadvantage because certainly I have seen
12 trials that Mike tried just as well with me
13 not being there, but that's not ordinarily the
14 thing I would brag about. So I think that as
15 a practical matter if that person has made
16 that choice, he's made such a bad choice we
17 ought to give him some advantages.
18 CHAIRMAN SOULES: Alex
19 Albright.
20 PROFESSOR ALBRIGHT: Well,
21 doing away with writ of error procedure
22 completely seems to be a pretty big issue that
23 would require some more study. Can we kick it
24 back to the committee to look at the bill of
25 review and see if it represents a viable

1 alternative if we did get rid of writ of
2 error? I just don't think it's the kind of
3 thing that we should decide right now.
4 HONORABLE C. A. GUITTARD:
5 Well, we're willing to consider the question
6 that hasn't been before us before as to
7 whether there ought to be a six-month review
8 anyway. We hadn't considered that. If that's
9 something that you think ought to be
10 abolished, well, well and good.
11 MR. ORSINGER: That's not
12 anything the committee -- the committee needs
13 to write the language, but the committee is
14 just going to get together and vote for or
15 against six months. We really ought to know
16 right here whether six months is something
17 that's desired or not. If we want the six
18 months, we can rewrite it at the committee
19 level, and if not, there is really no point in
20 taking the policy question back to the
21 committee.
22 CHAIRMAN SOULES: Judge
23 Brister.
24 HONORABLE SCOTT A. BRISTER: It
25 seems to me there is nothing wrong with study.

1 I mean, I am having trouble thinking of
2 anything other than defaults that applies to
3 writ of error. An SMU law student could look
4 that up in 30 minutes on Westlaw and find out
5 how many writ of errors other than default
6 judgment situations there have been. There
7 might be some situation we are not thinking
8 about.
9 PROFESSOR DORSANEO: Well, one
10 very common one is a divorce case that's
11 proved up where the trial is the presentation
12 of the agreements to the trial judge and only
13 one of the spouses is there.
14 HONORABLE SCOTT A. BRISTER:
15 It's a post-answer default.
16 PROFESSOR DORSANEO: No, no.
17 This is service, everything is fine. It's
18 settled. There are agreements incident to
19 divorce and only one of the spouses goes to
20 the prove-up. Okay. Well, now people who
21 know about writ of error appeal know that you
22 must get the one who doesn't go to sign the
23 draft of the judgment, that signing the
24 agreement and incident to divorce is not
25 participation in the actual trial. So either

1 you have the wife go to the prove-up and stand
2 there or you have her sign the agreement
3 incident to divorce if your husband,
4 ex-spouse, wants to get married again before
5 six months. I mean, and that's the reality of
6 it because otherwise you may have a writ of
7 error appeal. It may not be successful, but
8 that's one of the things that I don't like
9 about it. Why does it take so long to get
10 this over with? When it's over, it should be
11 over.
12 MR. ORSINGER: I would say as a
13 family lawyer that there is only one case that
14 I know about where that has happened, and
15 that's a published case where the courts have
16 ruled on that, but in my experience in the
17 family law practice if you have a deal if it's
18 going to fall apart, it falls apart before the
19 final judgment is signed. Once the final
20 judgment is signed then most people won't
21 appeal, can't even find a lawyer that would
22 appeal, because you have waived all error
23 except for lack of jurisdiction in the Court;
24 isn't that right, if you have entered into an
25 agreed judgment?

1 PROFESSOR DORSANEO: Probably.
2 Bernie Stubbs wouldn't agree with your
3 analysis. No. He's the one guy.
4 MR. ORSINGER: Yeah. Well, I
5 don't think that has -- I don't think we need
6 to preserve that or squash it out because of
7 the effect on family law because I think that
8 most of the family law deals fall apart
9 between the prove-up and the signing of the
10 original decree, and you know about it then.
11 CHAIRMAN SOULES: Okay. Would
12 somebody articulate then the policy issue that
13 you want to get a consensus on? No sense in
14 going back and doing that work if --
15 PROFESSOR DORSANEO: As I
16 understand they want to know whether in a no
17 service case the bill of review remedy is an
18 acceptable substitute that wouldn't be --
19 PROFESSOR ALBRIGHT: A no
20 notice case.
21 PROFESSOR DORSANEO: -- An
22 Alexander vs. Hagadorn impossibility
23 PROFESSOR ALBRIGHT: A no
24 notice case because you could be served but
25 not have notice of the trial date, for

1 instance.

2 MR. LOWE: Yeah. Look, if we

3 wanted to do away with just the writ of error,

4 then you could just change the caption "appeal

5 by party not appearing at trial," and start

6 out "A party may appeal a final judgment who

7 didn't appear by complying with the following

8 requirements" and just do away with the

9 language, if that's what we are trying to do

10 away with, and make it all just part of an

11 appeal, but the main thing as I see it is

12 Rusty says that there is a lot of confusion

13 caused by what's the face of the record, but I

14 have heard a lot of confusion talking about

15 this, too.

16 PROFESSOR DORSANEO: Let me

17 say one other thing.

18 CHAIRMAN SOULES: Let's bring

19 this to closure, though.

20 PROFESSOR DORSANEO: We will

21 also examine whether it ought to be the party

22 not participating in the trial or somebody

23 else, maybe somebody who wasn't served, maybe

24 that -- Rusty's comments all have to do with

25 the fact that that category is perhaps broader

1 than it ought to be in fairness to all of us.

2 HONORABLE C. A. GUITTARD:

3 Well, the question should be whether or not we

4 should abolish the six month review.

5 PROFESSOR DORSANEO: And if

6 not, how should it be changed?

7 HONORABLE C. A. GUITTARD:

8 Right.

9 CHAIRMAN SOULES: How many feel

10 that the six-month review should be abolished?

11 PROFESSOR ALBRIGHT: We don't

12 know yet.

13 HONORABLE SCOTT A. BRISTER: I

14 don't know. If it's nothing other than

15 defaults, if defaults are what's covered, then

16 all defaults ought to be under the same Rule,

17 bill of review or writ of error. If it's

18 something else...

19 HONORABLE C. A. GUITTARD:

20 Well, when a post-judgment, a post-answer

21 default, a fellow answers and then doesn't

22 come he is entitled to a six-month appeal.

23 Should he have one? I don't know, but that's

24 what we ought to decide.

25 HONORABLE SCOTT A. BRISTER:

1 But it seems like that ought to be covered by
2 the Gold, Smith, Hagadorn and whatever. It's
3 the clerk's fault and --
4 HONORABLE C. A. GUITTARD: In
5 other words, it should be a bill of review
6 problem.
7 HONORABLE SCOTT A. BRISTER: It
8 can be taken care of fine by the bill of
9 review.
10 HONORABLE C. A. GUITTARD:
11 Okay. That's the question to solve.
12 CHAIRMAN SOULES: Does the
13 subcommittee want any guidance from the
14 committee as a whole right now?
15 HONORABLE C. A. GUITTARD: Yes.
16 CHAIRMAN SOULES: Okay. What
17 would you like to have answered?
18 HONORABLE C. A. GUITTARD: We
19 want an answer to the question of should a
20 six-month review be abolished.
21 CHAIRMAN SOULES: Okay. Let's
22 take a show of hands, and I understand some
23 people don't feel like they can vote on that
24 because they don't have enough information.
25 Okay. First, Shelby.

1 MR. SHARPE: I think Rusty has
2 got one point that we should address before we
3 vote on that.
4 CHAIRMAN SOULES: That's fine.
5 What is it?
6 MR. SHARPE: And that is
7 failure to appear without fault because his
8 statement that you know about it and you just
9 don't show up, I realize that's not -- but it
10 could happen. I think that's the thing that's
11 really sticking in the craw of a lot of folks
12 is somebody just knows about it but just flat
13 doesn't show up, maybe just out of orneriness,
14 but to me a default or a judgment nil dicit
15 which is entered, which is basically a
16 judgment after having answered, those
17 situations need to be addressed, and I think
18 if you want to get rid of the writ of error
19 practice, hey, that's fine. Let's just go get
20 rid of the writ of error practice and leave it
21 down to appeals and bill of review and just go
22 with that. I think that would be great.
23 HONORABLE C. A. GUITTARD:
24 That's the question.
25 MR. ORSINGER: I would propose

1 that we break it into two steps. The first
2 vote is, is there anyone here who wants to
3 wipe it out no matter what your excuse is, and
4 if that fails, then let's find out if we want
5 to wipe it out if your excuse is that if you
6 just turned around and walked out of the
7 courtroom, you knew there was a trial and you
8 chose not to come. That's where Rusty's issue
9 is going to start splitting votes.
10 MR. MCMAINS: Well, okay.
11 CHAIRMAN SOULES: Rusty.
12 MR. MCMAINS: If I can make one
13 clarification because I went over this rather
14 fast. I was mentioning the difference between
15 180 days or 90 days or 180 days, whatever the
16 Rules are. With regards to the notice that
17 basically means that if you don't get notice
18 of the entry of a judgment, I mean, our
19 current Rules provide remedies. If you are in
20 the judgment and you don't get notice of it,
21 then the times don't start to run until you
22 get notice of it. Now, your burden under that
23 Rule I understand is to go get a finding that
24 you didn't get notice of it, and that's right
25 now one of the remedies that you have

1 basically in addition to the kind of automatic
2 remedy of you have got 30 days to find out if
3 you didn't know there was anything going on,
4 but it seems to me that that basic practice,
5 you are entitled to an appeal from that as
6 well, specifically under our Rule now, so that
7 you have got a period a maximum of which is
8 under the Rule up to -- the times don't start
9 to run and they are extended only up to a
10 maximum, and I don't remember what the number
11 is.
12 MR. ORSINGER: 90 days.
13 CHAIRMAN SOULES: 90 days.
14 PROFESSOR ALBRIGHT: 90 days.
15 MR. MCMAINS: And that includes
16 basically the time in which you can file a
17 motion for new trial. You can get all of the
18 appellate relief, do all of the things you
19 want to do in the trial. So you have already
20 got three months if you are assuming that you
21 didn't get notice of the judgment. I mean,
22 all of your times are already pushed back by
23 three, by up to three months if nobody sent
24 you notice of the judgment, and if you got
25 notice of the judgment, the question is why

1 should you be treated any differently just
2 because you didn't show up frequently or maybe
3 even after you had notice of the trial and
4 didn't show up, and you get to take advantage
5 of that and say, okay, here's a guy that
6 didn't have notice of the trial and did have
7 notice of the judgment, and he does his thing,
8 and here is somebody else who just ignores
9 both of them, and he gets an extra three
10 months?
11 It just seems silly. We seem to have
12 accommodated everybody who's going to know
13 that there was a judgment entered against
14 them. Apart from them you have the bill of
15 review practice, and why shouldn't they have
16 the burden in a bill of review, I guess is my
17 point. I mean, the judgment is entitled to
18 some integrity unless they are no service
19 judgments, in which case they are void, and
20 that remedy is available now.
21 CHAIRMAN SOULES: Okay. What
22 does the committee need guidance on? We need
23 to get something stated here.
24 MR. ORSINGER: I think we ought
25 to make a motion that we don't allow any kind

1 of six-month review under any circumstances,
2 see if it passes. If it passes, that's the
3 end of the argument. If it doesn't pass, then
4 we have got to find out --
5 HONORABLE C. A. GUITTARD: Then
6 we repeal Rule 45.
7 MR. ORSINGER: That's right.
8 MR. MCMAINS: If I may have one
9 other thing, from the standpoint there is, of
10 course, a Rule that specifically gives you
11 additional time in the event of service by
12 publication.
13 MR. ORSINGER: Two years.
14 MR. MCMAINS: Two years
15 already.
16 MR. ORSINGER: To file a motion
17 for new trial.
18 MR. MCMAINS: So that's already
19 in there, too. So again you are really
20 talking about affected service as being a
21 valid service in some fashion and still no
22 appearance.
23 CHAIRMAN SOULES: Okay. So
24 state the proposition.
25 MR. ORSINGER: I am going to

1 move that we eliminate the six-month delay,
2 whether it's under the form of a writ of error
3 or the form of an out of time appeal, for all
4 purposes, and let people fall back on if they
5 got no notice, their 90 day remedy or a bill
6 of review, which they can file up to four
7 years after the judgment, or if it's citation
8 by publication, file a motion for new trial up
9 to two years after the judgment. Those are
10 the only remedies. Just eliminate the
11 six-month out of time review. That's my
12 motion.
13 MR. MCMAINS: Second.
14 CHAIRMAN SOULES: It's moved
15 and seconded. Those in favor show by hands.
16 Eleven. Opposed? Eleven to seven in favor of
17 abolishing, what, Rule 45?
18 HONORABLE C. A. GUITTARD:
19 Yeah.
20 CHAIRMAN SOULES: Rule 45. And
21 leaving the party to whatever other appellate
22 remedies are available; is that correct,
23 Richard?
24 MR. ORSINGER: That's right.
25 CHAIRMAN SOULES: You didn't

1 mean to be comprehensive in your list of the
2 other appellate remedies that are available?
3 MR. ORSINGER: I thought I was,
4 but I may not have been.
5 CHAIRMAN SOULES: Well, you did
6 intend to be, but if you weren't, we can
7 include the others as well, right?
8 MR. ORSINGER: Right.
9 CHAIRMAN SOULES: Okay.
10 MR. ORSINGER: Now, was that
11 enough of a vote for us to assume it's done,
12 or was that too close?
13 HONORABLE SCOTT A. BRISTER: It
14 was for the committee to look at it.
15 PROFESSOR ALBRIGHT: I think
16 the committee still needs to look and make
17 sure that all parties that we want to protect
18 are adequately protected.
19 PROFESSOR DORSANEO: I will
20 make as good as a report as I can make on this
21 subject.
22 CHAIRMAN SOULES: All right.
23 The inclination is to abolish Rule 45 unless
24 there is some issue that we haven't looked at
25 here that should bring it back to our

1 attention, right? The committee is going to
2 look at that?
3 PROFESSOR DORSANEO: Uh-huh.
4 CHAIRMAN SOULES: Okay. So
5 charged. Next?
6 PROFESSOR DORSANEO: I am going
7 to exercise discretion here not to take up our
8 draft of Appellate Rule 52 at this point
9 because I think that may be part of the same
10 thing we were talking about, and I am not sure
11 we are ready yet, but so that would take us
12 all the way up to in terms of the policy
13 question of significance to Rule 74, which
14 deals with briefs in the Courts of Appeals.
15 There is a companion -- which that's on page
16 60. There is a companion Rule for
17 applications for writ of error in the Supreme
18 Court on page 68.
19 HONORABLE SAM HOUSTON CLINTON:
20 Why are you skipping over statement of facts,
21 Rule 56?
22 CHAIRMAN SOULES: Rule 56 on
23 page 61. I must have that wrong. What page
24 is it on, Judge?
25 HONORABLE SAM HOUSTON CLINTON:

1 61. Statement of facts.

2 MR. ORSINGER: It's on page 51.

3 HONORABLE SAM HOUSTON CLINTON:

4 Oh, I'm sorry. Yes. I can't read.

5 MR. ORSINGER: That's that

6 small font.

7 PROFESSOR DORSANEO: We can do

8 that one. Go ahead, Judge. Why don't do you

9 that one?

10 HONORABLE C. A. GUITTARD: The

11 question is with respect to the presumption of

12 completeness of the record when a party files

13 his statement of points to be relied on. Now,

14 apparently the Supreme Court when they adopted

15 that some years ago felt that if you specify

16 the points relied on and then request a

17 statement of facts limited to those points

18 that that ought to be the complete record for

19 the purpose of the appeal and that if the

20 appellee thinks some additional part of the

21 record should be included he has the right to

22 designate that and even by amendment he could

23 have it brought before the Appellate Court at

24 a later time.

25 So but some of the Courts of Appeals have

1 held that if there is a question of
2 sufficiency of the evidence to support the
3 fact finding that the whole record has to be
4 there even though you have limited your points
5 under Rule 53. That apparently was not the
6 intent of the Rule originally, and the intent
7 of the Rule in which we undertake to spell out
8 is that the record that is presented on appeal
9 is presumed to be the entire record, and if
10 there is a question to be reviewed in the
11 light of the entire record, then that should
12 be considered the entire record, and those
13 civil appeals, those appeals cases,
14 intermediate Court of Appeals cases, that say
15 the contrary ought to be in effect overruled.
16 Now, the Court of Criminal Appeals,
17 though, has taken the position over a very
18 strong descent by Judge Clinton that there is
19 a Constitutional problem of reviewing the
20 sufficiency of the evidence in the light of
21 the entire record and that the presumption
22 shouldn't apply in that case. Well, if that's
23 the prevailing doctrine of the Court of
24 Criminal Appeals we ought to make it a special
25 exception, a specific exception for that

1 situation in criminal cases. Otherwise, we
2 should say that the Rule means exactly what it
3 says, and that is that if a party specifies
4 the grounds upon which he appeals then there
5 should be a presumption that the record
6 presented on appeal is the entire record for
7 the purpose of that review.
8 CHAIRMAN SOULES: Okay. Well,
9 of course, Judge, there -- I can't find the
10 cite, but there is a case called Englander
11 that's a '68 case from the Supreme Court of
12 Texas itself.
13 HONORABLE C. A. GUITTARD: But
14 that is a case where this Rule was not
15 followed. In other words, in the cases where
16 you don't specify under Rule 53 what the
17 points are that you are relying on, then there
18 is no presumption. The presumption is that
19 there is something that's not in -- that's not
20 shown on appeal but might be in the record
21 that would sustain the judgment. That's the
22 situation when you don't follow Rule 53.
23 PROFESSOR DORSANEO: D.
24 HONORABLE C. A. GUITTARD:
25 53(d). But if you do follow Rule 53, that

1 takes the case out of the Englander Rule and
2 raises the presumption which is contrary to
3 the presumption in the Englander case.
4 PROFESSOR DORSANEO: It
5 reverses the presumption.
6 CHAIRMAN SOULES: Yeah. Not
7 everybody reads Englander that way. That
8 wasn't the discussion.
9 PROFESSOR DORSANEO: This is
10 the bad case, the Schafer versus --
11 MS. DUNCAN: Well, that puts it
12 in perspective, doesn't it?
13 CHAIRMAN SOULES: Well, the
14 idea of Englander was that the trial court's
15 judgment is the trial court's judgment, and if
16 the parties want to attack that judgment for
17 factual or legal sufficiency then there are
18 standards of review that apply, and you just
19 cannot limit that appeal by not taking up a
20 full statement of facts because the Court has
21 to look at the full statement of facts to
22 review factual or legal sufficiency, and so
23 this doesn't work on factual and legal
24 sufficiency points, and the parties can't by
25 doing whatever they are going to do with the

1 record or doing whatever they are going to do
2 with their briefs attack the trial court's
3 judgment any other way than on the fixed
4 standard of review. That was the rationale
5 behind Englander whenever it was decided
6 because the Supreme Court rejected this and
7 said so in that opinion that the application
8 of this Rule to legal and factual sufficiency
9 points, and it was intentional.
10 PROFESSOR DORSANEO: Well,
11 there wasn't any Rule 53(d) when Englander was
12 decided.
13 HONORABLE C. A. GUITTARD:
14 That's right. And the Rule 53(d) was adopted
15 in order to reverse the Englander presumption
16 in that limited class of cases. As a matter
17 of fact, I stood right -- it wasn't in there.
18 CHAIRMAN SOULES: There was a
19 counterpart of this in the Rules at the time.
20 PROFESSOR DORSANEO: And it's
21 still in there, and it's misleading. It talks
22 about if you don't go with an abbreviated
23 statement of facts that they are going to hurt
24 you for it. Now, we know under the Rule of
25 Englander vs. Kennedy that if you don't go

1 without a complete statement you are going to
2 get hurt worse unless you can use 53(d), and
3 now there is nothing in 53(d) right now that
4 says that you can't use it in the Englander
5 context, and I guess the committee thought
6 that this new case Schafer vs. Conner, which
7 is consistent with Englander, is probably not
8 the good approach, that the better approach is
9 to let the record be as big as it needs to be
10 but no larger than it needs to be.
11 CHAIRMAN SOULES: Okay. Sarah.
12 Then --
13 MS. DUNCAN: The committee was
14 not unanimous on this. Maybe I am the only
15 descender. I personally think Schafer was a
16 correct and good decision. In my view it is
17 the appellant who has the burden to bring up
18 whatever record that appellant thinks is
19 necessary to demonstrate reversible error, and
20 I don't think the appellant should be able to
21 shift the burden to the appellee to sift
22 through the record and determine what parts of
23 the record are necessary to disprove a showing
24 of reversible error, and in my view that's
25 what this proposed amendment does.

1 CHAIRMAN SOULES: Rusty.

2 MR. MCMAINS: Well, I guess I
3 have more kind of a pragmatic question in
4 terms of practice because I haven't read all
5 of the amendments, of course, that we have
6 done, but my recollection is that we now --
7 that these Rules theoretically require that
8 you advance the cost of the statement of
9 facts, and my question is whose burden is it
10 to pay if somebody were to choose this remedy
11 and to say, okay, I am going to make a factual
12 sufficiency complaint on damages, and there
13 are only these three pages involved, and in
14 reality there are 800 pages involved in terms
15 of in view of the other side, the other side
16 makes that request. Is it the appellant's
17 burden to pay for it under the Rules as they
18 are now drafted, or does the appellee have to
19 pay for that?

20 HONORABLE C. A. GUITTARD:
21 Well, the point is that if the appellant
22 doesn't request enough of it and the appellee
23 brings additional portions of the record up
24 that the appellant has not brought up, then
25 the appellate court has the discretion to

1 reverse the costs, put all those costs on the
2 appellant.
3 MR. MCMAINS: Well, I
4 understand. But remember now the current Rule
5 as I understand what we are now doing, though,
6 we are saying that it's the appellee that --
7 you have got to advance the costs.
8 PROFESSOR DORSANEO: No. It
9 says "pay or arrange to pay."
10 MR. ORSINGER: Yeah. But you
11 can't get your statement of facts until they
12 are paid in full.
13 MR. MCMAINS: I want my 792
14 pages. I know what that means to the court
15 reporter. It means I better write them a
16 check.
17 PROFESSOR DORSANEO: Your point
18 is a good point, but arrange to pay may be
19 theoretically you have to arrange by mandamus.
20 MR. ORSINGER: No. This is a
21 specific Rule here that says you are not
22 entitled to the statement of facts. It's
23 here. It's g.
24 HONORABLE C. A. GUITTARD:
25 That's right.

1 MR. ORSINGER: They are
2 entitled to be paid in full before they have
3 to deliver the statement of facts to you.
4 MR. MCMAINS: Right.
5 MR. ORSINGER: Now, we have the
6 problem under the current practice I don't
7 think the Rules right now tell you who has to
8 pay when the appellee wants to add, and I
9 think it would be unfair to let an appellant
10 say "I am only going to have my client's
11 testimony typed up and pay for that" and then
12 the appellee has to front the cost for all the
13 other witnesses. If we are going to do it,
14 the appellee should be able to elect and make
15 the appellant pay, and if that was abusive
16 then let it be adjusted on the assessment of
17 costs at the end of the case.
18 HONORABLE C. A. GUITTARD:
19 Well, we can, I think, cure that by an
20 amendment which would say that the -- when the
21 appellee designates additional portions of the
22 record that it be the appellant's burden to
23 include that and to pay for it.
24 MS. DUNCAN: You are still
25 shifting the burden to the appellee to go

1 through the record. For instance, on a no
2 evidence point to go through the record and
3 determine whether there is some evidence in
4 the record that's not included on appeal that
5 will support the jury's finding, or if you
6 have got charge error like on -- you are still
7 putting the burden on the appellee to go
8 through the record and determine whether
9 during opening statements, any part of the
10 testimony, closing arguments, whatever, they
11 can cure the alleged error in the charge
12 that's been brought forward on appeal.
13 CHAIRMAN SOULES: Judge
14 Brister.
15 HONORABLE SCOTT A. BRISTER: It
16 seems to me in the vast majority of the cases
17 there are very discrete, distinct different
18 parts of the trial. I mean, the vast majority
19 of our trials are personal injury cases. If
20 you say there is insufficient evidence of the
21 damages, then you are not going to have the
22 expert witnesses. You are not going to have
23 the eyewitnesses. You just get the other
24 people, and it seems to me ridiculous to make
25 you bring up the eyewitness' testimony so the

1 Court of Appeals won't "gotcha," you didn't --
2 when all that's left out has nothing to do
3 with it.
4 Similarly, if it's an insufficient
5 evidence and negligence, bringing up the
6 doctor's testimony who treated the patient and
7 who knows nothing about what happened in the
8 car wreck is a waste of expense. Now, clearly
9 in the complex cases that's a harder problem,
10 but in the complex cases it's more likely they
11 are going to bring up all the record anyway
12 because of a bunch more witnesses and stuff
13 like that, but the vast majority of trials and
14 the ones that would benefit most from saving
15 expense it seems to me is a reasonable
16 approach when the jury asks for testimony, you
17 know, what is so-and-so's testimony, we have a
18 dispute about what so-and-so said on
19 so-and-so. It's never more than two or three
20 pages. I mean, the vast majority of cases it
21 is discrete portions of the record. It seems
22 to me nothing wrong as long as Rusty's point
23 about cost is not unfairly shifted.
24 CHAIRMAN SOULES: Anyone else
25 have anything to say about this? Mike

1 Hatchell

2 MR. HATCHELL: To try to

3 sharpen the focus, the problem we have in the

4 wake of Schafer vs. Conner is that the present

5 rule is just flatly misleading to somebody who

6 doesn't do a lot of appeals. It implies that

7 you can take an appeal on a limited record and

8 get full review when in truth and in fact by a

9 case construction of the Rule you can't do

10 that. I would take the position the fact that

11 Schafer vs. Conner is even much broader than

12 factual sufficiency review because it says any

13 point that requires review of the entire

14 record, which would be admission of exclusion

15 of evidence and things of that nature. So

16 what we really need to decide is, is the

17 concept of limited record appeal worth

18 preserving against the concerns that Sarah

19 raises of burden and cost-shifting to the

20 appellee.

21 MR. ORSINGER: Can I make a

22 proposal that might be a midground for

23 somebody, or maybe it's not? Is that you

24 should be able to elect to include all or none

25 of a witness' testimony but not to be able to

1 selectively include some pages and skip some
2 pages and include more pages. Would that make
3 it any easier for you, for example, Sarah, if
4 you were to say "I am going to take eight
5 witnesses, and it's up to you if you want to
6 bring up the other five"? Or is the problem
7 just as bad?
8 MS. DUNCAN: I don't think that
9 would solve the problem. I mean, you are
10 still going to have -- an appellee is still
11 going to be required to go through the
12 undesignated testimony on the portions of the
13 record.
14 MR. ORSINGER: But you could
15 adapt more easily to what Judge Brister was
16 saying because if you know, for example, that
17 three witnesses testified on liability only
18 and what's going up is damages, you don't even
19 really need to read those guys' testimony to
20 know to exclude them, do you?
21 MS. DUNCAN: I agree with Judge
22 Brister that there needs to be a procedure for
23 a limited appeal, but I don't think either the
24 current Rule or the proposed Rule adequately
25 addresses that need without significantly

1 shifting the burdens or giving the potential
2 for significantly shifting the burdens.
3 CHAIRMAN SOULES: Dan Johnson.
4 MR. JACKSON: David Jackson.
5 CHAIRMAN SOULES: I mean
6 Jackson, excuse me.
7 MR. JACKSON: We do need to put
8 some parameters on it because I have had
9 requests for partial transcripts of
10 depositions, and a lawyer will ask you
11 something crazy like give me every question
12 and answer that he answered "I don't know,"
13 and you know, you can spend a lot more time
14 putting that together than you can just giving
15 them the whole transcript.
16 HONORABLE C. A. GUITTARD:
17 Bear in mind in Schafer vs. Conner that the
18 opinion shows that they didn't comply with
19 53(d). They didn't state the grounds, the
20 points that they are going to rely on. So our
21 present question really wasn't before the
22 Court then, but the problem is that's the way
23 it has been interpreted.
24 CHAIRMAN SOULES: Okay. Does
25 somebody have a proposition?

1 HONORABLE SCOTT A. BRISTER:
2 Yes. I propose we adopt the committee's
3 suggestion with an amendment to be added about
4 with discretion to the Court of Appeals to
5 assess costs if unreasonably restricted to
6 unfair designation on a limited appeal.
7 MR. ORSINGER: Who would pay
8 the initial cost of getting the statement?
9 HONORABLE SCOTT A. BRISTER:
10 You have got to pay what you designate, but if
11 it's unreasonably restricted -- well,
12 otherwise you have every little plaintiff in
13 every little car wreck case who wants to
14 appeal a discrete, simple issue has to request
15 the whole trial, even when everybody knows if
16 it's on liability the moaners and groaners,
17 the doctors have nothing to do with it.
18 Otherwise, you waive sufficiency of no
19 evidence. You just waive it. You have to pay
20 for all of it.
21 MS. DUNCAN: By the same token
22 when there is payment of the statement of
23 facts to consider as a cost of appeal there
24 are people who won't -- who will exercise that
25 privilege more responsibly and who will truly

1 sit down and say, "Is there a sufficiency to
2 appeal here in light of the fact that it's
3 going to cost me however many thousands of
4 dollars to get my record prepared?" And you
5 are enabling them to shift that cost, for
6 instance, to the defendant and then saying
7 "Defendant, don't worry. We will shift it
8 back to the plaintiff from whom you can never
9 collect, but don't worry about it." And
10 that's just not -- I don't think that's going
11 to be workable. I think everybody is going to
12 file a partial statement notice, and they are
13 going to shift the costs for preparing the
14 statement of facts to the nonappealing
15 prevailing party.
16 CHAIRMAN SOULES: Then there is
17 another side to that that's been discussed
18 here before, too, and that is whenever the
19 plaintiff or the appellant tries to limit the
20 statement of facts if the appellee can
21 designate "free" and force that back on the
22 appellant to start with they are going to go
23 ahead and do so just because they want to
24 include it altogether and make the appellant
25 pay for the whole thing. It's a dilemma

1 that's -- I don't know what the resolution is.
2 Let's see. Rusty.
3 MR. MCMAINS: Well, just I
4 understand Judge Brister's desire to make
5 appeals more efficient or economical, but the
6 fact of the matter is -- and this is kind of a
7 chicken and egg problem -- most appellate
8 lawyers that I know, many of whom are in this
9 room, that have taken referred appeals, cases
10 they didn't try, find things in the record to
11 support a proposition that the trial lawyer
12 never thought about. Just like we all get
13 opinions from the courts saying this evidence
14 proves this, and you had nobody ever took that
15 position before.
16 So until you see it, the idea of
17 designated basically gives an awful lot of
18 credence to the trial lawyer that is not
19 necessarily born out by subsequent events with
20 regards to the drafting of the appeal and the
21 appellate documents or the opinions of the
22 Courts of Appeal, and I frankly do not
23 disagree that we are misleading people in the
24 sense that you can appeal on an abbreviated
25 statement when in reality you can't, and that

1 needs to be corrected, but I am not sure that
2 it's that much more advisable or will make it
3 any easier to shift the costs.
4 CHAIRMAN SOULES: Sarah Duncan.
5 MS. DUNCAN: The example I used
6 earlier was governmental immunity. There
7 might be instances where determining whether a
8 governmental employee shares a municipality's
9 immunity or doesn't can be determined strictly
10 on the basis of the pleadings and the legal
11 arguments, and I think we are all struggling
12 with wanting to not burden those parties or
13 the system with a full record and a full
14 appeal in that situation.
15 What I am suggesting is that neither of
16 the two procedures that we have got works to
17 do that, but that doesn't mean that we can't
18 create a procedure that will accomplish that;
19 for instance, a certification procedure with
20 the trial court where the parties say, "This
21 is what we want to appeal, Judge. This is all
22 we think that will be necessary to do that."
23 The trial judge sanctions that and says go to
24 the Court of Appeals. That's one possibility.
25 I'm sure there are others, but I am not

1 arguing against a limited appellate procedure.
2 I am arguing against the two ways that we have
3 as not being effective to do that fairly to
4 all parties.
5 CHAIRMAN SOULES: All right.
6 The proposition though was that we adopt 53(d)
7 with some provision concerning costs, and we
8 haven't decided what that is.
9 HONORABLE C. A. GUITTARD:
10 Right.
11 CHAIRMAN SOULES: Okay. That
12 was your proposition, wasn't it?
13 MR. ORSINGER: Judge Brister's.
14 CHAIRMAN SOULES: Judge
15 Brister's and who seconded it? Anybody?
16 Richard. Okay.
17 Okay. Those in favor show by hands.
18 Nine for. Those opposed? Five opposed. So
19 nine for and five opposed. Okay. And
20 the -- what are we going to --
21 MR. ORSINGER: I would like to
22 move on the cost allocation. I think that the
23 party who's appealing the judgment should pay
24 for the costs and that the appellee if there
25 are portions to designate can simply indicate

1 what should be included and divulge upon the
2 appellant to pay for it.
3 HONORABLE SCOTT A. BRISTER:
4 What if they don't pay for it?
5 MR. ORSINGER: Then it's an
6 incomplete statement of facts.
7 HONORABLE SCOTT A. BRISTER:
8 Nil dismissed.
9 MR. ORSINGER: No. Then the
10 presumption applies.
11 HONORABLE C. A. GUITTARD:
12 Then the original presumption applies.
13 CHAIRMAN SOULES: Okay. Any
14 comment on that? Is there a second?
15 HONORABLE C. A. GUITTARD: I
16 have no objection to that.
17 CHAIRMAN SOULES: Okay. The
18 motion is that if the appellee designates
19 additional portions of the statement of facts
20 that the appellant has to pay or make
21 arrangements to pay, I suppose, or the words
22 that you-all are using, and failing that the
23 presumption does not apply.
24 HONORABLE C. A. GUITTARD:
25 Right.

1 CHAIRMAN SOULES: So it's
2 either go ahead and pay for what the appellee
3 has designated or bring up the entire
4 statement of facts.
5 MR. MARKS: Well, doesn't that
6 take us right back to where we were a minute
7 ago?
8 CHAIRMAN SOULES: John Marks.
9 MR. MARKS: Doesn't that take
10 us back to where we are right now?
11 PROFESSOR DORSANEO: No. One
12 thing it does, what it does, it lets lawyers
13 who don't want to be messing with each other
14 for no particular reason to have the case
15 appealed without running afoul of the
16 presumption. It lets the lawyers agree that
17 the presumption does not apply that this
18 record is enough, and that's a good thing.
19 MS. DUNCAN: That's a good
20 thing.
21 JUSTICE HECHT: But if you were
22 the appellee?
23 PROFESSOR DORSANEO: Yes. I
24 would not mess with somebody unnecessarily if
25 I was the appellee.

1 MR. MARKS: As a matter of
2 course isn't the nonappealing party going to
3 designate the rest of the statement of facts?
4 HONORABLE C. A. GUITTARD: Not
5 necessarily.
6 MR. ORSINGER: Let me also say
7 that you could have a curative -- a provision
8 that the appellate court could assess those
9 extra costs against the appellee if they felt
10 like the designation was unnecessary.
11 HONORABLE C. A. GUITTARD:
12 Right.
13 MR. ORSINGER: They already
14 have that authority.
15 CHAIRMAN SOULES: They have
16 that authority.
17 MR. ORSINGER: And so in a
18 sense it's self-correcting. Although you may
19 make the appellant pay the money on the front
20 end if it's an abusive designation you are
21 going to have to reimburse the appellant on
22 the back end, and that is some kind of
23 safeguard against that being abused.
24 MR. LATTING: Does it ever
25 happen?

1 CHAIRMAN SOULES: Yes. Not
2 often but --
3 MS. DUNCAN: Eve Evelett's
4 taken it up on a motion.
5 PROFESSOR DORSANEO: But now
6 if the appellant doesn't request a complete
7 statement and you are the appellee, you just
8 smile.
9 CHAIRMAN SOULES: Does it ever
10 happen that the costs are changed on appeal,
11 that part of the costs are charged against the
12 appellee? Is that your question, Joe?
13 MR. LATTING: Because of an
14 abusive designation.
15 MR. ORSINGER: Yeah. Sure.
16 Particularly on things like where somebody
17 designated the voir dire be taken up, but
18 there is nothing in the case on the voir dire
19 sometimes the appellate courts will assess the
20 voir dire costs regardless of who won or lost
21 the appeal. We are relying on them to
22 intervene in these situations, but we can make
23 the Rule more specific if we want by saying if
24 the request is unjustified.
25 CHAIRMAN SOULES: There is at

1 least one reported decision in the last year
2 in the advance sheets where the appellate
3 court reorganized the costs of the appellate
4 record. So it does happen.
5 Okay. Any further discussion? Okay.
6 Those in favor of Richard's motion show by
7 hands. Keep them up, please. 13. Those
8 opposed? That's unanimous.
9 Now, this doesn't say -- none of that is
10 in the Rule right now. So that has to be
11 written in, correct?
12 HONORABLE C. A. GUITTARD:
13 Right.
14 CHAIRMAN SOULES: Okay.
15 PROFESSOR ALBRIGHT: Luke?
16 CHAIRMAN SOULES: Yes. Alex
17 Albright.
18 PROFESSOR ALBRIGHT: I would
19 like to encourage Sarah to try to write a rule
20 that she's apparently thinking about for a
21 different way to limit appeals at the hearing
22 the next time, and it might be that's a better
23 alternative than what we are doing.
24 HONORABLE C. A. GUITTARD: I
25 think that Sarah is on our committee, and I

1 would encourage Sarah to bring it before our
2 committee.
3 CHAIRMAN SOULES: Okay. So
4 charged if Sarah will accept the charge.
5 PROFESSOR DORSANEO: Sarah,
6 are you on the Advisory Committee Appellate
7 Subcommittee?
8 (Ms. Duncan nods negatively.)
9 PROFESSOR DORSANEO: We need
10 to put her on there.
11 CHAIRMAN SOULES: Okay. If she
12 wants to be on there.
13 PROFESSOR DORSANEO: She's
14 gone to all the meetings anyway.
15 MS. DUNCAN: That's because we
16 joined the two groups. We have pretty much
17 joined the two groups.
18 PROFESSOR DORSANEO: Uh-huh.
19 MR. ORSINGER: Actually we are
20 ignoring the fact that it started out as an
21 appellate section committee, aren't we? We
22 are now operating under the foot offices of
23 the Supreme Court Advisory Committee.
24 MS. DUNCAN: If that's true
25 then --

1 MR. ORSINGER: Yeah. I
2 think --
3 HONORABLE C. A. GUITTARD:
4 Well, Luke just put you on it.
5 CHAIRMAN SOULES: Well, I want
6 her to accept that. What we have done is we
7 have made committee assignments at the
8 beginning and then, of course, announced and
9 invited anyone who wanted to volunteer to be
10 on any other committee to let us know because
11 it's just your election if you want to be on a
12 committee you are not on right now, let me
13 know, and I will see that your name is given
14 to the Chair of the subcommittee, and you will
15 be made a member of the subcommittee. Sarah
16 can let me know on that and I'll take care of
17 making that assignment. What's next, Bill?
18 PROFESSOR DORSANEO: 74.
19 MS. SWEENEY: Page or Rule?
20 PROFESSOR DORSANEO: 60.
21 CHAIRMAN SOULES: Judge
22 Clinton, do you see any problem with Rule 53?
23 It's got some language in there to address the
24 concerns that you apparently had in your
25 descent of concurring --

1 HONORABLE SAM HOUSTON CLINTON:
2 Well, I don't believe it's going to reach it,
3 but I don't believe you can reach it in view
4 of the opinion of the Court.
5 HONORABLE C. A. GUITTARD: Our
6 proposal is to make an exception for criminal
7 cases in light of that opinion that you
8 descented from.
9 HONORABLE SAM HOUSTON CLINTON:
10 That's right.
11 HONORABLE C. A. GUITTARD: And
12 you would approve that kind of provision,
13 right?
14 HONORABLE SAM HOUSTON CLINTON:
15 Right. Well, I don't have any choice.
16 MS. DUNCAN: It's the
17 Constitution.
18 CHAIRMAN SOULES: You won't if
19 you keep on writing descents. You have
20 written your descent.
21 HONORABLE SAM HOUSTON CLINTON:
22 Yeah, I have.
23 CHAIRMAN SOULES: Okay. 74 on
24 page what?
25 PROFESSOR DORSANEO: 60.

1 CHAIRMAN SOULES: Page 60.
2 PROFESSOR DORSANEO: Now, we
3 will have to make conforming changes to
4 paragraph (a) because of the notice of appeal
5 discussions that we had. I think probably
6 that conforming just gets changed in terms of
7 the parties to the appeal, parties to the
8 trial court's final judgment. I think it
9 probably just gets changed back to trial
10 court's final judgment, but that's not a big
11 thing.
12 The big issue is in paragraph (d). It
13 was -- well, basically the two types of
14 approaches stating the matter that's going to
15 be brought to the appellate court as a way to
16 challenge the judgment, the more so-called
17 issue practice which is common throughout the
18 country could even be said to be the more
19 modern practice, and that doesn't necessarily
20 mean it's any better than our practice or the
21 point of error practice.
22 The point of error practice, the point of
23 error as Mike Hatchell has explained it has at
24 least two parts, maybe three parts, talking
25 about who; and we would be talking about the

1 trial court erred, and then you would identify
2 in what respect by granting or denying a
3 motion for instructed verdict, and then it's
4 at least customary to give in good advocacy to
5 give why. So who, what, why, point of error
6 practice. Points of error cannot be abstract
7 statements of legal issues. Let's say they
8 couldn't be, you know, whether a defaulted
9 party must receive service by personal
10 delivery in a trover case. All right. That's
11 an abstract question. That's an issue in a
12 broader sense.
13 The question is, do we want to retain our
14 point of error practice, which is more defined
15 and identifies the particular ruling about
16 which complaint is made? It let's you as a
17 person getting the brief locate the ruling in
18 the record to see if that was the ruling that
19 was made, if there was a preservation of the
20 complaint properly; or do we want to also
21 authorize a broader statement of the issues as
22 a way to, you know, identify what the meat in
23 the coconut is about, what this brief is
24 about, what this case is about?
25 MR. ORSINGER: Can you give a

1 sample of an issue presented, Bill?

2 HONORABLE C. A. GUITTARD: He

3 just did.

4 PROFESSOR DORSANEO: I just

5 did. I gave an abstract one, but it would be

6 whether emotional distress damages are

7 available in a negligent infliction of

8 emotional distress case, whether Section 46 of

9 the restatement section of torts requires

10 proof of malice, whether the tort of whatever

11 requires this or doesn't require that. It

12 doesn't have anything to do with this case

13 exactly. It doesn't have anything to do with

14 the particular ruling in this case. Okay.

15 But it's in a broader sense what the appeal is

16 about.

17 CHAIRMAN SOULES: Okay. Sarah

18 Duncan.

19 MS. DUNCAN: The Rules still --

20 the proposed amendment (d) still requires that

21 the issue be stated in the terms of the

22 circumstances of the case. So I am not sure

23 that the real distinction between issues and

24 points of error is abstract versus

25 particularized. I think in the better -- in

1 the best courts a point of error is probably
2 fairly indistinguishable from issue practice.
3 Unfortunately Texas has a long history with
4 points of error that is not what the better
5 courts are doing today, and my view at least
6 in the committee was if we say point of error
7 or issue maybe we can get rid of some of that
8 baggage and some of the multifarious points of
9 error holdings that are unjustified. Maybe we
10 can just move the ball forward a little bit
11 and not get so picky.
12 PROFESSOR DORSANEO: In the
13 past we have been picky where they are not
14 supposed to be picky.
15 MS. DUNCAN: But they are.
16 PROFESSOR DORSANEO: But there
17 is still some pickiness afoot, not too much.
18 Like flies in the pool game but not too many,
19 as Marlon Brando said.
20 MS. DUNCAN: Pickiness,
21 pickiness.
22 CHAIRMAN SOULES: Okay.
23 Richard Orsinger.
24 MR. ORSINGER: Sarah, are you
25 saying that this is really more of a change in

1 name only and not a real change in the way we
2 would present our disputes?
3 MS. DUNCAN: No. I think it is
4 a -- there is now an option to -- under issue
5 practice you don't have to be as worried about
6 picky. So yes, I think it could have -- I
7 mean, we wouldn't be suggesting it if we
8 didn't think that it requires change.
9 HONORABLE C. A. GUITTARD: In
10 other words, this is simply to broaden the
11 point of error practice and make it less
12 technical.
13 MR. ORSINGER: But you still
14 have to tie everything down to a ruling in
15 your point or in your statement of the issue
16 presented, or can you liberate from that and
17 get down to the core legal issue?
18 MS. DUNCAN: I think the real
19 substance that is important to me, at least,
20 is the second sentence: "The statement of an
21 issue or point presented will be deemed to
22 comprise every subsidiary question fairly
23 included therein." That's from the United
24 States Supreme Court rule, and that to me is
25 what is wrong with the point of error practice

1 traditionally in Texas, and that is you end up
2 with 75 points of error because you want to
3 make sure that every evidentiary ruling, every
4 charge ruling, every motion ruling is included
5 when what the real question is was this
6 employee immune in all the different ways that
7 we have raised.
8 CHAIRMAN SOULES: Isn't that
9 sentence in the Texas decisions, the Supreme
10 Court decisions?
11 MS. DUNCAN: United States
12 Supreme Court?
13 CHAIRMAN SOULES: No. Texas
14 Supreme Court decisions.
15 MS. DUNCAN: It depends on what
16 year you are looking at.
17 CHAIRMAN SOULES: Well, the
18 recent ones. You can read down into the
19 argument presented to determine what the point
20 of error may mean.
21 MS. DUNCAN: I don't remember
22 having seen that in the Texas Supreme Court
23 opinions.
24 CHAIRMAN SOULES: And I guess
25 where my question is leading is why not just

1 insert that sentence into old (d) and not call
2 this something else?
3 MS. DUNCAN: Because you are
4 still going to have -- in my view you are
5 going to have it anyway, but hopefully we
6 could get rid of some of it. You are still
7 going to have people reaching back into the
8 1930's caselaw on points of error and saying,
9 "Well, we understand that they have added that
10 sentence in here, but this is the law of
11 Texas." I mean, I think with issues presented
12 it gives the Supreme Court a way to say, "No,
13 now, wait. We are looking at a little
14 different practice here, guys. You can forget
15 about all that old law." I mean, as initially
16 proposed it was the issues presented without
17 reference to points of error, but it was the
18 view of the majority of the committee that we
19 should offer the two as alternatives.
20 CHAIRMAN SOULES: Steve.
21 MR. HERRING: Do you have an
22 alternative proposal that would just be the
23 abstract statement of the issue as it still
24 says?
25 MS. DUNCAN: The issue is

1 presented the way they have it in the Fifth
2 Circuit in the Federal Courts.
3 MR. HERRING: But the committee
4 decided not to recommend that as it's first.
5 MS. DUNCAN: Majority.
6 CHAIRMAN SOULES: Steve, did
7 you have your hand up on this?
8 MR. SUSMAN: I'd like to -- I
9 mean, I think Sarah is right. We need to get
10 everyone's mindset out of the old past and say
11 this is a new era, and it's no longer some
12 game or "gotcha" where to write an appeal you
13 have got to go hire some expert who knows the
14 mine fields. You just tell the Court what's
15 wrong, I mean, what's the legal issue, what's
16 wrong here. You can say it in writing as
17 simply as you can say it orally. It's
18 impossible -
19 CHAIRMAN SOULES: Mike
20 Hatchell. I'm sorry I cut you off there,
21 Steve. What were you saying?
22 MR. SUSMAN: I was saying you
23 ought to be able to say it in writing as
24 simply as you can say it orally, which is
25 impossible under the current Rules.

1 CHAIRMAN SOULES: Okay. Mike
2 Hatchell.
3 MR. HATCHELL: This practice is
4 essentially that that's used in the Federal
5 circuits and the Supreme Court of the United
6 States, and it works very well there. In 30
7 years of practice I have never had a point
8 problem in Federal Court. You have them all
9 the time in state court, and now recently we
10 have begun to see some courts of appeals who
11 want to keep people out on the merits going
12 back to the 1930's concept of multifarious
13 points.
14 And the second thing is in addition to
15 just freeing ourselves from technical
16 procedural trappings I think the statement of
17 the points is much more meaningful. They move
18 them forward in Federal practice to where the
19 judges, that's the first thing they see, and
20 well-drafted statements of the issues are
21 very, very meaningful to the Court and very,
22 very instructive to the Court as to what's
23 actually involved. Our practice is so
24 technical I never read the points because they
25 are so boring, and I think that this really

1 will improve the quality of briefing in many
2 respects in addition to getting rid of these
3 technical problems that prevent review on the
4 merits.
5 CHAIRMAN SOULES: Rusty, you
6 had your hand up. Anything to add?
7 MR. MCMAINS: Largely just in
8 the context the real question I have is -- and
9 I do not appear to have the same draft we are
10 working from, but at any rate does it say
11 issues or points?
12 CHAIRMAN SOULES: This does.
13 MR. MCMAINS: Will it continue
14 to say issues or points?
15 HONORABLE C. A. GUITTARD:
16 Yeah.
17 MR. MCMAINS: I guess one of
18 the problems I have, remember earlier Steve's
19 complaint about the notion that we
20 Identify -- when we took away the
21 identification of appellee and we took away
22 notice to them of their involvement, now the
23 suggestion is basically that we take away
24 points that would identify specific rulings or
25 whatever by which at least if you knew what

1 the ruling was you would know whether you were
2 implicated in it or not and present rather an
3 abstract question of law. So the treatment of
4 that in my judgment, one slight problem here
5 is that coupled with what we had done earlier
6 that you really do have to read the entire
7 brief to figure out whether or not you are
8 likely to be involved.
9 MS. DUNCAN: Rusty, the Rule
10 still requires that you support by reference
11 to pages in the record where the ruling or
12 other matter complained of is shown.
13 MR. MCMAINS: Again, that just
14 says -- that's just a reference to the record.
15 I am talking right now we have Rules which
16 say, including in the motion for new trial
17 rules, requirements that you do, quote, "cross
18 points," not any kind of cross-issue or any
19 abstract statements but points specifically,
20 which theoretically we know what that means
21 under our current practice. The issue that is
22 now proposed is one which doesn't have really
23 a defined term in appellate practice, in Texas
24 appellate practice.
25 If we are going to look to the Federal

1 principles to see, Mike's right. Federal
2 Courts don't have any problems with the
3 issues. That's because basically the Federal
4 Courts have the ability to determine plain
5 error. They will also bounce you and reverse
6 cases or write rulings that were never raised
7 below. They have that authority. They can
8 just take the case and run wild with it.
9 That's not what our practice is and hopefully
10 isn't what it will become.
11 But right now one of my concerns is that
12 we don't -- that we have places that refer to
13 points specifically in our Rules that we have
14 kept even from votes today, and to try and
15 change the term from "points" thinking that's
16 going to do anything, I don't know that
17 That -- that we are accomplishing that because
18 of this cross-points requirement and how it is
19 you do cross-points in your rights to, quote,
20 "cross appeal." And I think if you take away
21 points that you even take away more notice to
22 people who might not have thought they were
23 involved in the appeal. But anyway that's --
24 I don't like the technicality stuff either.
25 Don't get me wrong, but I don't know that

1 changing the name of it is going to change the
2 attitude of Courts of appeals who are
3 determined to try and avoid work.
4 CHAIRMAN SOULES: Anyone else
5 have anything on this? I suppose the Chair of
6 the committee is moving that we adopt 74,
7 changes to 74(a) and (d); is that right?
8 HONORABLE C. A. GUITTARD: A
9 hasn't --
10 CHAIRMAN SOULES: Oh, you are
11 going to do some work on that.
12 HONORABLE C. A. GUITTARD:
13 Well, on (a) it's also a question of whether
14 you have to name all the parties individually,
15 and (a) would permit you to just omit the
16 addresses of the parties that are represented
17 by counsel. The present Rule would require
18 that your brief state the names and addresses
19 of all the parties, and that is burdensome and
20 unnecessary if you have got a lawyer there who
21 you can name and give his address and
22 telephone number and so forth.
23 PROFESSOR DORSANEO: So we
24 would take out "address"?
25 MS. DUNCAN: Yeah. It should

1 be marked out.

2 PROFESSOR DORSANEO: That's why

3 I didn't mention it because I thought

4 something happened in the committee meeting.

5 HONORABLE C. A. GUITTARD: You

6 have to give the names and addresses of

7 counsel but not the party.

8 MS. DUNCAN: But this doesn't

9 have "addresses" in reference to parties

10 crossed out.

11 PROFESSOR DORSANEO: In the

12 second line -- at the end of the first line of

13 (a) we need to cross out "and" and then

14 "addresses of" at the beginning of the second

15 line, such that it says "A complete list of

16 the names of all parties," blah, blah, blah,

17 "and the names and addresses of their

18 counsel."

19 HONORABLE C. A. GUITTARD:

20 Yeah. All right. Cross out that at the end

21 of the first line there "and addresses of

22 parties."

23 CHAIRMAN SOULES: Okay. What

24 are you going to do about parties that don't

25 have lawyers?

1 MS. DUNCAN: That's the last
2 sentence.
3 HONORABLE C. A. GUITTARD: You
4 have to give their addresses unless you can't
5 find them. Then you have to certify you can't
6 find them.
7 MR. ORSINGER: You want to
8 leave the sentence to say "the names of all
9 parties to the trial court's final judgment
10 and the names and addresses of their counsel"?
11 PROFESSOR DORSANEO: Yeah.
12 Just cross out "and addresses of."
13 MS. DUNCAN: Right.
14 PROFESSOR DORSANEO: I got it.
15 I have it.
16 MR. ORSINGER: Just take out
17 "names"?
18 PROFESSOR DORSANEO: Cross that
19 out.
20 MR. ORSINGER: Take out "and
21 addresses"? Take out "and addresses"?
22 HONORABLE C. A. GUITTARD:
23 Yeah. Take out "and addresses."
24 CHAIRMAN SOULES: All right.
25 And then (d), is there a second to that

1 motion?

2 MR. SHARPE: Luke?

3 CHAIRMAN SOULES: Shelby

4 Sharpe.

5 MR. SHARPE: You are going to

6 need to change the title on (a). It should be

7 "Identity of All Parties and Counsel to the

8 Trial Court's Final Judgment" because just

9 "Names of All Parties to the Trial Court's

10 Final Judgment" is not an accurate description

11 of what's in (a). It should be "Identity of

12 All Parties and Counsel to the Trial Court's

13 Judgment."

14 CHAIRMAN SOULES: Okay. Make

15 that change to the caption so that it reflects

16 what's in the body. Steve Susman.

17 MR. SUSMAN: Can we simply

18 eliminate the first sentence of this Rule on

19 the ground that it's a demonstration to the

20 public of the hypocrisy of our profession?

21 The first sentence, I have never heard

22 anything so outrageous. "Briefs shall be

23 brief."

24 HONORABLE C. A. GUITTARD:

25 That's Judge Polk's.

1 MR. SUSMAN: Huh?

2 HONORABLE C. A. GUITTARD:

3 That's Judge Polk's contribution.

4 MR. SUSMAN: That is the most

5 ridiculous thing I have ever heard. That's

6 what's wrong with our profession.

7 MR. LATTING: Plus it's in

8 non-serif type.

9 MR. SUSMAN: Seriously that

10 ought to come out. That is ridiculous "Briefs

11 shall be brief," and then it goes on to say 50

12 pages.

13 MR. ORSINGER: The only real

14 Rule is "Briefs should be brief under 50

15 pages." That's the real Rule.

16 CHAIRMAN SOULES: I think Judge

17 Polk put that in before we had a page

18 limitation.

19 MR. ORSINGER: It's still a

20 standard to emulate, isn't it?

21 HONORABLE C. A. GUITTARD:

22 That's hoardatory.

23 MR. ORSINGER: Hoardatory.

24 That's right.

25 HONORABLE C. A. GUITTARD:

1 Hoardatory.

2 CHAIRMAN SOULES: Before we get
3 to Steve's point there -- okay. Those in
4 favor, is there a second to a motion to adopt
5 74(a) and (d) on the way they are now set
6 forth on pages 60 and 61? Any second?

7 MS. DUNCAN: I second.

8 CHAIRMAN SOULES: Second.
9 Okay. Those in favor show hands. Those
10 opposed? Okay. That's unanimous. Unanimous
11 in favor of the changes.

12 HONORABLE C. A. GUITTARD: Now,
13 there is also in this Rule, there is two other
14 changes. When you talk about in subdivision
15 (e), "whereas a brief of appellee," we have
16 written into that Rule a provision that is
17 taken from the civil rules but which perhaps
18 ought to be here.

19 PROFESSOR DORSANEO: This is
20 the one that Rusty was talking about, the last
21 paragraph of Rule 324 over in the Civil
22 Procedure Rules really is about the appellee's
23 brief. So we thought we would put it with the
24 rest of the information.

25 HONORABLE C. A. GUITTARD: This

1 doesn't change the law. It just puts it where
2 people can probably find it easier.
3 MS. DUNCAN: And now we won't
4 even find it at all.
5 PROFESSOR DORSANEO: Right. I
6 won't be able to find it now.
7 HONORABLE C. A. GUITTARD: Then
8 there is also in subdivision (a) a provision
9 with respect to the appellant's brief in
10 reply. There is no present provision
11 concerning the reply brief, and this would
12 prescribe for the reply brief that at first it
13 should be confined to the issues or points in
14 the appellee's brief and that it should not
15 exceed 25 pages, and that it should be filed
16 within 25 days after the filing of appellee's
17 brief. This would eliminate coming right up
18 on the day of oral argument or maybe the day
19 before with your reply brief. You have got to
20 do it a little sooner than that.
21 PROFESSOR DORSANEO: I was
22 handed one, an argument, on Wednesday, and
23 that happens in some courts that permit it,
24 and that's a little late.
25 MR. ORSINGER: May I inquire,

1 this means that the appellant is entitled to
2 75 pages of briefing, and the appellee 50?
3 That's what this Rule does? Now the times are
4 equal on oral argument and heretofore the page
5 numbers --
6 MR. SUSMAN: No. The times
7 aren't equal.
8 MS. DUNCAN: No.
9 MR. SUSMAN: Huh-uh. 30 to 20.
10 MR. HERRING: No. They are
11 equal.
12 MS. DUNCAN: No. It's 20/20.
13 MR. ORSINGER: You just take
14 part of your time and if you want to reserve
15 it.
16 MR. SUSMAN: What are you
17 talking about? In Houston I just argued a
18 case on 20 minutes to open, 10 minutes to
19 rebut, and the other side gets 20 minutes.
20 MR. ORSINGER: Well, let's just
21 be conscious of that decision. I am not
22 totally sure that I am in favor of allowing in
23 more briefing by one party than the other, but
24 if that's what we are in favor of let's just
25 be aware of it.

1 CHAIRMAN SOULES: Does the
2 appellee get to respond to the appellant's
3 reply brief?
4 MR. ORSINGER: No.
5 MS. DUNCAN: You cannot leave
6 of court. I mean, we are not changing -- we
7 are not giving the appellant something that
8 they don't have under the current practice.
9 We are trying to regulate what they already
10 have.
11 HONORABLE C. A. GUITTARD:
12 That's right.
13 MS. DUNCAN: The problem now is
14 that different courts have different rules
15 about when reply briefs are due or they have
16 no rule at all.
17 MR. ORSINGER: Well, I would
18 propose that we reduce it to 15 or 10 pages
19 rather than 25 because it seems to me if you
20 are truly rebutting what's in the appellee's
21 brief then you don't need one-half of an
22 entire brief to do that. It seems to me that
23 that tilts the briefing, and briefing is
24 really essential in the appellate dynamic as
25 far as I am concerned.

1 PROFESSOR DORSANEO: I don't
2 mean to be facetious but I would like to
3 require them to reply within 200 pages, you
4 know, because I think that you are not really
5 helped by giving too many pages, see, to the
6 court.
7 MR. ORSINGER: It's not going
8 to get read, you are saying.
9 PROFESSOR DORSANEO: And in my
10 experience this appellant brief in reply
11 really might end up being the main appellant
12 brief because that's when you finally join
13 issue with the people.
14 HONORABLE C. A. GUITTARD:
15 That's the practice now.
16 PROFESSOR DORSANEO: Well,
17 really it's 50 more. The practice now is they
18 get 50 more pages.
19 MR. ORSINGER: Judge Hecht, you
20 are going to be reading a lot of these. Does
21 it make any difference?
22 JUSTICE HECHT: I am not going
23 to be reading that many of them actually. You
24 know, I think every judge, every appellate
25 judge, will tell you the shorter the better.

1 I mean, we are arguing about 50 pages, 25
2 pages, but it's more what's said, and the bulk
3 of it is 99 percent of the cases are going to
4 be misdirected. We preach that sermon a lot.
5 MS. DUNCAN: I guess that's why
6 I don't care if it's 15 pages or 25 pages
7 because I don't think I have filed maybe one
8 50-page brief in the last five years, and I
9 don't know that I have ever filed a 25 page
10 reply.
11 MR. ORSINGER: Okay. Well, I
12 guess I don't care. If we are going to be
13 ignored, then I don't care.
14 CHAIRMAN SOULES: Well, why
15 shouldn't this be the subsequent reason? I
16 mean, why is the appellee cut off? Here is
17 what concept that we have in filing the
18 replies, and some of the courts of appeals
19 have this, too: You can file your reply up to
20 seven days or up to ten days before oral
21 submission, and what they are really looking
22 for is an update in the caselaw since this
23 appeal has been pending for a year. You filed
24 your briefs, and the briefs joined a year ago.
25 Now you are to oral submission, and you

1 have got a year of jurisprudence in the
2 meantime, and the courts of appeals, in our
3 experience they want to see what the more
4 recent cases are, and you know, competent
5 appellant lawyers are going to know what those
6 are on both sides. You are going to pretty
7 well know what that reply brief is going to
8 look like before you get it, and you both get
9 it on the same day, ten days ahead of oral
10 submission, and there is seldom anything in
11 there that you haven't seen or didn't expect.
12 And so what we are doing here is we are
13 setting a time when an appellee must -- or an
14 appellant must reply or I guess waive a reply
15 of 25 pages max, and the appellee has no reply
16 anyway. So what does that do about the 10-day
17 Rule in the courts of appeals or on getting
18 them current? You just go and talk about
19 these cases that you never had a chance to
20 brief because it didn't exist in the original
21 papers. Steve Susman.
22 MR. SUSMAN: Well, I believe
23 that that's usually the case; I mean, that if
24 there is some new case you can talk about it
25 orally or ask permission of the Court to write

1 him a letter after the argument, that you can
2 always -- I mean, we have got to put an end to
3 the brief writing at some point in time. This
4 missiles race gets too expensive, and we have
5 just got to stop it. You can always on the
6 grounds of the new cases find something else
7 to write about and write another 20 pages. So
8 I think it should be stopped.
9 Now, you may have a point. It may be
10 that based on the way the courts set their
11 cases in the various courts of appeals that
12 the appellant's reply brief, you know, the
13 final brief should not be filed until a
14 certain time close to the argument, but I
15 don't see what's wrong with this. It's kind
16 of like the pattern in Federal Court, and I
17 think it's fine.
18 CHAIRMAN SOULES: Shelby Sharpe
19 and then I will get to Sarah. Sarah had some
20 points. Go ahead.
21 MR. SHARPE: I think this Rule
22 is a good Rule on when the appellant should
23 reply to the appellee's brief because, one,
24 the appellant is responding to either a
25 misstatement of the record or a misstatement

1 of some authority that's in it. So I think
2 this Rule is good. With respect to new
3 authority that comes out after that, that's a
4 supplemental brief. It's not a reply to the
5 opposition brief, and you can always file that
6 with leave of court. So I think Steve is
7 correct. We need to put a time limit on when
8 the appellant is going to respond to the
9 appellee's brief. If the appellee has
10 misstated, then, hey, let's get it done in a
11 short period of time and get on with business.
12 CHAIRMAN SOULES: If that's
13 what we think we are doing, I don't have any
14 problem with it, but if we are cutting off
15 briefing at the end of the 25th day and the
16 appellant's replies, and that's it --
17 MR. SHARPE: This says "a reply
18 brief." I do not interpret that as a
19 supplemental brief that brings new authority
20 that's come out since you filed your brief.
21 This is a reply to the other side's brief.
22 CHAIRMAN SOULES: Okay. Sarah.
23 MS. DUNCAN: I at first thought
24 that I liked the San Antonio practice better
25 where you file within one week of argument and

1 then I started thinking, no, because if
2 somebody is not like me and they actually
3 start preparing for argument before more than
4 a week before they are not going to have the
5 reply brief argument around which to construct
6 their argument. The one thing that -- what I
7 think is missing from our state practice is a
8 Rule 28(j) letter like they have in Federal
9 Court and to use that to bring the appellate
10 court current cases but without going through
11 25 or 30 more pages of briefing, and we don't
12 have that, but I think, you know, I think
13 you're right. This is a mandatory -- a brief
14 you get to file as a right. If you want to
15 ask leave of court to file something else, you
16 are certainly welcome to do that.
17 MR. ORSINGER: Could we include
18 a comment that the courts retain the power to
19 permit the filing of supplemental briefs or
20 something?
21 PROFESSOR ALBRIGHT: Well,
22 that's in (m).
23 MR. ORSINGER: (M) does that
24 already?
25 HONORABLE SAM HOUSTON CLINTON:

1 Yeah. (M) already does that.

2 MR. ORSINGER: Okay. Well,

3 then I will withdraw it.

4 CHAIRMAN SOULES: Okay. So the

5 motion to recommend to the Supreme Court, how

6 much of this --

7 HONORABLE C. A. GUITTARD:

8 Subdivision (k).

9 CHAIRMAN SOULES: Just

10 subdivision (k)?

11 HONORABLE C. A. GUITTARD: Yes.

12 MR. ORSINGER: Why aren't we

13 doing --

14 CHAIRMAN SOULES: 74(k).

15 PROFESSOR DORSANEO: Did we do

16 (e) yet?

17 MR. ORSINGER: We haven't done

18 (e), (f), or (g).

19 HONORABLE C. A. GUITTARD:

20 Well, we did (e). That's the one about just

21 putting in the provisions of the civil rules

22 into the appellate rules where they belong.

23 MR. ORSINGER: I don't think

24 that's been voted on yet.

25 CHAIRMAN SOULES: It hasn't

1 been.

2 MR. ORSINGER: Listen, why

3 don't we just sweep them all in?

4 HONORABLE C. A. GUITTARD:

5 Okay. Now (f) is another question. That is

6 whether the appellant ought to have the -- or

7 whether the parties ought to be allowed to

8 make a summary of their entire argument.

9 Well, they briefly do that anyway, and this

10 just spells it out in the Rules. So the real

11 question there is should they be required to

12 do that, or is that just an option? Now, (g),

13 that goes out in view of the previous

14 decisions that the committee made.

15 CHAIRMAN SOULES: Okay. So you

16 are withdrawing (g)?

17 HONORABLE C. A. GUITTARD: Yes.

18 MR. SHARPE: Is (g) out?

19 HONORABLE C. A. GUITTARD: As

20 well as this one.

21 CHAIRMAN SOULES: As well as

22 what?

23 PROFESSOR DORSANEO: We have

24 some other conforming things to do.

25 CHAIRMAN SOULES: Okay. So the

1 motion from the committee then, subcommittee,
2 is that we adopt the changes to 74(e), (f),
3 (k).
4 PROFESSOR DORSANEO: We can
5 talk about --
6 CHAIRMAN SOULES: Is that (n)?
7 PROFESSOR DORSANEO: We can
8 talk about -- yeah. Those are
9 Intentionally -- (h) is going to go back in
10 here. All right.
11 CHAIRMAN SOULES: Okay.
12 You-all make the motion so that I am not
13 making any --
14 MR. SHARPE: Mr. Chair, can we
15 have some discussion on that?
16 HONORABLE GUITTARD: (M)
17 doesn't have anything new. It just has this
18 last sentence that is transposed from a
19 different Rule.
20 CHAIRMAN SOULES: All right.
21 Would someone from the committee make a motion
22 then relative to 74? We have dealt with
23 74(d).
24 MR. ORSINGER: (A) and (d).
25 CHAIRMAN SOULES: (A) and (d).

1 Someone make a motion.

2 HONORABLE C. A. GUITTARD: I

3 move we adopt the committee's proposal with

4 respect to subdivision (e), (f), and (k).

5 CHAIRMAN SOULES: Second?

6 (Mr. Herring raises hand.)

7 MR. SHARPE: Mr. Chair, a

8 discussion on that?

9 CHAIRMAN SOULES: Moved and

10 seconded. Discussion?

11 MR. SHARPE: By putting this in

12 here with respect to the summary of argument I

13 really don't think we need that in our Rule.

14 I think that should be left to each individual

15 brief writer as to whether or not he wants to

16 put a summary in it or not. This has the

17 potential -- it says "The summary argument may

18 be included either after the preliminary

19 statement or at the conclusion of the brief."

20 People do that now from time to time.

21 People don't do it now from time to time. I

22 think this right here may very well be

23 construed by some people as requiring that

24 there must be a summary either in one place or

25 the other but not whether you can have it or

1 not have it, and some cases just flat don't
2 need a summary because they are just not that
3 long or not that complicated a case that needs
4 it. There is nothing that restricts you from
5 putting it in there, and as Judge Guittard
6 pointed out, it's very often done. I think
7 this is going to add to the length of time in
8 doing some briefs, and I think that increases
9 costs, and I just don't believe we need a
10 summary of argument requirement in here.
11 CHAIRMAN SOULES: It's not a
12 requirement. It's only permissive the way
13 this is written.
14 PROFESSOR DORSANEO: Well, we
15 can make it clear. "Summary of the entire
16 argument may be included in the brief."
17 MR. LOWE: If desired.
18 PROFESSOR DORSANEO: No.
19 "Either after the preliminary statement or at
20 the conclusion of the brief."
21 CHAIRMAN SOULES: We can make
22 it clear.
23 MR. ORSINGER: Shelby is
24 interpreting that to require that it be in one
25 place or the other.

1 MR. SHARPE: Yeah. The
2 indication is you have got to have it one or
3 the other.
4 CHAIRMAN SOULES: The court
5 reporter needs a break, so we will take ten
6 minutes. Okay. Ten minutes and be back here
7 at 3:40.
8 (At this time there was a
9 recess, after which the hearing continued as
10 follows:)
11 CHAIRMAN SOULES: Okay. Now,
12 those of you on the subcommittee, someone on
13 the subcommittee who has been following this
14 state the proposition again so that we can
15 take a vote on what we were looking at.
16 Before Shelby came up with his thoughts we had
17 as I understood a motion on the floor to adopt
18 several changes in Rule 74 that are shown
19 as --
20 MS. DUNCAN: (E), (f), and (k).
21 CHAIRMAN SOULES: (E), (f), and
22 (k); is that right? Okay. Those in favor
23 show by hands. Those opposed? All right.
24 That's unanimous.
25 MS. DUNCAN: If you really feel

1 strongly about something you know how to get
2 it done.
3 PROFESSOR DORSANEO: The next
4 one or ones, please take a look at (1) first,
5 a one-sentence addition indicating when a
6 motion for extension to file a brief may be
7 filed. We believe this is a clarification,
8 not really a change.
9 HONORABLE C. A. GUITTARD: But
10 there are those on the committee that were
11 concerned about some courts of appeals that
12 wouldn't let you file a motion for extension
13 after the time for filing the brief, and we
14 wanted to hear that.
15 CHAIRMAN SOULES: Okay. Any
16 opposition to that?
17 MS. DUNCAN: Can I point
18 something out?
19 CHAIRMAN SOULES: Sarah Duncan.
20 MS. DUNCAN: I just would like
21 to point out -- and after reviewing a file
22 this week I am not sure I am still in favor of
23 it but --
24 HONORABLE C. A. GUITTARD: I
25 thought this was your idea, now, Sarah.

1 MS. DUNCAN: No. My idea was
2 that there has been some disagreement as to
3 whether you had the 15-day window after the
4 date a brief was due in which to file a motion
5 for extension of time. So my proposal was
6 just to make it clear that that 15-day period
7 was the same for briefs as it was for
8 everything else. Bill's concern was that you
9 have never been limited to that 15-day period
10 after the date the brief was due. I went
11 through a file this week in which the brief
12 was due, for instance, in March of '91. It
13 was ultimately filed 18 months later, and the
14 motion for extension of time was not filed
15 until after, substantially after, the 15 days
16 after the date the brief was due. This Rule
17 permits you to file a motion for extension of
18 time to file a brief any time.
19 PROFESSOR DORSANEO: It doesn't
20 require the Court to grant it, though.
21 MS. DUNCAN: Right.
22 MR. LOWE: That's right.
23 MR. ORSINGER: I think that's
24 the current Rule anyway.
25 MS. DUNCAN: Right.

1 CHAIRMAN SOULES: Any
2 opposition to that? If there will be no
3 opposition that will be considered unanimously
4 approved.
5 PROFESSOR DORSANEO: And (m),
6 you could look at that, but I guess (m) that
7 comes from (m) and (n), or am I wrong? Where
8 did that come from?
9 HONORABLE GUITTARD: It's a
10 different rule that we are -- this is the
11 existing --
12 HONORABLE SAM HOUSTON CLINTON:
13 It's in the Rules somewhere now.
14 HONORABLE C. A. GUITTARD: It's
15 already in the Rules. It's no change.
16 HONORABLE SAM HOUSTON CLINTON:
17 I don't know where it is.
18 MS. DUNCAN: It's in the
19 amendment of supplementation of the record
20 Rule.
21 MR. HERRING: You are just
22 moving it?
23 HONORABLE C. A. GUITTARD:
24 Yeah. Just moving the local --
25 PROFESSOR DORSANEO: That's the

1 wrong place.

2 MS. DUNCAN: Rule 55 is it.

3 CHAIRMAN SOULES: Okay. Those

4 in favor of the changes indicated in 74(m)

5 show by hands. Those opposed? That's

6 unanimously approved.

7 PROFESSOR DORSANEO: We are

8 going to modify (o), as Richard Orsinger

9 indicated earlier to make it clear that we are

10 talking about the person who is made an

11 appellee by the appellee's cross-points, but

12 that's part of a larger rewrite on that

13 overall subject of notice of appeal,

14 cross-appeal, et cetera.

15 MR. ORSINGER: Luke, before we

16 leave the Rule I would like to mention one

17 thing.

18 CHAIRMAN SOULES: All right.

19 Go ahead.

20 MR. ORSINGER: I think that

21 some years ago the Rules were amended to

22 delete the reference to including the

23 statement of facts in the brief, and still I

24 think it is customary for appellate lawyers to

25 do it. I do it in most cases, and most of the

1 lawyers I have against me do it, and I, in
2 fact, think that it's appropriate and
3 sometimes helpful to do that, and I am
4 wondering why we don't put a provision in
5 there that a statement of facts, summary
6 statement of facts, may be included because we
7 are doing it. I mean, I think 95 percent of
8 the appellate lawyers do it anyway even though
9 there is no authority to do it.
10 There is one Supreme Court case that said
11 it's permissible when the facts relate to more
12 than one point of error, but as a practical
13 matter it's hard for the appellate court to
14 figure out what the case is without getting a
15 little bit of a story at the beginning of the
16 brief about who did what to who. Now, we can
17 go ahead with the practice we have now, which
18 is to pretend like that's permissible.
19 Nobody's brief is ever struck because of it,
20 but since we are all doing it, or if the other
21 appellate lawyers in here will express an
22 opinion, and I think we are all doing it. Why
23 don't we all do it?
24 PROFESSOR DORSANEO: The
25 proposal which is not in this package now

1 would be that we add a new subdivision that
2 would identify the way that a fact statement,
3 an optional fact statement, would or could be
4 developed for placement in the appellant's
5 brief and then by incorporation in an
6 appellee's brief. Now, we could do that.
7 Almost all of our standard treatises that talk
8 about this subject talk about the fact
9 statement.
10 HONORABLE C. A. GUITTARD: The
11 question is whether or not the fact statement
12 should include the facts related to all the
13 points. Now, when I was counsel for the
14 appellant I used to select as my first point
15 one that would give an overall view of the
16 facts of the case, and then when I got to the
17 subsequent points I would give the additional
18 fact statement that was particularly relevant
19 to that point. And do we want to preserve
20 that kind of a practice, or is that
21 permissible?
22 MS. DUNCAN: Whatever we do I
23 would like to make it optional because for me,
24 at least, what the points are, what the facts
25 are, I mean, sometimes the facts just don't

1 matter at all. It's strictly a procedural
2 case, and I would like to have the option not
3 to have a statement of facts.
4 PROFESSOR DORSANEO: Sometimes
5 the facts are not very helpful.
6 MS. DUNCAN: That's right.
7 More times than not.
8 HONORABLE C. A. GUITTARD:
9 Well, Richard, I suggest that since you are
10 now on the subcommittee and since this hasn't
11 been drafted that you draft it and present it
12 to our subcommittee meeting on the 8th of
13 April.
14 MR. ORSINGER: Will do.
15 PROFESSOR DORSANEO: That would
16 take us I believe to 75. We have 75 and 84,
17 just to give you a preview 75, 84, and then a
18 larger policy question on page 66 in terms of
19 what I think is particularly important.
20 75 speaks for itself. The Council of
21 Chief Judges wanted the ability for Courts of
22 appeals to decide criminal cases without oral
23 argument where oral argument would not
24 materially aid the Court in determination to
25 the issues of law and fact as I understand it,

1 and Judge Clinton can tell us more about this.
2 This is a controversial question to some
3 extent in the criminal context because
4 somebody might request oral argument and not
5 be able to show up for it or whatever so --
6 HONORABLE SAM HOUSTON CLINTON:
7 Not be able to what?
8 PROFESSOR DORSANEO: Not be
9 able to show up.
10 HONORABLE SAM HOUSTON CLINTON:
11 Oh, show up.
12 MS. DUNCAN: Being
13 incarcerated.
14 MR. ORSINGER: Like someone in
15 prison who wants to make a pro se appearance.
16 CHAIRMAN SOULES: You are
17 probably not going to do that, are you, Judge?
18 HONORABLE SAM HOUSTON CLINTON:
19 No. We don't do that. We are not going to
20 allow that.
21 HONORABLE C. A. GUITTARD: Also
22 Chief Justice McCloud was the one that brought
23 this before the committee and said that
24 particularly in cases that are transferred on
25 equalization of the docket that there is a

1 real problem about oral arguments in some of
2 those cases and that I am not just quite clear
3 what his problem was, but Sarah, you want to
4 answer that?
5 MS. DUNCAN: One of the
6 problems he mentioned was that they will get
7 50 cases from Dallas, and out of those 50
8 cases oral arguments are requested in five,
9 and they have to choose either to go sit in
10 Dallas to hear those five cases in the regular
11 order of things or whether to try to hold
12 enough transferred cases to make it worth
13 their while to go sit in Dallas for a week of
14 oral arguments, and he was saying, you know,
15 that it just seems like a tremendous expense
16 and bother when the oral argument doesn't help
17 anyway. That was his point.
18 HONORABLE SAM HOUSTON CLINTON:
19 Well, did he think as a general proposition
20 that oral argument doesn't help, and that's
21 the reason?
22 HONORABLE C. A. GUITTARD: No.
23 That's not. The reason why is that the Court
24 ought to have the discretion to determine from
25 the briefs before it whether oral arguments

1 would help or not, and personally I always
2 like to hear oral arguments.
3 HONORABLE SAM HOUSTON CLINTON:
4 Me, too.
5 HONORABLE C. A. GUITTARD: But
6 that was the suggestion. When this Rule was
7 written in actually to give the courts this
8 authority in civil cases I was opposed to it,
9 but apparently nobody seems to make a big
10 objection to it.
11 HONORABLE SAM HOUSTON CLINTON:
12 Well, the predicate was being laid about not
13 wanting to go to Dallas unless necessary. It
14 didn't have any connection in my mind with
15 whether that was materially -- oral arguments
16 were materially related to the determination
17 of the issue, but if that's what they want to
18 do, since we ourselves reserve the right to
19 determine who can argue the case or whether
20 the case will be argued I suppose I don't have
21 any objection to it.
22 MS. DUNCAN: I think that he
23 would like the discretion.
24 HONORABLE C. A. GUITTARD:
25 Yeah. That's right.

1 PROFESSOR DORSANEO: He also
2 thought it particularly unhelpful when it
3 doesn't really occur.
4 CHAIRMAN SOULES: Frequently,
5 almost every time I have appeared now in the
6 Court of Appeals they will call criminal cases
7 where oral argument has been requested, and no
8 one shows up.
9 HONORABLE SCOTT A. BRISTER: Is
10 that right?
11 CHAIRMAN SOULES: So they might
12 go to Houston to sit for five cases and have
13 no one show up.
14 HONORABLE SAM HOUSTON CLINTON:
15 But that's a different problem than what this
16 Rule is talking about.
17 CHAIRMAN SOULES: That's right.
18 I agree.
19 HONORABLE SAM HOUSTON CLINTON:
20 That's what I was getting at.
21 CHAIRMAN SOULES: Okay. Any
22 opposition then? You don't have any
23 opposition to this, Judge?
24 HONORABLE SAM HOUSTON CLINTON:
25 No, no.

1 CHAIRMAN SOULES: Anyone else
2 have any opposition? That will be unanimously
3 approved. That was 74(f).
4 PROFESSOR DORSANEO: And the
5 damages for delay is --
6 MR. ORSINGER: No. That was
7 75(f).
8 CHAIRMAN SOULES: I'm sorry.
9 75(f). Thank you.
10 PROFESSOR DORSANEO: The
11 damages for delay on page 65 is a simple
12 change unless we messed it up somehow to make
13 damages for delay in civil cases applicable to
14 original proceedings as well as appeal.
15 MR. ORSINGER: Well,
16 mandamuses, especially if you read Justice
17 Hecht's opinions, mandamuses are almost never
18 going to -- or many cases are almost never
19 going to fit into the proper mandamus slot,
20 and I don't know what the statistics of them
21 are, but it's probably a pretty low number of
22 mandamuses that are actually granted, probably
23 a lower number than the cases that are
24 reversed on appeal, and this is kind of scary
25 to me. What if you have an excellent legal

1 argument, but you really have an adequate
2 remedy by appeal? Does that mean that you
3 should be sanctioned because although you had
4 a good legal argument, you know, you shouldn't
5 have been there on a mandamus and --
6 PROFESSOR DORSANEO: Well, if
7 you were taking it -- if you were doing the
8 mandamus for delay.
9 MR. LOWE: Yeah.
10 MR. ORSINGER: Well, it isn't
11 going to delay anything unless some court
12 voluntarily stays itself or unless the
13 appellate court stays it.
14 MR. LOWE: No.
15 HONORABLE SCOTT A. BRISTER:
16 No, no, no, no, no. I had a trial six weeks
17 ago finished by the Texas Supreme Court.
18 MR. LOWE: Yeah.
19 MR. ORSINGER: Yeah. That's
20 what I am saying. Unless some court
21 Decides --
22 HONORABLE SCOTT A. BRISTER:
23 Leave has still not been granted. We are just
24 briefing the issue. That case has been on
25 file a couple of years. It's my humble

1 opinion several lies in the petition for
2 leave, which got -- after I had denied several
3 continuances he has gotten it granted because
4 the briefing schedule has passed. It will be
5 months before I get back to it.
6 MS. DUNCAN: And that was part
7 of the reason people wanted these original
8 proceedings included in the sanctions because
9 apparently there is some abuse of original
10 proceedings.
11 MR. HERRING: There has to be a
12 poor delay and without sufficient --
13 MR. ORSINGER: Well, I think --
14 CHAIRMAN SOULES: One at a
15 time. Okay. Richard and then --
16 MR. ORSINGER: If somebody lies
17 in the pleading, then we can address that
18 through the grievance system, but the problem
19 I have with the sanctions on mandamus actions
20 is that sometimes there are extant
21 circumstances that require you to seek
22 appellate relief, and you know it's a long
23 shot going up on a mandamus, and I
24 Really -- gosh, I just really feel differently
25 about sanctioning mandamuses, and besides

1 which if there is a stay, either the trial
2 court has to stay themselves or the appellate
3 court stays the trial court based on some kind
4 of preliminary showing that there is a decent
5 chance of getting a mandamus, and if that's
6 procured through lying, then grievance ought
7 to take care of that.
8 CHAIRMAN SOULES: Chuck
9 Herring.
10 MR. HERRING: Well, you have a
11 two-prong standard here. One is for delay,
12 and the other is rare. It does happen
13 occasionally, but it is rare, and in most
14 cases as you point out you never meet that
15 standard because there wouldn't be a delay.
16 And then without sufficient cause, without
17 sufficient cause is a fairly slippery notion.
18 You might want to look at a groundless
19 standard such as Rule 13 has, but there are
20 some cases where they are used abusively.
21 CHAIRMAN SOULES: Buddy Lowe.
22 MR. LOWE: Yeah. There is no
23 question. I have had two cases within the
24 last six months. We have trouble getting a
25 special setting. You get a No. 1 setting, and

1 you are not going to get another one for a
2 year, and low and behold they try a mandamus.
3 It doesn't go, and then another one, and then
4 right before trial, I mean on Friday, they go
5 to the appellate court, and the appellate
6 court says, "Well, we haven't had a chance to
7 review it. Don't do anything Monday."
8 Well, there is no panel there, and if I
9 hadn't had a pretty smart trial judge and one
10 that was cooperative, so he brought a panel
11 back on Wednesday, I would have never gotten
12 that case tried. They never went to a jury.
13 They paid what we wanted. It was strictly for
14 delay. So I have had two of them. So don't
15 say it doesn't cause delay, and don't say it's
16 not done for that. That's wrong, and to go to
17 the grievance committee wouldn't have helped
18 my plaintiff any with his sore back.
19 MS. DUNCAN: Well, and the
20 grievance committee is not going to make any
21 allocation of costs.
22 MR. LOWE: Right.
23 CHAIRMAN SOULES: Steve Susman.
24 MR. SUSMAN: I don't think
25 10 percent is enough. I don't. I mean, it is

1 the one most frivolous delay tactic that is
2 known to man, is the last minute mandamus to
3 interfere with the trial setting.
4 MR. LOWE: Right.
5 MR. SUSMAN: And appeal is
6 never going to cause any delay. I mean, it's
7 all over by the time you appeal. How can an
8 appeal cause delay? This is the delaying
9 tactic of all time.
10 MR. LOWE: Right. That's
11 right.
12 PROFESSOR DORSANEO: It says
13 "other amount as the Court deems just."
14 MS. DUNCAN: That's the reason
15 that "such other amount" was added because
16 several people thought 10 percent wasn't
17 enough.
18 MR. ORSINGER: You don't even
19 know what the costs are at this point if this
20 is pretrial.
21 MS. DUNCAN: But you could have
22 taxable costs to the Court of Appeals. You
23 have got cost of filing.
24 MR. ORSINGER: Oh, well, that's
25 only a few bucks, though.

1 MS. DUNCAN: Cost of preparing
2 the record, cost for preparing the briefs.
3 CHAIRMAN SOULES: So what do
4 you do? You put your proof of damages in your
5 response to the mandamus? How does the Court
6 of Appeals decide that?
7 HONORABLE C. A. GUITTARD: Oh,
8 you can resort to this last phrase "such other
9 amount as the Court deems necessary."
10 PROFESSOR DORSANEO: I don't
11 know. Just file an answer to it. They will
12 send it back to the trial court or something.
13 MR. ORSINGER: This is just
14 going to be an abuse of discretion. It could
15 be $5,000 in one case. It could be $50,000 in
16 one case.
17 CHAIRMAN SOULES: Yeah. I am
18 curious what happens if they deny leave to
19 file. They have never exercised jurisdiction
20 over anything other than motion for leave to
21 file. Is that covered?
22 MS. DUNCAN: Their jurisdiction
23 attaches when the motion is filed, right?
24 HONORABLE C. A. GUITTARD:
25 Right.

1 CHAIRMAN SOULES: Motion for
2 leave --
3 MS. DUNCAN: Their original
4 jurisdiction.
5 HONORABLE C. A. GUITTARD:
6 Right.
7 CHAIRMAN SOULES: Okay. That's
8 answered.
9 HONORABLE C. A. GUITTARD: All
10 this proposal does is just to extend the
11 damages delayed to original relief.
12 CHAIRMAN SOULES: Okay. Any
13 other discussion on this? Those in favor show
14 by hands. 15. Those opposed? Okay. That's
15 unanimously approved. Did you vote?
16 MR. ORSINGER: No, I didn't. I
17 backed down.
18 CHAIRMAN SOULES: Oh.
19 MR. ORSINGER: I made a hasty
20 retreat.
21 CHAIRMAN SOULES: I wanted to
22 be sure I got your vote recorded. Here we go.
23 What's next?
24 PROFESSOR DORSANEO: The next
25 one is not really a draft of a proposal, or is

1 it a proposal here as well? It's just a note
2 but --
3 CHAIRMAN SOULES: What page?
4 PROFESSOR DORSANEO: Page 66,
5 pages 66 and 67. We considered the -- we
6 being the appellate committee -- a change that
7 would have simplified the practice by
8 eliminating the motion for rehearing as a
9 prerequisite for filing a writ of error. The
10 particular fix would have been to have the
11 application for writ of error itself -- I may
12 have to defer to Judge Guittard on this. I
13 may have messed this up. My recollection is
14 not so good on it.
15 HONORABLE C. A. GUITTARD:
16 Well, I would say this, that there is a
17 sentiment among some lawyers that it doesn't
18 do any good to file a motion for rehearing and
19 that if you are going to the Supreme Court
20 anyway you ought not have to file a motion for
21 rehearing. Well, there is arguments both ways
22 on that, and as an appellate judge when this
23 matter was brought up I felt that as an
24 intermediate judge I would want the
25 opportunity to correct any error that was

1 going to be complained of in the Supreme
2 Court.
3 So we in civil -- in criminal cases there
4 is a provision that when a petition for
5 discretionary review is filed the Court of
6 Appeals may consider that within a certain
7 limited time and change its judgment or modify
8 its judgment, and then after it does that then
9 the further motions or petitions for
10 discretionary review can be filed. This
11 proposal was to extend that practice to civil
12 cases. In criminal cases it wasn't necessary
13 to file a motion for rehearing in order to
14 complain on appeal in a higher court.
15 Now, there are several issues to be
16 addressed here. First is should a motion for
17 rehearing, a point in the motion for
18 rehearing, be required as a directive for
19 review in the Supreme Court? Next question is
20 if not, then should the Court of Appeals have
21 an opportunity to review the application for
22 writ of error, application for discretionary
23 review, and have an opportunity to correct its
24 judgment before it goes to the higher court?
25 CHAIRMAN SOULES: Okay. As I

1 get it, the motion of the committee is to --

2 HONORABLE C. A. GUITTARD: The

3 committee originally adopted this proposal and

4 then at a subsequent meeting withdrew it, but

5 we thought it was -- there were probably

6 enough appellate lawyers that thought it had

7 merit that we ought to at least present it to

8 this committee.

9 CHAIRMAN SOULES: Does anyone

10 have a motion? Sarah.

11 MS. DUNCAN: I would like to

12 move that we abolish motions for rehearing as

13 a prerequisite to Supreme Court review.

14 CHAIRMAN SOULES: So moved. Is

15 there a second?

16 PROFESSOR DORSANEO: Second.

17 CHAIRMAN SOULES: Moved and

18 seconded. Any discussion?

19 MR. ORSINGER: Yeah. The

20 question is, why?

21 MR. LOWE: Question.

22 MS. DUNCAN: I think they are a

23 waste of trees. If most appellate court

24 judges were like Judge Guittard and seriously

25 took the motion for rehearing in their opinion

1 and tried to fix the errors that they agreed
2 existed in the opinion, that's great. If in a
3 particular case you have got errors in the
4 opinion that were not errors that originated
5 in the trial court, maybe there is good reason
6 for a motion for rehearing, and I think in
7 that type of case most appellate lawyers would
8 file a motion for rehearing, but I think in
9 most of the appeals, most of the time, a
10 motion for rehearing is a waste of paper.
11 It's a waste of time, and it is a way to
12 get trapped or at least to argue in the
13 Supreme Court about whether you have got all
14 the right points of error. I mean, the Court
15 at this point is not particularly picky about
16 points of error and motion for rehearing and
17 whether they hear all your points of error in
18 the application, and that's great, but I just
19 don't see any point in arguing about it.
20 PROFESSOR DORSANEO: But the
21 sense of your motion was to abolish as a
22 jurisdictional thing, not to abolish it as
23 someone --
24 MS. DUNCAN: No. If somebody
25 wants to do it, if they think they have got a

1 shot at changing the Court's mind --

2 MR. LOWE: Question.

3 MS. DUNCAN: -- And you have

4 got a split panel opinion, go for it.

5 MR. LOWE: Look, I have got a

6 question. Does that include then giving the

7 appellate court after the application of writ

8 of error is filed so many days to do

9 something? Because what happens if in the

10 meanwhile, you know, our laws change sometimes

11 within a week or so. We see that, and a new

12 case comes out. I mean, a lawyer, he is mad,

13 he says, "I am not going to give them a chance

14 to act again. I am just going to tell the

15 Supreme Court to bust them."

16 Why shouldn't that Court of Appeals have

17 a chance; say, "No, the law has changed now,

18 and we reverse it." Why not give them that

19 right rather than just pass it on? Because if

20 you think if I wasn't happy with the appellate

21 judges I wouldn't give them a chance. I would

22 say, "Boy, I got you now," and then, you know,

23 why not give them, the appellate court, a

24 chance to review that?

25 MS. DUNCAN: You can do --

1 under this if we remove the motion for
2 rehearing as a jurisdictional prerequisite you
3 can still do that if the case, the new case,
4 comes down within 15 days after the date of
5 the Court of Appeals' judgment.
6 MR. LOWE: You can do it. You
7 can do it, but I am saying as a practical
8 matter you think some of the lawyers, they
9 might just, you know, that case came out of
10 the Supreme Court. They are not going to mess
11 with that court they have been unsuccessful
12 with. They will just go straight to the big
13 boys, and so why not give this court a chance
14 to review that? I think that was the reason.
15 Motion for rehearing wasn't put in there just
16 for no reason at all originally. It was put
17 in there because things might develop. They
18 should be -- even though you can't expand your
19 points, law may change, you may think of
20 something, a different approach, and you
21 should be allowed to have that appellate court
22 a chance to review that rather than just
23 taking it straight on.
24 MS. DUNCAN: If the law changes
25 in that 15-day period I think a lawyer would.

1 I mean, the chances of getting into the
2 Supreme Court are one in twelve. So who would
3 take a risk on getting into the Supreme Court
4 when you are at least in the Court of Appeals,
5 and you can get them to rule on it?
6 MR. LOWE: Well --
7 MS. DUNCAN: So I think most
8 lawyers if they have really got a serious
9 motion for rehearing because of new law,
10 because of a split in the panel, because of a
11 misstated fact that's central to the decision,
12 those lawyers will file a motion for
13 rehearing, but to require it as a
14 jurisdictional prerequisite in my view is not
15 right.
16 MR. LOWE: I am agreeing it's
17 not a prerequisite. That's not my point. But
18 my point is why not give the Court of Appeals
19 a chance to rule, review the writ of error or
20 application for writ of error and so forth?
21 What's wrong with that?
22 PROFESSOR ALBRIGHT: It is in
23 Amendment 1, right?
24 CHAIRMAN SOULES: Yeah. What
25 discipline is there on the appealing lawyer to

1 file a complete motion for rehearing if it's
2 not going to be a predicate for the Supreme
3 Court appeal?
4 MR. LOWE: Well, there is not.
5 I mean, it's got to be a predicate. I am not
6 saying that, but as I understand the Rule now,
7 once it's -- the writ of error is filed,
8 application for writ of error is filed with
9 the Court of Appeals. They forward it on.
10 Does the appellate court, does the Court of
11 Appeals then have -- do they review that and
12 act on that, or do they just pass it on?
13 MS. DUNCAN: Criminal practice
14 they have --
15 HONORABLE SAM HOUSTON CLINTON:
16 101, 15 days.
17 MR. LOWE: Civil.
18 HONORABLE SAM HOUSTON CLINTON:
19 The difference is that's usually the
20 initiative, is in the members of the panel
21 that decide the case of the Court of Appeals.
22 It doesn't have to be called to their
23 attention by anybody. They have lawyers that
24 sometimes pick it up. The initiative, as I
25 say, is in the Court, not in the party, but I

1 am up here talking about the party.

2 MR. LOWE: But is the civil

3 Rule the same?

4 MS. DUNCAN: No.

5 HONORABLE SAM HOUSTON CLINTON:

6 No.

7 MR. LOWE: That's what I am

8 saying.

9 PROFESSOR ALBRIGHT: That's why

10 they are saying to change it.

11 CHAIRMAN SOULES: The Civil

12 Rule is where the party has to file motion for

13 rehearing, and it has to include everything

14 you plan to take to the Supreme Court of

15 Texas. This Rule as I am reading it here will

16 give you the option to file a motion for

17 rehearing. If you did so, then you still

18 wouldn't have to have all your points in your

19 motion for rehearing that you intend to raise

20 in the Supreme Court because it's not a

21 predicate for the Supreme Court filing, but it

22 does -- it would extend the time just the way

23 a motion for rehearing has in the past

24 extended the time for filing your petition for

25 writ of error.

1 HONORABLE C. A. GUITTARD: I
2 think we ought to vote in two sections. One
3 is should it be abolished as a prerequisite?
4 Second, if it is abolished as a prerequisite,
5 should the Court of Appeals have an
6 opportunity in civil cases as well as in
7 criminal cases to review the application for
8 writ of error?
9 MR. LOWE: That was my point.
10 In voting on that I wanted the second point.
11 I wouldn't abolish it unless I went to the
12 second point. That's why I wanted to -- I
13 guess if you want to divide it, you divide it,
14 but I am not going to vote on the first point.
15 CHAIRMAN SOULES: But there is
16 still a third point, and that is, if you do
17 file a motion for rehearing, does that delay
18 the time that you have to file your petition
19 for writ of error? Because that's what this
20 looks like it does.
21 HONORABLE C. A. GUITTARD:
22 Sure.
23 MS. DUNCAN: Yeah. The way
24 that we had originally written it was if a
25 motion for rehearing is filed, you are on the

1 same briefing schedule that you are on now.
2 You have got 30 days after the date the Court
3 denies your motion for rehearing to file your
4 application, absent a 130(d) motion.
5 CHAIRMAN SOULES: Without a
6 predicate? So you could file a motion for
7 rehearing that doesn't address the entire
8 array of things that you intend to take to the
9 Supreme Court, but it could be a rifle shot of
10 one point that you think should be brought to
11 the Court's attention before you go on to the
12 Supreme Court, and if you were to take a rifle
13 shot at that one point that does not limit
14 your Supreme Court appeal, and you don't have
15 to file a petition for writ of error until
16 after 30 days after that's been overruled. Is
17 that the motion?
18 MS. DUNCAN: Right.
19 CHAIRMAN SOULES: Judge Hecht.
20 JUSTICE HECHT: This comes in
21 the council category we talked about earlier.
22 I don't know what will happen, but I suspect
23 that if motions for rehearing are no longer
24 jurisdictional, that it will develop on our
25 Court that if you argue something in a writ of

1 error that you had a chance to bring it to the
2 attention of the Court of Appeals even after
3 the opinion is written and you didn't do it,
4 it's not a very good, strong likelihood that
5 we are going to be very sympathetic, and that
6 may not be jurisdictional, but as a practical
7 matter, I mean, there may be circumstances
8 where it's important enough that something
9 will override, but we are not going to be very
10 sympathetic to ambushing the Court of Appeals.
11 HONORABLE C. A. GUITTARD:
12 Mr. Chairman?
13 CHAIRMAN SOULES: Judge
14 Guittard.
15 HONORABLE C. A. GUITTARD: From
16 the point of view of jurisprudence the
17 question arises as to whether
18 Giving -- assuming that we abolish the
19 prerequisite as a matter of jurisdiction. The
20 question as to whether or not the Court of
21 Appeals ought to be able to review the
22 application, it has seemed to me that the
23 Supreme Court review in the case that the
24 Court has made a bad decision that it
25 otherwise might correct is by no means sure

1 that the Supreme Court is going to grant a
2 writ of error for that reason, and the Supreme
3 Court's review is discretionary. They have
4 more important cases to consider, perhaps,
5 than this one.
6 So they wouldn't have to change that, and
7 if the Court of Appeals makes a change, it
8 might be the only opportunity to correct this
9 error. From the point of view of
10 jurisprudence it would seem that giving the
11 Court of Appeals an opportunity to correct any
12 errors that are pointed out in the application
13 for writ of error before it goes to the
14 Supreme Court would result in fewer cases
15 going into the books with that kind of error
16 in it.
17 CHAIRMAN SOULES: Richard
18 Orsinger.
19 MR. ORSINGER: I would like to
20 ask Justice Hecht if the provision is made
21 that the application for writ of error is
22 filed in the Court of Appeals and they have
23 the power if they wish to review that, would
24 the fact that it was raised in the application
25 only and not in a motion for rehearing work

1 against the appellant, or is the fact that the
2 courts of appeals know they can review the
3 application and pull back their opinion, do
4 you think that might serve the same purpose?
5 JUSTICE HECHT: Well, I think
6 it is a good idea to either make it
7 nonjurisdictional or give -- or let the
8 application for writ of error in essence
9 substitute for the motion for rehearing
10 because we will never get out of the quandry
11 of what do you do when you file a motion for
12 rehearing and the Court of Appeals makes some
13 changes, but you are not sure whether it
14 affects the judgment. Perhaps it doesn't, but
15 it certainly affects something else that's
16 material in the opinion. Then do you get to
17 file another motion? Is it jurisdictional?
18 Do you have to file another motion?
19 I mean, we are trying to rewrite this
20 Rule to clarify when you have to file second
21 motions for rehearing in order to preserve
22 your time, but we, at least so far, we have
23 not been able to make that clear because our
24 Court still gets -- every time this is a
25 problem our Court gets a motion for extension

1 of time to file the application for writ of
2 error because they don't want it to be tied to
3 the ruling on the first motion, and their time
4 has run out, and they shouldn't have filed a
5 second motion. Or they should have filed a
6 second motion, and their time has not yet run,
7 and they are just always caught in that never,
8 never land.
9 So I think it's good to do one or the
10 other, but I also think it's a good idea to
11 give the Court of Appeals some opportunity to
12 correct mistakes that they made or to call to
13 their attention the change in the law, and
14 again, I just would doubt that over time the
15 Supreme Court would look very favorably on
16 applications that had not given the Court of
17 Appeals a chance to do that.
18 CHAIRMAN SOULES: Steve
19 Yelenosky.
20 MR. YELENOSKY: I just had a
21 question. If the question is whether it's
22 jurisdictional and mandatory or optional, if
23 it's optional, why wouldn't any attorney who
24 thought that there was any possibility that
25 this court, this intermediate court, the Court

1 of Appeals would change its decision because
2 of a change in the law or because of if they
3 made a mistake, why wouldn't he or she just
4 file a motion for rehearing? Why do you have
5 to make the application for writ of error
6 reviewable by the Court of Appeals?
7 CHAIRMAN SOULES: Steve.
8 MR. SUSMAN: I mean, I can
9 think of a lot of times where you don't want
10 to -- I mean, I can think of times where you
11 would not want the Court of Appeals to have
12 another shot at doing it right. I mean, you
13 know they are going to rule against you.
14 Okay. It's just whether they are going to be
15 able to articulate.
16 MR. YELENOSKY: Articulate.
17 MR. SUSMAN: Yeah. And why
18 give them -- why teach them how to screw you?
19 I mean, why make it easy for them? I mean,
20 just say, you know, you have presented the
21 argument. You can read the card. You know
22 that it ain't going to change the result. Why
23 waste time?
24 CHAIRMAN SOULES: Pam.
25 MS. BARON: I think the problem

1 that Judge Hecht raised is not answerable.
2 The problem is that if you give the Court of
3 Appeals the opportunity to review the
4 application for writ of error, they correct it
5 then. Then you have to file a new application
6 for writ of error. I think the motion for
7 rehearing problem is going to be around no
8 matter what. If we call the right of the
9 Court of Appeals to correct its opinion and
10 judgment, we are still going to have it, and I
11 don't know how you cure it. I can't think of
12 a way to do that.
13 CHAIRMAN SOULES: Okay. Mike
14 Hatchell.
15 MR. HATCHELL: Let me add to
16 Pam's comments. One of the difficulties with
17 the Rule that we adopted was, Pam, if the
18 Court of Appeals reads the application and
19 says, "Hey, they have got me here. Let's
20 change the basis and leave the judgment the
21 same," your time for filing application for
22 writ of error has run out. You don't get to
23 file another one as I understand it.
24 MS. BARON: Right.
25 MR. HATCHELL: So your

1 application for writ of error doesn't even
2 match up with the basis for the holding, and
3 it's probably going to be denied.
4 HONORABLE C. A. GUITTARD:
5 Under our proposal, Mike, you would have the
6 opportunity to file another application.
7 MR. LOWE: Right.
8 MR. HATCHELL: I don't think
9 so.
10 MR. LOWE: Or supplement it.
11 CHAIRMAN SOULES: Isn't it
12 correct that if the Court of Appeals hands
13 down an opinion in connection with the
14 overruling of a motion for rehearing that you
15 have a right to a further motion no matter
16 what?
17 HONORABLE C. A. GUITTARD: On a
18 motion for --
19 CHAIRMAN SOULES: On a motion
20 for rehearing.
21 MR. HATCHELL: Yeah. That's
22 under the present practice.
23 PROFESSOR DORSANEO: Well, we
24 can fix that.
25 CHAIRMAN SOULES: And if you

1 do, then your time for filing a petition for
2 writ of error doesn't run until that later
3 motion.
4 HONORABLE C. A. GUITTARD:
5 That's what the present Rules provide with
6 respect to the application for discretionary
7 review.
8 CHAIRMAN SOULES: And petition
9 for writ of error.
10 HONORABLE C. A. GUITTARD:
11 Well, I mean there is no right now. Under the
12 present Rule unamended you have to file for
13 rehearing, but if we adopt the criminal
14 practice in civil cases where you don't have
15 to have a motion for rehearing but you give
16 the Court of Appeals an opportunity to review
17 the application or the application for writ of
18 error, then if the Court of Appeals changes
19 its opinion then you can amend or file
20 additional applications for writ of error,
21 just like you can file additional petitions
22 for discretionary review under the present
23 Rules in the criminal cases.
24 CHAIRMAN SOULES: Okay. And
25 what is this proposal? How is that addressed

1 here, or is it?

2 HONORABLE C. A. GUITTARD: The

3 proposal would simply -- well, would simply

4 extend to civil cases the same procedure that

5 the present Rule provides with respect to

6 criminal cases.

7 CHAIRMAN SOULES: Could you --

8 Rusty, did you have something?

9 MR. MCMAINS: Well, I was

10 curious about that. Are you suggesting that

11 the Rule as current as you are proposing it is

12 that you just kind of if they change the

13 opinion, you say, "Well, forget that one.

14 Here is my new application for writ of error."

15 CHAIRMAN SOULES: File a new

16 application for writ of error. That was

17 exactly my question. Do you have to?

18 HONORABLE C. A. GUITTARD:

19 Well, you wouldn't have to, but you would

20 probably want to if it's material.

21 PROFESSOR ALBRIGHT: Where is

22 that in the Rules relating to filing it?

23 MS. DUNCAN: 101.

24 PROFESSOR ALBRIGHT: But it

25 doesn't say anything about briefing it again

1 or filing a new petition.

2 CHAIRMAN SOULES: Did you say

3 101?

4 PROFESSOR ALBRIGHT: 101.

5 PROFESSOR DORSANEO: Well, we

6 are talking about our draft proposal.

7 MR. ORSINGER: Yeah. This is

8 just a comment. The actual language didn't

9 get brought forward.

10 HONORABLE C. A. GUITTARD:

11 That's right.

12 Well, I would suggest that if the

13 committee is interested in the proposal that

14 we can bring back the exact language which

15 would require also some changes in some

16 subsequent Rules including the one about

17 filing -- the time for filing the petition for

18 writ of error.

19 PROFESSOR DORSANEO: That's

20 really what we want to know. Does anybody

21 want us to work on this?

22 CHAIRMAN SOULES: The way -- so

23 that I guess maybe we can understand it. At

24 least I would like to understand what it is

25 you would be working on. I guess it would be

1 a plan by which the procedure would be that a
2 motion for rehearing could be filed or not.
3 HONORABLE C. A. GUITTARD: Yes.
4 CHAIRMAN SOULES: Whether filed
5 or not it would not be a predicate to be -- a
6 requisite to the petition for writ of error or
7 any point in the petition for writ of error.
8 HONORABLE C. A. GUITTARD:
9 Right.
10 CHAIRMAN SOULES: If one is
11 filed, then the Rules we have got would just
12 follow in sequence. Any time the Court
13 changes its opinion, you can file another one.
14 HONORABLE C. A. GUITTARD:
15 Yeah.
16 CHAIRMAN SOULES: Until finally
17 the last one is overruled and then your time
18 for petition of writ of error would have run.
19 MR. ORSINGER: Not overruled.
20 They don't have a certain period of time to
21 overrule your application for writ of error.
22 CHAIRMAN SOULES: No. I am
23 over on application for rehearing.
24 MR. ORSINGER: Oh, okay.
25 CHAIRMAN SOULES: Then the

1 Court would have a chance to look at the
2 petition for writ of error for 15 days even
3 though it's already --
4 HONORABLE C. A. GUITTARD: If
5 it doesn't --
6 CHAIRMAN SOULES: -- Considered
7 all the motions for rehearing.
8 HONORABLE C. A. GUITTARD: If
9 it doesn't review it, it doesn't make any
10 change, then it sends the application on to
11 the Supreme Court.
12 CHAIRMAN SOULES: Now, that's
13 the scenario if you do file a motion for
14 rehearing. If you don't file a motion for
15 rehearing, you file a petition for writ of
16 error within 30 days of the time that the
17 Court renders its decision, and if there is no
18 change while that Court has preliminary
19 jurisdiction, that goes to the Supreme Court
20 for decision.
21 HONORABLE C. A. GUITTARD:
22 Right.
23 CHAIRMAN SOULES: If there is a
24 change, then you may or may not have to
25 thereafter file another petition for writ of

1 error, and you-all haven't decided on that one
2 yet.
3 HONORABLE C. A. GUITTARD: Our
4 proposal as originally adopted and
5 subsequently withdrawn would amend other Rules
6 to give you the opportunity to file another
7 application for writ of error.
8 CHAIRMAN SOULES: If you wished
9 but you would not be required to do so.
10 HONORABLE C. A. GUITTARD:
11 Right.
12 CHAIRMAN SOULES: Okay. So
13 that's the general picture of what they are
14 saying do we want the Appellate Rule
15 Subcommittee to work on that? If so, they
16 will work on it. If not, we will leave things
17 the way they are.
18 How many feel they should work on this
19 project? Show by hands. 13 votes for. And
20 against? Two. Looks like you-all have some
21 additional work to do then, and you are so
22 charged. Three, 13 to 3. Was there a hand
23 up?
24 MR. LOWE: Yeah.
25 CHAIRMAN SOULES: Okay. For a

1 comment? Oh, Harriet Myers.

2 MS. MYERS: I guess I am -- can

3 somebody explain to me why we need the option

4 of a motion for rehearing if you are going to

5 have the application for a writ of error serve

6 that function? I wasn't quite clear on why

7 you would reserve that option that would throw

8 the time -- I thought one of the reasons you

9 wanted to use the writ of error process was to

10 streamline the timetable, and what you do with

11 the motion for rehearing, if I am hearing it

12 correctly and maybe I am not, you just bog

13 down again with the limit, the time

14 extensions, and so am I hearing that wrong

15 or --

16 CHAIRMAN SOULES: Looks like

17 the two purposes would be, one, to buy time so

18 at least you would buy time until the Court of

19 Appeals rules on the motion for rehearing

20 while you are trying to get your petition

21 together while you are trying another lawsuit

22 at the same time. So you might be able to buy

23 some time. The second is that you might

24 actually -- and this may enhance the Court of

25 Appeals' scrutiny of a motion for rehearing.

1 You might file a rifle shot motion for
2 rehearing that they would pick up and get
3 their attention better rather than a long
4 litany of the predicates that we are now
5 filing just because we have to go to the
6 Supreme Court on all of those points. So
7 there may be a real reason for shortening it
8 and then shortening what's required,
9 abbreviating what's required to get the
10 Court's attention to that may be more -- a
11 higher degree of scrutiny plus buying time. I
12 don't see any other reason for it, but someone
13 else may.
14 Rusty, did you have a comment?
15 MR. MCMAINS: Well, I just
16 wanted to articulate if it hasn't already been
17 done basically the problem I have with the
18 notion that you would take away any
19 preservation features of the motion for
20 rehearing is that it is effectively then an
21 expansion of the jurisdiction of the Texas
22 Supreme Court. Right now there is a
23 restriction to those issues. One of the
24 problems that we currently -- that one
25 currently faces is that if you have a

1 complaint about the judgment of the Court of
2 Appeals, you don't like it.
3 Maybe you are prepared to live with it
4 depending on whether the other side files an
5 application for writ or whatever or a motion
6 for rehearing, but you have got to file a
7 motion for rehearing to preserve that
8 complaint if you have got a complaint to the
9 judgment. Otherwise, you are not going to be
10 able to take it up. So that in reality before
11 a party under the current practice has to file
12 an application for writ of error he will know
13 whether or not he is at risk with regards to
14 something that he may have won, either as
15 against another party or as against that
16 party. Maybe he didn't win at all, but he may
17 have won something.
18 That other party may not file a motion
19 for rehearing. If they don't, then they are
20 not going to be able to take it up on an
21 application for writ. That issue is out of
22 the case. You can define the issues that are
23 going to the Supreme Court. We have that
24 opportunity now because of the fact that it's
25 a preservation document. Now, if in truth and

1 in fact what Justice Hecht says is true, that
2 the Court is going to frown on not having
3 brought it up anyway, then unfortunately what
4 we have done is insert a surreptitious
5 preservation practice in saying that the
6 Supreme Court says, "Well, if they didn't
7 really think enough of it to bring it up to
8 the Court of Appeals, then we are not going to
9 think that much of it either." Then basically
10 we have sub silentio incorporated our current
11 practice it seems to me, you know, and it
12 being de facto a preservation --
13 MR. LOWE: Right.
14 MR. MCMAINS: -- issue or
15 consequence anyway. But from a standpoint of
16 being able to advise a client when you have
17 got an opinion on the Court of Appeals that
18 you may not be fully satisfied with but may be
19 willing to live with, right now depending upon
20 what everybody does in the motion for
21 rehearing stage, when that stage is completed
22 you now know pretty much whether or not you
23 want to take an application for writ and what
24 the risks are in the Supreme Court. Under the
25 proposed Rule and the abolition of it as a

1 preservation document you will not know, and
2 you will have no way of knowing until the
3 Supreme Court decides to do something, and
4 they may do something as they frequently do
5 without even hearing oral argument, so...
6 CHAIRMAN SOULES: Does anyone
7 want to change their votes after hearing that?
8 Okay. Then the committee should note those
9 remarks made by Rusty and go on forward with
10 your work on this subject. Okay. What's
11 next?
12 MR. SHARPE: Luke?
13 CHAIRMAN SOULES: I'm sorry.
14 Harriet, I didn't see your hand up.
15 HONORABLE C. A. GUITTARD: I
16 would like to respond to Harriet.
17 MS. MYERS: Well, and I guess
18 what I was going to ask, if -- depending on
19 what Judge Guittard says, and I know Sarah had
20 her hand up, too, but if the committee is
21 going to look at it again I would really
22 appreciate them proposing two alternatives,
23 one with and one without any rehearing
24 process, rather than coming back with one that
25 includes that in there.

1 CHAIRMAN SOULES: Okay. Is
2 there enough consensus on the committee for
3 them to work on two Rules?
4 MR. LOWE: Right.
5 CHAIRMAN SOULES: One is there
6 would be -- no motion for rehearing would be
7 available.
8 MR. LOWE: Right.
9 CHAIRMAN SOULES: And the other
10 it would be available along the lines as
11 previously discussed. How many feel that we
12 should look at both of those alternatives?
13 13. Those opposed? Okay. That's unanimous
14 that we look at both of those alternatives.
15 Okay. What's next?
16 HONORABLE C. A. GUITTARD: The
17 question arises as to -- with respect to an
18 affidavit of inability under proposed Rule 45.
19 CHAIRMAN SOULES: What page are
20 you on, Judge, of your report if you are on
21 one?
22 PROFESSOR DORSANEO: 42, page
23 42.
24 CHAIRMAN SOULES: 42. I have
25 got 42.

1 HONORABLE C. A. GUITTARD:
2 There is uncertainty in most Courts of Appeals
3 as to whether or not a contest to an affidavit
4 of inability should be under oath. The Rule
5 doesn't require it. Some courts say it
6 doesn't have to be. On the other hand, some
7 courts say it should be under oath. Now, the
8 committee simply proposes that we ought to
9 decide one way or the other and write into the
10 Rule whether they ought to be under oath or
11 not.
12 Now, another question that's been raised
13 here today concerning that by one of our clerk
14 members is that we ought to adopt the same
15 provision with respect to affidavits of
16 inability to pay that are in the Civil Rules,
17 and that is that the affiant ought to specify
18 the reasons why he is unable to pay and give
19 some information that substantiates his
20 statements that he is unable to pay. I think
21 that has merit, and I think our committee
22 would like to look into that, but the only
23 thing that's really before this committee now
24 is whether or not an oath should be required
25 for the contest for the affidavit.

1 CHAIRMAN SOULES: Okay. Those
2 who think an oath should be required, please
3 show by hands. One.
4 MR. ORSINGER: No, not for
5 contest. I'm sorry. I was confused. I
6 withdraw that.
7 MR. HERRING: In the trial
8 level under 145 there is no affidavit required
9 on the contest, right?
10 MS. WOLBRUECK: There is no
11 contest.
12 MR. ORSINGER: How would you be
13 able to swear to someone else's assets anyway?
14 PROFESSOR DORSANEO: If I can
15 tell a little bit of a funny story, and
16 partially on myself, when we did the appellate
17 rules statements and referrals we did actually
18 consider this question, the committee, the
19 combined committee, and decided to take the
20 requirement out that the contest be sworn that
21 was in the prior Rule basically on the idea
22 that how could they swear to that?
23 HONORABLE C. A. GUITTARD:
24 Yeah.
25 PROFESSOR DORSANEO: Unless you

1 just swear to it because you have to. But
2 then I had forgot about that and so we had no
3 comments, and some silly person mentioned
4 those prior cases in a work on this subject
5 and preserved the controversy down to the
6 present time.
7 MR. HERRING: Rule 145(1) says
8 that "Defendant may contest the affidavit by
9 filing a written contest giving notice," and I
10 don't see anything that says it must be under
11 oath at least at the trial level, attest to an
12 affidavit of inability.
13 CHAIRMAN SOULES: I saw no
14 hands up then for requiring that the contest
15 be under oath. Those that feel the contest
16 need not be under oath show by hands. Okay.
17 Now, that's unanimous that it need not be
18 under oath.
19 MR. YELENOSKY: Luke?
20 CHAIRMAN SOULES: Rule 45(c) on
21 page 42.
22 HONORABLE C. A. GUITTARD: Now,
23 we have a proposal --
24 CHAIRMAN SOULES: Steve
25 Yelenosky had a comment.

1 MR. YELENOSKY: I just want to
2 say that we haven't taken this up, I guess,
3 with respect to the Rules of Civil Procedure,
4 but there has been a proposal for the change
5 in the affidavit of inability at the initial
6 filing of a lawsuit that has been proposed by
7 the State Bar Committee on Services for the
8 Poor, and a draft of that has been sent to the
9 clerks on our committee, and there has been
10 some discussion of that, and what happens --
11 if anything happens with that that may reflect
12 on this Rule as well, but we don't need to
13 take that up now, I guess, and I had one other
14 question though on this particular Rule, and I
15 guess it comes up elsewhere as well.
16 The affidavit that is by the person
17 swearing the inability to pay says "unable to
18 pay the cost of appeal or any part thereof"
19 and then part (f) talks about paying to the
20 extent of ability, and are those two things
21 congruent, or do you -- I mean, in my
22 situation with legal services people can
23 honestly swear almost by definition that they
24 can't pay anything. Are there instances in
25 which the Court is actually -- somebody is

1 swearing they can't pay anything and then the
2 Court is asking them to pay part of it? Are
3 they able to swear "I can't pay all of it, but
4 I can pay part of it"? I don't know. I mean,
5 what the Rule literally says is they have to
6 swear they can't pay any part thereof when the
7 truth may be, as the Court may decide, that
8 they can pay a portion of it.
9 PROFESSOR DORSANEO: Well, when
10 I started practice a long time ago people
11 would be asked, "Do you smoke? Do you have a
12 couch?" Okay.
13 MR. YELENOSKY: Right.
14 PROFESSOR DORSANEO: And I
15 think that's how it was interpreted 25 years
16 ago.
17 MR. ORSINGER: That was the
18 problem.
19 PROFESSOR DORSANEO: Yeah. But
20 that's not the way it's been interpreted
21 lately although it remains the same. It may
22 be interpreted that way in particular trial
23 courts, but I think the appellate court
24 opinions are a little less hostile to people
25 proceeding as paupers than they were 25 years

1 ago.

2 MR. YELENOSKY: Well, I guess

3 the question is pointedly literally the Rule

4 doesn't allow somebody to swear that they can

5 pay a portion. Literally you have to swear

6 that I can't pay any part thereof. At least

7 that's how I read it.

8 CHAIRMAN SOULES: Yes.

9 MR. YELENOSKY: "The appellant

10 is unable to pay the costs of appeal or any

11 part thereof." Yet the Court has the

12 authority under (f) to order payment to the

13 extent of ability. So if you have an honest

14 person who says "I can't pay this full

15 amount," they have no option. They either

16 have to pay the full amount or they're in the

17 position of lying and saying, "I can't pay

18 anything."

19 MS. DUNCAN: It needs to be

20 written affirmatively so that they say "I can

21 pay so much of the cost of the appeal" or "I

22 can pay none at all."

23 MR. YELENOSKY: Right. And

24 again, I think this impacts clients more maybe

25 in a higher level of income than my clients

1 almost by definition, but there are people who
2 honestly would want to tell the Court maybe
3 that they can only pay a portion.
4 MS. DUNCAN: But what if we
5 said an affidavit stating that part of the
6 costs the appellant can pay, if any?
7 MR. YELENOSKY: Well, I don't
8 know the exact language.
9 MS. DUNCAN: Or something like
10 that.
11 MR. YELENOSKY: And maybe
12 that's appropriate to send back to committee,
13 but I am just raising whether the question can
14 be answered and the committee can be asked
15 To --
16 PROFESSOR DORSANEO: It really
17 should say "unable to pay the costs of appeal
18 or some part thereof."
19 PROFESSOR CARLSON: It does.
20 PROFESSOR DORSANEO: That's how
21 I always interpreted it.
22 PROFESSOR CARLSON: It does.
23 MR. YELENOSKY: Well, I think
24 that it's been interpreted. It says
25 Literally -- literally it says "The appellant

1 is unable to pay the cost of appeal or any
2 part thereof" and when we have had people
3 swear to it, we haven't had a problem, but the
4 way we have interpreted it is "I can't pay
5 anything," and that's usually true. These
6 people are on governmental assistance and have
7 been unemployed for some period of time.
8 PROFESSOR DORSANEO: Because
9 they have money from --
10 MR. YELENOSKY: Yeah. Well,
11 right. But it maybe should say "some."
12 CHAIRMAN SOULES: Well, I don't
13 know if that word would fix it or not, but
14 let's give the committee that charge to fix
15 that so that the affidavit will state either
16 that the appellant is unable to pay any
17 portion of the costs or to what extent the
18 appellant is limited in paying the costs, and
19 I don't know what the words are.
20 MR. HERRING: Make it
21 consistent with 145.
22 CHAIRMAN SOULES: With 145?
23 MR. HERRING: And you are going
24 to include the specifics there, but you are
25 going to want to change the language in 145.

1 MR. YELENOSKY: Right.

2 MR. HERRING: Because it
3 doesn't say "in part." It says "pay the
4 costs." You just ought to make them
5 consistent.

6 CHAIRMAN SOULES: So we want to
7 conform 145 to what is done in 45?

8 PROFESSOR DORSANEO: 145 says
9 "I am unable to pay the court costs," but I
10 gather the sense of it is to be more general.
11 "I am unable to pay the court costs" --

12 MR. HERRING: Well, if you look
13 at the first part of the Rule it says a person
14 who is unable to afford --

15 PROFESSOR DORSANEO: Afford,
16 right.

17 MR. HERRING: -- the costs, and
18 defines that as a person who is receiving a
19 governmental entitlement or otherwise has no
20 ability to pay costs. So the language is not
21 very good in either one right now.

22 HONORABLE C. A. GUITTARD:
23 Okay. We will consider it.

24 CHAIRMAN SOULES: Okay. So
25 charged.

1 HONORABLE C. A. GUITTARD: Does
2 anyone have an objection to Rule 121(a)(2)
3 which says "The original proceedings" --
4 CHAIRMAN SOULES: Do you have a
5 page number for us on that, Judge?
6 MR. ORSINGER: Page 76.
7 PROFESSOR DORSANEO: 76. Yes.
8 The Rule -- you have to go by the page numbers
9 because some of these Rules are not in
10 numerical sequence.
11 HONORABLE C. A. GUITTARD: Page
12 76, the present Rule provides that you -- if
13 you are having a mandamus against the trial
14 court you name the judge as the party
15 respondent and then you also serve the real
16 party of interest and let him argue. Now,
17 some trial judges are sensitive to being named
18 in these proceedings. So the proposal would
19 be to make the real party of interest a
20 respondent, and while the judge would still
21 Be -- or other official would still be
22 respondent, he is not to be named in the title
23 of the proceeding. Is there any objection to
24 that?
25 CHAIRMAN SOULES: Any objection

1 to that?

2 MR. ORSINGER: Well, I would

3 observe that their name is only published in

4 the mandamus application if granted and that

5 this might be a good incentive to make

6 district judges sensitive to the fact that the

7 mandamus may, in fact, be published. I mean,

8 I am not sure that publishing the name of a

9 judge who has used his discretion in the

10 process of a trial is a bad public policy.

11 CHAIRMAN SOULES: Judge McCown

12 promised to be here tomorrow.

13 MR. ORSINGER: I will say it to

14 him. If it is a point of concern for a trial

15 judge, that means they are going to make all

16 that much more a sober decision about whether

17 to rule or not.

18 CHAIRMAN SOULES: Okay. Anyone

19 else?

20 MR. ORSINGER: I am not

21 sympathetic with the district judges.

22 CHAIRMAN SOULES: Okay. There

23 is a proposal then or motion to amend 121 as

24 indicated in the portion to the parts 2(A) and

25 (B), 2(A) and 2(B).

1 I guess we are just talking about 2(A).
2 The motion to amend 121 as indicated on page
3 76, paragraph 2(A). Is there a second?
4 MS. DUNCAN: Second.
5 CHAIRMAN SOULES: Motion made
6 and seconded. Further discussion? Those in
7 favor show by hands. Those opposed? Let me
8 count the first hands again. I have got five
9 opposed.
10 MS. DUNCAN: Wait. This is
11 for?
12 CHAIRMAN SOULES: This is for.
13 10 for and 5 opposed.
14 MR. ORSINGER: For the record
15 that was 121(a)2(A), I believe.
16 CHAIRMAN SOULES: 121(a)2(A).
17 That's right. Okay. What's next?
18 HONORABLE SAM HOUSTON CLINTON:
19 Are we just skipping around here?
20 PROFESSOR DORSANEO: Yeah.
21 HONORABLE SAM HOUSTON CLINTON:
22 I would like to get some sense of -- I forgot
23 I can't be here tomorrow. I would like to get
24 some sense of the committee on Rules 11 and
25 12, the court reporters and statement of

1 facts. There are some changes made here that
2 our court is very interested in, and they may
3 be related to others, too, and that is the
4 role of the court reporter vis-a-vis the
5 lawyer in getting the statement of facts.
6 Present law since about 1984 was that the
7 appellant has that responsibility, and there
8 are provisions here that would put the
9 responsibility of preparing and filing and
10 Et cetera on the court reporter, and I would
11 like to get some idea here. For example,
12 there is another change, too, in Rule 11 that
13 the court reporter now is charged with keeping
14 custody of all exhibits. At the present time
15 the clerk has that responsibility.
16 MS. WOLBRUECK: I was just
17 going to say --
18 HONORABLE SAM HOUSTON CLINTON:
19 And that responsibility has moved back and
20 forth over the years. I think because the
21 clerk has security vaults and everything, and
22 the court reporter sometimes does not, but
23 that aside they are now coming back and
24 wanting the court reporter to keep custody of
25 all the exhibits and then have some other

1 duties in connection with preparing of the
2 record and those exhibits and everything, and
3 I am not asking for any final motion, but we
4 ourselves are working on this, and so that's
5 why I would like to get some kind of sense as
6 to what the feeling is here today.
7 CHAIRMAN SOULES: I think the
8 feeling was, Judge, that we talked about
9 earlier, was that the court reporter should be
10 responsible for filing the statement of facts
11 and that the court reporter that actually took
12 the record would have responsibility, but also
13 the current court reporter of the court, if
14 it's not the same, would in addition to the
15 court reporter who took the record would also
16 have responsibility to see that it gets filed.
17 We didn't talk about exhibits, and I can see
18 how maybe particularly in criminal cases it
19 might even be more important for that function
20 to be left with the clerk.
21 HONORABLE SAM HOUSTON CLINTON:
22 I'm sure the DPS and all the DEA and all the
23 rest of them would not want the court reporter
24 worrying about marijuana and drugs and all
25 that sort of things.

1 MR. ORSINGER: I think the
2 logic for that is that the exhibits are
3 treated as part of the statement of facts, and
4 since the court reporter does the statement of
5 facts, but technically the court reporters
6 have offices that they come and go, and the
7 district clerk may lose an election but there
8 is still a big district clerk's staff, and
9 they have vaults, and it seems to me that the
10 evidence ought to remain with the clerk's
11 office, which has continuity, and not with the
12 individual reporter that can come and go
13 depending on whether they have a baby or
14 whatever the reasons are that somebody would
15 go, freelance.
16 MS. DUNCAN: Are you then going
17 to require that the court reporter's notes go
18 into the record also?
19 MR. ORSINGER: No. Because I
20 think that the court reporters protect their
21 notes, but if you go back in the court
22 reporter offices you will see exhibits. You
23 will see pieces of automobile engines and all
24 kinds of stuff that are kind of stuck there
25 leftover from trials, and I really don't think

1 that the court reporters as a practical matter
2 who have just one little bitty office to have
3 all of their records including their notes and
4 all exhibits that it's fair to say that they
5 ought to keep all the exhibits on all of their
6 cases.
7 CHAIRMAN SOULES: Well,
8 logically, too, there is a courtroom deputy
9 clerk who is there who's present whenever the
10 exhibits are gathered up and passed back out
11 everyday.
12 MS. WOLBRUECK: Not in all
13 counties.
14 CHAIRMAN SOULES: Not in all
15 counties? I didn't know that.
16 MS. WOLBRUECK: I was just
17 going to bring that up, Judge, before you did
18 because I was reading Rule 11 also. Sitting
19 here as a clerk I would love to say this is a
20 wonderful idea, but in reality I could also
21 see that I think, you know, the exhibits
22 should probably stay with the clerk. We do
23 have the storage. That's not true. We do not
24 have the storage facility, but in reality we
25 probably have more storage facilities than

1 what the court reporters do.

2 I can see that probably statewide the

3 court reporters would possibly shout at -- I

4 don't know, David, you know how --

5 HONORABLE PAUL HEATH TILL: May

6 I ask a question?

7 CHAIRMAN SOULES: Yes, sir.

8 HONORABLE PAUL HEATH TILL: It

9 appears to me this just says that the court

10 reporter has custody of it. It doesn't say

11 where she has to store it. It doesn't say

12 anything here that it has to be in her office

13 or anything of the sort.

14 HONORABLE SAM HOUSTON CLINTON:

15 But in light of the way it has developed it

16 seems like they are giving the custody back to

17 the court reporter like it used to be before

18 it was given to the clerk. That's some of the

19 reason I am asking these questions in order to

20 get it thrashed out.

21 MS. LANGE: I believe the court

22 reporters after the trial turn over all the

23 exhibits to the clerk and then if they need to

24 borrow something for their statement of facts,

25 they check it out and get what they need and

1 then turn it back in, and there is a trail of
2 paper to follow that exhibit, but it does, I
3 think, need to stay with the clerk.
4 HONORABLE PAUL HEATH TILL:
5 Again, though, to me it appears that the court
6 reporter is responsible for keeping up with
7 these exhibits and keeping up with what's
8 where and who has it, and if they have it with
9 the clerk or whoever it doesn't change the
10 fact that the court reporter would be the one
11 responsible. They are the one that wants to
12 keep it together and keep sure that they have
13 everything prepared for their transcript I
14 would think.
15 CHAIRMAN SOULES: Okay. That
16 would be a change. What you are looking at
17 would be a change, Judge, which is what we are
18 talking about.
19 MS. DUNCAN: In fact, it
20 depends on the court. It will not be a change
21 in most civil courts --
22 HONORABLE PAUL HEATH TILL: No.
23 MS. DUNCAN: -- In most
24 counties.
25 HONORABLE PAUL HEATH TILL: No,

1 it won't.

2 MS. DUNCAN: If you would go

3 around now and tell people by-the-by "Did you

4 know that the clerk is supposed to prepare the

5 original exhibits and send them up to the

6 Court of Appeals" they will look at you like

7 you are crazy as they did me.

8 HONORABLE PAUL HEATH TILL: You

9 are absolutely right.

10 MS. DUNCAN: And I said, "No,

11 don't you see? Don't you see Mr. Green's

12 office, this says the clerk is supposed to

13 send up the original exhibits." And they

14 said, "Well, we are just not going to do it.

15 We don't have the personnel. We don't have

16 the copy machines," blah, blah, blah.

17 You go to the court reporter who is

18 sitting there with physical possession of the

19 exhibits, and she says, "Well, no. The Rule

20 says that the clerk needs to do it, and I

21 really don't want to spend the time to copy

22 these exhibits." So whichever it is it's

23 going to be changing somebody's practice

24 somewhere and that's why I don't think --

25 HONORABLE PAUL HEATH TILL:

1 Very well put.

2 MS. DUNCAN: -- That should not

3 be the basis upon which we make our decision

4 as to who will keep and prepare the original

5 exhibits.

6 CHAIRMAN SOULES: I don't see

7 how having a court reporter in control of the

8 exhibits in a criminal case could work.

9 HONORABLE C. A. GUITTARD:

10 Mr. Chairman, I suggest that I move that the

11 Rule be revised so that the clerk has the

12 custody of the exhibits as now but that the

13 court reporter when ordered to send up

14 original exhibits has responsibility to get

15 the exhibits from the clerk and file it with

16 the appellate court and for the statement of

17 facts.

18 PROFESSOR DORSANEO: Now, there

19 is a Rule of Civil Procedure now, 75(a) that

20 says "The court reporter or stenographer shall

21 file with the clerk of the court all exhibits

22 which were admitted in evidence or tendered on

23 a bill of exception during the course of any

24 hearing, proceeding, or trial." I guess from

25 a lawyer's perspective we don't really know

1 how that is even meant to work. Is that meant
2 for everyday to be turning in the exhibits
3 that you got that first day and then get them
4 in the morning or is it at the end of the
5 proceeding, or what's the preferred way to go
6 about handling this?
7 MS. WOLBRUECK: The preferred
8 way right now is it's been done after the
9 completion of the trial, when trial is --
10 HONORABLE SAM HOUSTON CLINTON:
11 After what?
12 MS. WOLBRUECK: After the
13 completion of the trial. Then the exhibits
14 are turned over to the clerk, and then also,
15 see, 14(b) gives us the ability to dispose of
16 those exhibits also.
17 CHAIRMAN SOULES: Right.
18 PROFESSOR DORSANEO: See,
19 another thing that may ultimately happen is
20 that these Rules on duties of court reporters
21 and clerks and all of that probably, I would
22 anticipate, that will move to the Rules of
23 Civil Procedure and all be put in one place so
24 that somebody can read them and know what is
25 supposed to happen.

1 CHAIRMAN SOULES: 75(a) and
2 75(b) adopted in 1967 --
3 PROFESSOR DORSANEO: Are hiding
4 over here.
5 CHAIRMAN SOULES: They say
6 exactly what's supposed to happen. The court
7 reporter is supposed to file them with the
8 clerk. We don't know when, whether it's daily
9 or whatever, and then the Court allows the
10 withdrawal of the exhibits. The court
11 reporter has access to the exhibits. Lawyers
12 have access to the exhibits.
13 MS. WOLBRUECK: That's right.
14 It's all there, and really to me because many
15 times you do have visiting court reporters and
16 for that visiting court reporter to take those
17 exhibits physically with them or whatever
18 their procedure would be, I don't see that
19 that would be real workable.
20 PROFESSOR DORSANEO: It even
21 troubles me that if the trial takes weeks that
22 the court reporter would have them for that
23 period.
24 MS. WOLBRUECK: That's right.
25 But usually that procedure is worked out

1 normally. Of course, if you tell all the
2 clerks in the state of Texas, they would love
3 to get rid of the exhibits, and I want you to
4 know that, but in reality I think that it's a
5 better place to be kept.
6 CHAIRMAN SOULES: Okay.
7 Anything else on this, whether it's the clerk
8 or the reporter? David Jackson.
9 MR. JACKSON: Functionally the
10 court reporter only needs them to prepare the
11 statement of facts, and that's all he needs
12 them for as far as --
13 HONORABLE SAM HOUSTON CLINTON:
14 Somebody has got to do copies of the exhibits
15 and put them in the statement of facts.
16 That's the court reporter.
17 MR. JACKSON: Well, that can be
18 when they turn everything over to the clerk
19 for filing or if the court reporter has to
20 file it with the Court of Appeals.
21 CHAIRMAN SOULES: Okay.
22 Richard Orsinger.
23 MR. ORSINGER: I would like to
24 comment that sometimes in jury trials I have
25 had the experience where we would have a

1 different court reporter on a different day,
2 and we might have one for the first week and a
3 different one for the second week, and
4 sometimes in Bexar County anyway for one
5 reason or another the official court reporter
6 doesn't transcribe the trial, and they get in
7 a freelance court reporter, and I just I think
8 that this would be a nightmare after six
9 months to track down who has the exhibits.
10 Whereas if you leave them with the district
11 clerk they are always going to be in some
12 office where there is always some continuity.
13 CHAIRMAN SOULES: Okay. Maybe
14 we have got this proposal. How many feel that
15 the exhibits should be handled as the Rule
16 presently requires, kept by the clerk? Show
17 by hands. Those opposed? Okay. That's the
18 house to one. So we will leave the exhibits
19 in the custody of the clerks and Rule 11,
20 whatever this is, (a)3 I suppose it is on 31
21 will be rejected.
22 Okay. What's next?
23 HONORABLE C. A. GUITTARD:
24 Mr. Chairman --
25 CHAIRMAN SOULES: I'm sorry.

1 Pam.

2 MS. BARON: Well, we have moved

3 off of 121, and I had had a couple of comments

4 on the Rule before we moved off of it. Is it

5 possible to go back to it?

6 CHAIRMAN SOULES: Yes. Judge

7 Clinton wanted to look at No. 12, too. Does

8 that take care of your concerns, Judge? We

9 did have a consensus of this committee

10 sometime earlier that the duty to file the

11 statement of facts would be on the court

12 reporter.

13 HONORABLE SAM HOUSTON CLINTON:

14 Rather than the appellant?

15 CHAIRMAN SOULES: Rather than

16 the party or the lawyer.

17 HONORABLE SAM HOUSTON CLINTON:

18 Just as long as that's understood, that's fine

19 with me.

20 CHAIRMAN SOULES: Okay.

21 HONORABLE SAM HOUSTON CLINTON:

22 And it's going to be very fine with a whole

23 bunch of lawyers and judges who have been

24 sending me mail.

25 CHAIRMAN SOULES: So I guess

1 that concludes. Let's go ahead and take a
2 consensus on the changes shown on Rule 12 on
3 page 32 to the effects that we just stated
4 that the duty to file a statement of facts is
5 on the court reporter, including
6 responsibilities on the current official court
7 reporter of the court in which the record was
8 made, and that may need some clarification.
9 Those in favor show by hands. Okay. Those
10 opposed? That's unanimous in favor.
11 HONORABLE SAM HOUSTON CLINTON:
12 If we can move across the page to Rule 18
13 talking about the appellate court clerk there,
14 following up on that, monitoring -- the new
15 thing is monitoring the record, which means
16 the clerk of the appellate court is going to
17 see to it that everything is done kosher and
18 timely, I think.
19 HONORABLE C. A. GUITTARD:
20 Right. That works in with proposed Rule 56.
21 CHAIRMAN SOULES: Those in
22 favor then of 18(a) show by hands, on page 33.
23 Those opposed? Okay. We are unanimously in
24 favor of that also.
25 HONORABLE SAM HOUSTON CLINTON:

1 All right.

2 CHAIRMAN SOULES: Judge, we do

3 appreciate very much your being here, and I do

4 want to prioritize any of these considerations

5 that you particularly want to focus on today,

6 if there are others. Do you have any others

7 in mind?

8 HONORABLE SAM HOUSTON CLINTON:

9 Well, there are others also that relate to the

10 exhibits, but there has been some things that

11 have been said here today contrary to our

12 procedures, as I understand it, but we will be

13 working on it. The original exhibits don't go

14 up in the criminal cases unless the judge

15 orders them.

16 HONORABLE C. A. GUITTARD:

17 Well, that's true in civil cases as well.

18 HONORABLE SAM HOUSTON CLINTON:

19 Well, I misunderstood what somebody had said.

20 MS. DUNCAN: Now, the dichotomy

21 that exists now I think, at least in my

22 experience, is that if you are going to have a

23 copy of the exhibits go up it's the court

24 reporter's responsibility to prepare them.

25 HONORABLE SAM HOUSTON CLINTON:

1 To prepare the copy?

2 HONORABLE C. A. GUITTARD:

3 Right.

4 MS. DUNCAN: To prepare the

5 copy, to bind them, to index them, et cetera,

6 et cetera. But if you are going to go up on

7 original exhibits as now written --

8 HONORABLE C. A. GUITTARD: You

9 have to get an order.

10 MS. DUNCAN: That is the

11 clerk's responsibility, and that's not

12 something that's commonly known. So when you

13 go up on original exhibits you can end up with

14 the clerk and the court reporter disagreeing

15 about whose responsibility it is to deal with

16 the original exhibits and bind them and all

17 that stuff.

18 HONORABLE C. A. GUITTARD:

19 Well, now I suggest that if it's the clerk's

20 responsibility to keep custody of the exhibits

21 that if the trial court orders the exhibits to

22 go up, then we provide that the reporter gets

23 the exhibits from the clerks and files it with

24 the Court of Appeals as a part of the

25 statement of facts in lieu of the original

1 exhibits only when the court orders it in
2 accordance with the Rules.
3 HONORABLE SAM HOUSTON CLINTON:
4 Well, we have got a Rule that deals with that.
5 That's contrary to the Rule that we have.
6 When you just said "in lieu of the copies," I
7 believe.
8 HONORABLE C. A. GUITTARD:
9 What's your gripe, Judge?
10 HONORABLE SAM HOUSTON CLINTON:
11 That the exhibits go up but that the copies
12 are already there, and sometimes the parties
13 want to see or the Court itself wants to see
14 the original exhibit and compare it to the
15 copy to make sure that -- so the original
16 exhibits are sort of in a class of their own.
17 They are neither exhibits attached to the
18 statement of facts nor are they in the
19 transcript, although they are more like a
20 supplemental transcript than the statement of
21 facts. And that's the way our procedure runs.
22 MS. DUNCAN: And in civil cases
23 I think it's true that you don't go up on the
24 original exhibits unless you have got very
25 voluminous exhibits that nobody wants to pay

1 to have copied and that it would be silly to
2 have copied.
3 CHAIRMAN SOULES: Well, the
4 TRAP rule dealing with original exhibits is
5 51(d), and that's under the transcript, and
6 that's under the clerk's duties.
7 MS. DUNCAN: That's right. And
8 if you look in the court reporters rule on the
9 following page, it requires the court reporter
10 to send up all of the evidence designated by
11 the parties in their request for perfection of
12 statement of facts.
13 CHAIRMAN SOULES: Where is
14 that?
15 HONORABLE SAM HOUSTON CLINTON:
16 But with the copy.
17 MS. DUNCAN: The next one.
18 HONORABLE SAM HOUSTON CLINTON:
19 The copies are usually done, not the
20 originals.
21 MS. DUNCAN: And I think in
22 most civil trials the court reporters and
23 attorneys have interpreted that to mean if you
24 are going to go up on a copy of the exhibits
25 they will be prepared by the court reporter

1 and considered part of the statement of facts.
2 So we have a dichotomy as to original exhibits
3 and copies of exhibits.
4 PROFESSOR DORSANEO: We
5 probably ought to get yours if it's all
6 written out because my own belief is that
7 there is no uniform practice in civil cases.
8 HONORABLE SAM HOUSTON CLINTON:
9 We have it somewhere. I mean, it's in the
10 Rules in criminal cases. Just what he read
11 from the part about the transcript.
12 MS. DUNCAN: It's not limited
13 to Criminal Rules.
14 HONORABLE SAM HOUSTON CLINTON:
15 It is in the -- well, I am not sure whether it
16 is or not, but it is in the part about
17 transcript. Well, as I said, I don't view it
18 as a part of the transcript. I view it as
19 sort of a supplemental or stand alone because
20 the judge has to make certain findings. He
21 has to make certain orders, safekeeping orders
22 and all that kind of thing, which is not
23 what's done in the transcript, and besides
24 you-all have already taken care of the
25 transcript.

1 CHAIRMAN SOULES: Okay.
2 Well --
3 HONORABLE SAM HOUSTON CLINTON:
4 Whatever Rule he was citing from.
5 CHAIRMAN SOULES: Well, let's
6 charge the Appellate Rule Subcommittee with
7 clarifying how copies are forwarded by the
8 court reporter. I don't see that.
9 HONORABLE SAM HOUSTON CLINTON:
10 I will tell you where most of that is. It's
11 in our appendix, Rule 1 of our appendix.
12 MS. DUNCAN: Uh-huh. That's --
13 the Rule itself says "all the evidence," but
14 it's in the appendix, and it says the court
15 reporter is defined as to bind and index.
16 HONORABLE SAM HOUSTON CLINTON:
17 How to do the index of all exhibits and
18 cross-reference and all that jazz.
19 CHAIRMAN SOULES: In the
20 appendix?
21 MS. DUNCAN: That was the
22 problem.
23 HONORABLE SAM HOUSTON CLINTON:
24 Well, we approved what we do.
25 CHAIRMAN SOULES: All right.

1 Can you-all --

2 MS. DUNCAN: No. We have to

3 know what you want to do. Our committee

4 decided that it should be the court reporter

5 who prepares and indexes, et cetera, the

6 exhibits. Now, as far as who has custody of

7 it, who knows.

8 CHAIRMAN SOULES: All right.

9 Is it the consensus of the committee that in

10 the general -- ordinarily in appeals copies

11 go, not the originals of the exhibits, and

12 that that process of copying, indexing, and

13 sending the copies to the appellate court

14 should be done by the court reporter and be

15 the responsibility of the court reporter, but

16 the original exhibits would stay in the

17 custody of the clerk unless the Court makes an

18 order under -- well, I just looked at it a

19 minute ago -- that the original exhibits be

20 used and then provides for safekeeping and so

21 forth.

22 MS. DUNCAN: But it's the

23 clerk's -- is it the clerk's responsibility to

24 do with the original exhibits just as the

25 court reporter would do with the copies of the

1 exhibits, that being to index them, to bind
2 them, to blah, blah.
3 PROFESSOR DORSANEO: Okay. Any
4 need for that in a civil case do you think?
5 MS. DUNCAN: Oh, I think some
6 courts might like to have an index.
7 CHAIRMAN SOULES: First my
8 proposition and then if it passes we will
9 decide who has to index the originals if
10 that's what's used.
11 Okay. Those in favor of what I just said
12 in terms of be it the court reporter's
13 responsibility to get copies of the exhibits
14 and index them and send them to the appellate
15 court with the statement of facts unless the
16 trial judge orders original exhibits sent.
17 How many in favor of that? Any opposition?
18 Okay. Let me see the hands up again on those
19 in favor. 15. And those opposed? One.
20 Okay. 15 to 1. Now, if the court --
21 HONORABLE SAM HOUSTON CLINTON:
22 Excuse me. Our Rule does not provide that you
23 send the original instead of the copies. You
24 send the original on a special situation by
25 the trial court. Somebody asks them usually

1 to say, "Get the originals up there." Usually
2 it's the appellate courts.
3 CHAIRMAN SOULES: Right.
4 HONORABLE SAM HOUSTON CLINTON:
5 And there they are not in lieu of the copies.
6 They are in addition to the copies.
7 CHAIRMAN SOULES: Okay.
8 HONORABLE SAM HOUSTON CLINTON:
9 That's why it is up to the clerk to do it
10 rather than the court reporter.
11 MS. DUNCAN: Because the court
12 reporter has already done his or her thing.
13 HONORABLE SAM HOUSTON CLINTON:
14 Because all of that is very carefully done
15 under the supervision of the judge.
16 CHAIRMAN SOULES: Okay. Let me
17 just --
18 HONORABLE SAM HOUSTON CLINTON:
19 According to our Rule anyway.
20 CHAIRMAN SOULES: Yeah. Let me
21 word it this way: If 51(d) is invoked, and
22 that can be invoked either by the trial judge
23 who decides that the appellate court should
24 see the original exhibits or by the appellate
25 court who says -- who tells the trial judge

1 that they want to see the original exhibits
2 but if 51(d) is invoked --
3 MS. DUNCAN: Or by a party.
4 HONORABLE SAM HOUSTON CLINTON:
5 Or by a party.
6 CHAIRMAN SOULES: Well, but
7 it's got to be either by a trial judge order
8 or an order from the appellate court in any
9 event whether it's requested by --
10 HONORABLE SAM HOUSTON CLINTON:
11 Well, it's normally got to be by a trial
12 court's order.
13 CHAIRMAN SOULES: So if 51(d)
14 is invoked how many feel that it is then the
15 responsibility of the clerk to do whatever is
16 necessary in terms of indexing or other
17 activities to see that the originals are
18 gotten to the appellate court, not the
19 responsibility of the court reporter? Okay.
20 How many -- those in favor show hands. 12.
21 Those opposed? One.
22 PROFESSOR DORSANEO: Two.
23 CHAIRMAN SOULES: Two. I'm
24 sorry, Judge Guittard. I didn't see you
25 there. I apologize to you for not seeing your

1 hand.

2 So that's the way it will be and the

3 Appellate Rule Subcommittee is charged with

4 drafting something to that effect.

5 HONORABLE C. A. GUITTARD:

6 Okay.

7 CHAIRMAN SOULES: Judge

8 Clinton, does that conform to your wishes as

9 well?

10 HONORABLE SAM HOUSTON CLINTON:

11 I think -- well, it's not my wishes. That's

12 kind of the way we have been doing it, so I am

13 just trying to protect what we have been

14 doing.

15 CHAIRMAN SOULES: Oh, I see.

16 What else do you see here that you would like

17 for us to focus on?

18 MR. ORSINGER: Luke, before we

19 leave Rule 12 can I ask one favor? We talk

20 here in the last sentence about substitute

21 reporters.

22 CHAIRMAN SOULES: By way of

23 time, we are going to have to stay and finish

24 these Appellate Rules tonight. We have too

25 much to do tomorrow. So we are just going to

1 have to hang tough and get this done, so there
2 we are.
3 MR. ORSINGER: We talk about
4 the substitute reporter and the official
5 reporter's responsible, but in the comment we
6 talked about the predecessor of the official
7 reporter. Our Rule ought to include the
8 predecessor as well as any substitute that
9 they bring in.
10 CHAIRMAN SOULES: It will be up
11 to the committee, to the subcommittee, to
12 write so that there is a chain of authority
13 and even some supervisory authority in the
14 current official court reporter at the time a
15 record is ordered to get that done. So
16 charged. Okay?
17 HONORABLE C. A. GUITTARD: Now,
18 there is a matter of considerable moment, Rule
19 184(c).
20 PROFESSOR ALBRIGHT: Page?
21 HONORABLE C. A. GUITTARD: On
22 page --
23 CHAIRMAN SOULES: Pam, you had
24 a -- you wanted to go back to 121 first,
25 right?

1 MS. BARON: I sure did.
2 CHAIRMAN SOULES: Okay. Let's
3 do that and then we will pick up with a new
4 one. 121 on what page?
5 MS. BARON: It's on page 76 and
6 77.
7 CHAIRMAN SOULES: Page 76 and
8 77.
9 MS. BARON: I just had three or
10 four additional changes I would recommend for
11 the committee's consideration. As a staff
12 attorney for the Supreme Court for four years
13 I have looked at a number of petitions and
14 briefs and motions, and it's a mess. It's a
15 mess mostly because the Rule isn't providing
16 enough guidance to people who do not file
17 these in the ordinary course to know what they
18 should look like. You will get petitions that
19 are very repetitive of briefs.
20 You will get petitions and briefs that
21 don't have tables of contents or indexes of
22 authorities because there is no requirement
23 for that in the Rules, and I guess the four
24 suggestions I would make is, first, on
25 subsection (a)2(E) which says, "The petition

1 shall include or be accompanied by a brief."
2 The petition and brief should always be the
3 same document. There is no way to divide them
4 into two and not have them just be a total
5 repetition of each other. It's just extra
6 paper. It's an extra binding task. It
7 doesn't make any sense at all. Secondly, I
8 would require that --
9 CHAIRMAN SOULES: Okay. Would
10 that be accomplished, Pam, by deleting the
11 words "or be accompanied by"?
12 MS. BARON: Yes.
13 CHAIRMAN SOULES: To say, "The
14 petition shall include a brief of authorities
15 and argument in support of the petition."
16 MS. BARON: Right. I would
17 also --
18 CHAIRMAN SOULES: Any
19 opposition to that? Okay.
20 HONORABLE C. A. GUITTARD:
21 Well, I proposed that several years ago, and
22 it didn't get adopted by the Supreme Court.
23 CHAIRMAN SOULES: Well, Pam's
24 got more authority. All right. You win on
25 that one.

1 MS. BARON: All right. The
2 second thing is I would require the combined
3 petition in brief to track the briefing rules
4 of the court you are in, either 131 or 136
5 depending on whether you are in the Court of
6 Appeals or Supreme Court. That way you would
7 get a statement of jurisdiction, a table of
8 contents, and index of authorities. You would
9 not need points of error, but if we are moving
10 to an issues statement, issues statements
11 would work great in a petition and brief on
12 mandamus. It would be nice to have them in
13 there to let the Court know what on earth is
14 going on and what you want, because you can't
15 find them when you read them.
16 CHAIRMAN SOULES: Okay. That
17 would be to conform to which briefing rules?
18 MS. BARON: Well, it would be
19 Either --
20 MS. DUNCAN: 74 or 131.
21 MS. BARON: 74 or 131.
22 CHAIRMAN SOULES: Or 131.
23 Okay. So we would add something to (E), I
24 guess, that the briefs shall conform to Rule
25 74 or 131 and then whatever adjustment needs

1 to be made to that language.

2 MS. BARON: Right.

3 CHAIRMAN SOULES: Since it's a

4 mandamus as opposed to an appellate brief the

5 appellate subcommittee --

6 HONORABLE C. A. GUITTARD:

7 Could we say something to the effect "to the

8 extent applicable"?

9 CHAIRMAN SOULES: Something to

10 that effect?

11 MS. BARON: Right. That would

12 be great.

13 CHAIRMAN SOULES: All right.

14 Any opposition to that? Okay. That's

15 approved.

16 MS. BARON: Third, if you look

17 at subsection (c) and (e) that has caused

18 considerable confusion. Almost any

19 practitioner who reads this looks at (e) and

20 thinks they have seven days to reply to the

21 motion, and that's not right. What it means

22 is that you have seven days to reply after the

23 Court has already told them they can file the

24 petition, and chances are you are going to

25 lose, and most people are very confused by

1 that. I just suggest a little alteration in
2 wording in (c) and (e).
3 In (c) I would say, "The court may
4 request that respondent submit a reply," and I
5 would just spell it out "to the motion for
6 leave to file petition for writ of mandamus."
7 And then in (e) I would say, "The clerk shall
8 notify by mail all identified parties and
9 their attorneys," and so forth, "of the
10 granting of the motion for leave to file
11 petition for writ of mandamus, the filing of
12 the petition" and so on and so forth. At
13 least there is some chance that somebody
14 reading it will recognize there is a
15 difference between the motion and the
16 petition. People don't know that there is a
17 difference when they read these, and they are
18 very confused by that.
19 CHAIRMAN SOULES: Okay. So you
20 would add to (c). We are on page 77 now. So
21 this is going to be Rule 121(c). "The court
22 may request that respondent submit a reply"
23 and insert "to the motion for leave to
24 File" --
25 MS. BARON: "Petition for

1 writ."

2 CHAIRMAN SOULES: "Petition for

3 writ of mandamus."

4 MS. BARON: Yes.

5 CHAIRMAN SOULES: Comma, and

6 then pick up "and in that event" and so forth.

7 MS. BARON: Yes.

8 CHAIRMAN SOULES: Okay. Any

9 opposition to that? Being no opposition, that

10 is approved. And then let me get -- I didn't

11 follow the next proposal. I was writing on

12 (c).

13 MS. BARON: Okay. On (e).

14 CHAIRMAN SOULES: Okay. On

15 121(e).

16 MS. BARON: Yeah. "The clerk

17 shall notify by mail all identified parties

18 and their attorneys of record if represented

19 by counsel of the granting of the motion for

20 leave to file petition for writ of mandamus,

21 the filing of the petition" -- I guess "and

22 the filing of the petition" and then so on and

23 so forth as it's now provided.

24 CHAIRMAN SOULES: Well, it's

25 really the filing of the --

1 MS. BARON: They don't know
2 what the filing of the petition means. They
3 think that means the filing of the motion.
4 The petition isn't technically filed until the
5 Court grants leave to file the motion, and
6 anybody -- most practitioners who read this
7 don't know there is a difference.
8 CHAIRMAN SOULES: Shouldn't the
9 clerk notify all identified parties of the
10 filing of the motion for leave?
11 MS. BARON: Well, that's up in
12 (c), and they don't do that. They don't do
13 that.
14 PROFESSOR ALBRIGHT: Isn't it
15 too late to respond?
16 MS. BARON: It's too late. An
17 answer at that point is not very useful.
18 PROFESSOR ALBRIGHT: So why do
19 we need (e) because don't they do that after
20 they have issued their opinion?
21 MS. BARON: Well, they haven't
22 issued the opinion yet. What they have said
23 is "We are very interested in hearing that,
24 and you have a pretty good chance of success."
25 The better time to file your reply is before

1 the Court has acted on the motion obviously.
2 Most people don't understand there is a
3 difference between acting on the motion and
4 filing the petition, and considering the
5 motion is different than filing the petition.
6 The petition is never filed until the Court
7 has granted the motion, and if you try to
8 explain that to somebody, they will look at
9 you like you are crazy.
10 CHAIRMAN SOULES: Well, should
11 this language, "and in that event, the clerk
12 shall notify all identified parties," should
13 that come out of (c)? That's not done; is
14 that right?
15 MS. BARON: Well, no. (C) is
16 correct in that the Court -- different courts
17 act differently. The Supreme Court will
18 usually call you and say if they want a
19 response to the motion. You still can file
20 one, but the Court will tell you if it's
21 specifically interested. Courts of appeals
22 read them -- some courts of appeals read this
23 differently and follow the 10-day motion
24 practice that's in the general Rules, I think
25 Rule 15, that says you have 10 days to reply

1 to a motion. That's not in here either, which
2 is confusing, and that differs, I think, from
3 court to court whether they give you that
4 10-day written notice.
5 CHAIRMAN SOULES: Okay. So
6 going to (e), "The clerk shall notify by mail
7 all identified parties and their attorneys, if
8 represented by counsel, of the," what?
9 MS. BARON: "Granting of the
10 motion for leave to file petition for writ of
11 mandamus."
12 I'm not sure you even need to say "filing
13 of the petition" because it's so confusing.
14 CHAIRMAN SOULES: Well, I guess
15 the court -- the clerk in the same notice can
16 say "The motion for leave to file has been
17 granted, and the petition has been filed."
18 MS. BARON: Right.
19 MR. ORSINGER: Now, there is no
20 provision I can find that the filing of the
21 motion that the Court gives notice.
22 MS. BARON: That's correct.
23 MR. ORSINGER: Are you aware of
24 that? Don't you think they ought to?
25 MS. BARON: No.

1 MR. ORSINGER: No? Okay. No
2 notice.
3 CHAIRMAN SOULES: Okay. Is
4 anyone opposed to Pam's suggestion on 121(e),
5 that the clerk not only give notice of the
6 filing of petition but gives notice that the
7 motion for leave to file has been granted and
8 the petition has been filed? Any opposition
9 to that?
10 MR. SHARPE: No opposition, but
11 down on (e) where you are going down to the
12 fourth line, it says, "And serve upon relator
13 an answer or brief of authorities," and should
14 it say "an answer including" to be consistent
15 with what Pam has been saying?
16 MS. BARON: Yes. That's good.
17 MR. SHARPE: "An answer
18 including the brief of authorities."
19 CHAIRMAN SOULES: All right.
20 Any opposition to that? Okay. Anything else
21 on 121(e)?
22 HONORABLE C. A. GUITTARD:
23 Mr. Chairman, I am not sure that we have gone
24 far enough to simplify this procedure. Under
25 current Rules you can go in for a mandamus and

1 you have to have three things. You have to
2 have a motion for leave; you have to have a
3 brief; you have to have a petition of
4 mandamus. Now, we have said you just have to
5 have two of them. My question is, why can't
6 we reduce that to one? You file a petition
7 with a brief, and you pray that the Court
8 grants leave to file this petition, and if
9 granted, then the Court grants the following
10 relief. Why should we have a separate motion
11 for leave to file?
12 MS. DUNCAN: Since you have to
13 file the other stuff anyway.
14 HONORABLE C. A. GUITTARD:
15 Yeah. That's right.
16 MS. BARON: I think that's true
17 in almost all cases. Sometimes it's nice to
18 have a separate motion because there you have
19 a remote chance that if emergency relief is
20 requested that it is more apparent. Often
21 it's difficult to know if emergency relief is
22 requested by reading of a very long petition
23 and brief.
24 CHAIRMAN SOULES: I would guess
25 that the Court would want to docket the motion

1 for leave without docketing the petition, and
2 there would then be a motion on file to
3 docket, for the Court to dispose of on its
4 docket.
5 MS. DUNCAN: That keeps the
6 same cause number, doesn't it?
7 JUSTICE HECHT: That keeps the
8 same number.
9 HONORABLE C. A. GUITTARD: You
10 could put the motion in your petition, and
11 then you could go ahead and docket it and then
12 when you file the -- when the motion is
13 granted then the petition serves as a brief
14 and basis for your relief.
15 MS. BARON: Well, I would
16 support a combination of motion, petition, and
17 brief.
18 CHAIRMAN SOULES: Can we just
19 say that, that the motion and petition can be
20 combined in a single --
21 HONORABLE C. A. GUITTARD:
22 Okay.
23 CHAIRMAN SOULES: Something.
24 HONORABLE C. A. GUITTARD:
25 Optional.

1 CHAIRMAN SOULES: Optional.

2 MR. ORSINGER: But why are we

3 maintaining the motion anyway? Isn't that

4 just a vestige of a former year?

5 MR. SHARPE: Huh-uh.

6 HONORABLE C. A. GUITTARD:

7 That's true.

8 MR. ORSINGER: Is there a

9 reason, logical reason, that the motion should

10 be separate from the petition?

11 MS. DUNCAN: That's what we are

12 saying. You still have to have a motion.

13 It's just that it can be included in there.

14 MR. ORSINGER: No. You don't

15 still have to. I mean, we are making a

16 decision about whether this should go in or

17 not.

18 MS. DUNCAN: Well, you don't

19 have automatic -- you can't file an original

20 proceeding as a matter of that.

21 MR. ORSINGER: Well, I mean,

22 that's because the Rules say you can't.

23 HONORABLE SAM HOUSTON CLINTON:

24 No. That's because basically it's a matter of

25 discretion of whether the Court wants to hear

1 any of it.

2 HONORABLE C. A. GUITTARD:

3 That's right.

4 HONORABLE SAM HOUSTON CLINTON:

5 And that's why you have the motion for leave.

6 HONORABLE C. A. GUITTARD: But

7 you have a motion for leave. It's just

8 contained in the same document.

9 MS. DUNCAN: Right.

10 CHAIRMAN SOULES: Okay. Pam.

11 MS. BARON: I have one last

12 comment, and that's on section (d) on

13 temporary relief. There on line 2 it says,

14 "The Court may grant temporary relief only

15 after granting the motion for leave to file."

16 Well, that's not true, or it's not being

17 followed. The Supreme Court regularly grants

18 temporary relief before granting leave to

19 file. The Third Court of Appeals in Austin

20 has recently started doing that. I don't know

21 how other Courts of appeals interpret that,

22 but I am sure that some feel limited by this

23 language. I guess there is an issue whether

24 "after" means after or it means after just

25 depending on whether or not the Court decides

1 it does.

2 CHAIRMAN SOULES: So you would

3 propose just delete the word "after"?

4 MS. BARON: Well, I don't have

5 a recommendation. I just think it's an issue

6 that needs to be considered, but I think that

7 we are getting inconsistent actions among

8 Courts of appeals because of that word.

9 CHAIRMAN SOULES: Judge

10 Clinton.

11 HONORABLE SAM HOUSTON CLINTON:

12 If I may interject my view, I would think that

13 the Court would feel more comfortable about

14 granting any temporary relief after it is said

15 we will grant the leave to file because

16 otherwise the Court may -- somebody may say,

17 "Well, wait a minute. Where is your

18 jurisdiction over any kind of subject matter?

19 You haven't granted any leave to file yet."

20 MR. LOWE: But what really --

21 CHAIRMAN SOULES: Buddy Lowe.

22 MR. LOWE: -- Happens is the

23 court in Beaumont, you file that, and you are

24 close to trial or something, and the chief

25 judge will call the trial judge. He will say,

1 "Look, don't start this trial because we
2 haven't," and so that's pretty temporary
3 relief and can end up being permanent if you
4 don't get to trial for another year. So they
5 are doing that now. I mean, I call that
6 temporary relief, and so if the judge
7 Hasn't -- that's not Rolaids, but it's relief.
8 If the judge doesn't have time to do something
9 and it's real urgent, then, you know, it's too
10 late. So it has to be interpreted that way.
11 CHAIRMAN SOULES: Even backing
12 up into the discovery process where you don't
13 have a trial setting if you go to the trial
14 judge and the judge orders discovery made in
15 the face of a privilege claim and you ask the
16 Court to stay the order pending mandamus
17 review and the trial judge denies that stay of
18 the trial judge's own order, I don't know how
19 long I have before I have got to give up my
20 privileged documents. I don't know whether I
21 have got to do it today or whatever. The
22 trial judge may say "Do it today" or in three
23 days, and I guess we have all had experiences
24 where the Court of Appeals will decide that
25 there is enough substance for it to issue a

1 stay, but they haven't decided yet whether
2 they are going to grant leave to file, and so
3 there should be -- not there should be, but we
4 should at least consider the fact that the
5 Court of Appeals or the appellate court may
6 want to grant temporary relief while
7 considering the motion for leave.
8 HONORABLE C. A. GUITTARD:
9 Mr. Chairman, I suggest that although if it's
10 something the Court feels it will have a
11 tendency to grant temporary relief without
12 granting a leave to file I would think that
13 the better practice would be for whenever they
14 grant any sort of relief they ought to grant
15 leave to file.
16 HONORABLE SAM HOUSTON CLINTON:
17 Leave to file. Exactly.
18 CHAIRMAN SOULES: Well, the
19 Court has jurisdiction over the matter because
20 it has jurisdiction over the motion for leave,
21 so it can grant temporary relief --
22 HONORABLE C. A. GUITTARD:
23 That's right.
24 CHAIRMAN SOULES: -- While it's
25 considering the motion for leave.

1 HONORABLE C. A. GUITTARD: Yes.
2 But if they have to consider the motion for
3 leave to such extent they ought to go ahead
4 and grant it. They don't have to grant the
5 permanent relief. So all they have to do, if
6 they come in with a petition for
7 Temporary -- application for temporary relief,
8 if it looks like they need temporary relief,
9 give them temporary relief, grant the motion
10 for leave to file, and then dispose of it in
11 regular order. I don't see any point in
12 granting the -- in withholding your decision
13 on leave to file while granting temporary
14 relief.
15 HONORABLE SAM HOUSTON CLINTON:
16 By definition if they are entitled to some
17 kind of relief, though, you need to grant
18 leave to file, so you can consider it,
19 actually consider it.
20 HONORABLE C. A. GUITTARD:
21 That's right.
22 CHAIRMAN SOULES: Just keep in
23 mind how hard it is to get a mandamus, get a
24 leave to file granted, and if the Court has to
25 do that before they can grant any kind of

1 temporary relief, is that going to be worse
2 than better? I don't know. Chuck Herring.
3 MR. HERRING: Yeah. The
4 practice that I have seen locally is that on a
5 true emergency, the one in lieu of deposits,
6 where you have an order to turn over
7 privileged documents at 1:00 o'clock this
8 afternoon you have barely got time to get a
9 motion on file for emergency relief, much less
10 package up everything else, and in those types
11 of rare emergencies I think that it should be
12 the exception. I agree. In most instances
13 there should be time, and there should be
14 everything laid out in front of the Court of
15 Appeals, but there needs to be that exception,
16 I think, allowed by the Rule because that's
17 what courts in true emergencies are doing now
18 anyway, and I would be in favor of modifying
19 the Rule so that at least current practice is
20 recognized in those situations. So I agree
21 that standard practice should be, as you say,
22 in the normal case.
23 HONORABLE SAM HOUSTON CLINTON:
24 Yeah. The more you chip away at it, the less
25 it will be standard.

1 CHAIRMAN SOULES: There is one
2 other problem here, and that is that the
3 appellate court may not want to act on the
4 motion for leave until it has the transcript
5 of the discovery hearing. It may decide that
6 it will rely on the representations of the
7 lawyers to state the discovery pending getting
8 the record, but it's not going to grant leave
9 or certainly not grant mandamus until it has
10 that record, and that may be some passage of
11 time, days or at least hours, before you get
12 the record.
13 HONORABLE C. A. GUITTARD: You
14 can grant leave without granting mandamus, of
15 course.
16 CHAIRMAN SOULES: So anyway.
17 MR. LOWE: But, Luke, the way
18 the trial judges look at a mandamus is not a
19 friendly ally, and there is more dignity to
20 granting the leave, and that's always been
21 that way. I mean, to the trial judge it
22 means, boy, I mean it's bad enough he had to
23 grant -- let them file it, but, boy, when you
24 say, "No. I am not even going to let you file
25 it," that means something to the trial judge.

1 I can tell you I have got some friends on
2 the trial bench, and that's the way they
3 interpret that, and to say that there is an
4 emergency and you have got to preserve your
5 jurisdiction like so, you have to rule these
6 until the cat's -- you know, hold these
7 documents and so forth or whatever to hold up
8 the trial. To say that when that comes along
9 you have got to grant it, that means you grant
10 leave every time there is an emergency, and
11 you have to hold something up, and it
12 shouldn't be given that dignity. I think
13 there is a dignity to the trial judge, or they
14 see it, when the grant -- when the leave is
15 granted.
16 CHAIRMAN SOULES: Well, let's
17 just take a consensus if we can on those, how
18 the committee feels about whether the
19 appellate court should be able to grant
20 emergency relief only with granting the motion
21 for leave, or on the other hand, without
22 granting the motion for leave. Okay. Those
23 who feel that emergency relief should be
24 allowed only when the appellate court has
25 granted leave to file the petition for writ of

1 mandamus show by hands. One.

2 Those who feel that the court -- that the

3 appellate court should be permitted to grant

4 emergency relief without granting a motion for

5 leave show by hands. That's 10 to 1 in favor

6 of the appellate courts having the ability to

7 grant emergency relief without granting motion

8 for leave to file petition for writ of

9 mandamus. That's probably fixed by just

10 deleting the word "after," but I am not

11 certain of that. "After" in the second line

12 of 121(d), but we will also need to look at

13 the Rules elsewhere to see if something else

14 needs to be fixed. Pam.

15 MS. BARON: Did you have

16 another comment on this part? Go ahead then.

17 I'm sorry.

18 CHAIRMAN SOULES: Okay.

19 Elaine.

20 PROFESSOR CARLSON: I just

21 wanted to say I would think under the

22 Government Code 21.001, which gives the

23 appellate courts the authority to -- in the

24 exercise of its jurisdiction and enforcement

25 of its orders to issue any writs and orders

1 necessary in aid of its jurisdiction. I have
2 always read that as authority to grant a stay
3 at the appellate level, and I think the
4 caselaw would bear that out.
5 CHAIRMAN SOULES: So it's there
6 anyway.
7 PROFESSOR CARLSON: I think the
8 power exists now.
9 CHAIRMAN SOULES: Pam.
10 MS. BARON: One last comment on
11 subsection (b) on service. I don't know how
12 we can correct this, but I think that when
13 parties ask for emergency relief and then
14 stick their petition, motion, and brief in the
15 mail to the other side certified mail or
16 return receipt requested that's unconscionable
17 because it's going to take five or six days to
18 get to the other side, and they are asking for
19 relief today. There should be provision that
20 when emergency relief is requested that
21 service be made on other parties in the same
22 manner as made to the court, that if it's by
23 messenger, that you do it by messenger or by
24 overnight delivery or by some sort of exigent
25 carrier to give the other side notice that

1 it's been filed before emergency relief is
2 actually granted.
3 MS. DUNCAN: Maybe overnight,
4 but I mean, if you are talking about messenger
5 service on all parties in a multi-party action
6 you could be talking about tens of thousands
7 of dollars.
8 MS. BARON: No. I understand
9 that. I was thinking if they were in the same
10 city as you. If they are in other cities,
11 that becomes more complicated, but there
12 should be some sort of expedited service in
13 that situation that does give the other side
14 notice of what you are doing.
15 MS. ALBRIGHT: What about,
16 isn't there a provision in the temporary
17 restraining order Rule that says if you know
18 they are represented by counsel you have to
19 give a telephone call or something?
20 MR. HERRING: A 680 call.
21 MR. LOWE: It's not in this. I
22 got notice from the Court that one had been
23 refused before I knew it had been filed, by
24 the Supreme Court clerk.
25 CHAIRMAN SOULES: Well, if

1 there is a way to fix that, give that some
2 thought. We will have the Appellate Rules
3 Subcommittee give that some thought. I am
4 sure there is a way to fix it.
5 HONORABLE C. A. GUITTARD: The
6 appellate court will not grant emergency
7 relief without getting in touch with the
8 respondent and giving them an opportunity to
9 state their position, but I understand
10 sometimes it doesn't happen.
11 MR. LOWE: That's how they call
12 and --
13 CHAIRMAN SOULES: Service is a
14 problem, too, because if you fax it it's only
15 served -- you have a Three-day Rule and then
16 you have got a 5:00 o'clock Rule and all kinds
17 of problems with that, too.
18 PROFESSOR ALBRIGHT: Well, Rule
19 (d) --
20 CHAIRMAN SOULES: Alex
21 Albright.
22 PROFESSOR ALBRIGHT: I'm sorry.
23 Rule (d), temporary relief, says that you can
24 get it without notice. The court can grant it
25 without notice. So it seems like isn't the

1 problem that when you know that they are
2 represented by counsel and you should give
3 them notice that you need to do it? There may
4 be situations where you feel like you can't
5 give proper notice, and under the T.R.O. Rule
6 you have to explain to the Court why you were
7 asking for relief without notice. So why
8 can't we just put into this Rule, the
9 Temporary Relief Rule, the same provisions
10 that are in the T.R.O. Rule? Would that solve
11 the problem?
12 MS. BARON: It might work. I
13 don't know.
14 CHAIRMAN SOULES: Maybe we
15 could say that the movant shall provide actual
16 notice to all other parties at the time it's
17 filed. That's not service, but it's actual
18 notice, which is different than service.
19 Maybe that's a way to fix it, something along
20 those lines would probably be workable.
21 Anything else? Bonnie.
22 MS. WOLBRUECK: Are you
23 finished with that Rule? I was going to --
24 JUSTICE HECHT: Let me make one
25 comment on it. Judge Guittard, I wish also in

1 121(3) in the revision of the record you would
2 consider some language that obligates the
3 relator not to present a record that is
4 misleading.
5 HONORABLE C. A. GUITTARD: Does
6 that have to be said?
7 MR. ORSINGER: Will they follow
8 it even if you say it?
9 JUSTICE HECHT: It does have to
10 be said. The way it's written now technically
11 you could bring in a record that as you look
12 at it it looks like you are entitled to
13 relief, but if you knew what was missing, it
14 would be clear that you weren't entitled to
15 relief, and all the Rule obligates the relator
16 to do is bring in enough to show that he is
17 entitled to relief, and we need some
18 countervailing provision.
19 HONORABLE SAM HOUSTON CLINTON:
20 I'm sorry. What are you talking about now?
21 JUSTICE HECHT: On the record,
22 top of page 77, 121.
23 HONORABLE SAM HOUSTON CLINTON:
24 Yeah. Okay. All right.
25 JUSTICE HECHT: We need some

1 provision that you won't present a misleading
2 record. I know that's kind of hard to say
3 because the parties haven't, but by the same
4 token it ought not to be affirmative.
5 HONORABLE C. A. GUITTARD:
6 Well, I think the sanction rule that we have
7 just approved, will that take care of that,
8 Judge Hecht?
9 JUSTICE HECHT: Well, when it's
10 for delay and without reasonable basis, and I
11 don't know if it would take care of it or not.
12 HONORABLE C. A. GUITTARD: How
13 do you say it shouldn't be misleading? Just
14 say it shouldn't be misleading?
15 JUSTICE HECHT: Well, that's
16 how come I moved the burden to you.
17 HONORABLE C. A. GUITTARD:
18 Okay. We will try to come up with something.
19 MS. BARON: Luke, I just
20 thought of one more thing. I am sorry.
21 CHAIRMAN SOULES: Yeah. Maybe
22 that can be done by saying "a complete and
23 sufficient record" or "the concept will be
24 germane to the issues presented" so that it
25 would be a complete record on those issues and

1 not just a one-sided record on those issues.

2 MR. LOWE: That would cover it

3 because I had a situation for a case in

4 Matagorda County, and they tried to mandamus

5 because they wouldn't transfer it to Beaumont.

6 It was dismissed and filed in Beaumont, and

7 then when they filed a mandamus they didn't

8 tell them they had already filed a mandamus to

9 have it in Beaumont, the very place now they

10 didn't want it. So the record was totally

11 incomplete, and when the Court got the

12 complete record he chastised them, but on the

13 basis of what they filed it -- so a misleading

14 record can be incomplete. Yeah.

15 CHAIRMAN SOULES: A complete

16 record on the issues presented or something to

17 that effect?

18 MR. LOWE: Yeah. Right.

19 CHAIRMAN SOULES: Madam Baron.

20 MS. BARON: One other comment

21 on the record. I think in the Supreme Court

22 the record should include any order or opinion

23 of the Court of Appeals. Often those aren't

24 included.

25 CHAIRMAN SOULES: Should that

1 include -- are you contemplating that that
2 would include the order denying leave --
3 MS. BARON: Yes.
4 CHAIRMAN SOULES: -- From Court
5 of Appeals?
6 MS. BARON: Yes. Or any
7 opinion that would deny leave or opinion
8 granting the leave, also.
9 MR. LOWE: It should include
10 motions filed in the same matter in another
11 court. I mean, you know, the record is
12 incomplete there because they didn't -- you
13 know, that was particulate of our record here
14 but --
15 CHAIRMAN SOULES: Well,
16 Pam's -- you are broadening what she is saying
17 and probably deliberately so.
18 MR. LOWE: Right.
19 MS. BARON: Yeah. I wouldn't
20 require necessarily the briefs from the Court
21 of Appeals. We have got enough trouble as it
22 is, but just the orders, any orders the Court
23 of Appeals has issued.
24 CHAIRMAN SOULES: Why would you
25 need to file, Buddy, in the Supreme Court the

1 motions and so forth that were filed in the
2 Court of Appeals so long as you file the
3 order?
4 MR. LOWE: No. No. I am not
5 talking about that. I am talking about to
6 have a complete record if this matter has gone
7 before another court or something, papers you
8 filed there if it's the same matter, then all
9 of those things should be brought forward to
10 the Court to review. Because a lot of times a
11 mandamus pertains to no jurisdiction or venue
12 or something like that, and so all of those
13 things would relate to that, and they
14 shouldn't just file a part of a record. So
15 orders or motions in other courts. Maybe you
16 wouldn't want to get that broad and maybe just
17 complete record would be sufficient, but those
18 could be important.
19 CHAIRMAN SOULES: All right.
20 So be sure -- I am trying to be sure that I
21 understand what you are suggesting. You are
22 saying that when a petition or motion for
23 leave of file and tendered petition is
24 presented to the clerk of the Supreme Court of
25 Texas that must be accompanied by everything

1 that got filed in the Court of Appeals and
2 it's order.
3 MR. LOWE: Well, now --
4 HONORABLE C. A. GUITTARD: I
5 point out that section (a)1 says now "The
6 motion for leave to file in the Supreme Court
7 shall state the date of presentation of the
8 petition to the court of appeals and that
9 court's action on the motion or petition or
10 the compelling reason that a motion was not
11 first presented to the court of appeals."
12 Now, you would amplify that by requiring the
13 order and the whole proceeding before the
14 Court of Appeals be included in the record and
15 be presented to the Supreme Court; is that
16 right?
17 MR. LOWE: Right.
18 CHAIRMAN SOULES: And Pam is
19 saying the order and not the rest of it.
20 MS. BARON: Right. I wouldn't
21 require the --
22 CHAIRMAN SOULES: Order and any
23 opinion.
24 MS. BARON: Order and opinion.
25 CHAIRMAN SOULES: But not the

1 rest of the materials.

2 MS. BARON: Right.

3 CHAIRMAN SOULES: Okay. How

4 many feel that any additions to (a)1 should be

5 limited to the Court of Appeals' order and any

6 opinion?

7 MS. DUNCAN: Why don't we try

8 additions to subsection 3, (a)3? Not (a)1.

9 HONORABLE C. A. GUITTARD:

10 Yeah. That would take care of it.

11 CHAIRMAN SOULES: What is it?

12 (A)1 is what I am looking at.

13 MS. DUNCAN: I was thinking

14 (a)3.

15 CHAIRMAN SOULES: Well, if we

16 are going to expand what's required when you

17 file in the Supreme Court should that be the

18 entire record of the Court of Appeals or just

19 the Court of Appeals' order and any opinion?

20 Okay. How many feel that it should be the

21 entire record in the Court of Appeals?

22 MR. LOWE: I think it should

23 because the Court might want to review it.

24 CHAIRMAN SOULES: How many feel

25 that we should provide that the order and any

1 opinion be a requirement of filing in the
2 Supreme Court? Eight. And how many feel that
3 there should be no change? Okay. So eight,
4 the sense of the committee is that we should
5 require the Court of Appeals' order and any
6 opinion of the Court of Appeals to accompany
7 the filing in the Supreme Court of Texas.
8 Okay. What's next? Anything else, Pam,
9 on this? Bonnie.
10 MS. WOLBRUECK: I didn't want
11 to change ideas if you were still on that.
12 CHAIRMAN SOULES: Okay. Sure.
13 MS. WOLBRUECK: If you are
14 finished with that, I wanted to direct some
15 thought to page 81 on the order directing the
16 form of the record on appeal, and this is just
17 a problem that's of the existing order. About
18 the middle of the page in regards to the
19 transcript there is a sentence that says about
20 how the clerk shall arrange the transcript,
21 and then it says "separating each preceding
22 instrument or other paper one from another in
23 such a manner that each is readily
24 distinguishable."
25 Recently my Court of Appeals has

1 determined that that should be by adding an
2 additional sheet of paper in between each
3 document and stating on each sheet of paper
4 what the document is, and that's really added
5 a great deal of extra burden and made it real
6 cumbersome along with adding a lot of extra
7 pages to the appeal. I am wondering if what
8 that -- maybe Justice Hecht can tell me
9 exactly what that means or why that is in
10 there.
11 HONORABLE C. A. GUITTARD: It's
12 started on a new page is all it means.
13 MS. WOLBRUECK: And I am just
14 wondering because that's the way my Court of
15 Appeals has determined that, and so all of my
16 transcripts now are going up with this extra
17 sheet of paper in between each document, and
18 it's really quite a burden.
19 MR. HERRING: You have to label
20 each thing?
21 MS. WOLBRUECK: Label each one
22 of those pages.
23 MR. SHARPE: The Third Court of
24 Appeals is the only one that requires it in
25 the state of Texas.

1 MS. WOLBRUECK: Yes. I'm sure
2 that it is.
3 CHAIRMAN SOULES: What court is
4 that?
5 MS. WOLBRUECK: No. That's
6 right here, the Third. In Austin. In Austin.
7 MS. LANGE: San Antonio does,
8 too.
9 MS. WOLBRUECK: Okay.
10 San Antonio does too then, but I would like
11 that not to read like that if that's the way
12 that it's being defined. And throughout the
13 years that has been handled differently. I
14 know at one time we put it in, and they said,
15 "Oh, don't ever put that in. That just adds
16 too much burden to it. Just please don't ever
17 do that again." And we took them out and now
18 we are having to put them back in again. So
19 it's become -- you know, it's quite a burden
20 right now.
21 MR. LOWE: So you have to read
22 the document and interpret it and then put
23 that interpreted --
24 MS. WOLBRUECK: Yeah. On a
25 piece of paper, a sheet of paper.

1 MR. LOWE: The appellate judge
2 ought to be able to interpret the document.
3 JUSTICE HECHT: That's a
4 motion?
5 MS. WOLBRUECK: Yes. That's a
6 motion.
7 CHAIRMAN SOULES: That's a
8 motion.
9 MS. LANGE: I second it.
10 CHAIRMAN SOULES: Okay. Those
11 in favor say "I." Opposed?
12 MR. ORSINGER: What do we write
13 down the motion says?
14 CHAIRMAN SOULES: The motion
15 says that the Appellate Rule Subcommittee of
16 the Supreme Court Advisory Committee is
17 charged with revising this so that it's --
18 MR. ORSINGER: So that it can't
19 be interpreted this way?
20 CHAIRMAN SOULES: That it's
21 clear that the only thing that goes up are the
22 copies of the papers. They don't have to be
23 separated by some kind of divider between the
24 instruments and that no additional labeling is
25 required by the clerk.

1 HONORABLE C. A. GUITTARD: We
2 sure are micromanaging things there, aren't
3 we?
4 CHAIRMAN SOULES: For the Third
5 Court.
6 MR. ORSINGER: Well, why don't
7 we just put it in the comments that the Third
8 Court can't do this.
9 CHAIRMAN SOULES: Maybe the
10 Supreme Court could just send an order to
11 Judge Carroll.
12 MS. WOLBRUECK: Yeah. Justice
13 Hecht may can help us out right now.
14 CHAIRMAN SOULES: But see if
15 some writing can be done on that to help out
16 here.
17 MS. DUNCAN: Tabs would sure be
18 nice.
19 MR. ORSINGER: You can put tabs
20 on your copies.
21 MS. DUNCAN: I do.
22 CHAIRMAN SOULES: Pam Baron.
23 MS. BARON: While we are on
24 exhibits can I raise another exhibit question?
25 CHAIRMAN SOULES: Yes.

1 MS. BARON: On page 71, Rule
2 132(a), the last sentence of that that says
3 "The clerk of the court of appeals need not
4 forward any exhibits that are not documentary
5 in nature." That's historically been a
6 problem. I don't know what the answer is to
7 it, but lots of appellate clerks think that
8 this means any exhibits don't need to be
9 forwarded, and often the Supreme Court will
10 not get documentary exhibits. For example,
11 administrative records are not routinely
12 forwarded because the clerk has decided they
13 are nondocumentary.
14 Now, I don't understand that, but then
15 you have to go and ask the Supreme Court to
16 have the administrative records sent over from
17 the Third Court over to the Supreme Court, or
18 a separate bound volume of exhibits might
19 include the critical leaks that's at issue
20 somehow is not in the Supreme Court record.
21 Now, if you are on the ball, you will go to
22 the Supreme Court and check the record, but
23 not everybody can do that. I don't know how
24 you can cure that other than to say if it's
25 paper, it's documentary.

1 MS. DUNCAN: Are they
2 interpreting nondocumentary --
3 MS. BARON: I don't know if
4 that's the problem or if it's because the
5 exhibits are kept in a different place, and
6 they don't find them when they send them, but
7 if you call the Supreme Court's clerk's
8 office, often you will find that your exhibits
9 didn't make it, and in administrative appeals
10 in Austin that's particularly a problem
11 because the administrative record doesn't get
12 sent. I don't see how the Court does anything
13 without the administrative record.
14 CHAIRMAN SOULES: I guess it's
15 obvious, but why doesn't the Supreme Court
16 take the same record that the Court of Appeals
17 has?
18 MS. BARON: Well, I don't know
19 why they shouldn't either.
20 MR. ORSINGER: Well, sometimes
21 you might have half of a Volkswagon, and you
22 don't want that up in the Supreme Court.
23 CHAIRMAN SOULES: Well, they
24 don't want it in the Court of Appeals either.
25 MR. ORSINGER: Well, let's

1 leave it in the trial court.

2 MS. DUNCAN: And if you don't

3 go up on the original exhibits, it won't be

4 there.

5 CHAIRMAN SOULES: So if the

6 Court of Appeals decides it needs to see the

7 half of a Volkswagon, it can have them, but it

8 can't send it from there to the Supreme Court?

9 MR. ORSINGER: Unless the

10 Supreme Court accepts it.

11 CHAIRMAN SOULES: Unless the

12 Supreme Court wants to see it, too. Well,

13 that makes sense.

14 HONORABLE C. A. GUITTARD: Can

15 we go to some other Rule here?

16 CHAIRMAN SOULES: I am not sure

17 that we can fix all of those.

18 MS. BARON: No. It's just a

19 warning to everybody to check your records, I

20 guess.

21 CHAIRMAN SOULES: Check the

22 records. Okay. Maybe we can put that in. Be

23 sure you check your record when it gets to the

24 Supreme Court.

25 MR. ORSINGER: Well, the

1 Supreme Court could issue an ancillary order
2 that would be essentially a communication to
3 the Court of Appeals and address the
4 administrative law problem.
5 MS. BARON: Well, there is
6 really only one court that does that. I don't
7 know how we can solve that.
8 CHAIRMAN SOULES: Okay. Let's
9 finish up. I mean, the Supreme Court meets
10 with the judges of the courts of appeals.
11 Some of these things ought to be able to be
12 resolved just by dialogue between the judges
13 of the Supreme Court and the judges of the
14 Court of Appeals, telling them how they have
15 got an issue that's come up and they think it
16 ought to be resolved a certain way. I mean,
17 maybe that's one way it can be worked out,
18 too. Is there anything else now in the
19 Appellate Rules?
20 HONORABLE C. A. GUITTARD:
21 Yeah. I have something.
22 CHAIRMAN SOULES: Okay.
23 MS. DUNCAN: Can I remind the
24 committee that the parking garage closes at
25 6:00?

1 CHAIRMAN SOULES: Yeah. We
2 have got to go. All right. Well, that's
3 going to conclude the appellate part of this
4 session.
5 HONORABLE C. A. GUITTARD: Let
6 me just say here that if anyone has any
7 objection to any of the other proposals or as
8 we have heard here has any other suggestions
9 for changes in the Appellate Rules, please let
10 us know so we can get some attention to it
11 before it comes before the whole committee.
12 CHAIRMAN SOULES: Okay. We are
13 adjourned until 8:30 in the morning.
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1 -

2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

3

- -

4 I, D'LOIS LEA NESBITT, Certified

5 Shorthand Reporter, State of Texas, hereby

6 certify that I reported the above hearing of

7 the Supreme Court Advisory Committee on March

8 18, 1994, and the same was thereafter reduced

9 to computer transcription by me.

10 I further certify that the costs for

11 this hearing are $1,202.00.

12

13 CHARGED TO: Luther H. Soules, III

14

15

16 Given under my hand and seal of

17 office on this the 4th day of April,

18 1994.

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