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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 20, 1994

(AFTERNOON SESSION)

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 20th day of May, A.D. 1994, between the hours of 1:00 o'clock p.m. and 5:30 o'clock p.m., at the Capitol Extension, Room E1.002, 1400 North Congress Avenue, Austin, Texas 78701.

ORIGINAL

MAY 20, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Professor Elaine Carlson
Honorable Ann Cochran
Professor William V. Dorsaneo
Anne Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
Thomas S. Leatherbury
Gilbert I. Low
John Marks
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard Orsinger
David L. Perry
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Pamela S. Baron
David J. Beck
Honorable Scott A. Brister
Sarah B. Duncan
Michael T. Gallagher
Franklin Jones, Jr.
David E. Keltner
Honorable David Peeples
Anthony Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable William Cornelius
Doyle Curry
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Thomas Riney
Bonnie Wolbrueck

Paul N. Gold
Honorable Paul Heath Till

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly H. Duderstadt, Soules & Wallace
Carl Hamilton
Denise Smith for Mike Gallagher

MAY 20, 1994 MEETING
THOSE STILL IN ATTENDANCE AT 5:00 P.M.

Professor Elaine Carlson
Honorable Sam Houston Clinton
Honorable William J. Cornelius
Professor William V. Dorsaneo
Sarah B. Duncan
Anne Gardner
Paul N. Gold
Honorable Clarence Guittard
Honorable Nathan L. Hecht
Donald M. Hunt
David B. Jackson
Honorable Scott McCown
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SUPREME COURT ADVISORY COMMITTEE

MAY 20, 1994 (AFTERNOON SESSION)

INDEX

AFTERNOON SESSION

(Reconvened at 1:00 p.m.)

CHAIRMAN SOULES: First, I'd like to at least address some of the philosophical issues in this draft. And if we could start with Paragraph 2(d)(3) on Page 3, it's right here where I've underlined in red (indicating).

It says the court can award sanctions in circumstances where a party has repeatedly or on a continuing basis filed untimely or clearly inadequate discovery responses. And I'm not concerned about the second part of it there where -- well, yes, I am, too -- failed to comply with specific requirements of a discovery rule, subpoena or order; made discovery requests or objections that are not justified. And the reason for my concern philosophically or policywise with this is that this is the rule that provides that you can get sanctions. It's not just attorneys' fees. That's all covered earlier on.

It seems to me that this rule is permitting us to go straight to sanctions without a previous order when a party

allegedly has, as it says, repeatedly or on a continuing basis failed to comply with specific requirements of a discovery rule.

HONORABLE SCOTT BRISTER: By the way, what's the difference between "repeatedly" and "continuing"?

CHAIRMAN SOULES: I don't know, Judge. Or has filed untimely or inadequate discovery responses.

Without ever having gone to court, as I read this rule, a party can go in and seek sanctions without ever having been in the courtroom before on any kind of discovery complaint, sit back and wait until several things have happened that don't seem to comply with the rules. I'm the guilty party, I have filed some responses that don't seem to comply with the rules or ask some questions that don't seem to comply with the rules, and I've done that now three, four or five times, nobody has made a complaint, just ordinary objections have come through, and my adversary now comes down and starts in on me for sanctions. It's the first time we've been in court and he's coming at me for sanctions. I

think that's permitted by this rule, and I don't think that's what this Committee has directed that the rule is supposed to mean.

MR. HERRING: That's the language Tommy had before the last time.

CHAIRMAN SOULES: And we voted against this as written the last time.

MR. HERRING: No, that's not. That's Tommy's language from last time which replaced the subcommittee's language. That's the language we voted on. We can go back into it, there's no reason we can't, but --

CHAIRMAN SOULES: Oh, is that what we -- okay. I'll stop. Is that what we intended?

MR. HERRING: Well, here is another point that we talked about in the subcommittee this week: If we go to a discovery system that only has six months allowed for discovery and you eliminate any possibility on a motion to compel of ever getting sanctions, why should I ever answer discovery? If I can stall you for three months out of the six months, I may have won the case that way. And that's another reason

the subcommittee said, well, let's see what kind of discovery system we come up with before we decide when sanctions ought to be available or what procedures will work if you have a constricted discovery process. But anyway, that's Tommy's language. We can change it or talk about it some more if you want to.

CHAIRMAN SOULES: All right. Well, (1) is failure to comply with an order. That's -- I know we agreed that sanctions should occur in that situation.

And (2), destruction of evidence or engaged in other conduct that cannot effectively be remedied by an order compelling, we all agreed sanctions should be available at that point.

But it seems to me like (3) puts us right back into the same scope of sanctions that we've got right now, which I thought we were going to try and change. I don't see how this is different from the current practice.

Joe Latting.

MR. LATTING: It is different from the current practice in that it requires

repeated or continuing actions. And when read in connection with the last paragraph, the last sentence of Paragraph 3, which says that "A sanction should be no more severe than necessary to satisfy its legitimate purposes," and you do have to go into court under (d)(3) and show that there has been a repeated course of conduct, or unless you're in violation of an order, then that's considerably more onerous than the current rule requires.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I'm not sure it will be more onerous. My problem with this whole thing is the law of unintended consequences. You tell -- it's like what we were talking about. If you say you can't file a motion for less than a thousand dollars in attorneys' fees, then you're meaning to leave the small stuff out. What you will do unintentionally is tell everybody that they need to file a motion for at least a thousand dollars in attorneys' fees and the cost to have a motion to compel will immediately go to $1,000 as a floor.

Your telling people this, as written, will increase my sanctions work, not just decrease it, because in every sanctions motion I will have to hear a history of the repeated or continuing problems or I will have to hear it twice. Coming in twice is not going to discourage the people who are trying to win on a technical foul. It just means I'll see them more often. They will find more occasions -- they will have to find more occasions to trip you up to get an order from me so that then they can come in and sanction you for something, which is what they really wanted in the first place.

The "repeated" and "continuing" means instead of as I do now, which is when attorneys come in and want to start with a tale of who wrote the first letter, who made the first call and what happened when I called and the letters going back and forth over the past three months, and I tell them right now I don't want to hear about it, what do you need, and I'm going to order them to produce it if it's discoverable.

But then I will have to hear that. We

will have to make a record on that, the continuing who did what to whom. And I'm telling you, and I can go through a list of those in here, there's other discovery abuses that these will not touch, that this rule does not touch. We'll never get to them.

For instance, No. 2 requires that if you've done something not in good faith, that can't be remedied. My example that we started off with some months ago was where shortly before trial the corporate defendant finds 100,000 documents that they had not previously found. There is no evidence that they were lying before. They really just had a bunch of documents and they just found them and it's going to cost $100,000 to redo all the depositions, but it was not in bad faith. This person comes in and says, "You can do nothing about that. You must retake all those depositions at your cost because this rule says that conduct is not sanctionable because it was not in bad faith."

My objection to this in general is that there are vast things that people do wrong that it does not cover. In particular, in

this section, it will make sanctions more expensive, take more time, not because that's what we want, but because the law of unintended consequences is that's the way it's going to be. If you make more hurdles, people won't stop trying to climb those hurdles. They will continue to do it, and it will just make more work on me having to, as a trial judge and you having to respond to it or whatever, to go through each of those requirements to establish.

CHAIRMAN SOULES: Any other discussion?

Buddy, congratulations.

MR. LOW: They've already put her in the room, and my plane was supposed to get there at 7:00. She told the doctor she was going to wait until 7:00 but could I make it a little earlier, so I apologize, but I think I'll go to the airport. This is her birthday, too.

CHAIRMAN SOULES: Good look.

MR. LOW: I'm sorry you won't have the benefit of my confusion to add. Thanks.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I have an additional concern with the "repeatedly or on a continuing." Does that apply to the case at hand, or is it going to allow a party to go in or somebody to go in and start looking at other cases and doing discovery on other cases, things that have happened in other cases with different law firms, and you know, lawyers doing the same thing with different lawsuits, that kind of thing?

MR. LATTING: We talked about that in an earlier meeting, and the consensus of group was that, yes, you could use like conduct in other cases.

MR. MARKS: Like conduct?

MR. LATTING: Like conduct in other cases. This law firm does this in every case they get. That could be a continuing course of conduct under this rule.

By the way, in case anybody is unclear, I agree with everything Judge Brister says, and I'm not defending this version of this draft. We were told by a narrow and misguided vote of the Committee to do it this way. We did it,

but he's right.

MS. SWEENEY: What would you rather have, Joe?

MR. LATTING: I would rather have the task force report, so that there would be discretion by the trial judge within the confines of Transamerica; so that the rule would still say that the sanction should be no more severe than necessary to satisfy its legitimate purposes and that any sanction imposed must be just and directed to remedying the particular violation involved, but not have to be either the violation of an order or the showing of a repeated course of conduct.

The rule that Chuck's committee wrote, in substance, is what I would rather have.

MR. HERRING: Well, again, we're going to have a change -- potentially, the whole dynamic changes if we go to a six-month discovery window, because I need to file my motion to compel right away and I can't afford to wait a week or a month. I mean, I need to go in the next day, and you're going to have a lot of people trying to do something to each other desperately so they

can get their discovery done during the relatively short period that we'll have in a lot of cases. If we go that route, that may change how we want to set this up, so that's another reason to come back and look at this after we get the lay of the land on our potentially major discovery changes.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I haven't had a chance to read the draft, but just on the basis of what's been said about it this afternoon, it seems to me that this is the fourth time, certainly the third time that we've debated this very same question. And when the task force proposal was brought forward, the committee really fundamentally didn't go along with that, and in the subsequent votes we've gotten, I think, clearer and clearer.

And the last time I remember talking about this, we decided that we didn't want the trial judge to have the discretion to levy heavy sanctions on the first motion to compel. Now, the counterargument to that was,

well, we're going to go back to like we did in the '70s when nobody bothered to even file answers to interrogatories until the day of the hearing on your motion to compel if you can't even recover the cost of your attorneys' fees and can't get any sanctions at all. That was all discussed. Everybody remembers those days, and my feeling was that the committee voted clearly that they would rather go back to that situation where you have to eat the cost of forcing compliance rather than live in this world of sanctions and countersanctions.

Now, my assessment of this, not being on this committee, and it's not my principal focus in my activities, is that the general Committee has a certain feeling about the way it ought to be and that the subcommittee that's in charge of writing the language doesn't agree with that view, and the subcommittee's proposals are getting closer and closer to the general Committee's vote but hasn't quite gotten there yet. And it seems to me like if we take a vote two or three times or four times and have pretty much a consensus, or at least a constant majority,

that we ought not to have wide open sanctions on the first motion, then the subcommittee ought to report back a draft that actually says that and then we don't have to reargue it every time it comes up.

MR. HERRING: Richard, this is the draft we voted on last time. We had the language in front of us and we voted on it. This is the same language that Tommy handed out and we voted on last time.

MR. ORSINGER: Well, Tommy changed it. I thought last time, and obviously I'm not anywhere near as familiar with the wording as you, but I thought that the language that Tommy proposed precluded a recovery of even compensatory attorneys' fees from your first motion to compel.

MR. LATTING: No. He backed off of that, Richard.

MR. ORSINGER: He did?

MR. LATTING: And this is Tommy and Pam Baron's draft. This is theirs; it is not the committee's -- this does not reflect, in my view -- and you're right, I did lose that vote. I mean, my side of that lost. But

this is Tommy and Pam Baron's draft and they were the spearhead of that whole version.

MR. HERRING: That's why we had Tommy come over there, so he would write it, and this is what he wrote, this group of language, and the Committee voted on it.

MR. ORSINGER: Well, I thought Tommy didn't make the meeting last time but somebody else did this language for him.

MR. HERRING: No. Before that -- he was not here last time and we didn't do sanctions last time. He had done it before, and he handed out this one and that's what we have.

MR. ORSINGER: Well, then maybe my perception was wrong, but I feel like we're about to enter into the same debate we voted on. And you know, fundamentally, the task force's recommendation was in that respect, I think, rejected by a majority vote of the Committee.

MR. LATTING: It was.

MR. ORSINGER: And we can vote again after more debate, but at some point we probably need to quit fighting the same fight

and move on to the language about the new fight. But like I said, I'm not on that subcommittee and maybe my perception of it is a little skewed.

MR. LATTING: Well, you've accurately stated the situation, except that this is Tommy Jacks and Pam Baron's language. And I think after some consideration that they realized that there were certain situations where a first time sanctions motion would justify -- or a first time appearance in court would justify sanctions, and this is the language that they wrote to cover that where it was a repeated course of action or a continuing course of conduct and so on, as it says here.

CHAIRMAN SOULES: Well, this language, this specific language was not distributed last time.

MR. HERRING: Here it is. Here is what Tommy handed out last time. We got it from him. He brought this to us.

MR. ORSINGER: We didn't vote on that, did we?

CHAIRMAN SOULES: And we voted

to approve that?

MR. HERRING: Yeah. He read it out, he handed it out and we voted on it. Here is your copy, if you want it.

HONORABLE SCOTT BRISTER: And again, the reason is because you can imagine a long list of things where one isolated, first-time incident has horribly expensive and drastic consequences, and that's why he, Tommy, in his draft put in some outs to cover that.

And again, that can be just dropped out totally, but let everybody know and understand that when it's you, and your client may have to pay $100,000 and there will be nothing you can do about it, that's fine, if that's what you think justice requires. That's not what I think justice requires, but that's the reason that that exception was put in there by Tommy.

MR. LATTING: And Judge Hecht, we were just talking, the subcommittee on sanctions wrote a note or wrote a letter, and you know about it, but we have this draft which shows what we believe the committee --

the direction that this committee wants to go. But we have to say that in view of the fact that we're looking at fairly substantial changes in discovery on this, we feel like the tail is wagging the dog here on sanctions. This is language that we can recommend as a body on sanctions, but it's probably going to be made moot if we adopt substantial discovery changes.

MR. HERRING: I think Richard's point is well taken, that we've gone through this now again and again and I believe that it's time that we move on. And we can either work on Tommy's draft some more or we can revisit this after we do the discovery, which the committee -- the subcommittee, at least, voted unanimously, Tommy Jacks and Pam Baron, that we ought to come back to this after we figure out what the discovery system looks like so then we can figure out what the crimes would be and we can figure out how the punishment system could exist at all to address them.

CHAIRMAN SOULES: Okay. Alex Albright.

PROFESSOR ALBRIGHT: I'd like to make a motion that we table this until after the discovery. I think we've gotten our two options as far as we can get for now, and let's do discovery and decide if we need to change it or whatever.

CHAIRMAN SOULES: Okay. Is that the consensus?

MR. HERRING: I second it.

CHAIRMAN SOULES: Okay. Then we'll set this aside for now and we'll go to the Appellate Rules.

Judge Guittard, if you're ready, if you need a few minutes to get yourself collected, that's fine.

HONORABLE C. A. GUITTARD: Yes, sir, I think I'm about ready. What we're working from here is a documents that was circulated entitled Report to the Supreme Court Advisory Committee and so forth, and it's Supplemental Report No. 1. That's what the words are.

Now, we also have some refernces here to our cumulative report that was before the Committee at that last meeting and which has

been revised to some extent.

I propose to go through here --

MS. SWEENEY: What does it look like, the cumulative report?

HONORABLE C. A. GUITTARD: Well, it's the real thick one that has real small type.

MS. DUNCAN: The sans serif type.

MS. SWEENEY: Oh, God, sans serif. My favorite.

CHAIRMAN SOULES: It says Report to the Supreme Court Advisory Committee and so forth, May 20th, Supplemental Report Number One.

HONORABLE C. A. GUITTARD: Now, there are a number of these things that are noted here that have been approved and I don't propose to discuss them any more. And then there are others that are in the cumulative report that have not been discussed by the Committee and I propose to postpone them until we get those concerning the rules that have been discussed by the Committee. There are other proposals here that we think we ought to

discuss further before we present to this Committee, and I'll skip over them for the present because we have plenty of matters to discuss at present.

So I would like to start with Rule 4(c) which we discussed last time. You may -- which is on Page 1 of this supplemental report. You may remember last time that it's a question of how you file papers and if they don't get there in time, what you do and so forth.

Now, the big discussion last time, one of the discussions last time was whether delivery by some agency other than the United States mail should permit you additional time for filing, and we have two versions before the committee, Alternative 1 and Alternative 2, as they're marked.

The first would not allow or not even mention delivery by any means other than United States Postal Service. The second would permit, would add, as you see in Alternative 2, the very last sentence there would say, "If the document is transmitted by private delivery service and received by the

clerk on the next business day after the last day for filing, or is received by the clerk within fifteen days of the last day for filing and credible proof is presented of receipt of the document by the private delivery service on or before the last day for filing, the document shall be filed in time."

Our subcommittee debated that at some length, and we were not at all sure that any means other than U.S. Postal Service is trustworthy or that we could devise language that would identify the trustworthy services, so we were not sure about that. But we thought that if it actually was by a private service and got there the next day, there ought not be any problem; and if it got there within 15 days, then some sort of proof might ought to be available to prove that it was received by the delivery service on or before the last day.

So I think probably the first thing that this committee ought to consider and vote on is whether or not we should permit delivery by private delivery service and extend thereby the time as it would be extended by mailing.

CHAIRMAN SOULES: What is your recommendation?

MS. DUNCAN: Contrary to the Committee's consensus, I'm sure.

HONORABLE C. A. GUITTARD: I think that our committee's consensus was that we adopt Alternative 1 and not say anything about private delivery service. But that's a matter of policy for this Committee to determine.

CHAIRMAN SOULES: And would you make a motion to that effect?

HONORABLE C. A. GUITTARD: I so move.

CHAIRMAN SOULES: Okay. Second?

PROFESSOR DORSANEO: I second it.

CHAIRMAN SOULES: Did Rusty McMains second it? Richard Orsinger?

MR. ORSINGER: I just had a question there about --

CHAIRMAN SOULES: Who seconded it? I'm sorry, I was looking the other way. Bill Dorsaneo seconded it. The motion was

made by Judge Guittard and seconded by Bill Dorsaneo that we adopt No. 4(c), Alternative 1, on Pages 1 and 2 of this report.

Discussion? Richard Orsinger.

MR. ORSINGER: There was some mention made that federal law may require government agencies and others to stipulate that official delivery occurs through the U.S. Mail unless there are some types of circumstances that preclude that. I don't know that anyone was quoting a federal statute directly, or has anyone looked into that, because if there is, it would probably be ill-advised for us to take a view that -- to take rules contra to such a federal law.

Does anyone remember that?

PROFESSOR ALBRIGHT: I remember that. I saw it in the newspaper.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Yeah, that's the same thing I heard. What I heard was through news reports. And what I heard was there was a federal law applying to everybody

because they were going supposedly after private companies that were sending things through private delivery services that were not -- I think the word was "urgent." So I don't know if that's by federal regulation or what, but that's all I know from the news report.

CHAIRMAN SOULES: Any others? Rusty.

MR. McMAINS: Well, the one problem that I see, as I think the committee probably had with the Alternative 2, is trying to define what a private delivery service is, because you could set up your own delivery service for your own firm, and -- I mean, without a definition there's no way that you could legitimately really probably contest that. And I just don't see that it makes any sense to be ratifying it, because one thing we don't do, we don't change the fact that we've got motions for extension that can be filed. If you sent it another way and it didn't get filed right away, the court -- that's a reasonable explanation, that you gave it to the Federal Express agent and then he keeled

over. That's something that certainly can be remedied by an extension motion, so I would move that we speak basically in furtherance of the Alternative 1, that we leave it with the post office.

CHAIRMAN SOULES: Anyone else? Joe Latting.

MR. LATTING: Are we worried about somebody from Amarillo using Federal Express? It seems like we ought to want to encourage that, if it's a good way to do it. And it seems to me the difference between Federal Express and the firm's private service that you set up that day is that one is a regulated carrier and one is not. And it seems like we can define that in terms of any regulated carrier would be an acceptable way of mailing papers.

MR. McMAINS: Well, the problem is -- you get into the question of regulation there. There probably are some people in this room who have done issues of regulation. We have -- for instance, under our Texas law you do not certificate your regular route carriers. UPS is not a Texas certificated

carrier but it is a national certificated carrier, or it was for a number of years, so I mean, you really bite off an awful lot if you want to try and talk about that.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Joe, what you have to remember is that the people in Amarillo are not -- they don't have any disadvantage over anybody else. Anybody can put it in the U.S. Mail on the day the brief is due and it is timely filed. And once you realize that you can do that, then you don't have to use Federal Express; you don't have to deal with any other outside carrier. Just put it in the mailbox and then you're okay.

CHAIRMAN SOULES: Why don't we say that then. Why don't we say it has to be received within 15 days.

PROFESSOR ALBRIGHT: Well, that's what it says.

HONORABLE C. A. GUITTARD: It does say that.

CHAIRMAN SOULES: I think that in the federal courts, if you put it in the

mail, it's filed whether or not it ever gets there.

PROFESSOR ALBRIGHT: Well, we just have a provision that says if it's 15 days later -- I guess you have to get a motion to extend the time.

CHAIRMAN SOULES: That's a different issue.

PROFESSOR ALBRIGHT: I guess we presume that the mail is going to get there in 15 days, but that's --

MR. McMAINS: Let's give them the benefit of the doubt.

PROFESSOR ALBRIGHT: Maybe we ought to make it 30 days.

CHAIRMAN SOULES: Okay. Any other discussion on whether we adopt Alternative 1? Sarah Duncan.

MS. DUNCAN: I am one of the people that is concerned about extending filing to private delivery services, but at the same time, I know Kim Baron is not here and I don't think Steve Susman is here, and I think both of them made a very good case for a private delivery service way of filing.

I know I've heard an awful lot of people in South Texas say that whether they are able to deliver something to the United States Mail and get a post office mark is questionable. And I know, living in San Antonio, that I have a distinct advantage because I have an airport mail facility that stays open until 9:30, whereas people in Austin and other cities don't. And since Pam and Steve aren't here, I just think we all need to consider the reasons that the committee was asked to draft the second alternative.

HONORABLE SCOTT F. McCOWN: Let's move on the question.

CHAIRMAN SOULES: Okay. Is there any other question on whether to adopt Alternative No. 1?

Okay. Those in favor of Alternative No. 1 show by hands.

PROFESSOR ALBRIGHT: What's Alternative No. 1?

HONORABLE SCOTT F. McCOWN: No provisions for private carriers.

CHAIRMAN SOULES: Okay. 22. Those opposed, none.

Okay. So we'll unanimously recommend to the Supreme Court to adopt Alternative 1 on Pages 1 and 2, and that includes the last sentence that's due, so everybody knows that. It's unanimous.

I think we discussed this last time, and you all may know this, they won't -- the post office won't cancel a metered postage, so you can't get a postmark on metered postage, so we use stamps or certified mail when it's going to the court so that we can get a cancellation of the stamps, even though we meter everything else. This is sort of a silly, technical thing to have to do, but so be it.

Okay. Judge, what's next?

HONORABLE C. A. GUITTARD: Well, we were concerned about the proof. Even when the mail is used, U.S. Mail, and rather than a certificate of mailing, the prima facie evidence, we thought there ought to be some circumstances that would be conclusive but that that ought not to be the only way of proving it. And so you see the language in Alternative 1 that's stricken out there, and instead the red-line language, "A legible

postmark, a receipt for registered or certified mail, or a certificate of mailing by the United States Postal Service shall be accepted as conclusive proof of mailing, but other proof may be considered."

CHAIRMAN SOULES: As I understood the vote, we passed that with Alternative No. 1. Does anybody have a different story?

HONORABLE C. A. GUITTARD: Very well. Well, I accept that.

MR. McMAINS: Well, I don't have a problem with it generally, but the problem is that if you talk to most of the clerks, they don't accept certified mail. Most of the clerks do not want to sign for certified mail and certainly for registered mail, a goodly number, yes, in the appellate courts. It's true with the district clerks as well, a lot of them.

CHAIRMAN SOULES: Is that a problem, Ms. Lange or Ms. Wolbrueck?

MS. WOLBRUECK: No. We receive certified mail all the time. The only problem I have with this rule -- of course, this is

the appellate clerks' rule, but going back to Rule 5, I think it is, in the regular rules, is the fact that you're asking the clerk that it shall be filed. What if the clerk thinks it wasn't received within that amount of time? What if it wasn't timely received by the clerk? Shall the clerk still file it?

HONORABLE C. A. GUITTARD: Well, the clerk is supposed to know when it was filed and stamp it as received on a certain date.

MS. WOLBRUECK: Yes. And as a district clerk, anything that we receive, any motions or anything, we file stamp it as it's received.

HONORABLE C. A. GUITTARD: Right.

MS. WOLBRUECK: But my question always with this is that it says that not more than 15 days after the last day for filing and shall be filed by the clerk. What if it's not timely received by the clerk? I mean, we always still file those documents, just, you know, for your information. We do file them, and I guess it's up to the court to determine,

then, if it was actually timely filed or not.

Now, my other concern is the fact that this rule, along with the other rule, requires the clerks to keep envelopes.

HONORALBLE C. A. GUITTARD: If it's not clear, then the clerk ought to simply stamp it as received and let it be determined whether it's properly filed.

CHAIRMAN SOULES: The way I understand how this works, similar to what you, Judge Guittard, just said, is that you receive it and there may be a question about whether you're going to file it. Whenever it's decided that the prerequisites of the rule are met, then it must be filed, shall be filed. It doesn't have to be filed when received; it has to be filed when the prerequisites for filing have been established.

MS. WOLBRUECK: And my concern, again, is just keeping the envelopes, and that's in regards to so many, many documents that possibly we don't know the timetable on those as to -- and these rules really require the clerk to keep an envelope that has the

postmark on it, and I just want your consideration on that whenever you're -- you know, with the clerks, the filings and everything else that we're keeping, is that, you know, that also causes a problem.

MR. HUNT: Excuse me, why does it require to you keep the envelope?

MS. WOLBRUECK: Are you -- you know, I'm asking you as attorneys, are you going to require that I have the envelope that has that legible postmark on it whenever you contest that it was received timely?

MR. HUNT: When I think I may be near the deadline, in a letter I ask the clerk to keep it and then notify me by postcard or something that tells me that she's gotten it.

MS. WOLBRUECK: I think that that's fine. I think that some clerks have been called on that rule and some attorneys have questioned why they did not keep the envelope to prove up that it had been received.

MR. HUNT: But if the clerk doesn't know and the clerk throws it away,

then the attorney is put back under other proof.

MS. WOLBRUECK: Which I think is fine, as long as -- you know, but I just know it's been a concern and an issue in some courts.

CHAIRMAN SOULES: Doris Lange.

MS. LANGE: But as far as accepting certified copies, we do that daily -- or no, certified mail.

MS. WOLBRUECK: Certified mail.

MS. LANGE: Yes. So I have no problem with that.

CHAIRMAN SOULES: Alex Albright. Oh, I'm sorry, go on.

MS. WOLBRUECK: Yes. That just surprised me too. I've never heard of not receiving certified mail.

CHAIRMAN SOULES: Okay. Alex Albright and then Justice Cornelius.

PROFESSOR ALBRIGHT: I think you're right, that this does raise a problem that you're really supposed to mark it received rather than filed, which I think is absurd. Why should we get into this unless

there's a challenge that it was not filed?

I would move to delete the language that begins the same -- or "on or before the last day for filing same"; delete "the same, if received by the clerk not more than 15 days after the last day for filing." If we delete that, then whenever the clerk receives it, the clerk marks it filed, and if somebody wants to claim that the document was not mailed in time therefore it wasn't filed timely, then it's up to that person to make a motion to strike that pleading; instead of for the clerk to have to decide whether it should be filed or received.

It seems like this should be a self-activating rule; that the only time anybody worries about it is when somebody brings a motion to strike a pleading for not being filed in a timely manner.

CHAIRMAN SOULES: Or the appellate brief.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Or the appellate papers or whatever is going on.

HONORABLE C. A. GUITTARD:

Well, would that mean if it's delayed in the mail for two months and you prove that it was deposited in the mail on or before the last day, it's still filed in time?

PROFESSOR ALBRIGHT: But does that matter if nobody has challenged it?

HONORABLE C. A. GUITTARD: Okay. You may be right.

MS. DUNCAN: We discussed this in --

CHAIRMAN SOULES: Okay. Sarah Duncan.

MS. DUNCAN: Sorry. We discussed this in the --

CHAIRMAN SOULES: Sarah, speak up. We've got some so much racket back there behind us, and I apologize for that, but I know the court reporter is probably having some trouble with background noise, so we have to speak up loud and clear.

MS. DUNCAN: We discussed this in the subcommittee meeting, and the only problem we could see with striking the 15 days or 10 days, or whatever you want the rule to say, was there are so many things that are

keyed to filing documents. I mean, there are deadlines and timetables.

For instance, the appellant's brief. If there's no time in which the appellant's brief has to be received in order to have been timely filed --

PROFESSOR ALBRIGHT: But it is filed when it is put in the mail.

CHAIRMAN SOULES: Let Sarah finish, please.

MS. DUNCAN: Well, if I look on the brief and I see that it says -- it's got a certificate of service and it's the date that it was due, my brief is then due based upon the date that that was filed, and I can figure out what that is. But if there's going to be no time in which that brief has to be received in order to have been filed, it seems what we discussed was we're going to have to run deadlines for responsive briefs or whatever off of some other definition of filing.

PROFESSOR ALBRIGHT: No, because if it's filed when you put it in the mailbox, you have filed your brief. I get it,

I see certificate of service, so I know when I have to mail mine. The only time there would be a problem is if it comes up for submission to the court and the court says, "I only have the respondent's brief. I don't have the first brief." So it's a problem because the court doesn't have it. The court calls and says, you know, "There's no brief here," so you're --

MS. DUNCAN: But, Alex, what do you do when neither the court nor the appellee receives it and the appellee's brief is not filed on time because the time has already passed for filing the appellee's brief without their ever having known that a brief was filed by the appellant?

PROFESSOR ALBRIGHT: Well, then you have motions. But it seems like that is a very unusual circumstance and that the usual circumstance is going to be that it's going to be received and it's not going to make any difference.

CHAIRMAN SOULES: All right. We'll refer that back to the subcommittee for consideration, if you care to give it

consideration.

MS. DUNCAN: We don't know what to consider.

PROFESSOR ALBRIGHT: They've already considered it.

MS. DUNCAN: Why should we --

HONORABLE C. A. GUITTARD: We've considered that.

CHAIRMAN SOULES: Okay.

MS. DUNCAN: But why should we not have the 15-day rule?

PROFESSOR ALBRIGHT: Because then a clerk has to decide whether to mark something received or filed.

CHAIRMAN SOULES: Let me get a consensus. How many people are in favor of keeping the 15-day rule just like it is under Alternative No. 2? 13.

How many are opposed? One.

Okay. I guess we'll move on.

HONORABLE C. A. GUITTARD: There's one other thing about this proposal that we ought to consider and that's whether it should be 10 or 15 days. The argument in favor of 10 is that if it's not received in

10 days, then the party has five days to determine whether or not to file a motion to extend. Whereas, if it's 15 days, you have to call on the 15th day and find out if it's filed that day and then get your motion in immediately.

CHAIRMAN SOULES: So really, this is just a bell and a whistle to tell you that if it wasn't there in 10 days, it will probably -- because you can always call on the 10th day, and if it's not there, file your motion in anticipation that it might not get there on time, so this is a whistle that tells you to check on the 10th day and then get your motion on file. It's just a reminder.

CHIEF JUSTICE CORNELIUS: It's a reminder for what used to be 10 days, not 15.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: It's a reminder if we leave it at 10; it's not a reminder, it will rule itself, if it goes to 15.

HONORABLE C. A. GUITTARD:

That's right.

CHAIRMAN SOULES: And you recommend 15?

HONORABLE C. A. GUITTARD: Well, on second thought, I'm not sure about that. I think we recommend -- I think the consensus of the committee, and there are a number of them here, they can speak up if they dissent, but we would recommend 10 rather than 15.

CHAIRMAN SOULES: Any opposition to that?

PROFESSOR DORSANEO: It seems like a quibble, but I don't think it's too much to ask a lawyer to call within 10 days, even if that's a premature call.

CHAIRMAN SOULES: All right. Any other comments? Does anyone want to change it from 10 to 15? We'll leave it at 10, Judge.

HONORABLE C. A. GUITTARD: All right.

MR. McMAINS: You mean we'll change it to 10?

CHAIRMAN SOULES: It's 10 now.

MR. McMAINS: I understand. I'm talking about on your draft.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. Now we're communicating, I think.

Okay. What's next, Judge Guittard?

I'm sorry, Justice Cornelius, I promised you were next.

CHIEF JUSTICE CORNELIUS: I wonder if we might ought not to address the problem of the postage meters. This may not be the proper time to do it. Maybe it ought to go to the subcommittee first, but I know in my court we've had a good bit of trouble with lawyers attempting to rely on a postage meter stamp rather than a legible postmark, and I wonder if something should be said about that.

HONORABLE C. A. GUITTARD: I suggest that be left open, and Judge Cornelius, being a member of the subcommittee now, can raise that in our subcommittee.

CHAIRMAN SOULES: Okay. Can we refer that to the subcommittee?

HONORABLE C. A. GUITTARD: Yes,

we can.

CHAIRMAN SOULES: And Justice Cornelius, will you serve on the Appellate Rules Subcommittee?

CHIEF JUSTICE CORNELIUS: Yes.

CHAIRMAN SOULES: Thank you very much.

HONORABLE C. A. GUITTARD: Okay. The next point has to do with 4(e), which has to do with -- and you may remember in our discussion last time that there was a very detailed provision about the typeface and so forth that the Committee thought was too restrictive.

Now, we have -- in subdivision (3) there we've modified that and tried to deal with the problem of what is a page. You say 50 pages; what is a page? This cumulative report that was circulated to you in type that was rather difficult to read, I don't think you ought to impose the task of reading that kind of type on the appellate court, so if the -- I think Richard Orsinger raised an objection that, well, if you have this compressed sort of type, you can get it in less pages.

Well, the subcommittee recommends now under subdivision (3) that appellate briefs and applications in civil cases, including amicus briefs, shall not exceed 50 pages of Courier type or the equivalent, and that probably should be 12-point Courier type or the equivalent, with one-inch margins. And that would provide a standard so you can use any other kind of type you want to just so long as it didn't amount to more material than would be contained in that kind of a brief, so I move for the adoption of subdivision (3) there with the words "12-point" inserted before "Courier type." Now, that's my motion.

Now, the alternative to that is you might establish the number of words that ought to go on a page. And if that's the consensus of this committee, we can modify it to find out the proper number of words, not each page, but just overall.

CHAIRMAN SOULES: Number of words in a brief?

HONORABLE C. A. GUITTARD: Yes. In other words, 50 pages of brief of

which -- well, we'll have to draft it -- of which the page would not be more than so many words, but not -- that's not true of each separate page necessarily, but that's just the overall average.

CHAIRMAN SOULES: But you're recommending we adopt subdivision (3) with the insertion of "12-point" before the "Courier type"?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: And maybe move "or the equivalent" up after the word "type"?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Is there a second?

MR. McMAINS: Before we start on the motion, there's nothing in there that talks about double-spaced.

CHAIRMAN SOULES: That's right.

MR. McMAINS: So you're saying 50 pages of single spacing?

HONORABLE C. A. GUITTARD: I

guess we ought to put "double-spaced" in there.

MR. McMAINS: Because everybody by and large double-spaces it. You basically double the size of the brief if you allow it to be single-spaced.

CHAIRMAN SOULES: All right. If that's the motion, I'd like to get a second so we can open discussions.

PROFESSOR CARLSON: I second the motion.

CHAIRMAN SOULES: Okay. Elaine Carlson seconds Justice Guittard's motion.

And Rusty by way of discussion has suggested that it ought to be -- that it ought to say "double-spaced" at some point.

HONORABLE C. A. GUITTARD: We'll accept that double-spaced.

MR. LATTING: Unless commercially printed? Would it have to be if it's commercially printed?

MR. McMAINS: 50 double-spaced pages or the equivalent.

CHAIRMAN SOULES: Double-spaced or the equivalent?

MS. DUNCAN: Double-spaced, period.

CHAIRMAN SOULES: I didn't understand that. What was that that was just said?

HONORABLE C. A. GUITTARD: Well, this is a formal discussion of whether the "double-spaced" ought to come before or after "50 pages," but I don't know that that's really significant.

CHAIRMAN SOULES: Okay. And then Joe Latting had a concern if it's a printed brief, how does double-spaced fit that context of a printed brief?

HONORABLE C. A. GUITTARD: Well, in the provision with respect to printed briefs this doesn't apply to printed briefs; that printed briefs are just different.

CHAIRMAN SOULES: Okay. Where is that, Justice Guittard? I haven't seen that yet.

CHIEF JUSTICE CORNELIUS: It says eight and a half by 11 unless commercially printed, but that refers to the size, right?

MS. DUNCAN: But if the concern is that briefs be limited to a certain amount of substance, then to make exceptions for printed briefs is only going to encourage everyone who can afford it to have their brief commercially printed. In my view, I don't care whether it ends up being commercially printed as long as it's 50 pages of Courier type when it went to the printer.

HONORABLE C. A. GUITTARD: That's right. In other words --

MS. DUNCAN: And I would consider that to be equivalent.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. So we should say "double-spaced, 12-point Courier type or the equivalent"?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: So the message about double-spaced, 12-point Courier type is all modified by "or the equivalent"?

HONORABLE C. A. GUITTARD: Yes. Well, it's 50 pages, double-spaced, of Courier

type. 50 pages, double-spaced, of 12-point Courier type.

MS. DUNCAN: So it's 50 pages of double-spaced, 12-point Courier type, or the equivalent.

CHIEF JUSTICE CORNELIUS: Then you better put the "equivalent" before you say "margins" or you're going to modify margins only.

MS. DUNCAN: But if you had a printed brief, you may want the one-inch margins to be part of what's being considered.

CHAIRMAN SOULES: Are we intending here to say that everything that's on a page of a brief has to be double-spaced?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Including quotations and footnotes?

HONORABLE C. A. GUITTARD: Well, yes. And the problem there is that if you put -- if you put single-space and just half -- if you do it single-spaced, which is half the number of -- just half of a page of single-spaced type would be in compliance with

the rule, which is not be exactly what we want, is it, if we say "or the equivalent"? In other words --

MS. DUNCAN: I personally don't mind saying -- yeah, we're saying everything has to be double-spaced at least for purposes of counting the number of pages, because otherwise, you're going to get briefs like I've gotten in one case where every page is single-spaced but it's all a quote so it's all included within the 50 pages. And all it means is you run one draft of your brief without that single-space format code and that's all there is to it.

CHAIRMAN SOULES: Okay. Any other discussion on this point?

Richard Orsinger.

MR. ORSINGER: The last time we started dictating the presentation of briefs we got really bogged down in detail, and I can see that if we really open it up we can do it again.

For example, on my word processor, which is Word Perfect, I can tell it what my line height is going to be so that I can have a

double-spaced brief on my machine that could take less inches than double-spaced would on a regular typewriter. And if I use -- I have a problem with footnotes being double-spaced and the same size because it's hard to differentiate them between the footnotes and the regular text in double-spacing; with quoted material, by tradition it's all single-spaced and bracketed two over from each margin.

I have a problem with the degree of regulation of this issue of how a brief is going to look like when it's read by the appellate court. The way I see the present rule, if somebody is abusing the 50-page limit, either the other side can move or the appellate judge sui sponte can strike the brief and ask for it to be rewritten. And I like that because then nobody has to get into a fight about the size, font, style and the width and whether you have one -- whether it's double-spaced or one-and-three-quarter spaced and everything else.

I'm not sure that the situation is really abused right now. I know of two cases that

the Supreme Court published where they struck briefs after being given the opportunity to bring it up to a reasonable reading size which they failed to do and then they lost their brief. That message went out loud and clear to all the appellate lawyers that if you want to play games with font size, you may get your brief cut. And to me, that is what stopped the abuse, when the harm is the difficulty for the appellate judge to read it anyway.

Once you start getting into font size and type, I use -- for example, I use Times Roman because I think it looks better, but I don't know whether Times Roman puts more letters on the line than Courier. I guess I'm just going to have to, you know, run briefs in two different styles and count letters or something. But I really wonder whether we need this degree of detail when the appellate courts in the last analysis retain the power to strike the brief and order it rewritten if in their opinion it's been abused, and to me that's adequate to govern the practice of law.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: The reason I believe that Judge Guittard and the subcommittee have written it the way they have is that this rule does not say anything about how you format your brief. You can use 28-point Heiress Bold and you can double or triple-space everything in the brief, if that's what you want to do, as long as when that brief is printed in 12-point Courier type it's no more than 50 pages.

And the problem I have with saying we don't need any rules, let's just have the appellate courts enforce this, is that every time you reprint a brief, when you're talking six copies, you're talking four or $500 just for the printing. You're talking about the time that it's going to take to cut and reformat to do whatever you need to do, and I personally don't believe it's fair to strike people's briefs for violating a rule that has never been written, and that's the reason the committee is trying so hard to come up with something that's acceptable to the Committee in terms of a rule. And if this isn't it and if anyone has an idea of what would be

acceptable, I think we would be happy to do whatever, you know, you wanted in that regard.

MR. ORSINGER: Can I respond?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: If equivalency is what you're talking about, then how are we going to police that? In other words, how are you going to prove it? Like I print 13 and a half Times Roman with proportional spacing on a Hewlett-Packard LaserJet 4. Now, how are you going to know what my brief is going look like in 12-point Courier type unless you're on my computer and run it? Are you going to be able to file a motion to force me to cough my floppy disk up so you can put it in your word processor and then format it in Courier and then count it up?

MS. DUNCAN: I -- no. The committee rejected the rule like the Fifth Circuit's, so we can't tell without typing yours up and putting it in Courier 12-point or getting your disk or whatever it is. I would hope that people would look at this rule and say, you know, unless this is really an

obvious, gross abuse of the rule, I'm not going to do anything.

CHAIRMAN SOULES: Any other discussion? Okay. So what's the --

HONORABLE C. A. GUITTARD: Mr. Chairman, I have a slight rewording here that would alleviate some of the problems we've discussed. It says "shall be" -- go down to "including amicus briefs," take it up there -- "shall be double-spaced unless commercially printed and shall not exceed 50 pages of 12-point Courier type with one-inch margins or the equivalent."

CHAIRMAN SOULES: Okay. Any further discussion? All in favor show by hands. 13.

Those opposed, six.

Motion carries by a vote of 13 to six.

Okay. Judge Guittard, what's next?

HONORABLE C. A. GUITTARD: The next one is the Rule on Page 4, 11(a)(3) and 12(a), and the only -- that has to do with the court reporters, and the only change is that we've inserted there what we were told to at the last meeting of this Committee and

provided for predecessor as well as substitute reporters.

CHAIRMAN SOULES: This is 12(a)?

HONORABLE C. A. GUITTARD: 12(a) and 11(a)(3). No, it's just 12(a).

CHAIRMAN SOULES: 12(a).

HONORABLE C. A. GUITTARD: It's on Page 4. Now, in 12(a) we need on the very last line after "substitute," we ought to insert again "or predecessor," so I move for the adoption of -- with that one modification, I move for the approval of Rule 12(a) as proposed.

MR. MARKS: I second the motion.

CHAIRMAN SOULES: Okay. The motion has been made, and seconded by John Marks.

I just have one question about this and that is I don't know if -- should it be the official reporter that has the responsibility or the judge?

HONORABLE SCOTT F. McCOWN: To do what?

CHAIRMAN SOULES: To obtain from the substitute or predecessor reporter a transcript of the proceedings. I mean, the court reporter doesn't have any authority over them, does she, he or she, over the substitute or predecessor? Aren't those selected or somehow given their responsibility for the trial? Aren't they given that by the judge?

HONORABLE SCOTT BRISTER: The substitute should have been hired by the court reporter. The court reporter pays him or her.

HONORABLE C. A. GUITTARD: Well, if it's a predecessor reporter, it wouldn't be. But if the reporter needs the help of the judge, it seems like the judge might be willing to help him.

CHAIRMAN SOULES: Okay. I just think we ought to give that responsibility to somebody that has the authority to discharge it. And that's my only question, if we've done that. And if we haven't, we need to do it.

HONORABLE C. A. GUITTARD: Why not insert there "official reporter and trial judge."

CHAIRMAN SOULES: Judge McCown.

HONORABLE SCOTT F. McCOWN: I would just leave it the way it is, because if the official reporter can't do it, then it's the responsibility of the court of appeals to mandamus the substitute reporter. It's really not -- it's really an issue between the official and the court of appeals. The trial judge is out of it here. It's just like an official who won't turn up a record. It's not the trial judge's responsibility to deal with the official, it's the court of appeals', and they'll have jurisdiction over the case because it will be on appeal.

HONORABLE SCOTT BRISTER: I think the bottom line is, you know, the judge can't read or type out the transcript, so the mandamus has to go to the person who can do it, which would be the reporter. I mean, if you throw me in jail because I can't type, that's not going to make it any better.

CHAIRMAN SOULES: All right. Where says, "responsibility to obtain" --

HONORABLE SCOTT BRISTER: I'll be left there.

MR. MARKS: Okay. How about language which would allow for that; in other words, if the official reporter cannot obtain it, or do we need that? Is that covered somewhere else? It's just a question.

CHAIRMAN SOULES: Well, maybe nobody is concerned about that. If not, I'm not going to worry about it.

Okay. So, Judge Guittard, you've moved, and it's been seconded, that with the insertion of the words "or predecessor" after "substitute" in the last line that you recommend it to the Supreme Court for adoption.

HONORABLE C. A. GUITTARD: Yes, sir.

CHAIRMAN SOULES: Those in favor show by hands. 22.

Those opposed. None opposed. So it's unanimously recommended.

HONORABLE C. A. GUITTARD: All right. The next one, then, has to do with 40(a)(2) on Page 5 and on the contents of the notice of appeal.

And in view of this Committee's decision

last time, we've withdrawn and excluded from that the names of the appellees. And besides that, we have proposed that the appellants give their names, addresses and telephone numbers if -- of counsel; but if they're represented by counsel, the addresses and telephone numbers of the individual appellants need not be included.

And with that change, as indicated on your draft there, Rule 40(a)(2), I move that it be adopted as it appears in this report.

CHAIRMAN SOULES: Is there any opposition? No opposition.

That will be deemed unanimously recommended.

MS. WOLBRUECK: I just have one comment.

CHAIRMAN SOULES: Okay. Ms. Wolbrueck.

MS. WOLBRUECK: In the order that the Supreme Court has on directing the record, the transcript and the like, in the preparation of the transcript by the clerk, the order from the Supreme Court requests the clerk to name the appellants and appellees,

and I would then request that that be deleted from the order if --

HONORABLE C. A. GUITTARD: We'll get to that order later.

MS. WOLBRUECK: Okay. Thank you.

CHAIRMAN SOULES: Is that addressed in your modification of the order?

HONORABLE C. A. GUITTARD: I think so. If not, well, we can take it up then.

The next item is Rule 51(a) as it appears on Page 7. There are some -- this has been modified to -- because of the vote of the Committee last time not to go up on original papers but to go up on copies as of now, so the changes that are from current rules is the underlined portion there; that instead of the "live pleadings upon which the trial was held," which was giving the district clerks some difficulty, to say "the last petition and answer and any supplements thereto filed by each party."

And then further down, what -- include any sort of document that would extend the

filing time, and in addition to "any motion for new trial," or motion to correct, modify or reform the judgment, or any request for finding of the facts and conclusion of law, which also would extend the time, and I would suggest that that be included.

And then the last change down there is sort of a textual matter which makes sure that the transcript includes any designation of matters to be included in the transcript pursuant to paragraph (b) and any filed paper listed in such a designation, not simply any filed paper and any part of that designated. That's the way you designate it; by designated, so filed.

And the last provision is just to suggest to those clerks that have difficulty knowing what should go in, that it's perfectly legitimate for them to call the lawyer and say, "What should I put in here?"

And that's -- and Justice Cornelius raises a good point, which is "copies of" should not be stricken out. It should be replaced.

CHIEF JUSTICE CORNELIUS: No,

put back in.

HONORABLE C. A. GUITTARD: Yes, put back in.

And with those changes, I move that it be adopted as it appears before you.

MS. WOLBRUECK: Judge, I have one amendment to that.

CHAIRMAN SOULES: Ms. Wolbrueck.

MS. WOLBRUECK: My only concern is that when it talks about the certified bill of costs, it says "including the cost of the transcript and the statement of facts." The clerk never knows the cost of the statement of facts, and usually our transcript is done prior to the statement of facts.

HONORABLE C. A. GUITTARD: That's a good point. Does anybody have a solution to that?

CHAIRMAN SOULES: Ms. Wolbrueck says delete it.

MS. WOLBRUECK: Delete it, yes.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Any opposition to that?

MS. DUNCAN: Well, wait a minute.

HONORABLE C. A. GUITTARD: If you're getting to executions of costs now, how are you going to get it without some sort of a record of what the cost of the statement of facts is? Now, how are you going to remedy that?

CHAIRMAN SOULES: You've got that problem, plus the problem that you don't know what it is whenever you file the transcript.

MS. WOLBRUECK: I haven't known what the statement of facts cost is in a transcript that I've filed in the last several years, because my transcript usually goes in before the statement of facts.

MR. HATCHELL: Traditionally, this is handled in two ways. Either the clerk calls the court reporter and finds out what the cost is; or if there's a discrepancy between the filing dates, the court reporter sends the bill of costs, sends the cost

statement to the court of appeals, which is then inserted into the back of the transcript. There may be other ways that some other courts do it. But I do think it is important, Luke, because the clerk does tax these costs and they don't like to have to call the court reporter and find out on that.

CHAIRMAN SOULES: Why don't we require that to be part of the statement of facts rather than the transcript.

MR. HATCHELL: Yeah. And it may well actually be.

MR. CURRY: That's what the reporter does. They include that in the certificate to their statement of facts.

MR. HATCHELL: We ought to look at our rules and see if that's required.

CHAIRMAN SOULES: Where is the Rule that says what's in the statement of facts?

PROFESSOR DORSANEO: That's Rule 53.

HONORABLE C. A. GUITTARD: Mr. Chairman, I will accept that amendment to strike out the "certified bill of costs," and

our committee will look into the question of whether or not it's in the transcript. And if so, we'll consider whether or not it should be put into the statement of facts.

CHAIRMAN SOULES: It looks like Rule 53 requires the official court reporter to include in his certification the amount of the charges for the preparation of the statement of facts.

HONORABLE C. A. GUITTARD: So that takes care of that. So I'll amend my -- I'll accept the amendment to my motion to strike out the "certified bill of costs."

PROFESSOR DORSANEO: No, just "and the statement of facts."

MS. DUNCAN: Yeah, just "and the statement of facts."

HONORABLE C. A. GUITTARD: Okay. "And the statement of facts."

CHAIRMAN SOULES: Okay. Let me catch up with you here. Strike out "and the statement of facts," and I was looking at that "if any," so "certified bill of costs of the transcript," right?

HONORABLE C. A. GUITTARD:

Including the cost of the transcript, a certified bill of costs, including the cost of the transcript, showing any credits for payments made, and so forth.

CHAIRMAN SOULES: "If any," does that go with the transcript or the statement of facts?

HONORABLE C. A. GUITTARD: No. "If any" has to do with the statement of facts. Strike out "and the statement of facts, (if any)."

CHAIRMAN SOULES: Okay. And you wanted to add after -- let's see, right about in the middle, any motion for a new trial or to correct, modify or reform the judgment --

HONORABLE C. A. GUITTARD: And enter "requests for findings of fact and conclusions of law."

PROFESSOR DORSANEO: Just "any requests for findings of fact," and you don't need to say "conclusions of law."

HONORABLE C. A. GUITTARD: That's right, "any requests for findings of fact."

MS. DUNCAN: And change "order" to plural "orders," right?

CHAIRMAN SOULES: I didn't hear that, Sarah. What were you suggesting?

MS. DUNCAN: I was just thinking of a situation where you might have both a motion for a new trial and a motion to modify or correct, so you could have "orders," plural.

HONORABLE C. A. GUITTARD: Any order of the court thereon.

MS. DUNCAN: "Orders" would be better.

CHAIRMAN SOULES: Any orders of the court thereon?

HONORABLE C. A. GUITTARD: "Any order" would be more than one, wouldn't it?

MS. DUNCAN: I don't --

HONORABLE C. A. GUITTARD: Any order of the court thereon.

CHAIRMAN SOULES: Any order of the court, okay.

Do any of the other parts of -- what are we talking about, 269, requests for process to extend the deadline besides the initial

request, like a notification of nonfiling -- no, that doesn't work. That doesn't do anything. Okay. So this would be complete.

Okay. Any other discussion on this?

Richard Orsinger.

MR. ORSINGER: I would like to propose here, as well as throughout the rules, that we take that "motion to correct, modify and reform" and just call it a motion of modifying judgment. I've never understood the difference between those words and it's a real mouthful. And if you ever write them down, it's a lot of verbage that's hard to deal with and I don't think it adds at all. So I think it ought to be motion to modify judgment, and I think we ought to consider doing that in the Rules of Civil Procedure as well as in the Appellate Rules and just have the understanding that it's the same thing we always had before but we're not distinguishing between correcting, modifying and reforming; we're just calling it a motion to modify.

CHAIRMAN SOULES: Let me refer that to Bill's subcommittee, Bill Dorsaneo's subcommittee for consideration on general

rewrite, because that probably appears in a number of places.

HONORABLE C. A. GUITTARD: Right. I think that's a good point.

PROFESSOR DORSANEO: I think the language is strung together because when 329(b) was rewritten, we were reading Transamerican vs. Three Bears and Mathis vs. Kelton, and those three Supreme Court opinions used that formulation of the language. It's probably not a good formulation.

CHAIRMAN SOULES: Okay. Anything else on proposed 51(a)? We'll vote on Rule 51(a).

Okay. Those in favor show by hands.

Is there any opposition? Okay. That's unanimously recommended.

HONORABLE C. A. GUITTARD: Mr. Chairman, I think we skipped over 11(a)(3), which -- and in accordance with what the Committee did last time, the duty of the reporter should be to file the exhibits with the clerk and make copies of them for inclusion in the statement of facts when the statement of facts is prepared, so that small

change is proposed there and I move that it be adopted.

CHAIRMAN SOULES: Any opposition to that? Any discussion?

HONORABLE SCOTT F. McCOWN: This wouldn't change the rule that you could send up the originals?

HONORABLE C. A. GUITTARD: No. That would be by special orders.

HONORABLE F. SCOTT McCOWN: Okay.

CHAIRMAN SOULES: Any other discussion? Any opposition? It's unanimously recommended.

What's next, Judge Guittard?

HONORABLE C. A. GUITTARD: Last time we discussed this provision about payment of the costs of the statement of facts that were requested by the appellee when the appellant had filed a statement of points for the purpose of limiting the record.

CHAIRMAN SOULES: What rule is that?

HONORABLE C. A. GUITTARD: 53(g) on Page 8.

CHAIRMAN SOULES: 53(g) on Page 8.

HONORABLE C. A. GUITTARD: I think actually the law is generally under these Rules that if the appellant designates certain parts of the transcript and the appellee designates additional parts, well, the plaintiff -- that is, of the statement of facts of the evidence, that the appellant has to pay for it all, even though part of it is designated by the appellee. And I think that takes care, really, of the problem that we had with it last time, and the only suggestion that our committee has is that if either party -- as proposed here, if the request of either party is improper, the appellate court may adjust the costs accordingly. I think that's the law anyway, but I think maybe that a little flag there would be helpful, so I move that that language be added to Rule 53(g).

CHAIRMAN SOULES: Okay. Is there a second?

MR. McMAINS: Is "improper" the correct test?

HONORABLE C. A. GUITTARD: What would be a better word?

MR. ORSINGER: Unnecessary.

CHAIRMAN SOULES: And I had two questions here. Is it the request that's improper or the material included?

HONORABLE C. A. GUITTARD: It's improper to request it if it's unnecessary.

CHAIRMAN SOULES: Maybe this is fine. Richard Orsinger.

MR. ORSINGER: The present Rule under 53(e) has to do with what gives the court, the appellate court, the power to tax what is entitled "unnecessary portions," and it explains more of the testimony than is necessary.

HONORABLE C. A. GUITTARD: Yes. But this has to do also with the question when the appellant doesn't request enough and casts an improper burden on the appellee.

MR. ORSINGER: It's not at all clear to me that that's what "improper" means. If that's what it means, then we'd better define it in a comment or in the text.

CHAIRMAN SOULES: Where were you reading, Richard?

MR. ORSINGER: I was reading from Rule 53(e) on unnecessary portions of the statement of the facts, but Justice Guittard is saying it may be that someone underincluded rather than overincluded, so you can't use the concept of unnecessary; that it's some kind of fairness concept. But on the other hand, "improper" doesn't really explain what it means.

HONORABLE C. A. GUITTARD: Well, I don't know whether we can spell it out all that much.

HONORABLE SCOTT F. McCOWN: Well, isn't what you're trying to say that if a party requests too much or too little that the appellate court may adjust the costs accordingly? That's not very fancy, but isn't that more precise?

MR. ORSINGER: Well, if I may, Mr. Chairman, Richard Orsinger, why isn't the problem solved -- if the appellant has to pay for what the appellee designates anyway, then what we're asking for here is the appellant is

going to want the court to charge the appellee for the extra baggage that the appellant had to carry. And that standard could be unnecessary, because the appellant would say, "Hey, you know, I designated five witnesses and they had added 10 on top of that and those 10 witnesses were unnecessary, and therefore, we want that part which the appellee included in my statement of facts, we want that taxed against the appellee because it was unnecessary." So really, aren't we dealing with overinclusion anyway and never dealing wiht underinclusion?

HONORABLE C. A. GUITTARD: What if the appellant has filed a statement of points --

MR. ORSINGER: Okay.

HONORABLE C. A. GUITTARD: -- so that he gets rid of the presumption. And he just designates certain parts and casts the burden on the appellee to go through and designate a lot more that the appellant really should have designated because it's pertinent. This would take care of that. Is that not a problem?

MR. ORSINGER: Well, it's not a problem under your first paragraph here, because under the committee's interpretation of the rule, if the appellant has underincluded, the appellee can make a designation and it automatically gets taxed to the appellant as costs.

HONORABLE C. A. GUITTARD: Where?

MR. ORSINGER: Well, the sentence says that those portions requested by the appellee would be the part of the statement of facts for which the appellant is required to pay. So if the appellant underincludes, the appellee responds by adding testimony. That added testimony is at the appellant's cost, not the appellee's cost, so the appellee has essentially punished the appellant for underincluding.

The only thing the court needs to do is if the appellee overincludes, then the appellant needs to have that cost transferred from the appellant to the appellee, which is an overinclusion in every case and it's never an underinclusion.

So couldn't we still use the same standard of unnecessary and the appellant would just say, "Hey, the appellee added all of this unnecessary stuff to my statement of facts and I would like for them to pay for it"?

HONORABLE C. A. GUITTARD: I would have no objection to that.

HONORABLE SCOTT F. McCOWN: Yeah, that works.

MR. ORSINGER: The only thing I would say is that I like very much the fact -- what it says here in Justice Guittard's first paragraph, but that's not in the rules, and there's -- I've debated that with many different lawyers from many different cities as to whether the appellee's factual designation is taxed to the appellant or not, and we ought to say that in a rule or in a comment or else we'll probably continue to have this debate.

HONORABLE C. A. GUITTARD: Well, Richard, why don't you put that in a proposal and send it to our committee so we can consider it and then report back.

CHAIRMAN SOULES: Okay. We'll reassign that Rule 53(g) back to the committee, given the discussion that we've had today, and we'll consider it again at a subsequent meeting.

Okay. Thank you, Judge Guittard.

HONORABLE C. A. GUITTARD: The next one has to do with --

HONORABLE SCOTT F. McCOWN: I just want to --

HONORABLE C. A. GUITTARD: Yes, sir?

HONORABLE SCOTT F. McCOWN: What Richard said is a big problem because then the court reporter doesn't get paid. The appellee won't pay it because it's the appellant, and the appellant won't pay it because he misunderstands the rule, so I think it's a good idea to spell out the duties in the rule.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: The next one has to do with the original exhibits. That rule now is in the transcript rule, Rule 51, and with respect to exhibits,

which are really part of the statement of facts, we propose to move to 53 that portion of the rule on original exhibits that relates to exhibits as distinguished from filed papers, which we would propose would still -- in the rare instance where the appellate wants to see a filed paper, I don't know of any case like that, but that's really not the problem.

It's the exhibits that need to be sent up as originals in some cases, so that should be in -- it's merely moving it from Rule 51 with respect to the exhibits, and I move that that be adopted.

CHIEF JUSTICE CORNELIUS: Where is that rule?

HONORABLE C. A. GUITTARD: At the bottom Page 8, 53(l).

PROFESSOR DORSANEO: It would actually end up being 53(o).

HONORABLE C. A. GUITTARD: Maybe so.

CHAIRMAN SOULES: Okay. Let me see, didn't we have the court reporter filing the original exhibits with the clerk and then sending copies to the appellate court, is that

right, in one of the earlier rules?

MS. LANGE: That's correct.

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Should the exhibits be filed, the original exhibits be filed with the clerk?

HONORABLE C. A. GUITTARD: They're filed with the clerk, but when it goes to anything that relates to the statement of facts, the court reporter has access to those exhibits that are filed with the clerk, and he should use them to make copies for the statement of facts; or if there's an order for him to send up the original, then he still has access to them, and he's the one that has to index them and all that, so let him take care of that, and that's part of the statement of facts.

CHAIRMAN SOULES: Do you agree with that, Ms. Lange?

MS. LANGE: Yes, sir.

CHIEF JUSTICE CORNELIUS: Rather than the clerk?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay.

CHIEF JUSTICE CORNELIUS: Would that include exhibits other than papers? We've had a couple of cases lately where we had exhibits like a weapon or a drug and they wanted them sent up to the court of appeals, the original exhibits, and they -- we ordered the court reporter to send them up, and the court reporter said she didn't have them; the clerk had them. The clerk wouldn't send them up because she said the sheriff had them.

PROFESSOR DORSANEO: And the sheriff lost them.

CHIEF JUSTICE CORNELIUS: So all exhibits are not papers.

HONORABLE C. A. GUITTARD: That's right.

CHIEF JUSTICE CORNELIUS: So should that be taken out of the district clerk's possession and then given to the court reporter?

MS. DUNCAN: I thought that was why we decided last time that the original exhibits --

MS. LANGE: Judge Cornelius wasn't in on it then.

MS. DUNCAN: Yeah. I'm looking at you all, because I bet you all remember it better than I do; that the exhibits would still be in the custody of the clerk, but if they were properly includable as a part of the statement of facts, it would be the court reporter who would bear the burden of copying and indexing. Isn't that what we decided?

CHAIRMAN SOULES: Well, that's right on the indexing. But we're not going to copy them; we're going to send them all up in their original form, right?

CHIEF JUSTICE CORNELIUS: Well, they can't be sent up if they're --

MR. McMAINS: They can be if --

CHIEF JUSTICE CORNELIUS: I mean, if they are, what if some are papers and some are objects?

CHAIRMAN SOULES: Well, 53(l) assumes that the original exhibits are going up. That's what we're talking about here.

HONORABLE C. A. GUITTARD: Well, under 53 --

CHAIRMAN SOULES: I'm sorry,

Judge Cornelius, I'm interrupting you. What were you saying, sir?

CHIEF JUSTICE CORNELIUS: I was just asking a question. If you were going to send up the originals, are you talking about just papers, or are you talking about objects as well? If so, you've got two different custodians.

CHAIRMAN SOULES: You do unless it goes from the -- the original exhibits go from the court reporter to the clerk, whatever those exhibits may be, paper or objects, and the clerk thereafter handles everything dealing with original exhibits, including getting them to the appellate court, and the court reporter doesn't have any involvement with that if it goes with the original exhibits. I'm just talking about the chain of custody that protects the integrity of the record. Is it better to leave that with the clerk if it's going to be original exhibits, or is it better to put the court reporter between the clerk and the appellate court even on original exhibits?

MS. WOLBRUECK: The way the

rule reads right now, if we send up the original exhibits, the clerk does it because it's under the area where the appellate court may direct the clerk to send up the original exhibits, which is under Rule 51 now, and we do that. It doesn't matter to me as a clerk; we can continue to do that.

But Judge Cornelius is correct. There are new statutory provisions that the clerk of the court does not keep firearms and contraband, and those are delivered or sent over to the sheriff's department, so we would not have it.

MR. McMAINS: Nobody has custody.

CHIEF JUSTICE CORNELIUS: We had a tiff in the storeroom and could not get it.

MR. McMAINS: Can you mandamus the sheriff?

CHIEF JUSTICE CORNELIUS: I think we're still arguing about it.

CHAIRMAN SOULES: The policy question here is do we put the court reporter between the appellate court and the clerk if

the original exhibits are what are going to the court, or do we leave it as is and let the clerk handle it.

MR. HATCHELL: My experience is that clerks are far more responsible with original exhibits than court reporters. Court reporters have a tendency to squirrel these away in closets; court reporters change very rapidly; you have multiple court reporters who take things with them. I think they ought to be centralized at the courthouse under the responsibility of the clerk.

CHAIRMAN SOULES: Okay. Is there a consensus on that, because that's really -- this change puts the court reporter into the process of original exhibits where the court reporter is not now in that process. Isn't that right, on original exhibits?

MS. DUNCAN: Well, I just remember the case that Mike and I had where this came up. The court reporter had had custody of the original paper exhibits throughout an extended trial and there was confusion about whether those exhibits,

original exhibits, were going to be indexed and put together by the clerk, who said that it just wasn't what they did and it wasn't their responsibility; nor the court reporter, who was transcribing a very long statement of facts and thought she had enough to do.

I mean, I'm not saying that I have a preference one way or the other, but in the cases I've been involved in, it's the court reporter who has the paper exhibits.

HONORABLE SCOTT F. McCOWN: Could I speak to this, Luke?

CHAIRMAN SOULES: All right. Judge McCown.

HONORABLE SCOTT F. McCOWN: The practice may be a little different in each county, but I think there's two parts to this and we're mixing them up. The court reporter marks the exhibits and takes care of them during the trial. At the end of the trial, the court reporter files the exhibits with the clerk. If there's an appeal, the court reporter prepares a statement of facts which includes an index in it of where all the exhibits are talked about and admitted inside

the statement of facts. The court reporter will go to the clerk, check out the originals, bind them up. If there's an order from the trial judge to send the originals, the court reporter will send the originals with the statement of facts to the court of appeals. If you're going to go on copies, the court reporter will check the originals out from the clerk, make the copies, include the copies with the statement of facts and send them up to the court of appeals and check the originals back in. So the clerk is the custodian of the originals; it is the court reporter who does the work of getting the originals together and indexed and to the court of appeals if they're going to go, or making the copies if they're going to go, so the custodian and the worker really are two separate functions.

PROFESSOR DORSANEO: And all of that is provided in Civil Procedure Rules 75a and 75b.

HONORABLE SCOTT F. McCOWN: Yeah. I think the Rules already sort out this. I don't think we've got a problem.

PROFESSOR DORSANEO: And I note that Rule 75b of the Rules of Civil Procedure cross-refers to former Rule 379 of the Texas Rules of Civil Procedure, so we had a hiatus probably caused by the fact that when the Appellate Rules were done, the reporter overlooked Rule 75a and 75b because of the way they are hidden in the midst of another subject.

HONORABLE C. A. GUITTARD: Well, I think it's just a matter of practicality. If they've got to be indexed, if these original exhibits are ordered up and have to be indexed and bound, should that be done by the clerk or should it be done by the court reporter? Now, if the clerk won't accept that responsibility, fine, I have no problem with that.

HONORABLE SCOTT F. McCOWN: Well, the court reporter is going to know the exhibits, going to know the record, going to know how the exhibits go with the statement of facts and how they got marked, and it's -- in our county, that's the court reporter's function. To ask a clerk who is not familiar

with the statement of facts or the exhibits, to get them ordered right and get them bound, I think is unfair to the clerk. The clerk is the custodian, but the court reporter should do the work of putting them together and getting them to the court of appeals.

HONORABLE C. A. GUITTARD: So you would approve of the amendment as proposed?

HONORABLE SCOTT F. McCOWN: Yes, sir. I think it's fine as proposed.

CHAIRMAN SOULES: Any other discussion? Rusty McMains.

MR. McMAINS: Well, the only question I have is Judge Cornelius' problem, is what if there is this statute that says the clerk is not supposed to retain custody of certain things?

HONORABLE C. A. GUITTARD: Well, I don't think we need to -- we could write a rule to take care of that exactly. We might. I'll propose it, but...

CHIEF JUSTICE CORNELIUS: I don't know of any statute that requires that. The clerks --

MR. McMAINS: Maybe it's just their own policy.

CHIEF JUSTICE CORNELELIUS: Particularly in Houston they have advised us that the sheriff takes custody of firearms and contraband.

MS. WOLBRUECK: During the last legislative session, there was some legislation passed that any contraband goes directly from the court to the sheriff's department and not to the clerk.

CHIEF JUSTICE CORNELIUS: And firearms.

MS. WOLBRUECK: Firearms or drugs.

MR. JACKSON: And that's a good rule, too, because we had some stuff disappear out of a court reporter's evidence locker in Dallas.

MR. McMAINS: Well, if that's a statute, we ought to -- if it's a statute, we do have to deal with it.

MS. WOLBRUECK: It was in the last legislative session that that was passed. It happens to have been a clerks'

bill. It was our piece of legislation.

CHIEF JUSTICE CORNELIUS: The clerks wanted to get rid of it.

HONORABLE C. A. GUITTARD: Well, if this Committee will decide whether in general the function of transmitting original exhibits should fall with the clerk rather than the court reporter or vice versa, we'll undertake to draft a rule on this different question of what happens to these tangible exhibits that the clerk -- neither the clerk nor the court reporter can retain custody of. We'll undertake to do that, but that's without respect to the proposal that we have here today.

CHAIRMAN SOULES: Judge Clinton, could I ask you a question about that?

If firearms and contraband or some other types of original exhibits are now by statute given to the custody of the sheriff, how do those get up on appeal in criminal cases?

HONORABLE C. A. GUITTARD: They don't come, do they?

HONORABLE SAM HOUSTON CLINTON:

Well, they rarely do. The initiative under the present rule starts with the judge. If the judge thinks that the original exhibits would be better than the copies, the judge will take care of that through, I guess, the court reporter and the clerk, just as people are talking about it now.

CHIEF JUSTICE CORNELIUS: You'll just have to direct the sheriff instead of the clerk. You'll just have to direct the sheriff to send it up instead of the clerk.

HONORABLE SAM HOUSTON CLINTON: Well, that's right. I wanted to say that you've got to keep in mind that the trial judge is a central figure here in terms of getting the original exhibits. He can throw his -- he or she can throw his or her weight around down there, the trial judge.

And the other alternative, as has been pointed out, is the appellate court can request it. But I would assume that -- although I've never really seen it done that I can recall, I would assume that the appellate court would then focus on the judge, the trial judge, to see that it's done.

Is that what you did here?

CHIEF JUSTICE CORNELIUS: Well, we had a request that we ordered the clerk to send the original exhibits, and we did, and the clerk said, "I can't do it. The sheriff has got them." I really don't know what we've done since then. I've got to check when I get back, but I suppose we can order the sheriff to send them up as well as we can the clerk.

HONORABLE C. A. GUITTARD: Well, our committee will consider that if this Committee wishes it to.

CHAIRMAN SOULES: Okay. So I guess we have two issues. That's one, how to deal with exhibits that are in the custody of neither the clerk nor the court reporter.

HONORABLE C. A. GUITTARD: And that's something that we didn't intend to have to deal with.

CHAIRMAN SOULES: Which is a new issue here.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: And the second one is do we want the court reporter to

be responsible for seeing that the exhibits, whatever they may be, get to the appellate court.

Ms. Wolbrueck?

MS. WOLBRUECK: I'm just wondering if it needs to be clarified. What is there is no statement of facts? What if it's going up on appeal and --

HONORABLE C. A. GUITTARD: Well, if there's no statement of facts, there's no occasion for exhibits to go up there.

MS. WOLBRUECK: There could have been some original exhibits, some paper exhibits or something, I'm not sure, that the court could have received.

HONORABLE C. A. GUITTARD: Well, you could have exhibits to a motion for summary judgment, for instance, but that would be in the transcript.

MS. WOLBRUECK: Okay. That should be in the transcript. I'm trying to think if there is any incident where that could happen.

HONORABLE C. A. GUITTARD:

Unless you don't have -- unless they're attached to a pleading or some other filed papers --

MS. WOLBRUECK: That would be the only one.

HONORABLE C. A. GUITTARD: -- they would have to go up only as part of the statement of facts, as I understand it.

MS. WOLBRUECK: I was trying to think if there was an instance where that could happen.

CHAIRMAN SOULES: Okay. So have we decided that the court reporter is going to have the responsibility for getting these original exhibits --

HONORABLE C. A. GUITTARD: That's what we need to vote on.

CHAIRMAN SOULES: And what's your recommendation then, Judge?

HONORABLE C. A. GUITTARD: Our recommendation is that the court reporter have the responsibility to bind, index, send up the original exhibits when ordered, and that's what this subdivision before you proposes.

CHAIRMAN SOULES: Those in

favor show by hands. 20.

Those opposed. One opposed.

By 20 to one the Committee approves your change as recommended, Justice Guittard, and you're going to then address the issue of how to deal with the exhibits that are in the custody of neither the reporter nor the clerk.

HONORABLE C. A. GUITTARD: Right. And I would like to direct your attention next to Page 10, Rule 74(a). This rule was not approved at our last meeting because we had attempted to make too drastic a change in it, not requiring the brief to list all of the parties to the trial court's final judgment; but that we have revised the rule, the proposal, to conform to this Committee's decision.

MS. DUNCAN: Now, wait a minute. I thought we were going to take out addresses.

HONORABLE C. A. GUITTARD: Except for one thing; and that is, our committee proposes that the brief need not list the addresses of parties that are represented if they have lawyers whose names

and addresses are included in the brief. And only in the event that the party is not represented should his address as well as his name be shown. In that case, if the appellant doesn't know the address and can't get it, he ought to make some sort of certificate of the facts there. So the rule as proposed here, striking out on the second line "and addresses," is what our proposal is, and I move that it be adopted.

CHAIRMAN SOULES: I guess we should strike out names and addresses, complete list of the parties, all parties.

HONORABLE C. A. GUITTARD: Complete list of all parties?

CHAIRMAN SOULES: Okay. So just give me what you want to take out and then we'll go with that.

HONORABLE C. A. GUITTARD: A complete list of the parties and the names and addresses of their counsel.

CHAIRMAN SOULES: Leave that out?

HONORABLE C. A. GUITTARD: The brief shall also include the address of any

party represented by an attorney -- any party not represented by an attorney, but if the address is not known, shall certify that the appellant's attorney has made a diligent inquiry and so forth.

CHAIRMAN SOULES: Okay. Judge, let me change it. I think we ought to say, "A complete list of all the parties to the trial court's final judgment."

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. So we will strike "the names and addresses of," and with that deletion, you recommend that this change to 74(a) be adopted or recommended to the Court?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Second?

MS. DUNCAN: Second.

CHAIRMAN SOULES: Any opposition? Okay. That's unanimously recommended.

HONORABLE C. A. GUITTARD: At our last meeting, there was a proposal before the court or before the Committee concerning

cross-appeals. And that proposal was not approved by the Committee, but there's still the question as to whether or not a cross-appeal can be filed or can be presented without going through the process of perfecting a separate appeal.

So the first sentence of our proposal, which was approved, should be more properly transferred to Rule 74(f), which would then -- because it has to do with what the appellee files. And our proposal is that that rule, which deals with the appellee's brief, shall read as shown here: "Cross-Appeal. Unless the appeal is limited in accordance with Rule 40(a)(5), an appellee's brief may include cross-points complaining of any ruling or action of the trial court without filing a separate appeal."

Now, I move that that be adopted.

HONORABLE F. SCOTT McCOWN: Second.

CHAIRMAN SOULES: The move is seconded. That would be 74(f), is that right?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: 74(f).

Okay. Richard Orsinger.

MR. ORSINGER: I'm wondering if we could substitute the word "perfecting" for "filing," because I'm not familiar so much with the word about filing an appeal; I know what perfecting is.

HONORABLE C. A. GUITTARD: I'll accept "perfecting."

MR. ORSINGER: Okay.

CHAIRMAN SOULES: And I take it you've moved 74(f), the existing 74(f) somewhere else?

HONORABLE C. A. GUITTARD: Oh, it's a matter of renumbering the paragraph. It's just renumbering.

CHAIRMAN SOULES: Okay. Just renumbering the paragraph.

Okay. Rusty McMains.

MR. McMAINS: Just as a point of clarification, is this basically designed, then, to say that you can perfect an appeal by cross-point if there's no notice of limitation of appeal against any party to the trial court's judgment?

HONORABLE C. A. GUITTARD: It's

not a question of perfecting an appeal. You can cross-appeal. You can proceed against any party.

MR. McMAINS: Right. What I'm saying is --

HONORABLE C. A. GUITTARD: Where there's no -- not under some third party.

MR. McMAINS: Right. But what I'm curious about is the use of the term "appellee" here in conjunction with "cross-appeal." Where we have gotten bogged down in the past is that nobody has any doubt that that is the way it works when there is an appellant and there is an appellee; that unless there's a notice of limitation of appeal, the appellee may cross-point. But when there is an appellant and there are two appellees or two potential appellees, one of those appellees having a complaint against the other appellee, as I understand what we're trying to do, we're trying to say nobody but the appellant has to perfect the appeal initally. As long as there's no limitation, the appeal against one appellee against the

other appellee may be raised in the appellee's brief. Is that right?

HONORABLE C. A. GUITTARD: Right. And it says it may include cross-points complaining of any ruling or action of the trial court, which ought to include whether it's adverse to the appellant or adverse to some other appellee.

MR. McMAINS: Okay. I'm just trying to clarify that that is what we were doing.

HONORABLE C. A. GUITTARD: Yes. And if that's not clear, then we ought to clarify it.

CHAIRMAN SOULES: I think it does need to be clarified.

Unless the appeal is limited in accordance with Rule 40(a)(5), somebody's brief may include -- whose brief may include?

MR. McMAINS: Well, it is the appellee's brief. I mean, that is what we're talking about. All I'm concerned about is whether or not we have communicated the scope of what we are doing by this.

HONORABLE C. A. GUITTARD:

Since this committee has said that anybody that's not an appellant is an appellee that was a party to the trial court, then if you say cross-points complaining of any ruling of the trial court -- I mean, how else are you going to say it?

HONORABLE SCOTT F. McCOWN: Judge, isn't what you're trying to say, if any party perfects an appeal, all other parties can bring cross-points complaining of any ruling or action of the trial court without perfecting a separate appeal?

HONORABLE C. A. GUITTARD: Isn't that what it says?

HONORABLE SCOTT F. McCOWN: Well, that's what it says. But I think what Rusty is saying is that it might be said a little bit clearer because people think automatically of appellant/appellee, but the problem is, if you've got two appellees, can Appellee B appeal his complaint against Appellee A if he has never perfected, and it doesn't jump right out and grab you, so since it is a technical area, you probably want it to jump right out and grab you.

HONORABLE C. A. GUITTARD: How would you do it?

HONORABLE SCOTT F. McCOWN: I would say, If any party perfects an appeal, any other party -- any other party's brief may include cross-points complaining of any ruling or action of the trial court without perfecting a separate appeal.

MR. McMAINS: Okay. The only problem with that is that it doesn't tell you when you do it.

HONORABLE SCOTT F. McCOWN: You do it in your timely filed brief.

MR. McMAINS: I know. But all I'm saying is that seems to be an empowerment to become an appellant.

HONORABLE SCOTT F. McCOWN: It is.

MR. McMAINS: I know. But at the perfection of somebody else's appeal. But it doesn't -- I think the reason that they have done it this way is they're trying to say when do you do it. You do it at the appellee's brief stage, and that's when you become -- that's when you file.

CHAIRMAN SOULES: There's too much inference in this and I think we need to have more specifics.

MR. McMAINS: Well, a suggestion that Elaine had is that -- which accomplishes, I think, roughly the same thing. It says, Unless the appeal is limited in accordance with this rule, appellee's brief may include cross-points or complain of any ruling or action of the trial court as to any party without perfecting a separate appeal.

HONORABLE SCOTT F. McCOWN: Yeah, that's good.

HONORABLE C. A. GUITTARD: That's right.

MR. McMAINS: Now, if you put that in there, then you've got the "as to any party," and you've got where it is; it's in your appellee's brief. So you kind of have a staged proceeding. You know that you didn't start it, but you get to start it over at the appellee's brief stage.

HONORABLE SCOTT F. McCOWN: Can you say that again slowly so we can all get it?

MR. McMAINS: Well, basically, on the cross-appeal that's there, where it says, "complaining of any ruling or action of the trial court," you would insert there "as to any party without perfecting a separate appeal."

HONORABLE SCOTT F. McCOWN: Okay.

HONORABLE C. A. GUITTARD: I'll accept that.

CHAIRMAN SOULES: Well, let me try one other thing.

Unless the appellant limits the appeal in accordance with Rule 40(a)(5), any other party to the trial court's judgment may include cross-points in its brief complaining of the ruling, of any ruling.

Again, unless the appellant limits the appeal in accordance with Rule 40(a)(5), any other party to the trial court's judgment may include cross-points in its brief complaining of any ruling or action of the trial court without perfecting a separate appeal.

CHIEF JUSTICE CORNELIUS: So is this eliminating cross-appeals in all cases

except where the appeal is limited initially by the appellant?

MR. McMAINS: No.

CHIEF JUSTICE CORNELIUS: It is not?

MS. DUNCAN: It is doing almost the opposite.

CHAIRMAN SOULES: It's the converse of that, if the appeal is limited.

CHIEF JUSTICE CORNELIUS: That's what I mean, the converse.

CHAIRMAN SOULES: It's the converse.

MR. McMAINS: The problem with saying "unless the appellant" is that sometimes there is more than one appellant.

CHAIRMAN SOULES: But then the appeal is not limited, or how do you deal with that?

MR. McMAINS: Well, that's what we said, "unless the appeal is limited." I mean, it's limited by them filing a notice of limitation of appeal. That's the only way you get to limit the scope of appeal. If that's not been done, then it isn't limited. But

when you say "the appellant" when you might actually have, like I say, in some cases several appellants anyway, and it's not really designed to be limited to that, we're just trying to say that unless the other rule that limits the scope of an appeal is in play, then everybody gets to appeal.

CHAIRMAN SOULES: Let me ask you this question: If one appellant attempts to limit the appeal but another appellant does not limit the appeal, then it's not a limited appeal?

MR. McMAINS: That's right.

CHAIRMAN SOULES: So unless the appeal is limited by all appellants, in accordance with Rule 40(a)(5), any other party to the trial court's judgment may include cross-points in his brief complaining of and so forth.

MR. McMAINS: Well, we'll have to go back and look at our rule. I'm not sure whether it works that way or not.

HONORABLE C. A. GUITTARD: Well, it seems like to me that --

MR. McMAINS: That is, if one

party limits its appeal and another party doesn't. It may be that that would behoove you, if you're going to complain about the party limiting, that you might then have to independently perfect. I don't know how --

CHAIRMAN SOULES: Not if you use my words, because it says unless the appeal is limited by all parties. One doesn't limit it.

CHIEF JUSTICE CORNELIUS: By all appellants.

CHAIRMAN SOULES: It has to be by all appellants.

Richard Orsinger.

MR. ORSINGER: I'm having a little conceptual difficulty with -- I think it was Rusty that said you appeal judges; you don't appeal parties. If an appellant limits an appeal, he's limiting the appeal to certain claims, not certain parties. And it could be in a multiclaim case that the appellant limits the appeal to a claim that touches every single appellee, or they might limit the appeal to a claim that only touches one out of 10 appellees. But we are allowing that

decision to limit the appeal to a claim to affect parties that are implicated by the appeal, and the limitation of appeal rule does not really affect parties; it affects claims. And so I think we have apples and oranges that are meeting here. That's one thing I'd like to say.

The other thing I'd like to say is that if this rule is adopted and I represent a third party who is named in a cross-point in an appellee's brief, when is my brief in response to that brief due? Was it due on the day they filed theirs, in which event, how in the heck did I know to defend against a cross-appeal, or do I have my own separate timetable against their cross-points that for the first time touch me?

HONORABLE C. A. GUITTARD: We had that all spelled out in our Rule 40(a) which has been disapproved.

MR. ORSINGER: But we have a conceptual problem here because we are leveraging a rule that relates to claims and treating it as if it relates to parties, and I think that it's creating conceptual

difficulties.

MR. McMAINS: Well, it could be either one, I think.

MR. ORSINGER: It could be?

MR. McMAINS: Well, I mean, obviously, you can limit --

CHAIRMAN SOULES: Speak up, Rusty, so the court reporter can get your conversation.

MR. McMAINS: Well, what I'm saying is that you can limit an appeal in that certain parties may only be implicated in certain claims, so it may be that in some cases a limitation of appeal would limit claims; in some cases it may limit parties. And so there are different ways in which that animal can operate.

I think that the logical thing that would happen is that if you're going to make it by cross-point, you're going to make it by then or you're not going to make it at all, in terms of having an appellant complain against somebody else that you didn't perfect an appeal against. And at that point you have become an appellant as to that party, and

basically the rules logically follow as being that if you were not implicated in the appeal until that brief, you would get an opportunity to reply as an appellee. I don't know that we need a rule to say that.

CHAIRMAN SOULES: That's right.

MR. McMAINS: And I think that's basically what our rules are now. The principal motion was that you do not limit the scope of an appeal. It could be limited -- and it can only be limited in accordance with that rule. It has to be a severable claim anyway. It has to be a severable issue. Whose involved in that issue could be a different deal.

For instance, in the classic example of a wrongful death or a survivor claim --

CHAIRMAN SOULES: Okay.

MR. McMAINS: -- because your beneficiary in a survivor claim under the will may be people that aren't going to let in other issues, so you can limit an appeal in either a survivor claim or a wrongful death claim.

CHAIRMAN SOULES: Judge

Clinton.

HONORABLE SAM HOUSTON CLINTON: It's a minor thing, but I think the reference to Rule 40(a)(5) is a typographical error. I've got the rule before me and it looks like we're talking about (4) instead of (5).

HONORABLE C. A. GUITTARD: That's the earlier one. We have renumbered that.

CHAIRMAN SOULES: There's been some renumbering, Judge, on this. I got confused on the same thing a moment ago.

You're referring to the amended rules that you're proposing, aren't you, Judge Guittard? And so 40(a)(5) is the old 40(a)(4)?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. So Richard, how do we address it? I proposed that we say, "Unless the appeal is limited by all appellants in accordance with Rule 40(a)(5), any other party to the trial court's judgment" and so forth. Does that work?

Richard Orsinger.

MR. ORSINGER: I would like to ask the question, the idea of limiting the appeal as the trigger for this rule doesn't accomplish its purpose.

HONORABLE C. A. GUITTARD: It's not the trigger; it's just a limitation.

MR. ORSINGER: Well, what I'm saying is that if the appellant limits the appeal to one claim out of four and that one claim happens to touch every single appellee, now everybody has got to have their own perfected cross-appeal?

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: And so what have you accomplished in a multiclaim case? In other words, the problem I'm having is that your rule breaks down in its application, I think, if you say the triggering event to liberate us from perfecting a cross-appeal is the limitation of the appeals.

HONORABLE C. A. GUITTARD: No, no. It's the other way around. It's the other way around. The triggering event is the -- the limitation of appeal is a restraint or a restriction or a limitation.

MR. McMAINS: It's the only exception.

HONORABLE C. A. GUITTARD: It's an exception to the rule.

CHAIRMAN SOULES: It works this way, Richard: If one party perfects a limited appeal, then that's all that's been perfected, is a limited appeal. And then thereafter these -- you can't launch from a limited appeal to every other party filing cross-points.

Now, maybe the policy would be or should be that no matter what kind of an appeal is perfected, everybody can launch their own appeal without perfecting it, but that's not where we've been up to now in the progress of this ruling.

HONORABLE SCOTT F. McCOWN: But isn't the reason the record? If you've got a limited appeal, you've got a limited record and therefore you don't want, at the briefing stage in the court of appeals, other issues being put on the table. So as long as you don't have a limited appeal, you've got the whole record and it doesn't matter if other

issues are put on the table at the briefing stage.

MR. ORSINGER: The reason for a limited appeal, in my opinion, is for an appellant to take the case up to try to get something they don't like changed without running the risk that the appellee will have something they don't like changed. And you may need a complete statement of facts in order to run your limited appeal. You probably do. But what I'm saying is that if I limit the appeal to a claim that everyone is an appellee in or that touches everyone, under the current rule, they don't have to perfect independent appeals as against everyone else's liability under that claim, do they not? If everyone that's an appellee is touched by that severable part of the judgment that the appellant puts in play, then everyone is an appellee right now.

MR. McMAINS: Correct.

MR. ORSINGER: What we have just said, though, is that if the appellant limits it to that claim and allows some other party not to be in play, then if I'm an

appellee, I must perfect a cross-appeal against every other appellee under the new rule when I didn't under the old rule. So haven't we gone the opposite direction from the direction we're ahead?

CHAIRMAN SOULES: Any response?

MR. McMAINS: No, because the function of the notice of limitation of appeal is to give you the ability to appeal on a limited basis; and that -- and the timing for serving that is 15 days. So when you get that served as another party, if you see that it's going up and there's something else that you want to complain about, then you just file a straight-up notice of appeal and school's out. At that point everything is in play.

CHAIRMAN SOULES: You perfect your own appeal because you had advance notice of --

MR. McMAINS: Right. You perfect your appeal because you've got the notice.

CHAIRMAN SOULES: You've got advance notice that somebody has got a limited

appeal.

MR. McMAINS: That's the way it works. I mean, we used to have a problem because the notice of limitation of appeal was delivered at a time when it was too late to perfect your own appeal, and that was kind of a problem.

CHAIRMAN SOULES: And we fixed that.

MR. McMAINS: We fixed that. That's not a problem any more.

And so all of this is an effort to implement the notice of limitation of appeal. You have that right. But it also gives everybody else the right -- once anybody perfects the appeal, then everybody else is an appellant as against everybody else.

CHAIRMAN SOULES: And so, Richard, in that scenario, you can give somebody notice of a limited appeal, and then one party gives a perfected general appeal, and then at that point everybody can come into play, but those who were standing out on the limited appeal, they don't know until the general appeal is perfected that they need to

get involved, because they may be happy with the issue that's going up on the limited appeal.

MR. ORSINGER: They really don't know until all the other briefs are in whether they're involved probably.

MR. McMAINS: That's right.

MR. ORSINGER: They have to wait and see until the last shoe falls and then they know whether they're in or out.

CHAIRMAN SOULES: That's right. And then they're in, they're appellees, and they can make any kind of complaints that they want in their brief, unless it's a limited appeal and it stays limited.

So what -- why not say unless the appeal is limited by all appellants?

MR. McMAINS: Well, the problem I see -- the only problem I have with the idea of saying that it's limited by the appellant is that people file limitations of appeal that aren't any good, so it's not the fact of filing something; it also has to be effective to do it or else it's not limited, you see.

The rule is self-effectuating. The rule says only if it's a severable portion of the judgment. If you do not have a severable claim, like let's suppose you get lots -- as a plaintiff, you get lots of lost earning capacity and not much pain and suffering. You don't get to limit your appeal as a plaintiff to the lack of getting money on the pain and suffering and I want to keep the five million I got on the lost earnings. It doesn't work that way because it isn't severable. You can file a notice of limitation of appeal, but it doesn't work, so it's not effective. That's the reason the rule is couched in terms of the cross-appeal so it says unless the appeal is limited.

But we don't have -- it isn't limited by the mere filing of a notice of limitation of appeal. It also has to be the type of case in which that is appropriately done, and that's -- because otherwise, there is no limitation when an appeal is perfected by somebody, even though they may think they're doing it with a notice of limitation of appeal. If that's not effective, then the

scope of the appeal is wide open.

CHAIRMAN SOULES: All right. Then if you start with this: If any party perfects an appeal, unless the appeal is limited in accordance with Rule 40(a)(5), any other party to the trial court's judgment may include cross-points in its brief complaining of and so forth.

MR. ORSINGER: You don't need the first clause, because if somebody hasn't perfected an appeal, we're not even using this rule. You've got to have somebody to perfect an appeal.

CHAIRMAN SOULES: No, but I'm trying to distinguish between somebody who does something first and then any other somebody who does something later. In order to get that done, I've got to have two difference classes of people.

HONORABLE C. A. GUITTARD: "Appellee's brief" assumes that somebody has filed an appeal.

MR. ORSINGER: Luke, what Rusty is saying is that your clarification is not needed because your clarification focuses on

the act of limiting the appeal or on filing a notice of limitation. This language says -- focuses on whether the notice is valid or effective or not. And if, after all the dust has settled, they properly limited the appeal, then this rule applies. And if after the dust settles there's 15 of these limitations and they're all no good, then this rule doesn't apply.

CHAIRMAN SOULES: Well, I was puzzling and I thought I saw other people puzzling about whether the word "appellee" includes every other party to the trial court's judgment. That's my puzzle, and that's what I'm trying to fix.

Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think that it shouldn't in this context. It ought to only include someone identified in the appellant's brief as an appellee, although in the notice of limitation of appeal -- well, listen to me --

CHAIRMAN SOULES: But the appellant doesn't identify me as an appellee. But when I get the appellant's brief, I say

"King's X, that hits me," and I need to get involved. And I need to do something and I want to make some cross-points. Now, am I an appellee or am I not an appellee?

MR. ORSINGER: If the judgment gets reversed and it affects you, you're an appellee. And that's what led us to this big debate about why we ought to name appellees, because you never really know if you're an appellee unless you're smart enough to figure out the effect of the success on the appeal.

CHAIRMAN SOULES: And that means that you name as appellees the entire class of the parties to the trial court's judgment other than yourself, right?

MR. ORSINGER: That was the original debate about naming appellees.

PROFESSOR DORSANEO: In the notice.

CHAIRMAN SOULES: "Any other party to the trial court's judgment" is language that tells you who this class of people are. Appellees may be a narrower class, and in some cases, I guess, are a narrower class.

Elaine Carlson.

PROFESSOR CARLSON: What if we reword 74(f) to something like this: Unless an appeal is properly limited to a severable portion of a judgment, any other party to the trial court's judgment may urge cross-points complaining of any ruling or action of the trial court as to any other party without perfecting a separate appeal.

MS. DUNCAN: In my view, it's not just that it's limited to a severable portion of the judgment but that there's been compliance with the rule.

PROFESSOR CARLSON: Well, that's why I said "unless an appeal is properly limited."

CHAIRMAN SOULES: I would leave 40(a)(5), the standard of 40(a)(5), alone without adding words to amplify it on 40(a)(5), Elaine. I mean, why would we want to put something else there?

PROFESSOR CARLSON: Because I wasn't sure of -- how do you refer to what undoes a 40(a)(5) limit? If I file what's now a 40(a)(4) or what will be a 40(a)(5) limit

and you file a notice of appeal, I've done a 40(a)(5) but it's not a limited appeal any more, so that the reference to 40(a)(5) could be undone?

HONORABLE C. A. GUITTARD: Sure.

PROFESSOR CARLSON: By other appealing parties?

HONORABLE C. A. GUITTARD: Of course.

CHAIRMAN SOULES: Well, how about unless the appeal is limited in accordance with Rule 40(a)(5) by all appellants?

MR. ORSINGER: Do you need to add that, because if anybody makes it a general appeal, then it's not a limited appeal and so why do we need to say that?

In other words, this says unless the appeal is limited in accordance with the rule, and what Rusty is saying is if anybody makes it a general appeal, then it's no longer limited in accordance with the rule.

CHAIRMAN SOULES: Okay. Back to what I suggested earlier that you thought

was unnecessary. If an appeal is perfected by any party, any other party of the trial court's judgment may assign by cross-points unless it's a limited appeal.

HONORABLE C. A. GUITTARD: If somebody hadn't filed an appeal, you don't have a problem. But why do you say that?

CHAIRMAN SOULES: Because I'm trying to differentiate between the persons who perfect an appeal and those that don't have to perfect an appeal.

MS. DUNCAN: But Luke, if we don't start at some point in the rules with everybody understanding that they have a class called "appellants" and if you didn't appeal you're an appellee, then we're going to have to use that phrase everywhere in the rule. I mean, if we need a rule up front telling people either you file a notice of appeal and you are an appellant or you didn't and you're an appellee, then...

CHAIRMAN SOULES: Going back to work we've done in prior years, there was a problem; people were not getting notice of an attack on a trial court's judgment because the

appellant said this is a class of appellees and that's the people that got notice. So we said, well, we're going to fix that. We're going to say that notice has got to go out to every party to the trial court's judgment so that we didn't have to worry about this appellee thing, which was vague, or maybe it shouldn't be vague, but it was at least thought by this Committee to be unclear enough that we ought to use some other words that were clear: "Every other party to the trial court's judgment."

And we started down that path and we can fix that by, I guess, defining "appellees" as every party to the trial court's judgment that's not an appellant; we don't say that any more. But we can't even around this table today say that "appellee" includes all those people.

MR. DORSANEO: Why can't we require that the brief at least identifies who the appelles are and who are the appellants.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: I mean, by the time we write the brief -- the notice is

one thing. I disagreed with that vote. But by the time you write the brief, you ought to be required to identify who the appellees are.

CHAIRMAN SOULES: But what if the appellant doesn't and somebody decides they are an appellee?

MR. ORSINGER: Or what if the appellant doesn't and the appellate court reverses? Do they reverse only as to those who were named as appellees?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: I don't think that's -- you're appealing a judgment. The appellant can't say the judgment is reversed as to only one appellee and not the other three.

PROFESSOR DORSANEO: It sure can.

MR. ORSINGER: Well, I don't think they should be. I don't think they can and I don't think they should be able to.

CHAIRMAN SOULES: Okay. Set aside that what I'm saying may be redundant, if a party -- if any party perfects an appeal. Say that's okay to say that, because

it may not say anything, but it doesn't say anything bad, okay? Okay. If any party perfects an appeal, unless the appeal is limited in accordance with Rule 40(a)(5), any other party to the trial court's judgment may do this. Now, what's wrong with that? Doesn't that fix the problem?

HONORABLE C. A. GUITTARD: Well --

PROFESSOR DORSANEO: Should it say any other party to the trial court's judgment who is, I guess, agreed by the trial court's judgment? I guess that's implicit.

MR. McMAINS: Why would you cross-appeal if you were in agreement with that?

CHAIRMAN SOULES: All right. Rusty McMains.

MR. McMAINS: I think the reason they're using the word "appellees" is because it's not -- and one of the problems with what our most recent deal here is is that it doesn't really show where this is, but I think -- aren't we in the appellee's brief rule?

HONORABLE C. A. GUITTARD: Well, that's the point. How is this other person or other party to the trial court's judgment going to present this to the court? He's going to be presented with an appellee's brief, and so we said here that the appellee's brief may include the cross-points.

CHAIRMAN SOULES: Okay. If it's clear to you all, then it ought to be clear to me. You all are a lot smarter than I am, and I will withdraw that.

Okay. So the proposal is to take this as is with the substituting of the word "perfecting" for the word "filing."

HONORABLE C. A. GUITTARD: And "as to any party," add that; insert that.

CHAIRMAN SOULES: Where is that?

HONORABLE C. A. GUITTARD: Insert that after "action of the trial court," after "complaining of any ruling or action of the trial court as to any party without perfecting a separate appeal." Isn't that right?

PROFESSOR CARLSON: Yes.

CHAIRMAN SOULES: Okay. And for the record of this --

CHIEF JUSTICE CORNELIUS: Does that specify any party to the trial court's judgment?

HONORABLE C. A. GUITTARD: Well, any party to the trial court's judgment who filed an appellee's brief, see?

CHIEF JUSTICE CORNELIUS: Okay.

CHAIRMAN SOULES: And so for purposes of the record of this Committee, we are interpreting "appellee" to mean any other party to the trial court's judgment, and that's what we say it means.

HONORABLE C. A. GUITTARD: Who files a brief.

MR. ORSINGER: Well, they're an appellee if they don't file a brief, but they're just not covered by this rule.

HONORABLE C. A. GUITTARD: That's right. They have to file a brief.

MR. ORSINGER: But they're still an appellee; they just didn't file a brief.

HONORABLE C. A. GUITTARD: That

is, an appellee's brief.

PROFESSOR DORSANEO: Luke?

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: Either in this subsection, which is right after, as proposed to be included, the brief of the appellee section, or in a later section, such as, for example, the section that talks about briefs and reply, we're going to need to provide for a reply by an appellee who is targeted by the cross-point in the appellee's brief.

CHAIRMAN SOULES: All right. Will you endeavor to do that, then, in your committee?

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: And will you consider giving us a definition of "appellee" that includes any other party to the trial court's judgment, consider that?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: All right.

PROFESSOR DORSANEO: I'll also

make you an alternate proposal that suggests that you're not an appellee unless the part of the judgment complained about bears on an interest that you have or a right that you want or receive.

CHAIRMAN SOULES: Who decides that, is my problem.

HONORABLE C. A. GUITTARD: Well, we'll consider that in our committee.

CHAIRMAN SOULES: Okay. That settles it.

So with those issues returned to the committee for consideration, the motion is on the floor to put in Rule 74(f), Cross-Appeal, Unless the appeal limited in accordance Rule 40(a)(5), an appellee's brief may include cross-points complaining of any ruling or action of the trial court as to any party without perfecting a separate appeal.

Those in favor show by hands. 11 for.

Opposed. None opposed, so that's unanimously recommended.

HONORABLE C. A. GUITTARD: Our next rule to be considered is on Page 11, Rule 101, which has to do with reconsiderations by

the court of appeals and whether or not an assignment in a motion for rehearing should be a prerequisite to a Supreme Court review.

Our committee has recommended that that rule be repealed; that the timing of the reconsideration by the court of appeals after filing of an application of writ of errors is such that the reconsideration has not proved to be practical. So we would propose repealing that but keeping the traditional rules that an assignment in the motion for rehearing be required as a prerequisite for appellate review. Now, but that is a separate question which the committee may want to decide.

Now, bear in mind this: If we repeal Rule 101, we are changing the rule in criminal cases by repealing the procedure allowed by that rule in criminal cases. Our original proposal was to extend the criminal rule of reconsideration to civil cases. Now the proposal is to abolish the reconsideration in both civil and criminal cases, and to provide that an assignment in a motion for rehearing be a prerequisite for appellate review in

civil cases.

Now, that's not a prerequisite to an appellate -- to a review by the Court of Criminal Appeals under current rules. We did not change that, so we would have a situation, if this is adopted, where assignment in the motion for -- which it has been heretofore, that assignment in the motion for rehearing is a prerequisite for Supreme Court review but not for review by the Court of Criminal Appeals.

CHAIRMAN SOULES: And this does not change the criminal appellate practice; it changes ours only?

HONORABLE C. A. GUITTARD: It would change the criminal rule but not the practice, because under present rules in a criminal case the Court of Appeals has authority to reconsider its opinion when a petition for discretionary review is filed.

I conferred with Judge Clinton, and he said, well, that was something that the Court of Appeals wanted and the Court of Criminal Appeals would be content to dispense with that, so we will dispense with that in

criminal cases and not propose it in those cases.

CHAIRMAN SOULES: Do you have a comment on that, Judge Clinton?

HONORABLE SAM HOUSTON CLINTON: Well, I'm not sure I caught the drift of everything you were saying. Would Rule 101 remain for criminal cases?

HONORABLE C. A. GUITTARD: No. We propose to repeal it.

HONORABLE SAM HOUSTON CLINTON: Well, then how is the court of appeals going to reconsider it?

HONORABLE C. A. GUITTARD: It doesn't.

HONORABLE SAM HOUSTON CLINTON: Well, I misunderstood that then. I thought you said they had the authority to reconsider.

HONORABLE C. A. GUITTARD: They have it now, but we would repeal it.

HONORABLE SAM HOUSTON CLINTON: This rule was adopted at the instance of essentially chiefs of the courts of appeals in criminal cases. There are two of them here; one is a former. Now, you've heard from one.

Judge, what do you think from the Texarkana court, if I may ask?

CHAIRMAN SOULES: Judge Cornelius.

CHIEF JUSTICE CORNELIUS: I haven't considered this or thought about it until today. It's just been brought to my attention. I had thought -- we had thought that it was a pretty good thing to have.

HONORABLE C. A. GUITTARD: Do you use it?

CHIEF JUSTICE CORNELIUS: We have used it once, I believe.

HONORABLE C. A. GUITTARD: Yeah. That was our experience.

HONORABLE SAM HOUSTON CLINTON: The use is infrequent, but it has served in some of those infrequent cases. It has served the purpose for what it was intended, so long as the court of appeals adheres to the timetable and doesn't try to go outside of it as one or two have done.

I'm neutral about this, and so is the court, I think. As I said, it was put in there at the instance of the chiefs of the

courts of appeals. And if their view is that they don't want it any more, well, I'm perfectly willing to recommend to my court to agree to that, to consent to that. I think the value, frankly, is limited, but it has worked in some cases.

CHAIRMAN SOULES: This doesn't affect the civil practice at all?

HONORABLE C. A. GUITTARD: The proposal, the original proposal would have. But this one does not.

CHAIRMAN SOULES: And Judge Clinton, as I understand it, you would want to have some input from the court of appeals chief before you would --

HONORABLE SAM HOUSTON CLINTON: Well, since we did it at their instance, essentially their instance, yes.

CHAIRMAN SOULES: Okay. So should we pass on this today or wait until we get some input from Judge Clinton as to whether or not his court --

HONORABLE C. A. GUITTARD: Now, are we talking about the Court of Criminal Appeals' input? I think Judge Clinton has

given us that, and I believe he has been speaking for our Court of Criminal Appeals in saying that the Court of Criminal Appeals really doesn't care, because that was a matter that the Court of Criminal Appeals had suggested.

CHAIRMAN SOULES: I think he's saying he cares if they still care.

HONORABLE SAM HOUSTON CLINTON: I do.

HONORABLE C. A. GUITTARD: If the court of appeals still cares?

CHAIRMAN SOULES: Yes, sir.

HONORABLE C. A. GUITTARD: Okay. Then we might want to refer it to the council of chief justices up at the courts of appeals to see whether they want to keep it or not.

CHIEF JUSTICE CORNELIUS: I would like to poll them on that. I know it was wanted initially and I know it has been used some, but I really don't know the sentiment.

HONORABLE C. A. GUITTARD: Well, the reason that it was proposed was that

it was in connection with a proposal to abolish the assignment of error in the motion for rehearing as a prerequisite for review by the Supreme Court. And the justices of the courts of appeals, myself among them, have felt, well, if you're going to adopt that, you ought to give the court of appeals some other opportunity to correct its mistakes.

CHIEF JUSTICE CORNELIUS: You mean a review by the Court of Criminal Appeals, not the Supreme Court?

HONORABLE C. A. GUITTARD: Yes.

CHIEF JUSTICE CORNELIUS: I thought you said the Supreme Court.

HONORABLE C. A. GUITTARD: Well, yeah, it was by the Court of Criminal Appeals as then proposed, but if you -- and this also has to do with if you abolish the prerequisite of an assignment in a motion for rehearing as a prerequisite to the Supreme Court review, you perhaps ought to keep this motion for -- this reconsideration by the court of appeals in order to give the court of appeals the same opportunity to correct its mistakes in civil cases as it has in criminal

cases. But if, as our committee now recommends, the motion for rehearing as a prerequisite for appellate review, further review, is retained, then there's no reason for a reconsideration by the court of appeals.

On the other hand, in the case of the criminal cases, which does not have that prerequisite for further review, it might be a useful thing, so perhaps the best solution is just to leave the rules as they now are, just leave Rule 101 as applying only to criminal cases.

CHAIRMAN SOULES: Do you agree with that, Judge Clinton?

HONORABLE SAM HOUSTON CLINTON: If it's helpful to the court of appeals, I agree with that.

CHIEF JUSTICE CORNELIUS: I do. I would agree to that, and then if we find out later on that it is not really very valuable, then we might propose a change at that time.

CHAIRMAN SOULES: Okay. So do we consider, then, that proposed Rule 101 be

withdrawn?

HONORABLE C. A. GUITTARD: Except for one thing. I think we need to decide whether we think that -- whether this Committee thinks that an assignment in the motion for rehearing ought to be a prerequisite for further review.

CHAIRMAN SOULES: In the civil or criminal?

CHIEF JUSTICE CORNELIUS: In what kind of cases?

HONORABLE C. A. GUITTARD: In civil cases.

CHAIRMAN SOULES: In civil cases.

HONORABLE C. A. GUITTARD: And as we say here, the Section Committee suggests that the Advisory Committee consider eliminating an assignment in the motion for new trial as a prerequisite for Supreme Court review. Our committee is against that, but we think that this Committee ought to face it in that fashion.

CHIEF JUSTICE CORNELIUS: Did you say motion for rehearing?

HONORABLE C. A. GUITTARD: Yes.

CHIEF JUSTICE CORNELIUS: I thought you said motion for new trial.

MR. McMAINS: Well, that's what it says on the paper, too, but it's what --

HONORABLE C. A. GUITTARD: Yes. Rehearing, right.

CHIEF JUSTICE CORNELIUS: Well, I think we ought to keep that rule, that an assignment in a motion for rehearing should be a prerequisite for Supreme Court review.

HONORABLE C. A. GUITTARD: Mr. Chairman, I move to amend as follows: That Rule 101 be retained as it is applying only to criminal cases and that an assignment in the motion for rehearing be continued as a prerequisite for Supreme Court review.

CHAIRMAN SOULES: And as I understand that, that's a recommendation for no change?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. Does anyone disagree with that? Okay. Those who favor no change to those rules that Judge Guittard has discussed here, show by hands.

Seven for no change.

And those who disagree, two.

Okay. Seven to two is the vote for no change.

Okay, sir. Judge Guittard, what's next?

HONORABLE C. A. GUITTARD: The next is in response to some suggestions at the last meeting with respect to the original proceedings, Rule 120, proposed Rule 120 at the bottom of the Page 11.

It was suggested at the last meeting that we ought not to have three separate documents to be filed each time you have an original proceeding. We proposed to -- or actually four separate documents, the motion for leave, the petition, the brief, and a record which would include certified copies of papers upon which the proceeding is based.

We proposed to reduce the filings to a petition which would include a brief and a motion for leave to file, and the record. And we redrafted this rule to apply to all original proceedings including habeas corpus, petition for habeas corpus. And if you've read this proposal, you will see that

references to habeas corpus are made at appropriate places to keep the habeas corpus proceeding essentially as it now is.

There are several perhaps significant changes that are considered. One of them is that the petition should state the grounds of jurisdiction. And as you'll see on Page 12 here, under B, Jurisdiction, cite the particular statute or other authority giving the court jurisdiction, and if a writ of habeas corpus is sought, the petition shall show that the relator is restrained of his or her liberty. No. 3, Inadequacy of Appeal, or rather, the inadequacy of legal rememdy. In other original proceedings, that is, other than habeas corpus, relating to an underlying cause, the petition shall state the facts showing that relator has no adequate remedy by appeal or other legal remedy.

Then the provision about concurrent jurisdiction; that it has to be presented first to the court of appeals.

Then we have a separate section that has to do with facts. This would take the place of the petition as it is distinguished from

the brief in that you state -- the petition shall state concisely and without argument the facts necessary to establish a compelling necessity for and relator's right to the relief sought, including a summary of the relevant proceedings in any underlying cause. All factual statements shall be verified by affidavit made on personal knowledge showing that the affiant is competent to testify to the matters stated.

That adopts the motion for summary judgment that's standard for establishing facts in an original proceeding.

Then we have an argument and authorities section of the petition, in which we must conform to the requirements of Rule 74, and we will probably want to add some provisions there concerning the points or issues as in Rule 74 and so forth.

Now, under section (3), subsection (3) there on Page 13, with respect to the record, it defines what a record should be in the case of an original proceeding so that you can file your record and you needn't file -- put it all in the petition and repeat it all in each

copy of the petition you have to file. The relator shall prepare and file with the petition one copy of a record consisting of a certified or sworn copy of the order complained of and also, if in the Supreme Court, the order or opinion of the court of appeals, if any. The record shall also contain any filed paper material to the relator's claim for relief, together with that portion of the evidence presented in any underlying proceeding in a properly authenticated form necessary to demonstrate the relator's right for relief sought. If a writ of habeas corpus is sought, the record shall contain proof of the restraint of the relator. The record shall not include more of the proceedings than is necessary, and no presumption shall be implied that anything omitted from the record is relevant.

The service requirement is essentially the same as it has been.

Then we -- it's significant as to what you can expect the court to do. If the court is of the tentative opinion that a writ of habeas corpus should be issued, the court will

set the amount of bond to be executed by relator as a condition of the release, order relator released on execution and filing of the bond, and schedule oral argument on the petition. Otherwise, that is, if the court is not of the tentative opinion, the court shall deny the relief sought without further hearing.

In other original proceedings, the court may request that respondents submit a reply to the petition, and in that event, the clerk will so notify all identified parties. If the court is of the tentative opinion that relator is entitled to the relief sought, or that a serious question concerning such relief requires further consideration, the court will schedule oral argument on the petition.

Now, bear in mind, we don't have a separate motion for leave to file. We don't -- since the whole thing has got to be filed, it's filed. There's no use to ask for leave to file if it's already been filed. Otherwise, the petition -- before setting oral argument -- now, here is an innovation; that is, as far as the rule is concerned, this

is what the practice was in our court when I was there. Before setting oral argument, and without the notice provided by paragraph (e), the court may hold an informal conference -- now, this is permissive -- hold an informal conference in person or by telephone, at which the respondents or their counsel are invited by telephone or other expedited communication to state orally any objection to further consideration of the petition and any information that may help the court make an expeditious disposition of the petition, including a convenient time for oral argument.

Then the provision in the Supreme Court -- this is the present rule; that if the action is contrary to a statute or rule and so forth, they don't have to have a hearing on it.

Now, Temporary Relief, subdivision (d), Page 14. This is an important change, I think. If the facts stated in the petition show that relator will be prejudiced unless immediate temporary relief is granted, the court may grant temporary relief without notice to respondents, as the exigencies of

the case require. Now, that's not new. The court may require a bond for the protection of the adverse parties as a condition of temporary relief. That's not new.

Now, here is what's new: Whenever practicable, before granting any immediate relief without the notice provided by subparagraph (e), the court shall hold an informal conference, in person or by telephone, at which the respondents or their counsel are invited by telephone or other expedited communication to state orally any objection to the immediate relief sought and any suggestions concerning the amount of the bond and the time for oral argument. An order granting temporary relief shall be effective until the final decision of the case, unless vacated or modified.

Now, this proposal is based on the practice that we had in our court of not granting temporary relief without giving the other party on rather short notice an opportunity to come in and say why we shouldn't do it. Now, if the other party doesn't respond or can't be there, we go ahead

and grant the temporary relief and we think that the plaintiff is entitled to it -- the petitioner or the relator is entitled to it, but we try. It's wonderfully stimulating to the other parties to give them an opportunity to say we're going to pass on this motion at a certain time for temporary relief unless you come in here and say why we shouldn't. That usually helps the defendant -- the relator make arrangements to come in and say anything he needs to say.

The next significant change is subdivision (g), which I believe has been inserted at Judge Hecht's suggestion, Misleading Statement or Record. If any party makes a factual statement in the petition or answers or files a record that is misleading, either by way of a gross affirmative misstatement or omission of obviously important and material facts, the court may, on motion and notice, hold the offending party or attorney in contempt or impose such other penalty as the court deems appropriate.

Now, frankly, our committee was afraid of this and we weren't prepared to recommend it

without qualification, and we tried to make it as -- we included some vituperative language here such as "grossly affirmative misstatement" or "obviously important and material facts," so as to not make it quite as dangerous as it looks. And maybe in that form it might be appropriate and maybe the committee could -- maybe this Committee could suggest something a little better than that.

So that's essentially our proposal, and we would welcome comments on it.

CHAIRMAN SOULES: Okay. It's about 4:00 o'clock. Let's take a 10-minute stretch and give the court reporter a chance to relax and we'll be back here at five minutes after 4:00. Let's make it quick so we can get done and then we'll get to comments on this.

(At this time there was a recess.)

CHAIRMAN SOULES: Okay. Let's have some discussion on original proceedings, proposed Rule 120. I think maybe let's try to start it this way: Pick any part of it you feel needs discussion, identify it and we'll

talk about it.

Justice Hecht.

JUSTICE HECHT: Okay. I'll address (g). I'll simply say that I have never heard --

CHAIRMAN SOULES: What page is that? Okay. Page 14.

JUSTICE HECHT: I have never heard the comment that we ought to be able to hold counsel in contempt for this but only that we ought to be able to impose the kind of sanctions that are available for delay and brought in bad faith short of sanctions. And in fact, if we could even import those standards from that rule into this one and simply say that if this is -- if from the context of it it's brought in bad faith or something on that order, then sanctions under, I believe it's Rule 174 or 184 or something like that, could be considered.

And the two cases that I'm aware of that it came up in our court were circumstances where it was clear from reading the whole thing through, not from any particular sentence, that there was no credible basis for

this proceeding; that there was no arguable basis in law or fact, whichever one of those standards we want to use. So that was my idea, and not too open-ended, that we might want to restrict the kind of sanctions that the court of appeals can impose as it's done in Rule 184. I'm not sure if that's the right one.

HONORABLE C. A. GUITTARD: Would you have a good faith standard? That's not what we have here.

CHAIRMAN SOULES: No. He said taken for delay or without sufficient cause.

JUSTICE HECHT: Yes. I don't think that delay really works, but some kind of good faith standard was more what I had in mind.

HONORABLE C. A. GUITTARD: Well, we'll be -- of course, we weren't satisfied with this and we just threw it out to get the discussion started and we'll be glad to reconsider that provision, and we would like any help, any suggestion that anybody wants to make.

MR. ORSINGER: Richard

Orsinger. I'd like to respond to Justice Hecht's discussion about using Rule 84. There won't be any damages in a mandamus typically, so you couldn't use that as a measuring of punishment; and the other standard is court costs, and I think you can award 10 times taxable costs, but the taxable costs for an original proceeding -- first of all, I don't know that they are costs. I think it's a deposit for costs and it's like 50 bucks or something like that, so we're talking about a fairly nominal amount of money if we're talking about up to $500. Is that the range we're talking about? And if it is, maybe we just ought to say up to blank dollars, up to a thousand dollars, up to $5,000 or whatever, but I -- you know, in an appeal you've got all the trial court costs, you've got the transcript, you've got the statement of facts. That starts adding up to some money, but those are not taxable costs in a mandamus.

JUSTICE HECHT: And that's a problem. The case we had was a case where there was a motion for expedited consideration

and emergency relief, and the order that was complained of had been superseded in the trial court. Now, the relator's position was that the superseding didn't do enough to change what they were complaining about. But if you don't put it in the papers, I think by any stretch that is materially misleading, and it's that kind of thing that we're trying to discourage.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Additionally, the problem -- and I recognize that we don't have a measuring stick yet, which we probably need to come up with, but more than any other area the mandamus is frequently sought for delay on. I mean, that is the object of the relief, is to postpone proceedings that are ongoing, to seek a stay for some period of time, if not an indefinite period of time, particularly in those counties like in Harris County and some of the other counties, where if you miss your trial date, you're off for another six months or so. And that kind of trash ought to be sanctionable by the court when it's fairly

apparent for that purpose.

CHAIRMAN SOULES: Judge McCown.

HONORABLE SCOTT F. McCOWN: Why is that? I mean, my position is that a mandamus shouldn't stop and doesn't stop the trial proceedings unless the appellate court sends me an order that it does stop it. But I know, you're right, that it's common for judges to hold up or pass trial settings merely because a mandamus leave to file has been granted.

MR. McMAINS: Well, one of the problem is, as Judge Hecht said, you have -- the thing that's there first of all is the mandamus, and the record is what they say, which frequently turns out to be not exactly true or maybe not even anywhere close, but because that's all they've got initially, sometimes the court, particularly if they're going to trial the next day or something, will grant a stay, which they do by telephone sometimes. Your clerk will call the clerk here and say, "Stay this until you hear from us. We've got to look at this mandamus."

And they haven't ruled on the motion for

leave; they're just looking at it and they're wanting a reply. Well, the other side has got to have a little time to reply. Well, by then they've bought one or two weeks frequently.

HONORABLE SCOTT F. McCOWN: And they've knocked themselves off the docket.

MR. McMAINS: And they may have knocked themselves off of somebody's docket and have succeeded in doing that and there really isn't any remedy for that.

JUSTICE HECHT: Or even if they haven't done that, they've distracted opposing counsel when they're picking a jury or on the first day of trial or on the Friday before the trial and there's no way to avoid that either. And that's why part of this would be alleviated by Judge Guittard's suggestion that the courts hold an informal conference on these things, the way trial judges do with emergency matters. And I must say that our court does not do that as a rule and I think it would be better if we did, so I -- that would solve part of it.

But even if you do that, there's still -- it's not enough to find out on an

emergency basis that the thing doesn't have any merit. If somebody is filing it to screw up the works, something bad ought to happen to them besides just losing it.

HONORABLE C. A. GUITTARD: Judge, I had understood that what the Supreme Court was concerned about was a misleading petition that left out some important fact or misled the court in some way, and that's what we addressed.

JUSTICE HECHT: Yes.

HONORABLE C. A. GUITTARD: Now, you're suggesting something else in addition to that, and that is simply if the case is so clearly lacking in merit that it's obvious that it was done not for the purpose of getting the relief asked for but for some ulterior reason. Now, that's another question that we didn't address that perhaps we ought to put in.

The third problem we have is as to the sanction or the penalty. We didn't know what to put in there. We looked at Rule 84, and it talks about so many times they called and so forth. We just didn't think that kind of

penalty was appropriate. And we don't know about contempt. We just put that in to see whether that was something that you would want. If not, we could leave that out and just say impose such penalty as the court deems appropriate or whatever you might say. So we would like some guidance, if you want us to redraft that, as to just what the court might be interested in.

JUSTICE HECHT: Well, I think our Rule 182(b) does not have a limit on the monetary sanctions that can be imposed the way Rule 84 does, and so I think we would be comfortable with that. I'm not sure whether we want to give the courts of appeals that much latitude or not, because if you don't put some parameters on it, then it just means another appeal to us and that's what we're trying to -- it's not that we don't trust the discretion of the court of appeals, we're just trying to cut down on the number of complaints that come to us a second time, so maybe just a dollar maximum there would do it. But I do think it's important to include the other idea of no substantial merit to the petition.

MS. DUNCAN: I think Rule 182(b), as it stands now without any amendments, does contain the same limitations on the court as are contained in Rule 84 as to the courts of appeals.

CHAIRMAN SOULES: I'm sorry, Sarah. I didn't hear that. What did you say?

MS. DUNCAN: Well, I don't have my rules books, for which I apologize, but looking at the cumulative report, Rule 182 on Page 64, Rule 182(a) -- (b), Damages for Delay. Whenever the Supreme Court shall determine an application for writ of error on an original proceeding -- let's see if the cumulative report is correct.

CHAIRMAN SOULES: What page is that on?

MS. DUNCAN: Rule 182(b), whenever the Supreme Court shall determine that application for writ of error has been taken for delay without sufficient cause, then the court may award each prevailing respondent an appropriate amount of damages as against -- well, see, it's not right. Our cumulative report is wrong.

CHAIRMAN SOULES: Well, this is different than the other rule.

MS. DUNCAN: Right. I was looking at the cumulative report, which is wrong.

HONORABLE C. A. GUITTARD: Very good. We've found that out.

JUSTICE HECHT: Well, the addition of the words in 182(b) --

MR. McMAINS: "Of the original proceedings."

JUSTICE HECHT: -- that may take care of the problem.

MR. McMAINS: Yeah.

JUSTICE HECHT: If you can't think of any other problems.

HONORABLE C. A. GUITTARD: Well, are you going to limit the sanction to a money amount?

JUSTICE HECHT: I think for purposes of the rule, yes. The only other sanction that I know of that the court would consider taking would be to refer the lawyer to the Grievance Committee, but we don't do that.

HONORABLE C. A. GUITTARD: You don't put that under the rule.

JUSTICE HECHT: We don't put that under the rule and it doesn't happen very often, but it does happen.

HONORABLE C. A. GUITTARD: Okay. We'll redraft it to adopt that standard and also put in some language about it being so grossly without -- so clearly without merit as to indicate that it was filed in bad faith or something like that.

JUSTICE HECHT: Yes, something like that.

HONORABLE C. A. GUITTARD: Okay.

MR. YELENOSKY: May I ask something?

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: May I ask, Justice Hecht, is the infrequency of the referral to the Grievance Committee because it's ineffective or because it's considered too harsh? I was curious because my first response to the kind of conduct that was being

described would be that that is appropriate for a grievance, and I'm wondering if you put a dollar amount on it whether it becomes something more you add into the calculus of whether it's worth it or not. And if it's a very important case or an expensive case of -- where you've got a thousand-dollar limit, figure that in and it's worth it.

JUSTICE HECHT: I think our view of it is that we only refer somebody to the Grievance Committee when what they have done raises the question about whether they ought to be practicing law. But for someone to file even a mandamus or an original proceeding that arguably doesn't have much merit to it or maybe no merit at all, I don't know if that is grounds to pull their ticket, so I think that's the reason why we would be reluctant to refer that kind of thing to the Grievance Committee, because it's more just misconduct rather than the kind of thing that we would want to see them look at.

MR. YELENOSKY: But the Grievance Committee could impose a penalty that's short of pulling a license, like you

see private and public reprimands all the time. I don't if they're effective, but certainly they have those tools, don't they?

JUSTICE HECHT: I just think that we think it's pretty devastating to have the Supreme Court refer a lawyer to the Grievance Committee.

CHAIRMAN SOULES: I would think that would be pretty devastating.

MR. ORSINGER: And you might be disqualified from reviewing that appeal, too, if you made the referral, and then what would you do.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, I was simply going to say that it may well be that under the canons and whatever is being revised that most things that will be sanctionable probably ought to be referred. And I'm just wondering whether or not the idea of maybe you change a little bit of the attitude about sanctions anyway among people and about doing things thinking that they're not going to get sanctioned very much if any sanctionable

conduct determined by a court automatically went to the Grievance Committee. I mean --

MR. YELENOSKY: Then you wouldn't have the problem of the Supreme Court exercising its discretion.

MR. McMAINS: Yeah. Then you don't have the problem of anybody having to decide that. I mean, granted, you would know it, but on a repeated basis --

HONORABLE SCOTT F. McCOWN: Well, in answer to Steve's question, my experience has been that it's both ineffective and too harsh and thus arbitrary. And it's ineffective when you want it to be effective and it's too harsh when you want it to be less and it rises to the level of arbitrariness and it's a big deal for a judge to make a decision to refer someone to the Grievance Committee. I sure wouldn't want it to be automatic.

CHAIRMAN SOULES: Well, I'm concerned about the standard of bad faith. I mean --

HONORABLE C. A. GUITTARD: Well, why not put --

CHAIRMAN SOULES: If the courts

have any encouragement to use this, either self-generated or encouraged by the rule itself or by parties making motions and deciding to do it, then they're going to have to make a finding that the lawyer or the party is in the court in bad faith. And my concern is that there would be an inclination to do that in circumstances where it really isn't present. I mean, are there some words that we could use? If that's what we want to recommend, then that's what we can do, if it was on a standard of substantially without merit.

I take what I think is a mandamus that has some merit and it may be because maybe it only has some appeal to the appellate court, but the consequence of not taking it is devastating to my client, so I take it up, and then somebody, because it's marginal -- maybe it's marginal in my judgment and not even the real issue in the judgment of the court, and then -- but since it's in my judgment marginal and the consequences are so devastating, as an advocate to the responsibility to my client, I decide to take

the mandamus to the appellate court. And then I'm faced with the finding that I've been in the appellate courts in bad faith. I don't want that. I think there's a real confrontation of loyalties and what you're supposed to do as an advocate if bad faith is going to be the finding of the court that I'm attempting to represent my client in.

MS. DUNCAN: Luke?

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: During our discussions in the subcommittee, we weren't real thrilled with this whole idea, and I think that the reason that we came up with "grossly affirmative misstatement or omission of obviously important and material facts" is because we wanted somebody to have to say specifically what it is that we did wrong, because it's gotten to the point with original proceedings that last week it was a really good one and this week it doesn't look very good at all and you don't know any more. And my own preference is if there is to be such a rule that the standard be pretty straightforward and clear and specific and

determined objectively.

CHAIRMAN SOULES: Well, I'd like to test "grossly affirmative misstatement or omission of obviously important and material facts." I mean, that's obviously going to be -- that requires somebody to make a decision, to make a judgment call, but there's something there you can argue. I could argue against it, if I were charged with it, that it's -- this affirmative statement is not incorrect and here is the basis for it. I don't know.

HONORABLE SCOTT F. McCOWN: Luke, it seems to me that this is a good example of where the effort to address the problem through sanctions is both ineffective and creates problems of its own.

What about a rule that simply says that if you've got a writ of -- an original proceeding where you're asking to delay a trial proceeding that there must be an immediate conference call between the judge of the appellate court, the trial judge, the movant and the respondent to determine whether the proceeding will be delayed. Get all four

of them on the phone and address that problem. The very thought that you're going to be on the phone with an appellate judge, the trial judge and the opposing parties to discuss whether the proceedings should be delayed would either deter those petitions better than theoretical sanctions and allow the appellate court to make a decision.

MS. DUNCAN: But that's only one of the problems we've discussed. You've still got the appellate court's time and the respondent's time, money and energy.

CHAIRMAN SOULES: I think we need to hold that thought, because if we're going to have sanctions at all, it needs to be on some standard. And I think what I heard was Judge Guittard accepting or at least considering a standard of bad faith. And if that's what we want, that's what we get maybe if we recommend it to the Supreme Court. But is that the standard that we want it to be measured by? The problem being that some courts may use that standard lightly and take it lightly in court and be very harmful to a lawyer or his party, or do we want something

that at least has words in there that give some -- I guess it's more objective than these words are, more objective than a subjective standard.

Judge Guittard.

HONORABLE C. A. GUITTARD: Let me throw out this language and see whether this makes some progress. Look at the language of the proposal down to where it says "material facts." If any party makes a factual statement in the petition or answer or files a record that is misleading either by way of gross affirmative statement or omission of obviously important and material facts, or if the petition is so clearly without merit as to indicate that the proceeding was brought in bad faith, the court may, on motion and notice, award an appropriate amount as damages against the relator.

CHAIRMAN SOULES: Instead of bad faith, I'd prefer "brought for delay and without sufficient cause" or "brought for delay or without sufficient cause."

HONORABLE F. SCOTT McCOWN: Could I make a suggestion?

CHAIRMAN SOULES: Now, that's a lighter statement to make.

Judge McCown.

HONORABLE F. SCOTT McCOWN: Why don't we just pick up the words from Rule 13, because it's a Rule 13 problem, and say groundless and brought in bad faith, so you're protected. It has to be both groundless and brought in bad faith or groundless and brought for the purpose of delay, so that you separate out delay as kind of a little different problem than bad faith. And then you've got a Rule 13 standard and a Rule 13 law and you're not creating a new body of law.

HONORABLE C. A. GUITTARD: For the purpose of delaying what? The underlying proceeding? Is that what you're saying?

HONORABLE SCOTT F. McCOWN: Right.

MS. DUNCAN: I thought part of our problem here was that Rule 13 wasn't working very well, is it?

HONORABLE F. SCOTT McCOWN: Well, there's nothing wrong with the standard in Rule 13. I think the standard works pretty

well. It's the mechanics of applying the rule and using sanctions. I think the standard, it seems like, gets at the issue, provides the proper balance and we've already got a body of law on it.

MS. DUNCAN: I thought part of the problem with Rule 13 was that the standard was sufficiently vague; that we're getting sanctions motions all the time in every case.

HONORABLE SCOTT F. McCOWN: I don't think so. I haven't heard that.

CHAIRMAN SOULES: Well, this is going to certainly raise motion practices in the appellate courts, because half the mandamuses are going to receive motions for sanctions.

Bill Dorsaneo.

PROFESSOR DORSANEO: I think the Rule 13 approach is probably better, plus if the other recommendations are accepted such that the paperwork looks more like an appellate brief pointwise and argumentwise, that should remedy the problem substantially as well. I think now somebody thinks they can just put together a mandamus petition without

spending a whole lot of energy to do it, make it almost look like a trial court petition with a few cites in it and formalizing the whole thing more ought to deal with the problem some.

CHAIRMAN SOULES: Well, if it's groundless and in bad faith, I'm more comfortable with that than just bad faith.

JUSTICE HECHT: We have in mind just including mandamus under the existing jurisprudence. I don't think we ought to have a special rule for mandamus. The only special problem with mandamus is that because the relator is responsible in the first instance for saying what the record is, the appellate court is greatly disadvantaged because you can't be sure that's what it really is and the respondent has not had a chance to say what he thinks about that.

But I don't know that that additional problem is such that it requires a different standard. Either the Rule 13 standard or the appellate rule standard would seem to work fine, and with respect to how much more work we're going to get, we don't get that many

motions for sanctions in appeals. In fact, it's fairly rare that we would.

MS. DUNCAN: But I think one of the reasons for that is that we haven't highlighted sanctions in the appellate court to any great degree, or maybe that's not true, but I feel like maybe here we are. And I would prefer to amend 84 and 182 to incorporate original proceedings rather than setting up a whole new subdivision of the original proceeding rule geared towards sanctions.

CHAIRMAN SOULES: So that every -- whatever goes to the appellate court is measured by the same standard.

MR. McMAINS: Well, the only problem is what is -- what are the rememdies that are available under 182? I mean, they don't translate as well.

MS. DUNCAN: Well, what we put in the rules that we initially proposed, 84 and 182, is simply, or in an original proceeding, such other amount as the court deems just.

CHAIRMAN SOULES: Well, I think

Justice Hecht made a good point here, that you've got a problem with the record that's going up in an original proceeding. And the words "misleading either by way of a grossly affirmative misstatement or omission of obviously important and material facts," I could certainly live with that. I don't know why other people can't live with that. If you do that, you've really done a bad thing.

MR. McMAINS: Yes. But that's not all. I mean, one of the problems in the original proceedings area is that in fact they are looked upon as maneuverable tactical weapons for purposes of postponing trial settings or blocking depositions from taking place or blocking further proceedings in the trial court and they are utilized for that purpose.

CHAIRMAN SOULES: Okay. That's the remedy --

MR. McMAINS: Only. No, but the point -- what I'm saying is it's not that there's anything -- that there would necessarily be anything misstated in the facts.

CHAIRMAN SOULES: Okay.

MR. McMAINS: It's that legally there's no basis for filing a mandamus. You're doing it for a totally different reason, and that standard doesn't deal with that issue. Now, the court ought to have the power to remedy that.

Now, if you wanted to enact what Scott was suggesting, in some way you could do the converse; and that is to say that no proceeding shall be stayed on an emergency motion without first arranging a consultation. Now, if you do that, then that requires people to talk the day they do it or something like that. That might fix the problem some, because right now people are figuring that, Well, I'll -- you know, they put all their effort into their emergency motion and very little effort into their other stuff. They're just talking about all the bad things that are going to happen if you don't listen to my mandamus, and then their mandamus looks like a piece of crap when it finally gets there, and so if they have to explain what it is they really are trying to do and

what they are trying to delay, then there are two things that will happen.

Number one, it will crystallize the issue rather quickly for the court. They can rule on the motion for leave probably right then; and number two, they can really crystallize the issue of whether they need to be staying the entire proceedings.

I mean, if it's only one deposition that's going on, why should they stay, you know, the next 10 depositions that have been scheduled. Because the problem -- one of the problems that happens is these emergency motions come out with a hammer and just stop everything without explaining, you know, well, actually that's the only -- you know, what they're doing here is we scheduled this a year ago and now they're undoing this entire schedule. And the court says, "Well, now, why are we doing that? What is it about this motion that will require anything of these others?"

That stuff could be dealt with right then and there. I don't have a problem with that. I don't even have a problem with that in lieu

of sanctions.

I would much rather have that issue up as long as somebody will just be able to tell the court, "This in our judgment is what's going on here," and you look at it from that standpoint. I would be perfectly satisfied from the delay standpoint to leave the sanctions alone but require no emergency motion to stay proceedings be granted without consultation first between the trial judge and the parties.

HONORABLE C. A. GUITTARD: Well, we could do that by referring back to this provision about temporary relief, which is subdivision (d), and make sure that temporary relief includes any stay of an underlying proceeding, and that would take care of that.

MR. McMAINS: But does that require a consultation?

HONORABLE C. A. GUITTARD: Yes.

MS. DUNCAN: But what if you just take out "whenever practicable, before granting any immediate relief"?

HONORABLE C. A. GUITTARD:

Well, that's another question.

CHIEF JUSTICE CORNELIUS: I think we need that in there, because there are times when it would not be practicable.

MR. McMAINS: Well, why don't you say, "Whenever practicable before but under no circumstances immediately" -- I mean, or at least immediately after. In other words, if they have to grant the relief because they've only got 20 minutes, that's one thing, you know, to consider it. But there still should be an opportunity for the court to be aware of what the impact of granting the stay is going to be on the disruption of the proceedings on down the line before they just haul off and say we're not going to look at it again and just to justify it by saying "whenever practicable."

HONORABLE SCOTT F. McCOWN: Well, there's never going to be a time when it wouldn't be practicable to have a telephone conference call before staying a proceeding in a trial court, because there is a point at which the judge and the parties are all there in court waiting to go forward or not and you

just patch in the justice of the court of appeals and you have a conference.

CHAIRMAN SOULES: Okay. We're kind of talking about two different things and let me see if we're -- we want everything involved.

Rusty, you're talking about having a conference between the trial judge and the parties --

MR. McMAINS: No. I'm talking about having it between the appellate court where the mandamus is filed and the trial judge who is a real party in interest -- I mean, he's the respondent, and then the real parties in interest as well.

CHAIRMAN SOULES: Because (d), or whatever this is, on Page 14 does not include the trial judge in the telephone or face-to-face conference. It's the relator and -- as I read this now, let me see, I was looking at it a moment ago.

CHIEF JUSTICE CORNELIUS: I think, Judge McCown, that there are times when it is impracticable to do that. Invariably, these come in at 4:30 Friday afternoon to stay

a proceeding that's going to begin at 9:00 o'clock Monday morning and it's not always possible for the appellate judges to get together at that late hour, or if they can, to find both parties involved in the mandamus. Then comes Monday morning, if you can't do it Friday afternoon. The appellate court is in conference or possibly in another city hearing arguments on transferred cases. I just think there are likely to be a number of occasions where it is not practicable for the court to hold an informal conference immediately.

JUSTICE HECHT: Plus it's a little awkward to confer with the district court. I mean, what are we going to say? "Judge, we're thinking about mandamusing you. What have you got to say about that?"

And he's going to say, "I don't think you should." His position is pretty clear.

MR. McMAINS: You were out of the room a little bit. We were talking about the problem of the use of the emergency relief as a vehicle for infecting delay into the process either of a trial proceeding, some other kind of a proceeding that's ongoing,

depositions and discovery schedules, and all I was suggesting is that before anybody grant -- or what we were suggesting is using this as a vehicle: Before granting an emergency motion to stay that there be a consultation between the court, the parties and whatever.

If there's a bona fide issue that may be relevant to mandamus, maybe the court will want to stay it. Maybe they'll want to have to stay the whole thing. It may be that we're not talking about a trial; we may be talking about depositions or some production which doesn't interfere with the rest of the discovery process. But what people are asking for in their emergency motion for stay frequently and what the court will grant is often just a hammer that says, "Stop the proceedings until we decide this." I mean, that's just silly.

HONORABLE F. SCOTT McCOWN: You don't have to include the trial judge --

MR. McMAINS: No.

HONORABLE SCOTT F. McCOWN: -- if you don't want to. My only question is

whether you're going to delay the proceedings or not, and on that question he may have important information about the docket problems that the parties don't have, but I suppose the respondent can always gather that up to present.

But delay of these cases is a very serious problem for the parties and also for the trial court. And I just don't see that there would hardly be any occasions when the court of appeals couldn't have a justice break free for a 15-minute conference on the phone before stopping a proceeding from moving forward, particularly if it's a trial proceeding. I think that is a reasonable precondition to saying that we're going to stop a trial proceeding.

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest that that be -- that we look at the third sentence of paragraph (d) and insert something there, and I'll read it as inserted: Whenever practicable, before granting any immediate relief, including any stay of proceedings in the trial court, without the notice provided in subparagraph

(e), the court shall hold an informal conference and so forth. Would that do it?

Now, there's another problem --

CHAIRMAN SOULES: I was wrong about whether or not the trial judge has to be included in that, because he is a respondent, so he's in the class of people that are supposed to be contacted.

HONORABLE C. A. GUITTARD: You can invite him but not require him.

MR. McMAINS: The only reason I suggested the trial judge be there is in terms of being effectual for what we really are talking about. You're going to get a different version of the facts between the parties as to what's happened. And you might as well ask the trial judge right there, "Well, what was your ruling or what did you do or what is going on?" I mean, it gives you an opportunity to have --

HONORABLE SCOTT F. McCOWN: As long as the sanctions rule doesn't apply to the trial judge; you know, the gross misstatement of facts.

MR. ORSINGER: And a more

pertinent thing might be what effect would a delay have on the trial of a case or something like that. He could say, "I can reset this for two weeks, no problem." Or he may say, you know, "If you stay it, then I can't try it for six months." And then the appellate court might want to make a decision.

MR. McMAINS: And he may also be able to tell you, and it may be the case, that there are witnesses that are all over the country that are coming in that have been scheduled for six months. This order was decided or this issue was decided six months ago. They waited up until the day before we were set for trial. I mean, these are things that if you don't have anything before the court as a respondent to be able to argue, you're more likely to believe the trial judge than you are the individual, than the attorney. And that's the reason I was suggesting that the trial judge be there. And basically, that was not also ex parte anyway because everybody is in the same ballpark.

MS. DUNCAN: I thought that's what (d) already said.

CHAIRMAN SOULES: What's that, Sarah?

HONORABLE C. A. GUITTARD: That's what (d) already says. It just says that before granting any temporary relief. That would certainly include a stay, but we might say that specifically.

MR. McMAINS: I agree, except the problem is that what we're arguing about, I think, as much as anything is the use of the qualifier "whenever practicable." And the reason -- the problem with that being is that basically what that looks like it says is, well, the court can just do it if it needs to. I mean, there's not any penalty or whatever. My problem with that is --

CHAIRMAN SOULES: This says if you hold that conference, the judge has got to be on the phone or be contacted. That's what it says.

MR. McMAINS: But it says "whenever practicable."

CHAIRMAN SOULES: Whenever practicable, you hold a conference.

HONORABLE C. A. GUITTARD: All

you have to do is invite him.

CHAIRMAN SOULES: You invite him. The judge has to be invited.

MR. McMAINS: Right. You have to invite him; he doesn't have to be there. But all I'm saying is the problem is that if you -- I think we have a dispute as to what "whenever practicable" means.

I mean, in some respects, we would think it's always practicable if you're in an ongoing proceeding, if all the parties and the judge are going to be there until it's stayed, and somebody has got to communicate to them to tell them it's stayed anyway, so you're going to have to communicate with the folks anyway, so one sense of it is what's the use of the words "whenever practicable."

The other one is some courts may well treat that as, well, it isn't practicable because it isn't convenient for us, you know, or whatever, and there isn't any penalty involved. And that's the problem.

The 4:30 filing is exactly what's going on, Judge, on a case that's been set for trial for six months, on an order that was rendered

three months ago and with witnesses and people coming into town from all over the world and somebody files a mandamus with a temporary emergency motion to stay at 4:30 in the afternoon on Friday for the first time. That's exactly the time when we --

CHAIRMAN SOULES: Okay, Rusty. We've got your facts.

MR. McMAINS: The problem is --

CHAIRMAN SOULES: We've got your facts.

CHIEF JUSTICE CORNELIUS: We don't have to have the trial judge to tell us that; the respondents will tell us that. They will point out all of those things. I think that it probably would not be a good idea to mandate that the conference include the trial judge.

HONORABLE C. A. GUITTARD: The conference doesn't have to include anybody. All you have to do is just invite him.

MS. DUNCAN: But the trial judge is a respondent.

HONORABLE C. A. GUITTARD: Well, sure. And he's invited.

JUSTICE HECHT: But it's just not going to work. Just think about it. Just think of the dynamics of it.

You've got an appellate judge on the phone, you've got a district judge on the phone, you've got the real party in interest and the relator. And so the appellate judge says, "What's going on?"

And the trial judge says, "Nothing. And we ought not to be bothering you with it and we're sorry, and you need to just dismiss this like you ought to and we'll be on about our business."

And the relator is going to say what? "Excuse us, your Honor, but we think the trial judge is lying to you," or "he hasn't quite exactly stated the problem." It's just not going to work.

MR. McMAINS: Look, we're not talking about the merits of the mandamus motion; we are talking, you know, not about getting into the merits necessarily. We are talking about is this really something that needs to be dealt with in an emergency fashion.

CHAIRMAN SOULES: No. We're talking about whether the trial judge needs to be involved. That's what we're talking about right now, whether the trial judge needs to be involved.

JUSTICE HECHT: Right. On an emergency basis.

CHAIRMAN SOULES: On an emergency basis. One way to approach this is to require that before temporary relief be granted that the trial judge be asked to stay or deny it, so that the trial judge has been given the opportunity to consider whether or not the proceedings ought to be stayed. And if he denies it, at least he's been asked to do the same thing the appellate court has been asked to do. But we don't take mandamuses without asking the trial court first. We don't seek temporary orders on appeal without asking first in the trial court. It's not a prerequisite, but I don't want to get Judge McCown that mad at me. If I want the appellate court to stay it and I think I've got grounds to do it, I'm going to ask him to do it first before I file my petition up there

to get it reviewed.

And in almost every case that I've ever taken, the trial judge has said, I'll stay this for some period of time, not very long, but some period of time to give the appellate court a chance to look at it, unless it's your facts, which we have. I haven't done one of those, but that's a different circumstance.

HONORABLE SCOTT F. McCOWN: I think Judge Hecht has convinced me that the trial judge is probably best not involved and need not be involved. But I think the place that I'm still hung up on is the words "whenever practicable" because the appellate courts are not going to change.

Appellate courts are primarily used to getting records where the deal is done and deciding whether it's right or wrong. They're not going to change their leisurely attitudes about life for these mandamuses unless they uphold the rule that as a precondition of staying an ongoing proceeding they have to have an emergency conference call to get the facts from both sides. And it's just not going to wind up being practicable unless

they've been told they've got to do it.

Wouldn't you agree that's true, Judge? You've convinced me.

JUSTICE HECHT: Well, I think it needs to be more in the nature of a mandate. The only problem is if you just can't get one and everybody has gone home for the weekend or for the day. I mean, you call our office and there's nobody there.

MR. McMAINS: And again --

CHAIRMAN SOULES: Let me interrupt here for a minute. I'm going to pass around another sign-up list as of 5:00 o'clock just to document the people that are here and those who are not here. We're going to work until 5:30, and I think it's important for this Committee to make a record that we're now down to half the number of people that started and I'd like to identify those that are here. I'll just pass this around again.

HONORABLE C. A. GUITTARD: Will you announce that at the beginning of the meeting hereafter?

CHAIRMAN SOULES: Pardon me?

HONORABLE C. A. GUITTARD: Will

you announce that, that that will be done, at the beginning of the meeting hereafter?

MR. ORSINGER: That's probably a function of the fact that we're debating appellate rules. If we were debating discovery rules, we'd probably have a full room still.

CHAIRMAN SOULES: Well, when we were debating sanctions, we certainly had a full house.

HONORABLE SCOTT F. McCOWN: We should take up discovery now and it will go a lot faster.

CHAIRMAN SOULES: But the Supreme Court has appointed this committee from a cross-section of the bar representing all interests and/or all points of view and from all parts of the state, and now we're down to a few when the Supreme Court intended for all those people to participate in the review of all these rules so it would have input from all corners. And I regret that we do have so many absentees at this point.

I do not think that was the intent of the Supreme Court when they made up the Committee

that we would be down to this few, whether it's for appellate rules or no matter what it is. And I would just like to make a record on that. If the Supreme Court chooses to review it, it may, so we will have a sign-up list as an additional exhibit as of 5:00 o'clock today and as of the time we started this morning at 9:00 o'clock. Okay.

MR. McMAINS: Well, all I was going to say is that you can accommodate the emergency type situation in terms of saying no stay -- making any stay expire after 48 hours, 72 hours, if you want to take it from Thursday to Monday. Most of the things are not going to be screwed up by just one day, but there's no reason why they cannot have that conference at some time over a three- or four-day period. And how you're going to accomplish that in terms of the rule, I don't know. It just seems to me it should expire and they should be entitled to proceed unless there is a further stay granted after the conference is held.

HONORABLE C. A. GUITTARD: Would you like to draft something of that

sort?

MR. McMAINS: I'll take a crack at it.

HONORABLE C. A. GUITTARD: Okay. Well, then let's draft it and consider that at our meeting and we'll want to hear from you on that.

CHAIRMAN SOULES: So we'll have two temporary stays. One can be done on an emergency basis for a short period of time; another one done after the conference. Is that the idea?

MR. McMAINS: Let's say whenever appropriate and whenever practicable, do this; if it's not practicable, then a stay can be granted up to "X" number period of time and until you can satisfy this requirement.

CHAIRMAN SOULES: All right. Let's work on that, Rusty, if you will, and submit it to the subcommittee.

Richard Orsinger.

MR. ORSINGER: I would like to ask as a practical matter who is in the conference on the the appellate court side? Is it just one judge that's in charge of

emergency orders, or do they get three judges together with a speaker phone?

CHAIRMAN SOULES: Whoever the court says.

CHIEF JUSTICE CORNELIUS: I was just going to propose an amendment to take care of that, if I may.

CHAIRMAN SOULES: Yes, please, Judge Cornelius.

CHIEF JUSTICE CORNELIUS: Down here in the sixth line of paragraph (d), by subparagraph (e), the court, through one or more of its justices, shall hold an informal conference, in person or by telephone, with all parties -- I want to add "with all parties" -- at which the respondents or their counsel are invited by telephone.

That would make it clear that the whole court wouldn't have to be in on the conference; one or more justices could. And also that both sides would be involved in the conference.

MR. ORSINGER: If you can't get all parties and if it's a multiparty case, I guess it has to be all parties or then you

can't have the conference?

HONORABLE C. A. GUITTARD: Well, you surely invite them and say, "We're going to pass on it in your absence if you don't come."

CHAIRMAN SOULES: All parties are invited by telephone.

HONORABLE C. A. GUITTARD: That's right.

CHIEF JUSTICE CORNELIUS: I think they have to be given the opportunity to be in on it.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Anne Gardner. I just wanted to make an observation about something that's going on in Tarrant County, and I don't know if the district judges are doing this in other counties or not. But they're immediately taking their copies that they get of motions for leave to file petitions for writ of mandamus to the district attorney's office and are appointing attorneys in the DA's office to represent them, not necessarily all of them maybe, but the last couple of ones I've had. And one of my

partners is married to a woman who is in the appellate section of the DA's office in Tarrant County, and they are doing this.

So if you make the judge, the district judge a respondent, as this amendment will do, I think that more and more of them will start to employ their own counsel in the DA's office, which I think that -- I really think there's something wrong with that. I can't quite figure out what it is yet, but somehow, when I'm the petitioner and I've got the State of Texas on the other side or Tarrant County, I feel like I've been outmanned.

But anyway, I think that's going to be more and more maybe of a coming thing that they'll want to be included in on the telephone conferences, too.

CHAIRMAN SOULES: Well, let's just take a consensus. How many feel that the trial judge should be part of the early conference? Hold up your hand.

How many feel that the trial judge should not be. Hold up your hand.

Okay. Well, the division of the house is not to include -- not to invite the trial

judge to participate in the conference.

HONORABLE C. A. GUITTARD: Well, then we should specifically exclude him.

CHAIRMAN SOULES: That's fine.

HONORABLE C. A. GUITTARD: I'm not sure that's such a good idea.

CHIEF JUSTICE CORNELIUS: I think it ought to be left to the option of the court.

MS. SWEENEY: Which? The appellate court of the trial court?

CHIEF JUSTICE CORNELIUS: The appellate court.

MS. DUNCAN: I mean, you're talking about someone's schedule, it seems to me. Isn't it disruptive when the respondent does not carry the day on the stay and a stay is issued? I mean, it's not just the respondent that that stay order affects.

HONORABLE SCOTT F. McCOWN: Well, I think Judge Guittard's approach works; that a trial judge is not going to get on the phone, it seems to me, unless the appellate court specifically says, "I need you on the phone to verify some fact." So if the court

of appeals justice really needs him, then he would get on the phone; and if they didn't really need him, he wouldn't get on the phone, and we can just leave it. I don't think we need to provide for it one way or the other. I think the practice will just be they don't get on the phone unless they're asked to get on the phone to verify some fact.

CHAIRMAN SOULES: So the rule would say the "parties" as opposed to the "respondents." Okay.

CHIEF JUSTICE CORNELIUS: Well, what I was suggesting is that it should say, "Shall hold an informal conference, in person or by telephone with all parties, at which the respondents are invited to object or make any suggestions." The petitioner or the relator has already made his suggestions in the petition. But I just thought we ought to say the conference would involve all parties, because you wouldn't want to have an ex parte conference.

HONORABLE C. A. GUITTARD: They at least ought to be invited. Now, the trial judge, of course, is a party and that would

include him.

MR. McMAINS: Or the parties to the original proceeding. I mean, we can recast it to say the real parties in interest.

CHIEF JUSTICE CORNELIUS: Real parties in interest, yes.

MR. ORSINGER: That would require a change in the rule because the rule now says that the judge and the real parties in interest are all going to be called respondents.

MR. McMAINS: Oh, that's right.

MR. ORSINGER: That's on Page 12, so we're going to have to go back and redifferentiate the real parties.

MS. DUNCAN: All the rule says is that they shall have the conference and that the trial judge as well the other parties be invited. If the appellate court judge says to the trial judge, "You don't need to be there, but I'm inviting you in compliance with the rule," that's all that needs to happen, it seems to me.

CHAIRMAN SOULES: Well, how many think that it should be mandatory that

the trial judge be invited to participate? Let's have a show of hands. How many people feel that it should be mandatory to invite the trial judge? Four.

How many people feel that it should not be mandatory to invite the trial judge? How many opposed?

MR. ORSINGER: That means it's discretionary with the appellate court?

CHAIRMAN SOULES: Yes, discretionary with the appellate court. The appellate court can do anything -- whatever they want to do. They can either invite him or not invite him.

Four. Well, we're split.

What's your preference on that, Justice Hecht? I think we need to -- what do you think the court's preference would be?

JUSTICE HECHT: I just think that mandamuses are difficult enough without embroiling the district judge in the defense of his order. He's going to defend it. If there is a question about the docket or some aspect of it, I hope that the appellate court would be sensitive to that, but it's going to

be very hard, I think, given the nature of the judiciary, to call up the district judge about an order that he has issued.

I was a district judge, and we don't like getting mandamused, basically. It could even not be something that you're very upset about. It's just something kind of spiritual. You just don't want to be mandamused. That's why several judges in Houston have raised the issue of they don't want to be named, because it goes into case books like they lost.

MR. ORSINGER: Or like they abused their discretion.

JUSTICE HECHT: Of course, there's that feeling. And I just think that as far as collegiality is concerned, it's just not going to work.

CHAIRMAN SOULES: Well, let's be guided by that. Okay?

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I just want

to throw out one other suggestion. Why don't we draw upon Rule 680 on temporary restraining orders. That provides that no TROs be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon. And then roll into that how an appellant court determines that a request for original -- or for relief in an original proceeding is groundless if for delay; and monetary sanctions may be imposed up to blah. Isn't that what we're really kind of saying?

CHAIRMAN SOULES: Rusty, can you put that into what you're considering?

MR. McMAINS: Yeah, I think so.

CHAIRMAN SOULES: There's some language in the rule that begins to speak at least to something like that.

MR. McMAINS: I think it's a question of meshing the two.

CHAIRMAN SOULES: Is there anything else on the original proceedings that

somebody wants to bring up here?

HONORABLE C. A. GUITTARD: I think Judge Cornelius has an amendment we need to consider as to identify what -- how much appellate court you need? Do you need the whole panel that's going to grant the relief, one justice or what?

CHAIRMAN SOULES: Is there any opposition to Judge Cornelius' suggestions that we say that the court, through one or more of its justices or one or more of its members? I didn't hear any objection to that. All right. That should be included.

HONORABLE C. A. GUITTARD: That's fine. I just want to make sure.

Well, in order to effectuate the decision of the committee, would we say the respondents not including the trial judge be invited, or including the trial court judge only at the discretion of --

MR. McMAINS: You'd have to say all respondents other than the trial judge.

MR. ORSINGER: How about all named respondents, because the trial judge is an unnamed respondent.

HONORABLE C. A. GUITTARD: Oh, no, he's named.

MR. ORSINGER: He's named?

HONORABLE C. A. GUITTARD: Yes, sir.

CHIEF JUSTICE CORNELIUS: Is he a party in interest?

MR. McMAINS: No, he's not a real party in interest.

CHIEF JUSTICE CORNELIUS: How about saying "in which all real parties in interest shall be invited"?

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: If you're going to use "real parties in interest," let's go back to Page 12 (iii), Any person whose interest would be affected by the relief sought is a real party in interest and shall be named a respondent. And then we've got real party in interest, don't we?

HONORABLE F. SCOTT McCOWN: Can I ask --

CHAIRMAN SOULES: Just one second, Judge McCown.

Judge Guittard, do you see where I --

HONORABLE C. A. GUITTARD: Yes, I see what you're talking about here. That goes back to the question of who is a party to the original proceeding and who should be served, and this merely addresses the thought that if it affects somebody, they ought to be named.

CHAIRMAN SOULES: Right. And I haven't changed any of that. It just says "is a real party in interest and shall be named a respondent," so it defines real party in interest, so that when we use it later --

MS. DUNCAN: Then you're excluding the relator.

CHAIRMAN SOULES: What?

MS. DUNCAN: If you're talking about --

CHAIRMAN SOULES: Oh, that's right. That's another problem with the way this is written. It looks like the court can hold the conference just with the respondents, and that needs to be added.

HONORABLE C. A. GUITTARD: Yes. Judge Cornelius pointed that out, I think,

correctly.

CHAIRMAN SOULES: So it would say the relator and the real parties in interest? No, that doesn't work either.

MS. DUNCAN: Well, the relator is a real party.

CHIEF JUSTICE CORNELIUS: I would just say all real parties in interest.

CHAIRMAN SOULES: Okay. That's fine. Anything else on original proceedings?

Richard Orsinger.

MR. ORSINGER: I've got several queries that bug me a little bit. On Page 12, (D), Argument and Authorities. The petition will contain a brief and all of the things that have to be in the brief.

What bothers me about that is that there's a lot of stuff in the brief that is not going to fit in the middle of a petition, like a title page and the list of parties and a prayer and maybe a table of authorities and the statement of jurisdiction in the Supreme Court, which you already require independently over here earlier in the petition. And I'm just bothered by saying that the brief that's

contained in the petition has to contain all of the elements of a regular appellate brief.

I don't mind including those things, but just picking that rule up and dropping it in the middle of a petition makes you create a new table of contents and a title page, and if that's not what we mean, maybe we ought to say that -- maybe we ought to write what we want to include. We already have part of it.

HONORABLE C. A. GUITTARD: Does the expression "so far as applicable" help?

MR. ORSINGER: Yeah, it sure does.

MS. DUNCAN: I think what we're trying to get to is that we do want the petition to look like a brief, but the problem is placement. It seems to me that where it says the brief shall conform to the requirements of Rule 74, that should be moved up to petition language under (a)(1) on Page 11.

MR. ORSINGER: Yeah. That makes more sense.

MS. DUNCAN: And it should say the petition shall conform to the requirements

of Rule 74 if in the court of appeals and Rule 131 if in the Supreme Court, so far as applicable, and shall contain the following information.

MR. ORSINGER: The only clarification you need on that is that in the appellate briefs you discourage a general statement of facts and your statements are supposed to be under your individual points, and I don't think that's really practical for a mandamus. You really do need a good, comprehensive statement of facts at the beginning of your mandamus.

MS. DUNCAN: But we've already mandated that the petition, in subsection (c), contain a statement of the facts.

MR. ORSINGER: I like your suggestion. I think it ought to look like an appellant brief, the sole difference being that you have a fairly broad statement of facts in your mandamus brief that you wouldn't have in your appellate brief.

MS. DUNCAN: Well, but we have in subsection (C) a statement of the facts. And when we say that it's going to conform to

Rule 74 or Rule 31 so far as it's applicable, we've just said what your facts have to look like.

MR. ORSINGER: Okay. I agree with that.

PROFESSOR DORSANEO: I had thought, when we circulated this a little bit, that we could do it perhaps like this: (C), which says "Facts" -- I didn't even mention this to the other members of the committee. We could say, you know, factual statement, or if you prefer, statement of facts, to make it clear that we're talking about a specific part of the brief that, you know, would be denominated like that as such.

I drafted a Section (D) that was worded differently from Judge Guittard's that read like this; try this out: Brief of the Argument. The petition shall contain a brief of the argument containing a statement of the issues or points presented as the basis for relief, together with argument and authority supporting relator's right to the relief sought in conformity with the requirements of Rule 74 or Rule 131.

Now, that just merely talks about the brief of the argument, the argument part being in conformity with 74 and 131.

And there's an alternative suggestion that perhaps a separate subsection concerning issues or points should be identified as (D), and then argument and authorities as (E), because really we think of the points as being distinct from the brief of the argument of the points.

MS. DUNCAN: But that's why I think we want to move 74 and 131 to the front, because I think you should not only have to do issues or points but also a table of contents and a table of authority.

CHAIRMAN SOULES: There does seem to be a lot of disagreement about what should be there and maybe where, and the four speakers, I think, are all on the Appellate Rules Subcommittee. Could you all get together, then, and reconcile that?

HONORABLE C. A. GUITTARD: Okay. Incidentally, I concur with what Bill Dorsaneo just recommended.

CHAIRMAN SOULES: You're the

subcommitte chair?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. Then Bill, can you pick up the input from Sarah and Richard and work on how the material should be presented and in what order and what the content of it should be?

Richard, you're on that Appellate Rules Committee too.

MR. ORSINGER: Okay. But can I make another comment?

CHAIRMAN SOULES: Yes, please.

MR. ORSINGER: Okay. Page 13, paragraph (F)(3), Record. The last line about if there's an omission there's no presumption that anything omitted is relevant. I think that that conflicts a little bit with the requirement that you bring up enough of the material or facts to warrant your relief. And I'm concerned about what happens if someone comes forward with no statement of facts from the fact hearing that led to the order that you're targeting. And does this last clause, "no presumption shall be implied that

anything omitted from the record," mean that if a party doesn't bring up a transcription of the testimony that you can't presume that the evidence heard by the judge supports the judge's order?

CHAIRMAN SOULES: Right. And another problem with that is that if there is a hearing and you can't get the court reporter's transcript before you file your petition, then you have to make a presentation to the court of what took place at the hearing. Is that good enough to substitute for the statement of facts? We've all been in situations where we couldn't get the record from the court reporter in time to solve a problem of need for temporary relief.

MR. ORSINGER: See, my thought of this clause is that this is supposed to be kind of like the partial statement of facts rule; that if there's a bunch of irrelevant stuff, then why clutter the record with it. The way it's written, the exception could swallow the requirement that you bring up any facts at all or arguably stuff that's essential like the pleadings or other things.

I think we have to be very careful about how we're dealing with that exception.

CHAIRMAN SOULES: Okay. Can you all reconcile that? The intent of this sentence was probably different from the problem that you see that is there. You can reconcile that in your subcommittee, can you not?

HONORABLE C. A. GUITTARD: In other words --

MR. ORSINGER: What if you bring no statement of facts up from the fact hearing and then you argue, "Hey, you can't assume the facts are adverse to me. This rule right here says no presumption can be applied that anything omitted from the record is relevant."

CHAIRMAN SOULES: But if it's a discovery -- if it's a mandamus on a discovery issue where there has to be a fact hearing in the trial court, and there has been a fact hearing, and then you go up --

HONORABLE C. A. GUITTARD: Well, that doesn't excuse the relator from putting sufficient facts in to justify the

relief.

PROFESSOR DORSANEO: That would be my answer.

MR. ORSINGER: Well, you can do that by affidavit. I can write you an affidavit that will get me a mandamus.

MR. McMAINS: It might be a lie.

MR. ORSINGER: No, it might not be a lie. But it might include facts that were not before the trial court when they ruled.

If you don't see a problem, I'm not going to worry about it, but I see a big problem.

CHAIRMAN SOULES: Okay. I've omitted the statement of facts from the record on appeal, but I've said what it contains.

MR. ORSINGER: Or let's say that all my evidence does not --

CHAIRMAN SOULES: Does what I say count because if the statement of facts is omitted it's not relevant?

CHIEF JUSTICE CORNELIUS: Why don't we just eliminate that last clause of that last sentence, leaving in there that the

record shall not include more of the proceedings than is necessary, period, and not get into that presumption business, because that does seem to me to militate against the rule that the relator has to bring sufficient evidence to show that he's entitled to the relief.

MS. DUNCAN: That's right. But you don't want anybody -- as I understand maybe the origin of this, you don't want anyone arguing that the presumption that generally would apply is applicable in original proceedings.

CHIEF JUSTICE CORNELIUS: And why do you not want them arguing about that?

CHAIRMAN SOULES: Because it doesn't apply.

MS. DUNCAN: Because an original proceeding is a discreet aspect of the larger proceeding; whereas the unlimited appeal --

MR. McMAINS: If you don't have a statement of facts, in a classic sense anyway, I mean, I don't know that it ever applied. I don't know why anybody would ever

think it would apply.

CHAIRMAN SOULES: Has any mandamus case applied the rule, you know, that applies to, like, no evidence, insufficiency of evidence, so that if you don't bring up a full statement of facts, you can't --

MS. DUNCAN: Yes.

MR. McMAINS: Yes.

MR. ORSINGER: Yes. But the Supreme Court says you can get around it by putting in your brief or representing in an oral argument, for example, that there were no facts at the mandamus hearing and therefore the absence of a statement of facts shouldn't be taken against me. They did that in Marcus vs. Widdington or -- you know, the Widdington trial.

PROFESSOR DORSANEO: Barnes.

MR. ORSINGER: Barnes vs. Widdington is an example where the appellate lawyer said the fact that I haven't got a statement of facts shouldn't be taken against me because there were no facts offered. It was just all legal argument. And the Supreme Court said, "Okay, we accept that. It wasn't

contested in oral arguments so we're going to accept there were no facts and we don't need a statement of facts."

There are other cases that have said, "You didn't bring forward the evidence that was before the trial judge and we're going to presume that that supported the trial judge's order."

I think that if I can give you an affidavit to say that these three documents are covered by the attorney-client privilege and I go ahead and attach it to my mandamus application, that if I didn't put that proof on in front of the trial judge, it's not fair for me to bring it to the Supreme Court for the first time. If we're reviewing an order that the trial judge did based on evidence in front of the trial judge, that review should be based on the evidence the judge saw, not affidavits you bring in for the first time on appeal.

MR. McMAINS: I agree with that. I don't think anybody disagrees.

MR. ORSINGER: Well, then, I think this exception here at least arguably

permits that to happen, because if I can bring forward enough evidence to show that I'm entitled to a mandamus based on affidavits I've attached to my petition and I don't bring up the statements of facts, there's no presumption that whatever was put before the judge could have have affected it in any way.

MR. McMAINS: Well, I don't know that you could actually legitimately make an argument for mandamus unless you could take the position that the judge had before him this evidence. Then that would require you to lie, to put in an affidavit which says you had this evidence that was attorney-client privilege. I don't think you can get -- I mean, I think it's necessary in the mandamus that the issue was presented to the judge and he had abused his discretion or whatever in making his determination.

CHAIRMAN SOULES: Somebody propose some language to fix this problem, if you can. If not, then we'll have to send it back to the subcommittee.

PROFESSOR DORSANEO: I think it's sufficient to send it back. My own

attitude would be that by eliminating the presumption you don't create problems, because, let's say you do put in a lot of baloney by affidavit that you swear to that has nothing to do with what happened below. Well, the other side ought to take care of that problem by just --

MR. ORSINGER: -- bringing up the statement of facts.

PROFESSOR DORSANEO: Well, it isn't the opposite presumption, that what happened below was irrelevant; it's just that there's no presumption that what happened below --

MR. McMAINS: -- was relevant.

PROFESSOR DORSANEO: -- contradicts what you say.

CHAIRMAN SOULES: But that's not what this says. I think Richard has raised a good point.

MR. McMAINS: It says there's no presumption that it's relevant. There's no presumption that anything that's missing is relevant.

MS. DUNCAN: Right.

CHAIRMAN SOULES: You all are focusing on two different issues. Richard says, Well, I can take affidavits and not present what happened at the trial court and no one can presume that what happened in the trial court is different from what my affidavits say.

MR. ORSINGER: Or that what happened in the trial court is even relevant.

MR. McMAINS: That's right.

CHAIRMAN SOULES: And then the other one --

PROFESSOR DORSANEO: I so dislike those presumptions that I might have overreacted.

CHAIRMAN SOULES: Okay. So what should we do? Send it back to your committee, Bill, or do you have enough identification of the problem to -- is the problem defined well enough for you to get it on the table? It's being defined by two of your subcommittee members anyway, Sarah and Richard.

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD:

Okay. Anything else?

CHAIRMAN SOULES: Anything else on original proceedings?

Okay. Judge Guittard, I think, then, with that input you can --

HONORABLE C. A. GUITTARD: But is the rest of the rule approved with those qualifications?

CHAIRMAN SOULES: Well, that's what I understand, but we've got a short Committee.

HONORABLE C. A. GUITTARD: Well, that's what I've got to find out.

CHAIRMAN SOULES: With those qualifications, do you move that the balance of the rule be recommended to the Supreme Court for adoption?

HONORABLE C. A. GUITTARD: So moved.

CHAIRMAN SOULES: Is there a second?

MS. DUNCAN: Second.

CHAIRMAN SOULES: Moved by Justice Guittard and seconded by Sarah Duncan. All in favor, show by hands.

Opposed. Okay. That's unanimously recommended for adoption.

It's 5:30. We'll be back in this room at 8:30 tomorrow morning.

(HEARING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 20, 1994, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,190^{00}$.

CHARGED TO: Soules + Wallace.

Given under my hand and seal of office on this the 8th day of June, 1994.

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William F. Wolfe

WILLIAM F. WOLFE, CSR
Certification No. 4696
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