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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 18, 1994

(AFTERNOON SESSION)

VOLUME II

* * * * *

Taken before D'Lois L. Jones,
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 18th day of
November, A.D., 1994, between the hours of
1:00 o'clock p.m. and 5:30 p.m. at the Capitol
Extension, Room E1.002, 1400 North Congress
Avenue, Austin, Texas 78701.

ORIGINAL

SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 18, 1994
(AFTERNOON SESSION)

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NOVEMBER 18, 1994 MEETING

MEMBERS PRESENT:

Alexandra Albright
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Professor Elaine A. Carlson
Professor William Dorsaneo III
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Russell H. McMains
Anne McNamara
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Anthony J. Sadberry
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Honorable Sam Houston Clinton
Honorable William J. Cornelius
W. Kenneth Law
David B. Jackson
Doris Lange
Bonnie Wolbrueck

Also present:

Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt
Denise Smith

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
Ann T. Cochran
Tommy Jacks
Franklin Jones, Jr.
David Keltner
Joseph Latting
Thomas S. Leatherbury
Gilbert I. Low
John Marks, Jr.
Honorable F. Scott McCown
Robert E. Meadows
David L. Perry
Stephen D. Susman

EX OFFICIO MEMBERS ABSENT:

Doyle Curry
Paul N. Gold
Thomas C. Riney
Honorable Paul Heath Till

1 (A recess was had, as reflected
2 in Volume I, and the proceedings continued as
3 follows:)

4 CHAIRMAN SOULES: While we were
5 on the lunch break Sarah reminded me that she
6 had another suggestion about the garnishment
7 availibility that I forgot about whenever I
8 took the consensus, and I do want to get to
9 that before you -- I apologize. She said,
10 "Why didn't you offer up my suggestion?" And
11 I said, "I forgot it." So...

12 MR. SADBERRY: Good reason.

13 CHAIRMAN SOULES: She suggested
14 that garnishment be available from the signing
15 of the judgment but for only such time until
16 the supersedeas bond is posted. In other
17 words, not to delay to the time execution is
18 available, to make it available from the time
19 the judgment is signed, but the posting of the
20 supersedeas would extinguish that proceeding.

21 MS. DUNCAN: That equalizes the
22 treatment of cash and non-cash assets because
23 we now have a procedure to get a lien on
24 non-cash assets from the date of real
25 property, at least from the date the judgment

1 is signed by virtue of, you know, recording
2 your lien and judgment and all that stuff, and
3 this would treat the two types of assets the
4 same.

5 CHAIRMAN SOULES: So I guess we
6 have got three alternatives, hers, which we
7 have just said; from the time of judgment,
8 which got defeated, so I won't repeat that; or
9 from the time execution is available. So
10 let's just vote between hers and the time
11 execution is available. So one is from the
12 time execution is available garnishment would
13 be available. The other is garnishment would
14 be available from the time a judgment is
15 signed, but the posting of a supersedeas bond
16 would stop -- would terminate all garnishment
17 proceedings.

18 MS. DUNCAN: And release the
19 funds.

20 CHAIRMAN SOULES: And release
21 the funds. Let me see a show of hands. How
22 many feel it should be available only when
23 execution is available?

24 How many feel it should be available from
25 the time a judgment is signed but only so long

1 as there is no supersedeas?

2 MS. DUNCAN: Or alternate
3 security.

4 CHAIRMAN SOULES: Or alternate
5 security. Well, nobody voted for the
6 execution time again. So Sarah's idea is the
7 best, and I apologize again.

8 MS. DUNCAN: Just that middle
9 ground of us moderates.

10 CHAIRMAN SOULES: So the timing
11 on the garnishment, the garnishment should be,
12 it's available from the time the judgment is
13 signed but only 'til supersedeas is posted or
14 alternate security under 47 and 48. That's a
15 change.

16 Also, Judge Clinton was invited to and
17 did take a look at Rule 44. What page is that
18 on, Judge?

19 HONORABLE SAM HOUSTON CLINTON:
20 Page 14.

21 CHAIRMAN SOULES: He's now
22 looked at that and has a comment.

23 HONORABLE SAM HOUSTON CLINTON:
24 Well, I wanted to look back first on page 13
25 to Rule 41(b). Rule 41(b), which is a general

1 rule concerning when an appeal is perfected in
2 criminal cases, and it states among other
3 things that the notice of appeal is filed
4 within 30 days or in the case of the State,
5 15.

6 Now, go to 44. 44 amounts to a different
7 schedule of time, and we'll see, maybe
8 something else, for appeals in habeas corpus
9 and bail cases. It reduces the time to 15
10 days. I'm sorry. Ten days. And my concern
11 there is that the practitioners now have
12 worked with the general rule so long that
13 maybe it would be out of abundance of caution
14 and assistance to them that something be
15 flagged over on Rule 40 that would let them
16 know that that's -- Rule 41, excuse me, 41(b)
17 to let them know that that general rule
18 doesn't apply to cases in Rule 44 such as, you
19 know, just put "except as otherwise provides"
20 or something like that so that will flag the
21 idea that they may need to look elsewhere, and
22 Rule 44 would be one place where they need to
23 look.

24 Secondly, in criminal cases the concept
25 has always been that once notice of appeal is

1 properly given a transcript follows to be made
2 up and go to the appellate court regardless of
3 anybody asking for it. That's just the notice
4 of appeal triggers the clerk to put the
5 transcript together and send it up to the
6 court. Now, I'm not including any statement
7 of facts at all in that situation, Rule 44 as
8 originally -- as we had it. It is now being
9 modified. If you will look there, it confirms
10 what I just said.

11 "When notice of appeal from the judgment
12 on" -- so "the transcript and, if requested by
13 the appellant, the statement of facts." Now,
14 the change that is before you in the bottom
15 line there says "the transcript and statement
16 of facts, if requested by the applicant."
17 Now, that offends the practice that we have
18 had forever where the transcript doesn't have
19 to be requested. It's triggered by the notice
20 of appeal, and so I think that if you are
21 going to change the time and the other thing,
22 why, that should not alter the general
23 proposition that we have always had in
24 criminal cases, which is the transcript is
25 triggered by filing the notice of appeal

1 without anybody requesting.

2 And to ease anybody's mind about that,
3 the rule that talks about the transcript --
4 oh, here it is, starting with Rule 50 on page
5 19 it says "all papers" -- and this implicates
6 the change of procedure that you-all have all
7 adopted, and that's fine. "Shall consist of
8 all papers on file including those contained
9 in a transcript and where necessary to appeal
10 the statement of facts." And then the
11 transcript on appeal is provided by Rule 51,
12 and it says, "Unless otherwise designated by
13 the parties in accordance with Rule 50 the
14 transcript on appeal shall include....."

15 All I'm trying to point out is that again
16 re-affirms what I'm saying that the clerk has
17 a duty to prepare a transcript when a notice
18 of appeal is given and include these things
19 that are mandatory whether anybody requests
20 them or not. Now, so again, I think that
21 needs to be squared up with what our present
22 policy of practice is. Now, finally, and this
23 may seem to be nit-picking, but it's really
24 not because we have had two or three cases on
25 this very point lately.

1 Also in Rule 44 under the (a) that is set
2 out there that we now have under
3 consideration, contrary to -- I'm talking now
4 about the date or the occurrence which governs
5 the timetable it follows. In this case under
6 (a) it says "10 days after the judgment or
7 order is entered," and I'm concentrating on
8 the word "entered" right there because in Rule
9 41 the normal appeal starting date is the day
10 after the sentence is imposed or suspended in
11 open court or an appealable order is signed,
12 signed by the trial judge. And you have got
13 another rule here I notice that you are
14 working on.

15 There is a distinction between the judge
16 signing an order and the order being entered,
17 and they do not necessarily occur on the same
18 day. They may -- the entering of the order is
19 a ministerial act by the clerk of the court
20 and can be done at any time. Furthermore, you
21 don't know necessarily when it's done. No
22 party will know when it's done unless they are
23 up there. So that's why we have decided that
24 it is when the judge signs it, and therefore,
25 I'm suggesting that in proposed change of

1 43(a) you take out hither and talk about the
2 same language that is in Rule 41 in (b) in
3 criminal cases.

4 HONORABLE C. A. GUITTARD:

5 Judge, what about the changes in the times?

6 HONORABLE SAM HOUSTON CLINTON:

7 In the times?

8 HONORABLE C. A. GUITTARD:

9 Yeah. Do you have any comment on that?

10 HONORABLE SAM HOUSTON CLINTON:

11 Well, we haven't had any trouble with the
12 30-day rule as it is, and it's just one of
13 those things you decide whether you think
14 there is anything to be gained by it, and I'm
15 not sure frankly there is. You just talk
16 about 20 days.

17 HONORABLE C. A. GUITTARD:

18 Well --

19 HONORABLE SAM HOUSTON CLINTON:

20 Well, you know, stop and think about what you
21 are talking about. You are talking about --
22 mainly you are talking about bail proceedings
23 in which somebody, the accused, has not gotten
24 the relief that he wanted in the trial. His
25 inclination is not to dillydally around

1 The appeal procedure in that, if you notice in
2 the way it was originally, is all sort of
3 ad hoc. "The appellate court may shorten or
4 extend the time for filing the record with
5 reasonable explanation," and set the time for
6 briefs and everything because it recognizes
7 that this is a proceeding that the parties
8 want to get done promptly anyway, and I mean,
9 if it's --

10 JUSTICE CORNELIUS: Well, if
11 you withdraw the amendment, you go back to,
12 what, 15 days?

13 HONORABLE C. A. GUITTARD:
14 Yeah. Well, the amendment has 15 days.

15 JUSTICE CORNELIUS: It's got 10
16 days.

17 No. That's right. It's 15 days.

18 HONORABLE C. A. GUITTARD:
19 Unless somebody has any objection we will just
20 withdraw the amendment, and let the notice of
21 appeal, which is not mentioned up here in the
22 old section, just let it be controlled by
23 41(b) and just restore the original
24 subdivision (a).

25 HONORABLE SAM HOUSTON CLINTON:

1 Just go back to the original 44(a)?

2 HONORABLE C. A. GUITTARD: In
3 one amendment.

4 HONORABLE SAM HOUSTON CLINTON:
5 I think that will be easier for the
6 practitioner.

7 HONORABLE C. A. GUITTARD: All
8 right. Let's make it easy for them.

9 CHAIRMAN SOULES: So there will
10 be no change in 44(a) and the change in
11 41(b) --

12 HONORABLE C. A. GUITTARD: Is
13 already in 44.

14 HONORABLE SAM HOUSTON CLINTON:
15 44.

16 CHAIRMAN SOULES: -- would be
17 just the 30-day rule. So...

18 HONORABLE SAM HOUSTON CLINTON:
19 As I understand it, you are now willing to go
20 back just to leave the 44 alone.

21 HONORABLE C. A. GUITTARD:
22 Right.

23 HONORABLE SAM HOUSTON CLINTON:
24 And not make any change at all --

25 HONORABLE C. A. GUITTARD:

1 Right.

2 HONORABLE SAM HOUSTON CLINTON:
3 -- from the way it is at the present time.

4 PROFESSOR DORSANEO: Judge
5 Clinton, what about the sentence that says,
6 "The appellate court may shorten or extend the
7 time for filing the record if there is a
8 reasonable explanation for the need for such
9 action"? Under the rest of what we are doing
10 or proposing to do now I think it would make
11 sense to have the sentence end before the
12 words "if there is a reasonable explanation"
13 because that will not be something that will
14 be the responsibility of counsel, the filing
15 of the --

16 HONORABLE SAM HOUSTON CLINTON:
17 Oh, yeah.

18 PROFESSOR DORSANEO: The filing
19 of the record. Why not just let the appellate
20 court shorten it or not, period?

21 HONORABLE SAM HOUSTON CLINTON:
22 Well, that's fine.

23 HONORABLE C. A. GUITTARD: So
24 we will amend it then by just deleting that
25 language from the next to last sentence, "if

1 there is a reasonable explanation for the need
2 for such action."

3 CHAIRMAN SOULES: Put the
4 period after "record" and strike the rest of
5 that sentence and then have the last sentence
6 in there as it previously existed before?

7 HONORABLE C. A. GUITTARD:
8 Yeah.

9 CHAIRMAN SOULES: Okay. Any
10 further discussion? Any opposition? Okay.
11 That will stand then as the record reflects.
12 Did you have any further comments, Judge
13 Clinton, on the work we did on the appellate
14 rules this morning that you needed to give us?

15 HONORABLE SAM HOUSTON CLINTON:
16 No. I'm still considering the docketing
17 statement in a criminal case.

18 HONORABLE C. A. GUITTARD:
19 Well, we'll consider that further.

20 HONORABLE SAM HOUSTON CLINTON:
21 And let me see, just one more, I think. Oh,
22 and the Rule 87 was also mentioned. That's on
23 page 39 right at the top. As I said earlier,
24 there were valid reasons, I think, commanded
25 by our clerk when we were -- by our clerk for

1 having that in both instances, and I think
2 they are probably still valid, but I will
3 confer with him if you think that will be
4 helpful to try to explain. My recollection is
5 pretty vague since it's been several years
6 ago.

7 His idea was that the clerk -- that the
8 court, if you tell somebody below or some
9 official below to do something he needed to be
10 advised whether that had been done so he would
11 be able to close up the records and the
12 consideration of that matter. Especially in
13 the last one where the sheriff was to execute
14 a habeas, and he needed to let us know that
15 that had been done because sometimes, although
16 they may notify the clerk of the trial court,
17 we never knew whether our own order had been
18 carried out, and that was the purpose of that,
19 merely to kind of be a windup of that
20 particular proceeding so we would know that
21 what had happened we had ordered happened or
22 the appellate court had ordered happened had
23 been carried out.

24 HONORABLE C. A. GUITTARD: Do
25 you sometimes fail to get these

1 acknowledgements?

2 HONORABLE SAM HOUSTON CLINTON:

3 Oh, absolutely.

4 HONORABLE C. A. GUITTARD: And
5 then have to take further action to enforce
6 the judgment?

7 HONORABLE SAM HOUSTON CLINTON:

8 Well, we don't know -- it's hard to say that
9 we fail because we fail, yes, if they don't do
10 it, but we don't know the reason why they are
11 failing.

12 HONORABLE C. A. GUITTARD: And
13 if you find that out what do you do?

14 HONORABLE SAM HOUSTON CLINTON:
15 I don't know that we have ever found it out.
16 That's why you are putting it in here and
17 saying they are sure going to tell us. We
18 would assume then if they are not telling us,
19 that it hasn't been -- the habeas hasn't been
20 served or whatever.

21 CHAIRMAN SOULES: Does your
22 clerk follow up then on your orders to -- if
23 the clerk sends the message down to the trial
24 court or the sheriff or whoever it is and
25 there is supposed to be an acknowledgement,

1 the acknowledgement does not come. Does your
2 clerk follow up on that --

3 HONORABLE SAM HOUSTON CLINTON:

4 That I will ask him.

5 CHAIRMAN SOULES: Probably so.

6 I'd guess they do.

7 HONORABLE C. A. GUITTARD: And

8 if you find out that --

9 HONORABLE SAM HOUSTON CLINTON:

10 Well, certainly if we don't hear from them in

11 a reasonable period of time I'm sure that he

12 or she would make some effort to find out.

13 HONORABLE C. A. GUITTARD: And

14 if you find out it hasn't been done what does

15 the court do?

16 HONORABLE SAM HOUSTON CLINTON:

17 I don't know. I don't know that we have found

18 out.

19 HONORABLE C. A. GUITTARD: In

20 other words, I'm exploring the question, what

21 function does this report have besides just

22 satisfying the curiosity of the clerk of the

23 Court of Criminal Appeals? Is there something

24 that --

25 HONORABLE SAM HOUSTON CLINTON:

1 Well, excuse me. It doesn't satisfy the
2 curiosity. It tells him that our work is
3 done.

4 JUSTICE CORNELIUS: Your work
5 is done anyway.

6 HONORABLE C. A. GUITTARD:
7 Well, the question is, is your work done as
8 soon as you make your order? Do you have to
9 follow up on your order to see if your order
10 is enforced?

11 HONORABLE SAM HOUSTON CLINTON:
12 Yes. That's what we --

13 HONORABLE C. A. GUITTARD:
14 Ordinarily appellate courts just make the
15 order and send down a mandate and then that
16 closes the file for the purpose of the
17 appellate court, and they don't have to follow
18 up as to whether execution has been levied or
19 anything else.

20 JUSTICE CORNELIUS: Or whether
21 they arrest the defendant.

22 HONORABLE C. A. GUITTARD: Or
23 whether they arrest the defendant. Why is the
24 court concerned about whether its -- at that
25 point as to whether or not its order is

1 enforced?

2 HONORABLE SAM HOUSTON CLINTON:

3 Because we want to know that that particular
4 episode has been wound up. That's why.

5 HONORABLE C. A. GUITTARD:

6 Well, isn't it wound up as soon as you order
7 them to do something?

8 CHAIRMAN SOULES: Let me see if
9 I can articulate this. They have just
10 affirmed a conviction of a criminal, and his
11 court is interested in seeing that that
12 criminal goes to jail. It's a criminal that's
13 out on bail.

14 HONORABLE C. A. GUITTARD:

15 Right.

16 CHAIRMAN SOULES: They want him
17 in jail even if the district attorney doesn't
18 follow up like we might in civil cases in
19 following a mandate.

20 HONORABLE C. A. GUITTARD:

21 Yeah.

22 CHAIRMAN SOULES: They want --
23 if the district attorney doesn't follow up
24 after their mandate issues they want to know
25 it because they are going to get it done.

1 They are going to get him remanded. They
2 don't want to have the press hit and say,
3 "Court never sent mandate after it convicted."
4 Some man's still out, and he's killed somebody
5 else.

6 HONORABLE C. A. GUITTARD: If
7 they are going to do something about it, they
8 need to know.

9 JUSTICE CORNELIUS: That's
10 right.

11 HONORABLE C. A. GUITTARD: If
12 it's just a matter of closing the files they
13 can close the files without knowing that just
14 when they issue the order.

15 JUSTICE CORNELIUS: I think
16 their job is over when they issue the mandate.

17 HONORABLE SAM HOUSTON CLINTON:
18 It's an effort to induce, which maybe would be
19 a little too weak, but to command that that's
20 exactly what the sheriff do, and we want to
21 know that he's done it. Because as you may
22 know or may not know, in some of these
23 counties the sheriffs don't pay any more
24 attention to the mandates, and someone's got
25 to be sent to the penitentiary because they

1 would like to have him or her around there
2 doing whatever they are doing inside the jail,
3 and we want our mandate, and we think the
4 appellate court mandate ought to be carried
5 out in accordance with its terms. Okay.

6 CHAIRMAN SOULES: So given that
7 input from the Court of Criminal Appeals why
8 don't we just withdraw this?

9 HONORABLE C. A. GUITTARD:
10 Well, we can or we can --

11 CHAIRMAN SOULES: Does it need
12 any further amendment?

13 HONORABLE C. A. GUITTARD: We
14 can make that apply only to the Court of
15 Criminal Appeals, if the Court of Criminal
16 Appeals likes that. Then it may be that the
17 courts are not interested in it and don't
18 usually expect it. Maybe we can just apply it
19 to the Court of Criminal Appeals. I think
20 perhaps we might get Judge Cornelius to sit
21 with his colleagues on the court of appeals
22 and see whether they have any opinion.

23 JUSTICE CORNELIUS: Well, I can
24 do that. I really don't think that it's of
25 sufficient significance to even fool with. I

1 mean, I think I can safely say that the courts
2 of appeals don't care. Once we issue our
3 mandate the case is over as far as we are
4 concerned. We don't follow through to see
5 whether anybody levies execution on the
6 judgment or arrests the defendant or anything
7 else. The case is over as far as we are
8 concerned.

9 HONORABLE C. A. GUITTARD:

10 Okay.

11 JUSTICE CORNELIUS: But I don't
12 know whether it's worth having two rules on
13 it, though.

14 HONORABLE SAM HOUSTON CLINTON:
15 Judge, now, this is only when the defendant is
16 on bail. That's all we're talking about.

17 HONORABLE C. A. GUITTARD:

18 Yeah.

19 HONORABLE SAM HOUSTON CLINTON:
20 We want to know that he is confined to carry
21 out the judgment of the appellate court and if
22 it is in the right court, whichever. That's
23 all.

24 JUSTICE CORNELIUS: I would
25 suggest we just withdraw it.

1 HONORABLE C. A. GUITTARD:
2 Let's just withdraw it. I was the one that
3 suggested it, but if the Court of Criminal
4 Appeals -- let's just follow the Court of
5 Criminal Appeals and leave it unmentioned.

6 CHAIRMAN SOULES: Any
7 opposition? It's done then. 87, was it (1)?

8 HONORABLE C. A. GUITTARD: One.

9 CHAIRMAN SOULES: 87 on page
10 39. 87(b)(1) will be withdrawn.

11 HONORABLE C. A. GUITTARD:

12 Okay.

13 CHAIRMAN SOULES: Okay. So we
14 were up to something that was going to delay
15 us 'til 3:00 o'clock.

16 MS. DUNCAN: Electronic
17 recording.

18 HONORABLE C. A. GUITTARD:
19 That's the electronic recording thing. Are
20 you ready for that?

21 CHAIRMAN SOULES: Yes, sir.

22 HONORABLE C. A. GUITTARD: All
23 right. It appears in the cumulative report
24 page 64 and other rules following, but this is
25 the gist of it. In our last meeting in

1 September we presented this proposal to the
2 committee so as recognizing that there are
3 certain courts that use electronic recordings
4 and are authorized by the Supreme Court to use
5 such recordings and to have them have
6 electronically recorded statement of facts
7 instead of a stenographically recorded
8 statement of facts, and without recommending
9 whether that should be done or not recognizing
10 that it is being done, we propose this rule to
11 regularize the practice and avoid any pitfalls
12 that the special rules might have when
13 considered in connection with the general
14 rules, so to put these provisions in the
15 general rules rather than in specific orders.

16 The committee at its last meeting had a
17 number of concerns and suggestions and sent it
18 back to us to revise the rule in the light
19 of -- the proposal in light of what the
20 concerns of the committee expressed, and our
21 committee has done that, and this Rule 64 that
22 you have before you is the result of that
23 revision.

24 CHAIRMAN SOULES: Where is
25 that, judge?

1 HONORABLE C. A. GUITTARD: Page
2 64. First of all, the very first paragraph,
3 unnumbered paragraph there, there was an
4 objection at the last meeting --

5 MR. GALLAGHER: Excuse me,
6 Judge. Mike Gallagher. I'm sorry. Are you
7 starting on page 62 to discuss this, or are
8 you going --

9 HONORABLE C. A. GUITTARD: 64.
10 JUSTICE CORNELIUS: Page 62 is
11 the --

12 HONORABLE SCOTT BRISTER: Rule
13 264b.

14 CHAIRMAN SOULES: We are on
15 Rule 264b, page 64. It's about in the middle
16 of page 64.

17 HONORABLE C. A. GUITTARD: But
18 if you have an earlier version of these rules,
19 then it might be -- it would be on page 62 of
20 that version. Okay. The first concern that
21 we had was that the proposal as originally
22 written said, "Any court may use an electronic
23 recording," and the committee thought that was
24 a little too broad, that if the Supreme Court
25 or Court of Criminal Appeals authorizes the

1 court to use it, then that might be acceptable
2 but not just let any court do it depending on
3 what the judge wanted to do. So we have
4 revised that first paragraph to say, "Any
5 court authorized by the Supreme Court in civil
6 cases or the Court of Criminal Appeals in
7 criminal cases to make an electronic recording
8 in lieu of a stenographic record of its
9 proceedings shall be governed by the following
10 requirements."

11 There was also a concern at the last
12 meeting as to what equipment could be used and
13 wanted some provision to specify the
14 capacities of the equipment, and we have
15 attempted to do that. So that's subdivision
16 (1). "Any equipment used for electronic
17 recording of court proceedings shall use
18 separate microphones for the witness, the
19 examining attorney, all cross-examining
20 attorneys, and the judge. The equipment shall
21 be adequate to make a clear, distinct,
22 separate and transcribable recording of the
23 voice of each person to whom a microphone is
24 assigned, even when more than one person
25 speaks at the same time." I understand that

1 equipment does have that capacity. I mean,
2 that kind of equipment is available. "The
3 equipment shall have a backup capacity so that
4 if any component fails to function properly,
5 the trial may proceed without substantial
6 interruption."

7 The next provision has to do with the
8 recorder. "To operate the electronic
9 recording equipment the judge shall appoint
10 one or more recorders who shall be certified
11 to be a record -- certified to record court
12 proceedings by any official authorized to
13 certify the qualifications of electronic
14 recorders of court proceedings, if there is
15 such an agency." So it was raised the last
16 time that there isn't such an agency, and we
17 recognize that, and if there isn't such
18 agency, you won't have to be certified, but if
19 there is, this rule -- or if one is
20 constituted, that this rule would take care of
21 that and require they be certified.

22 "(3), Responsibility of the Judge. During
23 any court proceeding being recorded by
24 electronic equipment in lieu of stenographic
25 means the judge shall make sure that each

1 person being recorded is speaking so that his
2 or her voice can be properly recorded." Now,
3 the question there is should that be the
4 responsibility of the judge. And this next --
5 a related question next.

6 MR. GALLAGHER: Is it time for
7 questions yet, or do you want to go through
8 the whole thing, Luke?

9 CHAIRMAN SOULES: We're going
10 to go through the whole thing.

11 MR. GALLAGHER: Okay.

12 HONORABLE C. A. GUITTARD: Next
13 with respect to certificate of judge.

14 "Electronically recorded statement of facts
15 filed in an appellate court shall be governed
16 by a certificate of the judge that heard the
17 case stating that the equipment used applied
18 to paragraph (1), that it was operated
19 throughout the proceeding by a recorder
20 qualified as required in paragraph (2), and
21 that the judge is satisfied that the recording
22 is a clear, distinct, transcribable, and
23 complete recording of the proceeding that it
24 purports to include." Now, there is some
25 question as to whether the judge ought to have

1 that responsibility, particularly that in the
2 subdivision (2) there.

3 We have added some subdivision (5). "Any
4 party may, at that party's own expense, hire a
5 certified court reporter to make a
6 stenographic record of the trial or hearing.
7 The court may use the stenographic record to
8 resolve any claim that the official
9 (electronic) record is incomplete or
10 inaccurate under applicable rules." And that,
11 I believe, is the extent of the electronic
12 recording rule.

13 CHAIRMAN SOULES: No. 6?

14 HONORABLE C. A. GUITTARD: I've
15 lost my place here.

16 Okay. And this also is in response to
17 the comments of the committee at its last
18 meeting. "Effect of the Rule. This rule does
19 not in itself authorize any court to record
20 its proceedings by electronic means --
21 electronic equipment in lieu of stenographic
22 means. This rule supersedes all special
23 orders of the Supreme Court prescribing rules
24 for specified courts to use such equipment,
25 except to the extent that such orders

1 authorize the use of electronic recording
2 equipment in the specified courts. The
3 Supreme Court may from time to time authorize
4 other courts to record their proceedings by
5 electronic equipment in accordance with this
6 rule and may withdraw such authority from any
7 or all courts previously authorized."

8 Mr. Chairman, to get this rule before the
9 committee I move the adoption or the approval
10 of this recommendation.

11 CHAIRMAN SOULES: Okay. It's
12 been moved by the subcommittee. Mike, did you
13 want to, again, comment on it? Mike
14 Gallagher.

15 MR. GALLAGHER: Yes.

16 CHAIRMAN SOULES: Okay. Go
17 ahead.

18 MR. GALLAGHER: I have not
19 tried a case in Judge Brister's court, and
20 it's my understanding that maybe this system
21 is being employed in Judge Brister's court,
22 and when you grow up under a system there is a
23 great deal of inertia when a change is
24 offered, and you have a lot of questions, and
25 because you feel secure in the fact that the

1 system that is currently being employed
2 guarantees, at least to the satisfaction of
3 most parties, an accurate and complete record
4 at all times, and one of the concerns that I
5 had is with regard to, for instance, section
6 (3), the responsibility of the judge. How can
7 the equipment or can the equipment be designed
8 in such a manner as to make certain that
9 conferences at the bench in a circumstance in
10 which a jury is not excused are recorded so
11 that the objection of a party to evidence is
12 preserved and the ruling of the court stays
13 on -- is of record.

14 A favorite trick, I know of some lawyers,
15 is to go to the bench and get a ruling and
16 hopefully the court reporter doesn't hear it.
17 While I don't approve of that kind of
18 circumstance or situation or conduct, I can
19 readily foresee in a situation like this where
20 certain problems arise, and I don't have
21 sufficient experience in this area to do
22 anything but to raise questions. I don't have
23 any answers, and all I would like to know,
24 Judge, is what did the committee do in order
25 to determine that the trial court would at all

1 times be able to ascertain that each person is
2 being properly recorded?

3 HONORABLE C. A. GUITTARD:

4 Well, I don't know what we could do other than
5 what we have done here in subdivision (3).

6 "The judge shall make sure that each person
7 being recorded is speaking so his voice can be
8 properly recorded" and to make sure that it's
9 operated throughout the proceedings so as to
10 do that. Now, I'd like Judge Brister to
11 comment on how he handles that matter in
12 his -- that problem in his courtroom.

13 HONORABLE SCOTT BRISTER: Sure.

14 I think I'm opposed to almost everything in
15 this rule. A few exceptions. I don't oppose,
16 you know, the power of the Supreme Court or
17 the Court of Criminal Appeals to say whether
18 you can or can't use it. Do you want me to go
19 directly into No. 3, or you want me to take
20 them up one by one?

21 MR. GALLAGHER: I have got more
22 questions than --

23 HONORABLE SCOTT BRISTER: I'm
24 sorry.

25 HONORABLE C. A. GUITTARD: Take

1 them up one by one if you would like and tell
2 us what --

3 HONORABLE SCOTT BRISTER: Well,
4 I don't want to butt in on Mike if you're --

5 CHAIRMAN SOULES: Judge, you
6 have got the floor. Tell us --

7 MR. GALLAGHER: Judge, I yield
8 to most judges.

9 HONORABLE SCOTT BRISTER: Oh,
10 well.

11 HONORABLE C. A. GUITTARD: And
12 tell us what alternatives you would suggest.

13 HONORABLE SCOTT BRISTER: Sure.
14 Well, over -- I will go through it point by
15 point. The main deal is you have, remember, a
16 court recorder who is being paid a salary to
17 do a job, which is to get a good record. You
18 don't have requirements like this on court
19 reporters because you count on the court
20 reporter to do their job, and if the court
21 reporter doesn't, then the -- you expect the
22 court reporter will be fired, and I'm not sure
23 why the same would not apply -- would not
24 assume that I would do the same with my court
25 recorder. If my court recorder is making bad

1 records, I'm having to try cases several times
2 because there is no record, I will remind you
3 under Rule TRAP 50, I believe it is, if there
4 is a significant portion, under your proposed
5 amendment, of the transcript that is -- a
6 significant portion of the proceedings are
7 inaudible. This is TRAP 50(e) was your
8 committee's proposal, then you are entitled to
9 a new trial.

10 And, you know, I have not had it arise,
11 but I can understand how once or twice if
12 something messed up on the machine or my
13 recorder and I had to retry the case, to err
14 is human, et cetera, but by the third time I'm
15 getting a new recorder. She or he is looking
16 for a job. So that applies in this sense.

17 First on equipment, No. 1, the two
18 primary court recording systems on the market
19 are four-track systems. If you require
20 separate microphones for the witness, the
21 attorney, the judge, and all cross-examining
22 attorneys there will be no equipment that can
23 do that.

24 HONORABLE C. A. GUITTARD: I
25 thought there was eight-channel equipment.

1 HONORABLE SCOTT BRISTER: There
2 may be. The main ones on the system, a Sony
3 and the other one I can't remember right now,
4 but it's -- Lanier are four-track, and so
5 those are the main folks in the market. You
6 just can't use them.

7 CHAIRMAN SOULES: Why can't you
8 use two? Use two.

9 HONORABLE SCOTT BRISTER: Two
10 systems?

11 CHAIRMAN SOULES: Two
12 four-tracks.

13 HONORABLE SCOTT BRISTER: It's
14 twice as expensive. I mean, the main reason
15 to go to this is it's cheaper, and that's
16 besides the fact that you get wires all over
17 the courtroom and the place looks crowded, and
18 in any event, I mean, I have tried
19 200-some-odd jury trials with it. With a
20 four-track system it's no problem. Of course,
21 the vast majority of cases you just have one
22 or maybe two cross-examining attorneys, and
23 they can put the microphone in between them or
24 pass it back and forth, whatever they need to
25 do. It's not that complicated.

1 The backup capacity, if that means a
2 backup, an extra system, I don't have any
3 problem with that, though, again, we have used
4 our system for just short of four years and
5 200 trials and never had a problem with it.
6 If it means equipment that has something else,
7 it's not like the shuttle where you have got a
8 backup system within the machine that takes
9 over if something else breaks down. It's just
10 that if it means the machine doesn't work, you
11 have got another machine, I don't have any
12 problem with that.

13 No. 2, this -- one of the other
14 advantages of electronic recording is it is so
15 simple a junior high school student could
16 operate it. Now, I'm not advocating that
17 junior high school students do operate it, but
18 my clerk's job is more complicated and takes
19 more training than my court recorder's job,
20 and I see no reason to require licenses for
21 court clerks. It would just make it more
22 expensive as all licensing systems do,
23 establish a monopoly to whatever degree that
24 ends up happening, and it is literally a
25 matter of training somebody for two hours to

1 do the system. Why you would want to add or
2 suggest a licensing requirement to that, I
3 don't know.

4 Again, if the problem -- if the concern
5 is getting a good record, that is going to be
6 handled by what happens -- what you do if you
7 don't get a good record and the natural
8 results from that. (3), the only way I can be
9 sure that each person is being recorded is if
10 I have earphones from the machine. The
11 machine has an earphone system, and what the
12 court recorder does is sits there during the
13 trial listening to the proceedings through the
14 earphone system, and if somebody's voice is
15 not picked up, she in my court says, "Move
16 closer to the mike. Put the mike on. Speak
17 up, please."

18 I would have to do the same thing, which
19 is duplicating her job, plus feeling a little
20 silly sitting up there looking like I'm
21 listening to a football game during the trial,
22 listening to the earphones, and second of all,
23 what am I paying her for? If she's not doing
24 that, the same as the court reporter. If the
25 court reporter misses something, it is the

1 court reporter's job to say "I missed it." I
2 don't know whether the court reporter misses
3 something or not. That's his or her job and
4 responsibility. That's what they are paid to
5 do. I expect them to do it.

6 Same thing on the certificate of the
7 judge. There is no way I can do that unless I
8 sit down and listen and, you know, unless I
9 test the machine everyday, unless I
10 spot-check, I suppose would be the least
11 onerous way, every recording that's made.
12 Again, I am not paid to do that. That's what
13 I'm paying the court reporter -- the county is
14 paying the court recorder to do, and no reason
15 the judge should be doing that. If the court
16 recorder doesn't do that, if the record is no
17 good, then the court recorder needs to be
18 fired and take care of it that way.

19 I don't have any problem with (5). If
20 people want to bring in -- if people feel more
21 comfortable having a court reporter as a
22 backup, that's fine. (6), I think is
23 superfluous. One, the first sentence of (6)
24 you have already said in the introduction.

25 HONORABLE C. A. GUITTARD:

1 Right.

2 HONORABLE SCOTT BRISTER: The
3 second sentence of (6), obviously if the
4 Supreme Court passes this rule then it will
5 supersede previous rules, and the third
6 sentence to say the Supreme Court can
7 authorize it or can refuse to authorize
8 anybody to do it, I mean, you know, of course
9 they can do anything they want. So as
10 somebody who believes that the rules should
11 have -- if you can say the same thing in more
12 words or less words, less words is better, and
13 (6) doesn't add anything. That's it on 264b.
14 I have a few comments on 264a, but --

15 HONORABLE C. A. GUITTARD:
16 Well, let me put this question to you, Judge
17 Brister, since you weren't here in September,
18 were you?

19 HONORABLE SCOTT BRISTER: Yeah.
20 No, I was not.

21 HONORABLE C. A. GUITTARD: We
22 had originally proposed this rule
23 substantially in the language of these special
24 orders that the Supreme Court has been
25 issuing, and we added this language because of

1 the comments and concerns of this committee.
2 Now, my question to you is, if we go back to
3 the language that are in these special orders,
4 do you think that would be an acceptable
5 solution to the problem?

6 HONORABLE SCOTT BRISTER: Well,
7 it's been a while since I've looked back at
8 the Supreme Court's special order. I think
9 most of that is the stuff that's in 264a, the
10 procedures for the log and such as that. I
11 know there is no certificate by the judge or
12 anything like that in the Supreme Court
13 orders.

14 HONORABLE C. A. GUITTARD:
15 Right.

16 HONORABLE SCOTT BRISTER: So I
17 don't -- on the 264a requirements I think most
18 of those are fine. I'm not sure what part of
19 this is -- No. 1 is covered in the Supreme
20 Court orders. If it is, in any event, you
21 know, as I said, the guarantee for a good
22 record is people complain about the record,
23 and if the record is gone, there is problems
24 with the record, then it is to be expected the
25 judge has every incentive to make sure that

1 that stops, whether firing the court reporter
2 or recorder or stopping court recording and
3 going back to a court reporter, whatever you
4 need to do, because there is just no incentive
5 for a judge to have to try cases over and over
6 again because you miss something, and I am
7 unclear why that needs to be put into a rule
8 to mandate that judges do that if it's nothing
9 but natural that they would.

10 PROFESSOR DORSANEO: Luke?

11 CHAIRMAN SOULES: Bill

12 Dorsaneo.

13 PROFESSOR DORSANEO: I'm
14 recalling what was said at the last meeting
15 and listening to what you have just said,
16 Judge Brister. Would there be a way to put
17 something in there about the equipment to
18 protect the parties from -- well, some high
19 school student with a new Sony recorder that
20 costs about \$20 from being authorized by
21 someone? I think at the last meeting Buddy
22 Lowe was talking about some judge who's
23 decided that his nephew has a new Sony, and
24 that's how that got in there. Maybe we did
25 too much in terms of what's available and what

1 you use and are planning to continue on using.
2 Obviously you wouldn't use, you know, the kind
3 of thing that somebody carries around when
4 they go jogging. I can see on the certificate
5 of the judge that that probably is -- would
6 just be a formality, and that doesn't make any
7 sense.

8 HONORABLE SCOTT BRISTER:
9 Doesn't 50(e) take care of that concern,
10 though?

11 PROFESSOR DORSANEO: It might,
12 but it takes care of it kind of after the
13 fact, backwards. I would like to see somebody
14 never have to worry about 50(e) because that's
15 something that's not going to happen because
16 the precautions are taken at the front end.
17 As far as --

18 HONORABLE SCOTT BRISTER: If
19 you have a chimpanzee recording the
20 proceedings and there is nothing wrong with
21 the record, what's the problem?

22 PROFESSOR DORSANEO: Well,
23 nothing, but these things are for that
24 purpose. Like the recorder, why not have the
25 recorder be --

1 CHAIRMAN SOULES: Licensed.

2 PROFESSOR DORSANEO: Or
3 certified?

4 HONORABLE SCOTT BRISTER:

5 Because it costs money. I mean, that's --
6 licensing systems cost money. That's why cab
7 license, that's why, you know --

8 HONORABLE C. A. GUITTARD: We
9 are not proposing a licensing system. We are
10 just proposing that if somebody wants to
11 license it, they have got to comply with it
12 just like a court reporter does. So under the
13 present system if you don't need to license
14 those people, you won't have an agency and
15 there won't be any problem.

16 PROFESSOR DORSANEO: And the
17 argument, I thought of George Jetson when I
18 heard you talk about, you know, well, anybody
19 can do this. It's just going to work and
20 pushing a button, but even the George Jetson
21 kind of circumstance ought to have some
22 formality to it because this is important. I
23 mean, it's important that the recording be
24 accurate, and people need to be responsible.

25 HONORABLE SCOTT BRISTER:

1 Absolutely.

2 PROFESSOR DORSANEO: And when
3 you're -- the responsibility of the judge, I
4 don't know whether you have to have earphones
5 on to fulfill this responsibility. Maybe it's
6 some change in the wording, but as far as the
7 certificate, you convinced me. As far as the
8 equipment, you convinced me that that's too
9 onerous, but on the other two I'm not
10 convinced that 50(e) takes care of it.

11 CHAIRMAN SOULES: Well, 50(e)
12 puts the parties to another trial, puts the
13 parties to a new trial. Very, very expensive.

14 HONORABLE C. A. GUITTARD:
15 Wouldn't that be true in any case where the
16 transcription is not adequate?

17 CHAIRMAN SOULES: Yes.

18 HONORABLE C. A. GUITTARD: That
19 just spells out the law as it would be anyway,
20 doesn't it?

21 CHAIRMAN SOULES: That's right,
22 but there are other things that play that
23 David raised last time. I want to get his
24 input here in just a moment. Court reporters
25 are trained. They have to pass education

1 requirements. They have to pass testing.
2 They have to be licensed, and they have some
3 official connection with the court. I don't
4 know what it is, but they are an officer of
5 the court. I don't know if a recorder is an
6 officer of the court.

7 HONORABLE SCOTT BRISTER: Oh,
8 sure.

9 CHAIRMAN SOULES: But there are
10 some background things built into the court
11 reporting process that I haven't seen built
12 into this just inherently, and I think that's
13 what our concern is. The inherent built-in
14 qualities of a court reported record may not
15 be in a court recorded record, and that's what
16 I think our concern is, a lot of our concern
17 is. Also, David raised an issue that in the
18 jurisdictions where recordings are used
19 extensively they have had to change the test
20 as to the accuracy of the transcript to be a
21 reasonable representation of the transcript as
22 opposed to --

23 MR. JACKSON: Faithful
24 representation.

25 CHAIRMAN SOULES: A faithful

1 representation as opposed to an accurate
2 recording of the transcript, but why don't you
3 give us -- you have been involved in this for
4 some time, David, and why don't you give us
5 your comments?

6 MR. JACKSON: I think the
7 biggest point we are missing here, you know,
8 last time we got into the discussion about
9 works just fine, and there is a big definition
10 difference in works just fine. One, you go to
11 the courthouse, you try your case, and you
12 lose. You get handed a box of tapes. Now,
13 those tapes may be perfectly accurate, but if
14 you are going to have to spend lawyer time
15 digging through those tapes to find what you
16 need to prepare your appeal, or worse, another
17 lawyer is going to handle the appeal, he has
18 to sit and listen to all of those tapes. It's
19 not nearly as cost-effective as if you had a
20 certified shorthand reporter there who's doing
21 95 percent of the work while she's sitting
22 there writing now. If we had a screen hooked
23 to her computer and hooked to the machine, you
24 could see 95 percent of the text coming up in
25 English now. She's working now. She's not

1 gathering noise on a tape to hand to somebody
2 else later who wasn't here, didn't have the
3 ability to look around the room, see who was
4 talking, stop them if they are talking at the
5 same time, ask for a clarification if they
6 didn't understand something, and I think
7 that's the major point we are missing. We
8 don't have the same product when we say
9 "record."

10 If you have got a transcribed record, and
11 even better yet with a court reporter, an
12 ASCII disk that you can plug into your
13 computer and search with a computer the
14 objections, the terms, code issues, and do all
15 the other things you can do with a computer
16 and a text file, you can prepare your appeal a
17 lot faster than you are going to be able to
18 prepare an appeal sitting and listening to a
19 tape recorder.

20 HONORABLE C. A. GUITTARD:

21 Mr. Chairman, I think Mr. Jackson is talking
22 about an issue that we don't propose to
23 address, and that is whether these -- this
24 kind of recordings should be authorized in the
25 first place, and we are saying under this rule

1 that would be up to the Supreme Court. If
2 they don't want to authorize it, they don't
3 authorize it. We are not saying, as we did in
4 our original proposal, that any court can do
5 it if he wants to. Now, we are simply saying
6 that if it is done as judge -- as Brister is
7 doing, the present problems ought to be
8 addressed.

9 CHAIRMAN SOULES: All right.

10 As I'm hearing what David is saying is that
11 there are problems with the recording process.
12 He's articulated some of them. The recording
13 process is already --

14 HONORABLE C. A. GUITTARD:

15 Right. Right.

16 CHAIRMAN SOULES: -- in use,
17 and it's going to be in use, and it may be
18 expanded in use, but we have got the concerns
19 that I heard the last time in September, that
20 meeting in September, was basically how do we
21 get this recording as close as we possibly can
22 get it to a transcript taken by a court
23 reporter. What safeguards can be built into
24 the process so that we make it as good as it
25 possibly can be?

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HONORABLE C. A. GUITTARD:

Right.

PROFESSOR DORSANEO: You can't.

CHAIRMAN SOULES: And what David, I think, is saying is it will never be the same, and here are some of the problems, and how do we deal with those problems? Mike Gallagher.

MR. GALLAGHER: It appears to me, Judge, that the manner in which to -- if this pilot program is going to continue, and it's obvious that there are people that are in favor of it that rather than relying on Rule 50 prospectively or retrospectively to address a problem that exists, we could address the problem prospectively through some kind of guarantee that when you go into a courtroom and there is going to be an electronic transcription of the trial that there are some minimal safeguards that will insure that we are going to get a good record rather than looking at it retrospectively and trying to deal with the question of was a significant portion of the transcript inaudible?

What is significant is not always

1 reflected in the quantity that's inaudible.
2 It may be a particularly significant portion
3 of the trial, and while I can assure you I
4 will always try to have a court reporter
5 available in any case that I try I think that
6 in circumstances in which people for one
7 reason or another can't afford to incur that
8 expense that we ought to be able to provide
9 them with a level of assurance that these
10 people are, as this rule calls for, certified,
11 they meet some minimum guidelines so that we
12 know that we are not -- that you are not
13 getting into a situation in which the record
14 may not truly reflect what occurred in the
15 trial court, and the certification part of it
16 I think is absolutely essential. Now, who
17 establishes the guidelines and what they would
18 involve is going to require somebody with some
19 knowledge of electronics that far exceeds
20 mine.

21 CHAIRMAN SOULES: Richard
22 Orsinger.

23 MR. ORSINGER: This rule does
24 not require certification unless a certifying
25 agency is brought into existence, which I

1 would assume is going to require an act of the
2 Legislature, and conceivably the Supreme
3 Court, but most likely an act of the
4 Legislature, and I really feel like this rule
5 doesn't impact the decision about whether
6 there should be a certifying agency. It just
7 says if there is a certifying agency, then the
8 court recorders need to comply with the
9 certification requirements, and if there is a
10 legislation that creates a certifying agency
11 the statute will require that. So I really
12 feel like it's kind of a false issue to debate
13 certification or not in this rule.

14 MR. GALLAGHER: Well, that's --

15 HONORABLE SCOTT BRISTER: No.

16 You don't understand how the Legislature
17 works. Now, I don't want to offend any of my
18 friends that are court reporters. I didn't
19 get into this to put court reporters out of
20 business. The court reporters I have dealt
21 with are very professional, prepare excellent
22 records. I just got into it because it's an
23 alternative that is cheaper and to see if it
24 could work. If it's cheaper, we are all
25 concerned about costs. It ought to be looked

1 into. In the last legislative session, this
2 is another problem with the rule, the court
3 reporters passed a statute saying you can't
4 use the term "court reporter" or "court
5 recorder" if you are not certified by their
6 agency. Now, I can get the statute for you.
7 Judge Delaney it sent around to us.

8 We didn't know what to do with it. We
9 have continued to call my court recorder a
10 court recorder just because we figured when
11 the D.A. comes to arrest her we will figure
12 out what to do then. If you pass this rule in
13 the next session of the Legislature, do you
14 know what's going to be established? An
15 agency to certify court recorders. Now, I
16 don't mean to offend anybody or accuse
17 anybody. I am just telling you politically
18 court recording has very few advocates as we
19 have seen at Bar conventions, judicial
20 conventions. Court reporting has very many
21 advocates, and it's a way of life. It's the
22 way you make your living. I would protect my
23 living as well, but if you pass this, there
24 will soon be such an agency, and it will soon
25 require so many requirements it will become

1 prohibitive or at least not competitive to do
2 electronic recording.

3 CHAIRMAN SOULES: I was looking
4 over here on page 24 and 25 about what the
5 statement of facts would be, and I think on
6 some of the orders that have gone out that the
7 parties are under the responsibility to type
8 up --

9 HONORABLE SCOTT BRISTER: Yeah.

10 CHAIRMAN SOULES: -- the tapes
11 for the appellate court.

12 MR. ORSINGER: The portion they
13 want the appellate court to hear.

14 CHAIRMAN SOULES: And one
15 appellate court has said under Englander they
16 can't review factual and legal sufficiency
17 unless the party types up every word of the
18 tapes.

19 HONORABLE C. A. GUITTARD:
20 Well, we have tried to deal with that
21 question.

22 PROFESSOR DORSANEO: We have
23 fixed that.

24 CHAIRMAN SOULES: And that's
25 what I was looking at because, as I see here,

1 there is no typewritten portion of the tapes
2 that has to be filed.

3 HONORABLE C. A. GUITTARD:

4 That's right.

5 HONORABLE SCOTT BRISTER:

6 That's right.

7 CHAIRMAN SOULES: The appellate
8 court listens to the tapes if they want to
9 check the evidence.

10 PROFESSOR DORSANEO: No.

11 HONORABLE SCOTT BRISTER: No,
12 no, no. No. Let me explain that, if I can.
13 It works the same way as the court reporters
14 notes. The tapes equal the notes. It is as
15 if to perfect your appeal the notes were filed
16 in the court of appeals. The court of appeals
17 is not going to read the notes, and they don't
18 listen to the tapes. If there is something
19 you want them to pay attention to, for
20 instance, if you have an appeal where you
21 don't care about testimony, you're appealing
22 on some matter of law, not taking care of the
23 testimony, you don't type them up.

24 Same thing on court recording. If you
25 are appealing on something where you don't

1 need the testimony, not relying on the
2 evidence, you don't type it up. If you do
3 have a greater weight and sufficiency, then
4 you have to type the whole thing up. Now,
5 remember, that doesn't get typed up for free
6 if a court reporter does it. You have to pay
7 to have that typed up. You can have our
8 cassette tapes for a two-day trial for 20
9 bucks. That's not thousands of bucks. You
10 get the tape.

11 Now, you have to get that typed up. You
12 can get it typed up for less because it's
13 competitive. Court reporters' notes, court
14 reporters' notes can only be typed up by one
15 person, the court reporter that did it, with
16 their machine, you know, and those kind of
17 things. You know, it's a shorthand system.
18 The court tape can be typed up by anybody with
19 a good enough tape machine to hear it.
20 Therefore, more people can do it. Therefore,
21 its price is going to tend to be less because
22 there is competition. More than one person
23 can do it.

24 So you -- on the other hand, if you have
25 a machine good enough to listen, to separate

1 out the four tracks or whatever, your
2 secretary can do it. I was talking with --
3 one of the advantages of the system I
4 perceive, and it's not available under the
5 current rules but might be under something
6 like the rules here is, indigent, the indigent
7 pro se criminal, who I get most of my
8 inability to pay affidavits on. My
9 inability -- I don't know what some of the
10 other judges see. My inability to pay people
11 always are the people that have every brief is
12 at least 40 or 50 pages. They are amazing.
13 Clearly the most voluminous litigants I have
14 are the people who are unable to pay for the
15 transcript, which to me the electronic
16 recording is the perfect thing. If we could
17 tell them, "Here, you have got nothing but
18 time. Here is the tapes. Type them up if you
19 want, and you don't have to pay a court
20 reporter or anybody else. Use that typewriter
21 you have been using to do these 50-page
22 briefs." So that again, compare apples to
23 apples. You are going to have to pay to type
24 the transcript up. It's just a court reporter
25 versus the court recording service or whoever

1 ends up doing it.

2 HONORABLE C. A. GUITTARD:

3 Mr. Chairman, we have raised some questions
4 that other related proposals deal with. Like
5 53(i), 74(n). Perhaps in order to put this in
6 proper context we ought to lay those out
7 before the committee.

8 CHAIRMAN SOULES: Whatever you
9 suggest, Judge, on that.

10 HONORABLE C. A. GUITTARD:

11 Well, my sense is essentially to wait. Don't
12 you think, Bill?

13 PROFESSOR DORSANEO: Uh-huh.

14 HONORABLE C. A. GUITTARD:

15 Okay. Let's -- now, I think we have been
16 referring to Rule 50, and that really, I don't
17 think, would change what the law would be
18 otherwise, but it just says if you don't have
19 a good record, if you can't get a good record,
20 you can get a new trial. That's on page 19.

21 CHAIRMAN SOULES: Okay.

22 HONORABLE C. A. GUITTARD: It
23 says, "If the appellant has made a timely
24 request for a statement of facts but a
25 significant portion of the court reporter's

1 notes or records have been lost or destroyed,"
2 and not say particularly if the notes have
3 been lost but if a significant portion of it
4 has been lost without the appellant's cause or
5 if the proceedings were electronically
6 recorded and the recording or a significant
7 portion thereof have been lost or destroyed or
8 a significant portion of the proceedings are
9 inaudible without appellant's fault and the
10 parties cannot agree on a statement of facts,
11 appellant may be entitled to a new trial.
12 Now, we don't say "shall be" because he may be
13 entitled to a new trial unless the parties
14 agree on the statement of facts.

15 Now, let's go forward to Rule 53(i) which
16 has to do with the portion of the statement of
17 facts. That's on page 24, I believe. On page
18 24, electronic recording. Or it's (j). This
19 copy seems to have two (j)'s. So anyway it's
20 one marked (j) where it says, "Electronic
21 Recording. The statement of facts on appeal
22 from any proceeding that has been recorded
23 electronically according to Rule 264b of the
24 Texas Rules of Civil Procedure shall be (1), a
25 standard recording labeled to reflect clearly

1 the contents and numbered if more than one
2 recording unit is required." In other words,
3 you don't just send a bunch of boxes. You
4 have to have them properly labeled.

5 "Certified by the court recorder to be a
6 clear and accurate duplicate of the original
7 recording of the entire proceeding. (2), a
8 copy of the typewritten and original logs
9 filed in the case, certified by the court
10 recorder," and "(3), all exhibits arranged in
11 numerical order and a brief description of
12 each."

13 Now, let's go to Rule 74(n) on page 35,
14 which has to do with briefs. "Electronic
15 Statement of Facts. When an electronic
16 statement of facts has been filed the
17 following rules shall apply: (1), Appendix.
18 Each party shall file with the brief one copy
19 of an appendix containing a typewritten or
20 printed transcription of all portions of the
21 recorded statement of facts and one copy of
22 all exhibits relevant to the issues raised on
23 the appeal. Appellee's appendix need not
24 repeat any of the evidence included in the
25 appellant's appendix. The transcription shall

1 be presumed" -- now, this has to do with that
2 Englander problem.

3 "The transcription shall be presumed to
4 be accurate unless an objection is made. The
5 form of the appendix and transcription shall
6 conform to any specifications of the Supreme
7 Court concerning the formal statement of
8 facts," and the presumption is the problem is
9 further dealt with in subdivision (2). "The
10 appellate court shall presume that nothing
11 omitted from the appendices filed by the
12 parties is relevant to any of the issues
13 raised or to disposition of the appeal. The
14 appellate court has no duty to review any part
15 of the electronic recording.

16 "(3), A Supplemental Appendix. The
17 appellate court may direct a party to file a
18 supplemental appendix containing additional
19 portions of the recorded statement of facts
20 and may grant a party leave to do so." Then
21 on inability to pay, "If any party is unable
22 to pay the cost of the appendix and files the
23 affidavit provided by Rule 45 and any contest
24 to the affidavit is overruled, the recorder
25 shall transcribe or have transcribed such

1 portions of the recorded statement of facts as
2 the party designates and shall file it as that
3 party's opinion." Just like they would if it
4 were the court reporter who would have to
5 prepare a free statement of facts.

6 "Inaccuracy. Any inaccuracies in the
7 transcription of the recorded statement of
8 facts may be corrected by agreement of the
9 parties. Should any dispute arise after the
10 statement of facts or appendices are filed
11 whether any electronic recording or
12 transcription of it accurately discloses what
13 occurred in the trial court an appellate court
14 may resolve the dispute by reviewing the
15 recording, or the court may submit the matter
16 to the trial judge who, after notice to all
17 the parties in hearing, shall settle the
18 dispute and make the statement of facts or
19 transcription conform to what occurred in the
20 trial court.

21 "Costs. The actual expense of the
22 appendices but not more than the amount
23 prescribed for official recorders shall be
24 taxed as costs. The appellate court may
25 disallow the cost of a portion of the

1 appendices that it considers surplusage or do
2 not conform to any specifications provided by
3 the Supreme Court." So that and other rules
4 that refer to court reporters, of course,
5 would have to be amended to include recorders
6 as well.

7 HONORABLE SCOTT BRISTER:
8 Assuming a recorder is not an illegal term to
9 use --

10 HONORABLE C. A. GUITTARD:
11 Yeah.

12 HONORABLE SCOTT BRISTER:
13 -- for electronic recorders.

14 HONORABLE C. A. GUITTARD:
15 Right.

16 CHAIRMAN SOULES: Well, that
17 doesn't fix Englander.

18 HONORABLE C. A. GUITTARD: Why
19 not?

20 CHAIRMAN SOULES: Because
21 that's what Rule 53 says right now, and it
22 existed --

23 HONORABLE C. A. GUITTARD: We
24 fixed that in 53(d).

25 CHAIRMAN SOULES: Okay. So

1 that's addressed on page 23 of 53(d)?

2 HONORABLE C. A. GUITTARD:

3 Right.

4 CHAIRMAN SOULES: Okay. Okay.

5 Now, let's --

6 MS. BARON: Luke?

7 CHAIRMAN SOULES: Yes.

8 MS. BARON: I don't know if
9 this is appropriate. I have two picky points
10 on this rule. Can I raise them now?

11 CHAIRMAN SOULES: Sure.

12 MS. BARON: First, it's unclear
13 to me whether the appendix has to be served on
14 opposing parties. That's going to be a fairly
15 large expense. It's like copying your entire
16 statement of facts for the other side.
17 Second, I don't think the exhibits would need
18 to be filed with the appendix because they
19 have already been filed under 53(j)(3) with
20 the tapes.

21 HONORABLE C. A. GUITTARD:

22 You're right about that. It's contemplated
23 that the appendices would be part of the
24 briefs, and therefore, would be served as part
25 of the briefs. The whole thing is about

1 appendices of the briefs.

2 MS. BARON: Right.

3 HONORABLE C. A. GUITTARD: So
4 if that needs to be clarified, we need to
5 clarify that, but that paragraph --

6 MS. DUNCAN: I think Pam is
7 objecting to that.

8 MS. BARON: I think as a policy
9 matter do we want to require that amount of
10 copying?

11 PROFESSOR DORSANEO: What
12 copying?

13 HONORABLE C. A. GUITTARD: Now,
14 that wouldn't include the exhibits.

15 MS. BARON: Right. But what if
16 you have a two-week trial that you have
17 transcribed from the tapes? It's going to be
18 a -- it's a huge expense.

19 HONORABLE C. A. GUITTARD:
20 Well, it's no more than a court reporter's
21 transcription.

22 HONORABLE SCOTT BRISTER:
23 Somebody is going to have to copy it, and they
24 are going to have to be --

25 CHAIRMAN SOULES: Just a

1 moment. The court reporter cannot take more
2 than one person speaking even if an electronic
3 machine can take four or eight.

4 HONORABLE SCOTT BRISTER: No
5 more than four.

6 CHAIRMAN SOULES: Who wants to
7 speak? Let's just -- Sarah.

8 MS. DUNCAN: But in the case of
9 a court reported statement of facts the
10 appellant does not pay the cost of the
11 appellee's copies.

12 MS. BARON: That's right.

13 MR. MCMAINS: Correct.

14 MS. DUNCAN: The appellees pay
15 the cost of their own copy of the statement of
16 facts. So if the appendix is the statement of
17 facts for a two-week trial, the appellant will
18 end up bearing the cost of everybody's copy of
19 the statement of facts.

20 CHAIRMAN SOULES: And that can
21 run into some real money. Anyone who has
22 filed an extensive mandamus proceeding, you
23 can have a copy cost of \$10,000 just to serve
24 the record on multiple parties or more.

25 HONORABLE SCOTT BRISTER:

1 Understand it will be at your in-house copying
2 rate and maybe you can work out some deal with
3 shifting that cost when costs are assessed.
4 It will not be a court reporter's copying
5 rate, which is sometimes significantly higher
6 than what you do it for.

7 MS. DUNCAN: But you are still,
8 whatever the cost is --

9 CHAIRMAN SOULES: Just a
10 moment. Rusty.

11 MR. MCMAINS: The problem,
12 though, is I think that cautious
13 practitioners, which most of us consider
14 ourselves to be, will transcribe -- if you are
15 appealing are going to transcribe the whole
16 thing.

17 HONORABLE SCOTT BRISTER: Sure.

18 MR. MCMAINS: And therefore, in
19 any trial of any consequence, I mean, first of
20 all, you say the appendices is supposed to be
21 part of the brief. Well, now we serve 12
22 copies. The court doesn't have 12 copies of
23 the record in anything else to the Supreme
24 Court or the courts of appeals or whatever. I
25 mean, the appendix should only -- I think what

1 the suggestion is, the appendix should be
2 filed once in the court of appeals by the
3 appellant and then let anybody who wants to
4 make a copy of it go check it out just like
5 they do the record and make a copy of it, or
6 if they want to make arrangements with them,
7 that's fine.

8 PROFESSOR DORSANEO: I think we
9 can agree to just fix that. One copy, just
10 like we do it for the -- like we fixed it for
11 the mandamus.

12 MR. MCMAINS: Right.

13 PROFESSOR DORSANEO: Which had
14 the same --

15 MR. MCMAINS: And that it not
16 be part of the brief, too.

17 CHAIRMAN SOULES: Just a
18 moment. What's your comment, Bill?

19 PROFESSOR DORSANEO: We can do
20 the appendix one copy idea, and we can do the
21 fix on the exhibits as well. I think we can
22 just agree to do that, but Pam had some and
23 Sarah had some larger, more obscure point.

24 CHAIRMAN SOULES: Would you
25 care to articulate that?

1 MS. BARON: It was not.

2 CHAIRMAN SOULES: We've taken
3 care of that. Steve Yelenosky.

4 MR. YELENOSKY: This rule
5 refers to, under "inability to pay," that the
6 recorder shall transcribe, and Judge Brister
7 was suggesting that it wouldn't necessarily be
8 a transcription by the person who records. In
9 fact, one of the benefits would be an option
10 as to who transcribes it; is that correct?

11 HONORABLE SCOTT BRISTER: No.
12 There is a conflict here, and it is --

13 MR. YELENOSKY: While you are
14 looking for that --

15 HONORABLE SCOTT BRISTER: Sure.

16 MR. YELENOSKY: If in fact, as
17 it is now if there is an inability to pay or
18 there is some statutory provisions that
19 provide for a transcript without charge to the
20 appellant, like in an unemployment appeal, the
21 court reporter ends up having to do that and
22 without pay as an officer of the court. If
23 the recorder is not going to be the one always
24 transcribing it, then you have a question as
25 to who's going to bear the cost of the

1 transcription.

2 CHAIRMAN SOULES: Sarah. She's
3 got to be listening to people, and she can't
4 hear if you are talking behind her.

5 MR. YELENOSKY: So if it's like
6 a court reporter situation where you have an
7 official recorder who also does all the
8 transcription, you might want to place upon
9 that person the burden of carrying the expense
10 of people who cannot pay. If you have a
11 variety of people doing transcriptions, I
12 don't know how you do that unless the court
13 funds were used.

14 CHAIRMAN SOULES: What page are
15 you on, Steve? Exactly what are you
16 addressing?

17 MR. YELENOSKY: 36.

18 HONORABLE SCOTT BRISTER: I've
19 got it here.

20 CHAIRMAN SOULES: Okay.

21 HONORABLE SCOTT BRISTER: You
22 can go either way. On 50 -- TRAP 53, the
23 second (j).

24 CHAIRMAN SOULES: What page?

25 HONORABLE SCOTT BRISTER: It's

1 224. On civil cases the second -- second (j),
2 the second No. 1, civil cases where "paying
3 the fees of the clerk and the official court
4 reporter or recorder" is underlined says that
5 you are to prepare a statement of facts,
6 deliver it to the appellate court. Court
7 reporter or recorder shall receive no pay for
8 same, and statement of facts is defined in the
9 first part of (j) to be just the tapes, and
10 that's a policy decision. You decide whether
11 you want just the tapes and have indigents
12 type them up, figure out some way to type them
13 up or not. I mean, I'm just suggesting that's
14 an option which at least in -- and your
15 indigent clients are probably different from
16 the -- as I say, the ones I get are the
17 courthouse lawyers who file 50 cases or the
18 prison inmates, jail inmates, who file -- who
19 have massive filings. They have complete
20 access and ability to type up their own
21 transcripts.

22 MR. YELENOSKY: Right. Well,
23 for example, there is a provision in the
24 statute that says any appeal of a decision by
25 the TEC on unemployment benefits shall be

1 without cost to the claimant under the
2 unemployment statute, and I had a situation
3 where we lost a case in court and wanted to
4 appeal to the appellate court and tried to use
5 that provision and ended up getting a mandamus
6 requiring the court reporter to do it without
7 cost. If that had been electronically
8 recorded, I guess you could have ordered the
9 recorder, assuming the recorder is also the
10 person who routinely does the transcription,
11 to do the transcription without cost, but if
12 you have a variety of people doing
13 transcriptions and none of them are official,
14 I don't see where you have any authority to
15 order anybody to do it for free.

16 HONORABLE SCOTT BRISTER: Well,
17 either you get one of the services to do it
18 and get the county to pay for it, or as
19 I'm -- an in between possibility might be
20 where the judge decides. You know, if the
21 person has filed 50-page briefs before and
22 clearly has access and ability to type, you
23 can order them to do it. If it's a person, as
24 some of your clients may be, who don't type
25 and don't make a living doing that at the

1 courthouse, then the county has to pay for
2 some of it.

3 MR. JACKSON: Luke?

4 CHAIRMAN SOULES: So where are
5 we? The statement of facts, the typewritten
6 appendix would be filed in the appellate
7 court.

8 HONORABLE C. A. GUITTARD: And
9 the rule just says one copy of it. You don't
10 have to file more than one as somebody
11 suggested, getting copies or six copies. You
12 just have to file one.

13 CHAIRMAN SOULES: And it's not
14 served?

15 HONORABLE C. A. GUITTARD:
16 Well, that's another question we need to
17 address.

18 CHAIRMAN SOULES: And if it's
19 not served then how does the other party know
20 what's been typed up and included?

21 HONORABLE C. A. GUITTARD:
22 That's a question we need to address.

23 CHAIRMAN SOULES: Bill
24 Dorsaneo.

25 PROFESSOR DORSANEO: I think

1 the language now where it says "with the
2 brief" --

3 CHAIRMAN SOULES: Where?

4 PROFESSOR DORSANEO: On page
5 35. "Each party shall file with the brief."
6 Now, I understand what Pam was saying earlier
7 about the copy. It suggests that even if the
8 appendix is just sent with the brief that it
9 would be served on the other side and that
10 would mean that you would need to make one
11 extra copy or --

12 MS. BARON: Or five or six.

13 PROFESSOR DORSANEO: -- more
14 depending upon the number of appellees who you
15 are serving it on. The issue then is should
16 we require the appellant to make only one
17 transcription and file that and tell the other
18 people they can go look at it in the court of
19 appeals, or do we do it by making a copy for
20 everyone? That's not that difficult an issue
21 to resolve. You know, is it one, or is it one
22 for everyone at the expense presumably of the
23 appellant?

24 HONORABLE C. A. GUITTARD:

25 Conceivably --

1 CHAIRMAN SOULES: I don't see
2 how you could ever give notice to the
3 appellees of what you have transcribed without
4 sending them a copy.

5 HONORABLE C. A. GUITTARD:
6 Well, you could say transcribed the testimony
7 of these witnesses and not those.

8 CHAIRMAN SOULES: But I'm
9 probably only going to put the best part of
10 these witnesses.

11 HONORABLE C. A. GUITTARD: If
12 you say all of it, well, that will take care
13 of it.

14 CHAIRMAN SOULES: Right. But
15 if I don't want to do that, I just want to put
16 my direct on. I don't want to put in the
17 cross-examination, and I don't have a page and
18 line designation because it's not paged and
19 lined. I mean, this is just sort of
20 illustrations --

21 HONORABLE C. A. GUITTARD:
22 Yeah.

23 CHAIRMAN SOULES: -- of what
24 could happen, and we have to address those.
25 Bill Dorsaneo, do you have an idea?

1 PROFESSOR DORSANEO: Well, my
2 preference would be to send everybody a copy,
3 but I can see that a lot of people have
4 exactly the opposite preference, and I don't
5 know. We could talk about it probably for a
6 half an hour before we vote on it.

7 CHAIRMAN SOULES: Pam Baron.

8 MS. BARON: Well, you just go
9 and you check it out. You know it's at the
10 court. You check it out. You can look at it.
11 You can copy the parts you want, and you don't
12 have to copy it all. That's how it works now
13 for any kind statement of facts unless you
14 order a separate copy from the court reporter
15 and pay the court reporter directly, but many
16 people wait until it's filed with the court,
17 check it out and copy it.

18 MS. DUNCAN: The transcript,
19 too.

20 MS. BARON: Yeah. And the
21 transcript, too. You don't serve the other
22 side a copy of your transcript.

23 HONORABLE C. A. GUITTARD: That
24 makes sense.

25 CHAIRMAN SOULES: Okay. You

1 just file one with the court and serve no
2 copies. Is that -- or send a copy to every
3 appellee. That seems to be the -- that's the
4 issue. Sarah Duncan.

5 MS. DUNCAN: It seems to me the
6 difference between the transcriptions of the
7 recorded statements on the one hand and the
8 transcript and court reported statement on the
9 other hand is that in the latter we have a
10 neutral third party upon whom we can rely, and
11 as far as recorded statements go, we are now
12 talking about letting anybody transcribe them,
13 which means we are going to shift not only the
14 burden of going to make a copy of it at the
15 court, but we are now going to shift the
16 burden of going through and comparing every
17 page of the transcription to every tape, and
18 somebody is going to have to transcribe them
19 and sit there and compare.

20 HONORABLE SCOTT BRISTER: Do
21 you do that --

22 CHAIRMAN SOULES: You mean
23 someone is going to have to listen to the
24 tapes and read the typewritten transcript in
25 order to see that it's been accurately

1 recorded?

2 MR. GALLAGHER: Precisely.

3 HONORABLE SCOTT BRISTER: No,
4 no, no, no, no.

5 CHAIRMAN SOULES: Okay. Judge
6 Brister.

7 HONORABLE SCOTT BRISTER: Do
8 you do that when the court -- on your appeals
9 when the court reporter types it up do you
10 read through the whole trial to make sure
11 that -- I mean, let me get --

12 MR. GALLAGHER: The difference
13 is it's not a party.

14 HONORABLE SCOTT BRISTER: Wait,
15 wait, wait, wait, wait.

16 MS. DUNCAN: That's right.

17 HONORABLE SCOTT BRISTER: Let
18 me get something straight. Let me get
19 something straight. We all know anybody that
20 has done litigation for a while has gotten a
21 transcript back from a court reporter that had
22 a "yes" where you know the witness said "no."
23 They are human beings. We are not even -- we
24 are not talking about a human being that makes
25 that mistake. It records "yes" when somebody

1 says "yes." That happens, and when you run
2 across that you go, "oh, my God" and you call
3 up the court reporter. You call up the other
4 side, and you do something to get it changed.

5 That's -- if the problem is, why, these
6 people will be filing something and there may
7 be errors in there, and the court reporter may
8 be filing something that there may be errors
9 in there, and this is to me the argument that
10 I hear the most which makes the least sense.
11 No. 1, it's a presumption that opposing
12 counsel will take the risk of intentionally
13 changing something in typing up the record,
14 that you won't find it, and will do it as an
15 officer of the court, will intentionally
16 change the record knowing that there is a tape
17 out there that they can be caught with, and
18 that they will be, in my opinion, not just
19 sanctioned but that is one of the things you
20 should start to lose your license for. I
21 mean, this entirely -- there is no way you can
22 be sure you will get away with that, and if
23 it's on anything important, you should presume
24 you will be caught.

25 Now, if you are concerned about reading

1 through it, then I would expect that you would
2 do that when you get it back from the court
3 reporter and read through every page of that.
4 If you trust the court reporter, I'm assuming
5 you will trust the tape service, whoever types
6 that up, and if you have -- because of the
7 built-in problems if somebody intentionally
8 tries to change that.

9 CHAIRMAN SOULES: Judge Peeples
10 and then I will get Mike Gallagher. Judge
11 Peeples.

12 HONORABLE DAVID PEEPLES: We
13 have several years of experience with this
14 right now in certain courtrooms across the
15 state, and I would like to know what the
16 actual real world experience has been in the
17 trial courts and the courts of appeals that
18 have heard those cases. We are talking about
19 what could happen, could happen, could happen.
20 What has happened in the last -- how many
21 years has it been since we started doing this?
22 Four, five, six?

23 JUSTICE HECHT: Ten.

24 HONORABLE DAVID PEEPLES: What
25 has happened? You know, the rational 20th

1 Century way to do things is you don't
2 speculate. You say what has happened in the
3 real world? Have these horribles happened?

4 HONORABLE C. A. GUITTARD:
5 That's why we have Judge Peeples here, for
6 one -- Judge Brister.

7 HONORABLE DAVID PEEPLES:
8 Brister. Well, look, I have been on the court
9 of appeals six years. I haven't seen one
10 problem in one case that's come out of Charlie
11 Gonzalez' court, which is the only one I think
12 we deal with. I can't remember one problem.

13 CHAIRMAN SOULES: Mike, you had
14 your hand up.

15 MR. HATCHELL: We did have a
16 representative before the committee from the
17 Dallas Court of Appeals that says that the
18 problem particularly in criminal cases is so
19 bad that due process is being threatened, that
20 the quality of the recordings that they have
21 had is just horrible, and that they do not
22 like the system at all. I just wanted to
23 answer your question. In the real world we
24 did get some imperical evidence.

25 HONORABLE DAVID PEEPLES: We

1 already talked about that.

2 CHAIRMAN SOULES: Judge
3 Clinton.

4 HONORABLE SAM HOUSTON CLINTON:
5 I will reiterate what some of you may have
6 already heard. We had authorized that test to
7 the people in Dallas that this be an
8 experiment or trial in the capitals. The only
9 cases we have a direct appeal jurisdiction
10 over is capital cases. That was about six
11 years ago. Earlier this year we received what
12 was purported to be the recorder's record of
13 that, and it was so bad, and we have sent it
14 back and sent it back, and they never could
15 make the change. We had to reverse the
16 conviction, a sentence of death, and remand it
17 to start all over. That's the only experience
18 we have had with it, and that may not be
19 typical, but it sure does get your attention
20 on this subject. I tell you that.

21 CHAIRMAN SOULES: Bill
22 Dorsaneo. Then I will come around the table.

23 PROFESSOR DORSANEO: I want to
24 go back to this issue of how many copies do we
25 make and who gets served with it because we

1 want to get this finished at some point in
2 time.

3 CHAIRMAN SOULES: Okay. How
4 many feel just file it with the court?

5 PROFESSOR DORSANEO: I have one
6 other thing to say. Now, with respect to
7 the -- we have two methods of proceeding in
8 our appellate court work. In original
9 proceedings, although we only have one copy of
10 the record, the relator shall promptly serve
11 upon each respondent a copy of the petition
12 and record. Okay. So in original proceedings
13 we decided to do it the in-between way, which
14 is only to make one copy but you send a copy
15 to each respondent. Okay. And I think,
16 without giving it complete thought, that this
17 electronic court recording, the way that the
18 record is developed by a party from tapes is
19 more like the way records are developed in
20 original proceedings than it is like ordinary
21 appeals with the court reporter
22 intermediating.

23 Now, granted you could think of
24 circumstances where there would be a number of
25 different appellees and you have to make whole

1 bunches of copies, et cetera, but if I'm the
2 appellee and I get a notice that something has
3 been filed, I guess I go down and look at it,
4 and I say, "Gosh. That looks kind of odd,"
5 and then I have to get the tapes, and I have
6 to take all of that -- I have to copy the
7 whole thing myself, hmm? And go back to my
8 office and look at it and then see what I'm
9 going to do. Why not just send it to them?
10 How much expense is it? Not much. Well, you
11 shouldn't be copying so much of it then.

12 CHAIRMAN SOULES: Okay. How
13 many feel that just -- it seems to me like
14 there is two ways to do it. I don't think
15 anyone disagrees that only one copy of this
16 appendix, what's called an appendix, should be
17 filed in the appellate court.

18 HONORABLE C. A. GUITTARD:
19 Uh-huh.

20 PROFESSOR DORSANEO: Right.

21 CHAIRMAN SOULES: Okay. Is
22 that the only copy that the appellant must
23 furnish and then the appellees get that from
24 the court or however they get it? On the
25 other hand, should there be one copy filed

1 with the court and a copy served on all the
2 appellees? Pam, do you have some alternative
3 vote?

4 MS. BARON: Well, I'm a sole
5 practitioner, and I take the briefs down to
6 the copy shop myself and pay directly for the
7 copying and binding. I don't have an in-house
8 facility that does this, and it's a lot more
9 expensive than you think. I guess that's what
10 I would say. A short brief, 20 pages, enough
11 copies for the court, opposing counsel, is 120
12 to \$150 for copying and binding, and if you
13 have a 2,000-page statement of facts it's just
14 going to be an extraordinary expense.

15 CHAIRMAN SOULES: Are we ready
16 to vote on this, or does somebody else want to
17 talk about it? Richard.

18 MR. ORSINGER: I think you can
19 get stuff copied for 8 cents a page if you
20 don't have to unbind it or bind it. You take
21 it down to a copy shop or a copy service like
22 Night Rider. So a thousand-page transcript is
23 going to cost \$80.

24 MR. MCMAINS: 80 bucks.

25 MR. ORSINGER: And a

1 10,000-page transcript is going to cost \$800,
2 but not many of them are 10,000 pages long,
3 more like a thousand pages or less, and we are
4 talking about less than a hundred dollars
5 approximately, if my numbers are right.

6 CHAIRMAN SOULES: Okay. How
7 many feel that the appellant should have the
8 responsibility to serve copies of the
9 statement of facts on the appellees? Four.

10 And how many feel that the appellant
11 should not be required to serve copies of the
12 appendix on the appellees? Okay. That's the
13 house to four, and that will be in favor of no
14 service.

15 PROFESSOR DORSANEO: The
16 expense is just who you pay. I mean, it's
17 going to be more costly to go down there and
18 do it yourself.

19 CHAIRMAN SOULES: Justice Hecht
20 has something to input here.

21 JUSTICE HECHT: I hate to
22 interrupt such an interesting discussion, and
23 I rarely feel that it is my place to speak on
24 behalf of the Court at these meetings because
25 I really don't know what they will think about

1 it, but I have been a veteran of these
2 discussions now for 10 years. Judge Guittard
3 and I worked on this a long, long time ago.
4 These arguments have been made in the halls of
5 Congress, in the halls of the Legislature, in
6 the halls of commissioner's courts, and they
7 convince me whenever I need convincing that
8 there is such a thing as infinity, and it's
9 always possible that this group or some other
10 group will come along and solve it, but I do
11 want to say that it is a string without an end
12 as nearly as I have been able to tell, and I
13 do hope we won't get so bogged down in it that
14 we take away from the other work the committee
15 has to do.

16 I mean, I know some of these problems
17 have to be solved, and there are a lot of
18 other attractable problems in the rules, but I
19 think my colleagues would say to you, probably
20 to a person, that as between worrying about
21 this for six or eight hours and worrying about
22 something else for six or eight hours almost
23 anything else would be better. So, I mean,
24 they have made a proposal here, and I don't
25 mean to say that we shouldn't talk about it or

1 try to solve some of these problems, but some
2 of them really are attractable, and David
3 knows this. We are going to go round and
4 round about this, too, for a long time, I
5 think.

6 CHAIRMAN SOULES: Well, what do
7 you suggest we do? Just move on or move as
8 quickly through this as we can?

9 JUSTICE HECHT: That's my
10 suggestion is that you either kind of save
11 this for another day when there are fewer of
12 us here or whatever you think. I hate to
13 not -- we are anxious to see the report on the
14 appellate rules because we would like to do
15 something starting in January. So I hope you
16 get through the rest of it.

17 CHAIRMAN SOULES: Okay. Just
18 one question about the -- how are the exhibits
19 handled, Judge Brister?

20 HONORABLE SCOTT BRISTER: Same
21 way as the court reporter.

22 CHAIRMAN SOULES: Does the
23 court recorder keep the exhibits until the
24 trial is completed?

25 HONORABLE SCOTT BRISTER: Marks

1 them with the same sticker, files them with
2 the clerk, makes copies, takes them to the
3 court of appeals.

4 MR. MCMAINS: Do they index on
5 the tape where they are admitted or excluded?

6 HONORABLE SCOTT BRISTER: No.
7 There is a log. You do a separate log as
8 described in here and attach to that just
9 basically an exhibit list.

10 MR. MCMAINS: I know, but can
11 you find out on the tape where it's admitted
12 or excluded?

13 HONORABLE SCOTT BRISTER: Sure.

14 MR. MCMAINS: With that log?

15 CHAIRMAN SOULES: They are
16 supposed to keep that logged.

17 HONORABLE SCOTT BRISTER: The
18 log will say, "Exhibit No. 1 was admitted at
19 marker 0348 on the tape."

20 MR. MCMAINS: Okay. That's
21 what I was wondering.

22 PROFESSOR DORSANEO:
23 Mr. Chairman?

24 CHAIRMAN SOULES: Okay. Bill
25 Dorsaneo.

1 PROFESSOR DORSANEO: I suggest
2 on this that we follow the committee's vote
3 and have one copy of the transcription of the
4 tapes filed with a notice sent to the
5 appellees that it has been filed. We can work
6 on content of the notice, and frankly, I would
7 probably prefer not to call this thing an
8 appendix to the brief because that sends
9 people off in thinking about it in a different
10 way and just call it the -- something.

11 CHAIRMAN SOULES: Well, come up
12 with a --

13 PROFESSOR DORSANEO:
14 Transcribed recording, you know, transcription
15 of the recording. And with that we are
16 probably pretty much through if we can get
17 past these issues about whether we want there
18 to be something said about the equipment,
19 something said about the recorder and the
20 qualifications of the recorder, and something
21 said about the judge's responsibility. With
22 respect to that paragraph (6) being necessary
23 or unnecessary, the real reason why it's in
24 there, Judge Brister, is that people want to
25 emphasize that point.

1 HONORABLE SCOTT BRISTER: They
2 want to say it twice?

3 PROFESSOR DORSANEO: Yes.

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

6 PROFESSOR DORSANEO: So as far
7 as I'm concerned the only thing we need to
8 consider here for the committee to be able to
9 do what it can accomplish would be the detail
10 on the equipment, a separate thing, and we
11 want the rule to say that the equipment has to
12 have four tracks.

13 HONORABLE SCOTT BRISTER: That
14 would be fine.

15 PROFESSOR DORSANEO: It's not
16 all right to say eight tracks because that's
17 technologically unsatisfactory.

18 HONORABLE SCOTT BRISTER: At
19 least four tracks, and that would be fine.

20 PROFESSOR DORSANEO: Okay. Why
21 don't we just by consensus agree to do it like
22 that, and we will change it to that?

23 CHAIRMAN SOULES: Okay.

24 PROFESSOR DORSANEO: Would it
25 be all right, Judge Brister, to say with

1 respect to the qualification of the recorder
2 that not just that the recorder will be
3 selected by the judge but that the judge will
4 do something formal with respect to that
5 recorder until some certifying agency -- well,
6 maybe we don't want to mention that. Maybe
7 you have convinced me of that, too, but I
8 think it's probably too late. We've already
9 talked about it. If it's going to happen,
10 it's already going to happen.

11 HONORABLE SCOTT BRISTER: I
12 mean, my recollection is my court recorder
13 took an oath, for one thing, to do the
14 proceedings, takes an oath every time she
15 files the oath or at least a certificate every
16 time she files the tapes, and I mean, I don't
17 know how many oaths you want us to take that
18 we are really going to try. One more?

19 PROFESSOR DORSANEO: No. Just
20 one.

21 HONORABLE SCOTT BRISTER: I
22 mean, we really are trying to do --

23 HONORABLE C. A. GUITTARD: I
24 think perhaps the committee's concern was with
25 the judges that are not as careful as Judge

1 Brister is, and we want to tell him just what
2 to do. I don't know whether that's necessary
3 or not, but I think that was the concern of
4 the committee.

5 CHAIRMAN SOULES: Yes. Anne
6 Gardner.

7 MS. GARDNER: This is probably
8 not appropriate, but it's more a general
9 question. I have some concern that our
10 committee might be perceived as approving the
11 use of --

12 HONORABLE C. A. GUITTARD: No.

13 MS. GARDNER: Well, but yet
14 others outside the committee might perceive
15 that we are, and the Supreme Court may, and of
16 course, they will not if they read the
17 transcription, but if there is not some
18 comment made by adopting the rule with respect
19 to recordings that we are not approving the
20 use of them and that once they are set in
21 concrete it would tend to perpetuate itself,
22 and I'm wondering what our goal is in putting
23 the rule in and adopting the rule.

24 HONORABLE C. A. GUITTARD:
25 Well, that's expressly provided in subdivision

1 (6) of proposed Rule 264a, "does not itself
2 authorize any court recorded proceedings by
3 electronic equipment in lieu of stenographic
4 means."

5 CHAIRMAN SOULES: Time out.

6 What we are going to do is step through the
7 mechanics of this. That's all we are going to
8 talk about. Okay. The mechanics are getting
9 done or the logistics, maybe it's a better
10 word, are getting done.

11 HONORABLE SCOTT BRISTER: Let
12 me make just one more mechanical suggestion.
13 264a.

14 HONORABLE DAVID PEEPLES: What
15 page is that?

16 HONORABLE SCOTT BRISTER: Pages
17 62 and 63. The duties of the court recorder
18 and the duties of the court reporter, almost
19 everything -- 80 percent of the court recorder
20 is identical quotes to what's under court
21 reporter, the same words. You ought to say --
22 (a) ought to be duties of court reporters and
23 recorders, and if you want a separate section
24 to add some stuff on recorders you might
25 consider doing that, but you know, most of

1 these under court recorders, (2) is identical
2 to (1) under (a), (6) is identical to (2), (7)
3 is identical to (3), (10) is identical to (4),
4 (11) is identical to (5), (12) is identical to
5 (6). It just makes the rule twice as long.

6 CHAIRMAN SOULES: Okay. 264b,
7 the first one we are going to say "at least
8 four tracks" and otherwise leave it as is.

9 HONORABLE SCOTT BRISTER: How
10 about make it the court shall have a backup
11 capacity rather than the equipment?

12 CHAIRMAN SOULES: Okay. Done.
13 No. 2, I guess we are going to take out the
14 "who shall be certified" and so forth and just
15 leave it to the judge to appoint a properly
16 qualified official.

17 HONORABLE SCOTT BRISTER: I
18 don't have any problem saying the judge shall
19 appoint a capable, qualified, you know,
20 non-felon or whatever you, you know, want to
21 say but --

22 CHAIRMAN SOULES: But it's not
23 going to be a court reporter.

24 HONORABLE SCOTT BRISTER: There
25 is nothing to be gained by certification in

1 this area in my humble opinion.

2 CHAIRMAN SOULES: This says
3 that the judge shall appoint a court reporter
4 to be the --

5 HONORABLE C. A. GUITTARD: No.

6 HONORABLE SCOTT BRISTER:

7 That's in the alternative.

8 HONORABLE C. A. GUITTARD:

9 That's instead.

10 MR. JACKSON: But are you going
11 to make him use a tape recorder because court
12 reporters don't want to use a tape recorder?

13 HONORABLE C. A. GUITTARD:

14 Well, in that case he wouldn't be appointed as
15 a recorder, would he?

16 CHAIRMAN SOULES: Okay. Under
17 (2) it's going to be "a judge shall appoint a
18 qualified recorder." You can use more words
19 than that if you wish, but that's what the
20 substance of it is.

21 HONORABLE C. A. GUITTARD: Just
22 put "qualified."

23 CHAIRMAN SOULES: Pardon me?

24 HONORABLE C. A. GUITTARD: Just
25 put "qualified court recorder."

1 CHAIRMAN SOULES: Who shall
2 take an oath, I guess.

3 HONORABLE SCOTT BRISTER: Just
4 something in there to indicate that it's --
5 you know, the judge should make sure it's
6 somebody with half a brain, et cetera.

7 CHAIRMAN SOULES: Well, I do
8 have a concern about this person and whether
9 or not this person is an officer of the court.
10 Some formality should -- do you agree, Judge
11 Brister?

12 HONORABLE SCOTT BRISTER: Sure.
13 Sure.

14 CHAIRMAN SOULES: Some
15 formality should be observed.

16 HONORABLE SCOTT BRISTER: I
17 think they ought to swear to faithfully
18 execute their duties the same as everybody
19 else would.

20 CHAIRMAN SOULES: Judge Brister
21 is going to provide us with the text of the
22 oath.

23 HONORABLE SCOTT BRISTER: Oh,
24 boy.

25 CHAIRMAN SOULES: During any

1 court proceedings should the recorder make
2 sure that the person is recording or speaking
3 so they can be heard, not the judge, or should
4 there be anything about that? It's either
5 recorder or nothing. Judges don't want to do
6 that.

7 MR. JACKSON: It should be the
8 recorder, same as the court reporter. I agree
9 with Judge Brister, but the question I have
10 is, are we going to make them prepare a
11 statement of facts? It's in here that they
12 have to, and when it comes down to reality
13 you're not going to have a tape recorder
14 person that's going to be typing these things
15 up.

16 CHAIRMAN SOULES: Where is
17 that?

18 HONORABLE SCOTT BRISTER: No.
19 Statement of facts --

20 PROFESSOR DORSANEO: Statement
21 of facts is tapes of the statement of facts.

22 HONORABLE SCOTT BRISTER: -- is
23 defined to be the tapes.

24 MR. JACKSON: To be the tapes?

25 CHAIRMAN SOULES: Yeah. It's

1 just the tapes.

2 PROFESSOR DORSANEO: The tape
3 is it.

4 MR. JACKSON: Okay.

5 CHAIRMAN SOULES: The tape
6 itself. The certificate of the judge, is that
7 to be eliminated completely?

8 HONORABLE SCOTT BRISTER:
9 Please.

10 PROFESSOR DORSANEO: Yes. Yes.

11 CHAIRMAN SOULES: Okay. (4) is
12 out. (5) is in.

13 HONORABLE SCOTT BRISTER:
14 That's fine.

15 CHAIRMAN SOULES: If we omit
16 (4).

17 PROFESSOR DORSANEO: Let (6) be
18 renumbered.

19 CHAIRMAN SOULES: What's this
20 now?

21 PROFESSOR DORSANEO: Keep (6)
22 but renumber it.

23 HONORABLE C. A. GUITTARD: (5)
24 and (6) would be (4) and (5).

25 CHAIRMAN SOULES: Okay. Does

1 that take care of 264b?

2 HONORABLE SAM HOUSTON CLINTON:

3 Wait, wait. Before you -- as I understand
4 that the very first line says "in civil
5 cases." This is limited only to civil cases?

6 HONORABLE C. A. GUITTARD: In
7 which --

8 HONORABLE SAM HOUSTON CLINTON:

9 Is that right?

10 CHAIRMAN SOULES: No. Judge,
11 it says, "Any court authorized by the Supreme
12 Court in civil cases."

13 HONORABLE SAM HOUSTON CLINTON:
14 Civil cases.

15 CHAIRMAN SOULES: "Or the Court
16 of Criminal Appeals in criminal cases."

17 HONORABLE SAM HOUSTON CLINTON:
18 I know but -- okay. Or the Court of Criminal
19 Appeals.

20 CHAIRMAN SOULES: In criminal
21 cases. Is that okay --

22 HONORABLE SAM HOUSTON CLINTON:
23 All right.

24 CHAIRMAN SOULES: -- with you?

25 HONORABLE SAM HOUSTON CLINTON:

1 Okay. Don't look for any, but the reason I
2 raise that is it is not then clear in some of
3 these other implementing provisions. If what
4 we have just said is true, for example, the
5 statement of facts that is in whatever this
6 rule is that talks about it, who has
7 responsibility and all of that, apparently you
8 are going to have a different procedure if it
9 is done by a recorder or if it is not done by
10 a recorder.

11 CHAIRMAN SOULES: I think
12 that's right. I think that's right. Yes,
13 sir.

14 HONORABLE SAM HOUSTON CLINTON:
15 Okay.

16 CHAIRMAN SOULES: Okay. Are we
17 done now with the electronic? Okay. Okay.
18 We have got to get to Steve Yelenosky's point.
19 How do we get a written transcription of the
20 electronically recorded statement of facts for
21 an indigent?

22 HONORABLE SCOTT BRISTER: I
23 would propose we just send it up both ways to
24 the court. As I indicated, there are two
25 places here, one where it says you do the

1 statement of facts without cost and one where
2 it says you do the typewritten thing from it.
3 It seems to me like that's a policy decision.
4 You could ask the Supreme Court whether they
5 think and all -- you know, whether it ought to
6 be all a county cost or the indigent ought to
7 do it themselves or the judge ought to decide
8 it either way, or you can just do a vote on
9 it. I mean --

10 CHAIRMAN SOULES: Let's give
11 them a recommendation one way or the other.
12 What do you recommend, Steve?

13 MR. YELENOSKY: Well, I mean,
14 currently if you are entitled and you meet the
15 requirements either because of an affidavit of
16 inability or because of the state statute to
17 have an appeal without cost you are not
18 required to type up yourself or do anything
19 like that. The cost is born generally by the
20 official court reporter as part of his or her
21 duties. So to do anything but duplicate that
22 would be unfavorable from my perspective for
23 indigents.

24 CHAIRMAN SOULES: Is the
25 official court reporter paid for the time as

1 though they were in court while they are
2 preparing the free transcript?

3 HONORABLE SCOTT BRISTER: No.
4 They have to do it on their own time,
5 supposedly.

6 CHAIRMAN SOULES: Now, these
7 recorders are going to be paid, or they are
8 not going to be paid commensurate with court
9 reporters?

10 HONORABLE SCOTT BRISTER: Oh,
11 about half as much.

12 MR. JACKSON: You are talking
13 about just the salary, though.

14 HONORABLE SCOTT BRISTER: Yeah.
15 Well, they don't get anything -- I mean, gross
16 annual salary is a quarter of what a court
17 reporter makes, half as much salary, and zero
18 typed up appeals.

19 CHAIRMAN SOULES: So what
20 entity, what individual, what person bears the
21 cost of this transcription, written
22 transcription, of the electronically recorded
23 tape?

24 HONORABLE SCOTT BRISTER:
25 That's unclear.

1 HONORABLE C. A. GUITTARD:

2 Leave it to the judge to determine that.

3 CHAIRMAN SOULES: Well, then
4 he's got to go to the commissioners court or
5 somebody.

6 HONORABLE SAM HOUSTON CLINTON:
7 Well, first of all, I think you cured it by
8 saying the Court of Criminal Appeals can
9 authorize to use this procedure. Isn't it?

10 CHAIRMAN SOULES: I'm sorry.

11 HONORABLE SCOTT BRISTER: No,
12 no, no. I'm talking about indigent prisoners
13 that are suing the judge for putting them in
14 jail and their attorney for legal malpractice
15 and the sheriff for arresting them. Civil
16 cases.

17 CHAIRMAN SOULES: Civil cases.

18 HONORABLE SAM HOUSTON CLINTON:

19 Oh, okay.

20 HONORABLE SCOTT BRISTER: I
21 really would -- and I propose that I come up
22 with some -- and I will work with Steve or
23 whoever else, some language. There ought to
24 be some -- if he has got a hundred pages of
25 typewritten transcript on file already, there

1 ought to be some mechanism where the judge can
2 say, "Don't shift that onto the county when
3 you are making us read" -- see, I may not be
4 able to come up with it.

5 HONORABLE C. A. GUITTARD: I'd
6 appreciate it if you would do that as soon as
7 you can and get a copy to Dorsaneo and me.

8 HONORABLE SCOTT BRISTER: Yeah.

9 MR. YELENOSKY: I mean, it's
10 not just a question of language. I mean, I
11 think Judge Brister is pointing out that he
12 feels in some instances that indigents ought
13 to have to type it up themselves, and if
14 that's true, it should also be true that when
15 there is a court reporter that the burden
16 should not be shifted to the court reporter in
17 those instances, if you agree with that. I
18 just didn't see the distinction.

19 HONORABLE SCOTT BRISTER: No.
20 It's not the same because nobody can read the
21 court reporter's notes.

22 MR. YELENOSKY: Right.

23 HONORABLE SCOTT BRISTER: This
24 is a tape that anybody can type up. The
25 question is whether we should at county

1 expense send it out to some service and ask
2 them to type it up and pay them for it, or if
3 the guy is filing hundred-page typed
4 transcripts and has a typewriter and plenty of
5 time, whether we should just ask him to do it,
6 just his contribution to society.

7 MR. YELENOSKY: Well, aside
8 from that I guess the built-in checks that you
9 have identified about opposing counsel making
10 sure that the transcript is correct, probably
11 you wouldn't have the same confidence in that
12 transcription, but that's a different concern
13 than mine.

14 HONORABLE SCOTT BRISTER:
15 Indigent appeals that's usually not a problem.

16 MR. YELENOSKY: I'm just
17 wondering about the discretion to decide
18 whether or not somebody is going to have to
19 type up their own transcript.

20 HONORABLE SCOTT BRISTER: Yeah.
21 We will talk about that.

22 CHAIRMAN SOULES: Well, some
23 indigents can't read and write, much less
24 type.

25 HONORABLE SCOTT BRISTER: Sure.

1 Sure.

2 CHAIRMAN SOULES: And they
3 can't go type up something. I mean, they may
4 be able to listen to it, and if they can't get
5 that done, I don't see how we can burden the
6 appellate process. We have got to give them a
7 way to get that done.

8 HONORABLE SCOTT BRISTER: But
9 we have made special rules for prisoner
10 indigents in other circumstances because we
11 all know this is a problem, the prison house
12 lawyer, and I'm just suggesting we ought
13 to -- if I can't come up with it, I can't, but
14 take a few minutes and see if we might come up
15 with something to cut them out.

16 CHAIRMAN SOULES: Okay. I
17 mean, it's one alternative that the court will
18 engage someone to cause it to be typed up to
19 get that paid. It's just going to have to be
20 a piece of the court's budget, I guess, or the
21 county probably. Okay. Anything else on
22 this? Elaine.

23 PROFESSOR CARLSON: I just had
24 a quick question that I really don't
25 understand on this one. We said that the

1 tapes that are filed constitutes the statement
2 of facts. So if you file all of the tapes, is
3 that a complete statement of facts so you
4 don't have to designate a partial statement of
5 facts? Is that how it works?

6 HONORABLE SCOTT BRISTER:

7 Uh-huh. I'll explain that to you.

8 PROFESSOR DORSANEO: Uh-huh.

9 CHAIRMAN SOULES: Is that how
10 it still works?

11 HONORABLE C. A. GUITTARD:

12 Yeah.

13 CHAIRMAN SOULES: Okay. Any
14 other questions that you need clarified on
15 this so we can move on?

16 HONORABLE C. A. GUITTARD: I
17 guess that's it.

18 CHAIRMAN SOULES: Okay. Now
19 that we want to go to the --

20 PROFESSOR DORSANEO: No. A few
21 more on this one.

22 CHAIRMAN SOULES: Okay. What's
23 next, Bill?

24 PROFESSOR DORSANEO: All right.
25 If you will look at the cumulative report

1 dated November 14, 1994, this is updated based
2 upon the action that we took at the September
3 16th meeting, and actually now we have been
4 through, I believe, virtually every item in
5 here concerning the appellate rules with the
6 exception of Appellate Rule 52. There are,
7 however, three or four items that required
8 further consideration because they were sent
9 back to us or for other reasons should have a
10 tiny bit more consideration.

11 Let me just go to those quickly. The
12 first one is Rule 16 on page 8. That, if you
13 will remember from last time, is the court of
14 appeals unable to take immediate action
15 proposal. At the last meeting on September
16 16th we decided to draft an alternative to the
17 last sentence with the issue being what should
18 happen after the court that doesn't have
19 jurisdiction takes action because the court
20 that does is unable to take immediate action.
21 The alternative, based upon our discussion
22 last time, is indicated at the bottom of the
23 page.

24 I would for our purposes here today like
25 to change the word in the consideration of the

1 alternative "transferor court," to change
2 those words to "court having jurisdiction."
3 That would be more parallel to the original
4 language. So we have the question as to
5 whether we accept the -- take the alternative.
6 Under the alternative the court that has
7 jurisdiction but the one that was unavailable
8 certifies that it is available and then the
9 matter is sent back to the court having
10 jurisdiction for any additional action.

11 The other proposal -- and we could decide
12 to submit this to the court both ways. The
13 Supreme Court could do what they want. Under
14 the other proposal the court would take action
15 and then send it, send it back to the court
16 having jurisdiction, which would happen
17 automatically without the certificate. So I
18 guess the question would be which alternative
19 do you like today now that you can see them
20 both here, or do you like both of them about
21 equally as well, in which event we send it on
22 in that shape?

23 CHAIRMAN SOULES: The first one
24 is as soon as the available court acts then it
25 returns the papers to the court of

1 jurisdiction?

2 PROFESSOR DORSANEO: Right.

3 CHAIRMAN SOULES:

4 Automatically?

5 PROFESSOR DORSANEO: Right.

6 CHAIRMAN SOULES: The second
7 one is when the available court is active it
8 waits until it hears from the transferor court
9 or the court of jurisdiction before it can
10 send the papers back?

11 PROFESSOR DORSANEO: Right.

12 HONORABLE C. A. GUITTARD: In
13 that scenario then the court of original
14 jurisdiction could just say, "Well, we don't
15 want it back. Let them have it. We are not
16 going to certify it."

17 CHAIRMAN SOULES: Okay. How
18 many feel that the papers should be returned
19 automatically after the available court has
20 acted on whatever emergency relief is sought?
21 Automatic return? Nine.

22 Okay. How many feel that the available
23 court should keep the papers until the court
24 of original jurisdiction makes some
25 certification? It's unanimous then for

1 automatic return.

2 HONORABLE C. A. GUITTARD:

3 Okay.

4 PROFESSOR DORSANEO: Okay.

5 CHAIRMAN SOULES: Next?

6 PROFESSOR DORSANEO: The next
7 one is on page -- my reading glasses have been
8 misplaced somewhere in the room. Page 28.
9 They would work better.

10 CHAIRMAN SOULES: Here they
11 are. I have them. These work better for me,
12 too.

13 PROFESSOR DORSANEO: Page 28,
14 the no record file, 56(c). Now, we have
15 debated this many times in our combined
16 committee meetings, and at our last meeting on
17 September 16th when the matter was discussed
18 the progress that was made was to add the
19 words in the first line "or 30 days in the
20 case of an accelerated appeal." The issue
21 really is as to the numbers, all of the
22 numbers, in the overall. Should it be 120
23 days or should it be 90 days, would be the way
24 I would frame it because you get another 30
25 days in the second sentence. Follow me?

1 Should we deal with accelerated appeals
2 differently? I think we decided to do that
3 last time. If we should deal with them
4 differently, should we deal with them
5 differently this way, on expiration of 30 days
6 in the case of an accelerated appeal? If we
7 do that, do we have the same 30 days more in
8 the second sentence for an accelerated appeal
9 or some shorter number of days more in an
10 accelerated appeal? My recommendation
11 personally would be, since we don't have a
12 committee recommendation on it, to change the
13 120 to 90 and to otherwise just change the
14 written word "thirty" to the number "30."

15 CHAIRMAN SOULES: Discussion?
16 Any opposition? Okay. Then the first line
17 of -- let's see. This is rule --

18 HONORABLE C. A. GUITTARD: 56.

19 CHAIRMAN SOULES: 56,
20 subparagraph (c). First line would be on
21 expiration of 90 days instead of 120, and the
22 third line, just change the typewritten
23 "thirty" to a mere "30," and that's approved,
24 unanimously approved.

25 PROFESSOR DORSANEO: The next

1 one would be on page 31. The first change,
2 which I'll just make, is in (a)(2) which
3 should say "if it appears to the appellate
4 court." The more significant one would be to
5 change (a), and I don't know whether we even
6 need to vote on this, Mr. Chairman, to
7 simplify it such that it doesn't refer any
8 more to -- and actually, we could actually
9 combine (1) and (2) -- two procedures that
10 have been superseded by the entire proposal.
11 The costs on the appeal bond, cash deposit,
12 should be eliminated.

13 The whole thing should read, "If an
14 appeal is subject to dismissal for want of
15 jurisdiction or for failure of the appellant
16 to comply with any requirements of these rules
17 or any order of the court," then we could add
18 and I would recommend this, "or any notice
19 from the clerk requiring a response or other
20 action within a specified time, the appellee
21 may file a motion for dismissal or for
22 affirmance." Without having the additional
23 words "in judgment for costs in the appeal
24 bond or for the cash deposit."

25 We could also eliminate the language that

1 refers in the second sentence to the appeal
2 bond or other document perfecting or
3 attempting to perfect the appeal. I guess
4 what I'm suggesting, Mr. Chairman, without
5 getting into the detail of the language is
6 that (a)(1) needs to be redrafted to
7 correspond to the other changes that we have
8 made by deleting references to things that are
9 no longer part of the process.

10 CHAIRMAN SOULES: Okay. Any
11 discussion? Any opposition? That's
12 unanimously approved.

13 PROFESSOR DORSANEO: The next
14 one is on page 34. We discussed at an earlier
15 meeting 74(e), the briefing process, the brief
16 of the appellee or the cross-appellee. To
17 refresh your recollection, a cross-appellee is
18 a new appellee who is proceeded against by the
19 the appellee who is acting as an appellant by
20 reference to the inclusion of a cross-point
21 complaining of a ruling or action of the trial
22 court as to any party to the trial court's
23 final judgment; that is to say, someone who
24 was not the appellant. That's kind of almost
25 like a third party action in the trial court.

1 We drafted this and redrafted it. My
2 motion would be, in light of our discussions,
3 to draft it a little bit more to simplify it
4 after the semicolon by saying this: "and in
5 civil cases if an appellee or -- and in civil
6 cases an appellee or cross-appellee may
7 complain of any ruling or action of the trial
8 court by including cross-points in his or her
9 brief." The change is simply to include a
10 reference to cross-appellee and to say in very
11 simple terms that these folks may complain of
12 any ruling or action of the trial court by
13 including cross-points in his or her brief. I
14 don't think that changes any meaning. It just
15 makes it clearer.

16 CHAIRMAN SOULES: Any
17 discussion? Any opposition? Okay. That
18 stands unanimously approved then. 74(b).

19 HONORABLE C. A. GUITTARD:
20 Mr. Chairman?

21 CHAIRMAN SOULES: Judge
22 Guittard.

23 HONORABLE C. A. GUITTARD: It
24 might be conducive to clarity instead of (e),
25 brief of appellee or cross-appellee, to remove

1 the reference there to appellee and
2 cross-appellee and where it -- and on further
3 down in subdivision (f), which applies to
4 cross-appeal, put the provisions about the
5 briefs of the cross-appellee there.

6 PROFESSOR DORSANEO: I don't
7 have any problem doing it either way. (E)
8 needs to be read together with (f), and they
9 work fine the way I just stated them, but they
10 might even be clearer yet if they were changed
11 around a little bit. If we can have the
12 authorization to move things around --

13 CHAIRMAN SOULES: Any objection
14 to that?

15 PROFESSOR DORSANEO: -- we
16 could talk about that further.

17 CHAIRMAN SOULES: Okay. You
18 have that authorization.

19 PROFESSOR DORSANEO: Okay.

20 HONORABLE SAM HOUSTON CLINTON:
21 Before we leave Rule 74.

22 CHAIRMAN SOULES: Judge
23 Clinton.

24 HONORABLE SAM HOUSTON CLINTON:
25 I'm sorry. I thought this had come up before

1 and was settled, but apparently it was not.
2 I'm talking about Rule 74 now, the designation
3 of these parties. In criminal cases we have
4 long provided that for some time under our
5 rules that the State is always the State
6 whether the appellant or the appellee. That's
7 our Rule 74, and the defendant is not the
8 appellant in the case, is the appellee only
9 when the State is the appellant. Our Rule 74
10 so provides, and I would hope that this would
11 correspond with our rule.

12 CHAIRMAN SOULES: Okay. Then
13 we need to as far as the -- let's see. The
14 parties, designating the parties by a title,
15 preserve the current 74 as it applies to
16 criminal cases.

17 HONORABLE SAM HOUSTON CLINTON:
18 There have been two (b)'s.

19 CHAIRMAN SOULES: Yeah. This
20 is one of those cases where the Supreme Court
21 changed the rules in 1990 without asking
22 permission and getting the concurrence of the
23 Court of Criminal Appeals.

24 HONORABLE SAM HOUSTON CLINTON:
25 We had already changed ours I think before

1 then.

2 CHAIRMAN SOULES: So we have
3 got two Rule 3(b)'s. So we need to merge the
4 3(b)'s. Do you need to look at this to see
5 what I'm talking about?

6 So that the court of appeal's
7 promulgation of Rule 3(b) is a part of this so
8 we will have some -- Rule 74 as far as the
9 designation of parties will say in civil cases
10 this and in criminal cases something else that
11 tracks their current rule.

12 PROFESSOR DORSANEO: Okay.

13 CHAIRMAN SOULES: Okay.

14 PROFESSOR DORSANEO: All right.
15 We will take care of that, and I have got
16 three more things. The first one, in terms of
17 drafting involves backing up here. Rule 13 on
18 page 7, we discussed this at our September
19 16th meeting, this fee or deposit problem. We
20 tried to redraft it to make it not
21 problematic. It's not an easy thing to
22 redraft. It may not be a big deal, but to
23 just say "fee or deposit" simply ends up not
24 clarifying anything. The rule when it uses
25 the term "deposit" as either a noun or a verb

1 gives the wrong suggestion. When it says
2 "deposit" we should change that to "fee" when
3 "deposit" is a noun. When it says "deposit"
4 as a verb we should change it to "pay," and
5 that will make it say what it means. Why
6 don't we just go ahead and do that?

7 CHAIRMAN SOULES: Any
8 opposition to that? Any discussion? That's
9 unanimously approved.

10 PROFESSOR DORSANEO: Good.

11 HONORABLE C. A. GUITTARD:

12 Buddy wasn't here.

13 CHAIRMAN SOULES: What?

14 HONORABLE C. A. GUITTARD: The
15 last time Buddy Lowe -- we had it set to go
16 that way. He said, "Well, it says deposit.
17 It may mean something, so let's leave it in."
18 So Buddy won't be very --

19 CHAIRMAN SOULES: Okay.

20 PROFESSOR DORSANEO: Page 12,
21 please. And this will be page 12. Also the
22 last thing on page 14, on the signing and
23 service of the notice of appeal, and while I
24 was in the airplane this morning you may have
25 covered this, but I don't think so from our

1 discussion, and we have talked about this on
2 several occasions at several of our meetings.
3 The notice of appeal shall be signed and
4 served. Now, on page 12 in (a)(3) it doesn't
5 say in this rule who it's served on.

6 Okay. Now, you say, well, that's said by
7 indirection in Rule 4. However, if you'll
8 look down at the (a)(5) we make it plain that
9 the notice of limitation of appeal is served
10 on all parties, other parties to the trial
11 court's final judgment. My recommendation
12 would be in this rule that we say, "The notice
13 of appeal shall be signed and served on all
14 parties to the trial court's final judgment"
15 even though that may be using one, two, three,
16 four, five, six, seven, eight, nine more words
17 than we really need to. That makes it
18 absolutely clear, and we won't run into a
19 difficulty.

20 Now that, the reason why I think that
21 relates to Rule 42 that we talked about this
22 morning, this (a)(3) on page 14, is that, of
23 course, in an accelerated appeal we will not
24 necessarily have a trial court's final
25 judgment, and we have this notice of appeal

1 being filed. Presumably it would need to be
2 served in accordance with Rule 4 on all
3 parties to the trial court's final judgment.
4 I think we need to add service language in
5 (a)(3) with respect to accelerated appeals to
6 make reference to who is served, and that
7 would be presumably all parties to the
8 proceeding in the court below or some similar
9 language. Okay. But not the trial court's
10 final judgment necessarily because accelerated
11 appeals will not normally involve cases in
12 which there is a final judgment. I would make
13 those two recommendations to make a specific
14 change in Rule 40(a)(3) and to authorize us to
15 write the service language into 42(a)(3) by
16 reference to the appropriate parties.

17 CHAIRMAN SOULES: Any
18 objection? Any discussion? Okay. That's
19 unanimously approved.

20 HONORABLE C. A. GUITTARD: In
21 Rule 42 we haven't previously -- 42(a)(3), we
22 have not yet presented that.

23 PROFESSOR DORSANEO: All right.
24 Well, let me do that, too. The other thing --

25 CHAIRMAN SOULES: How much

1 more? The court reporter --

2 PROFESSOR DORSANEO: This is
3 it.

4 CHAIRMAN SOULES: Okay.

5 PROFESSOR DORSANEO: The other
6 thing with respect to this (a)(3) is that
7 there is an issue in the courts of appeals as
8 to whether an accelerated appeals filing, that
9 is to say perfection, can be extended by
10 motion as provided in 41(a)(2). The courts
11 are, I think, in disagreement about that. Our
12 committee, combined committee on appellate
13 rules, recommends to this committee that
14 accelerated appeals -- the perfection of
15 accelerated appeals can be extended in the
16 same manner as other appeals in accordance
17 with Rule 41(a)(2) which is on page 13 and
18 that that conflict be resolved in that manner.

19 CHAIRMAN SOULES: Any
20 objection? Any discussion? That's approved.
21 Okay.

22 HONORABLE C. A. GUITTARD: All
23 right.

24 CHAIRMAN SOULES: Okay. Let's
25 take about 10 minutes. Be back at 3:45.

1 MS. DUNCAN: 3:45? 30 minutes?

2 CHAIRMAN SOULES: I'm sorry.

3 3:30. Be back at 3:30 for sure.

4 (At this time there was a
5 recess, after which the proceedings continued
6 as follows:)

7 CHAIRMAN SOULES: Okay. Let's
8 go to work. Okay. If you'll get -- what
9 volume is this? If you'll get Volume 2 of
10 your supreme -- this big book, Volume 2, and
11 turn to page 983 and supplement to page 440.
12 983 and supplement to page 440.

13 PROFESSOR DORSANEO:
14 Mr. Chairman?

15 CHAIRMAN SOULES: Pass those
16 out.

17 MS. DUDERSTADT: Everybody
18 should have one of those.

19 PROFESSOR DORSANEO: Does
20 everybody have one of these? What this is,
21 this smaller document, which has if you'll
22 look at the first page of it, the first page
23 heading of 984, it's a digest or abstract of
24 the bigger books. Each proposal or
25 recommendation that appears on a page in the

1 court's agenda is digested or abstracted here
2 with the subcommittee's recommendation for
3 action or the subcommittee's response to the
4 proposal. The response may be and frequently
5 is that we have already dealt with that
6 suggestion or proposal in working on the
7 revision of the appellate rules that we have
8 completed discussing today. So you can use
9 this along with the agenda. First, it deals
10 with the original agenda. Then later it picks
11 up with the supplemental agenda.

12 CHAIRMAN SOULES: Okay.

13 PROFESSOR DORSANEO: And I
14 think Judge Guittard will probably be speaking
15 from this document primarily because it has
16 our comments and suggestions on it.

17 CHAIRMAN SOULES: So that
18 everybody understands, if you are on page 93
19 of your book, 983. That's a letter that
20 Justice Hecht wrote back to Michael Northrup,
21 and Michael Northrup wrote in and has some
22 suggestions, and then this, what follows are
23 similar suggestions from people, lawyers and
24 others, judges, from Frank Evans, and what we
25 always need to do is to address each -- we

1 call them inquiries that we get from any
2 source, and what we are going to do now is
3 take up these inquiries that have to do with
4 appellate practice, and the committee, of
5 course, has essentially completed its report
6 subject to the one last rewrite for January
7 and subject to what we do on these individual
8 inquiries.

9 Many of them have been dealt with by the
10 committee's work in this big report. Some of
11 them may or may not need to be addressed by
12 additional change. Traditionally a lot of
13 them this committee considers and decides that
14 maybe nothing needs to be done. So what the
15 committee has done, has taken from 983 on
16 through the TRAP Rules and then the supplement
17 beginning at 440 on through the TRAP Rules,
18 looked at those and made this report which is
19 separate from their main report so that we can
20 deal with these individual inquiries, and
21 that's what we are going to do now. That will
22 wrap up -- basically wrap up the appellate
23 considerations for this session of the SCAC.

24 HONORABLE C. A. GUITTARD:

25 Right. I will refer to each of these

1 proposals or inquiries by the pages as they
2 appear in the original agenda. You can see on
3 each case that page is referred to here, and I
4 think that would be the easiest way to draw
5 your attention to it, those who want to go
6 through it one by one.

7 CHAIRMAN SOULES: Let's do it.

8 HONORABLE C. A. GUITTARD: Rule
9 4(a)(1) and -- 41(a)(1) and 52(c)(1). The
10 proposal is that a motion to modify the
11 judgment does not extend the time for
12 perfecting the appeal or for filing a bill of
13 exception. He says it should. Well, we have
14 done that, and the rules that do that are
15 cited here. So no further action is required
16 there. Now, do you want to --

17 CHAIRMAN SOULES: So
18 Mr. Northrup's inquiry is being satisfied by
19 the work on the main report?

20 HONORABLE C. A. GUITTARD:
21 Yeah. In that respect, yes. Now, Michael
22 Northrup had another proposal. It says, "From
23 a theoretical standpoint, making original
24 exhibits part of the transcript while putting
25 the court reporter in charge of the exhibits

1 is incongruous for other rules relating to
2 the -- incongruous with other rules relating
3 to the record."

4 Now, we have provided that -- and there
5 is also a related inquiry from our proposal by
6 Judge Paul Nye on page 1016 with respect to
7 Rules 11 and 53(1). He suggests that we ought
8 to specify who files exhibits with the
9 appellate court. Now, of course, the normal
10 procedure is for the court reporter to copy
11 the exhibits which are in the custody of the
12 clerk and put the copies in the statement of
13 facts. So this question -- and then the
14 reporter files the statement of facts.

15 Now, the only problem arises with respect
16 to the original exhibits when there is an
17 order to send them up, and Rule 53(1) doesn't
18 expressly say who sends them up. I think you
19 can read the rules all together, and it
20 appears that it's the court reporter's duty,
21 but in order to resolve any problems out there
22 it might be well just to add to the second
23 sentence of proposed 53(1) the following
24 language. That rule says the order of the
25 court descending, giving up, shall be -- shall

1 designate they should be bound and how they
2 would be safeguarded and so forth, and the
3 proposal there would be simply to add the
4 following: "...and transmitted by the
5 official reporter to the clerk of the
6 appellate court," and I think that will take
7 care of that. And would you like some
8 discussion of that?

9 CHAIRMAN SOULES: Was there
10 some discussion from the clerks last time that
11 they --

12 MS. LANGE: I think that's all
13 been taken care of, don't you?

14 HONORABLE C. A. GUITTARD: Yes,
15 but not expressly. By implication it has, but
16 in Rule 53(1), if you read it, it says that
17 the appellate court can direct the reporter to
18 send it, but if the trial court orders it up,
19 it doesn't say who sends it, and this would
20 say that.

21 CHAIRMAN SOULES: And was the
22 resolution that the clerks felt that the
23 reporter should secure the exhibits and send
24 them up or the clerks themselves send them up?

25 MS. WOLBRUECK: I don't think

1 we said.

2 MS. LANGE: I think it was
3 decided at the time that the clerks would
4 furnish the copies to the court reporters for
5 them to submit with their statement of facts.

6 HONORABLE C. A. GUITTARD:
7 That's clear with respect to the copies.

8 MS. WOLBRUECK: But this is the
9 original.

10 HONORABLE C. A. GUITTARD: But
11 this is with respect to what to do with the
12 originals when they are ordered up.

13 MS. WOLBRUECK: I had made a
14 note to myself on 51(1). There is a statement
15 here that says, "If an exhibit is in the
16 custody of a person other than the clerk the
17 trial court -- the trial court or the
18 appellate court may order the exhibits to be
19 delivered to the appellate court." My
20 question that I made here was, by whom?

21 HONORABLE C. A. GUITTARD:
22 Yeah.

23 MS. WOLBRUECK: Because it may
24 be -- it could be in the custody of somebody
25 besides the clerk because of contraband or

1 other items or something that are now
2 deposited to the sheriff. So it could be in
3 the custody of somebody besides the clerk.

4 HONORABLE C. A. GUITTARD:

5 That's right. And this would simply say that
6 it's the official reporter's duty to send the
7 original exhibits when they are ordered up.

8 MS. WOLBRUECK: I think it
9 would be good to clarify that just due to the
10 fact that there is no clarification at this
11 point.

12 HONORABLE C. A. GUITTARD:

13 Okay.

14 CHAIRMAN SOULES: Well, do the
15 clerks have a preference about whether the
16 clerk sends the originals up or whether the
17 clerk gives them to the reporter to be sent to
18 the appellate court?

19 MS. WOLBRUECK: It doesn't
20 matter, but I will make this one comment
21 because we have a case that's going on right
22 now that had, like, massive amounts of
23 exhibits entered in it, and it's going to be a
24 great deal of difficulty for the court
25 reporter to copy the records. So they have

1 decided that maybe they will get an order to
2 send up the originals, and so I can see, you
3 know, if it's not clarified it's going to be
4 one of those things of, well, I don't really
5 have the time to make the copies so if I get
6 an order signed by the judge to send up the
7 originals, well, then the clerk has to do it
8 or vice-versa or something, and we are going
9 through a little bit of that controversy right
10 now with one of my court reporters. Actually,
11 it doesn't matter to me personally.

12 CHAIRMAN SOULES: Who has
13 custody of the exhibits?

14 MS. LANGE: Of the original
15 exhibits, the clerk.

16 CHAIRMAN SOULES: As long as
17 it's not contraband or something.

18 MS. WOLBRUECK: Yeah. As long
19 as it's not contraband, supposedly the clerk.
20 They are to be handed to the clerk by the
21 court reporter, turned over by the court
22 reporter to the clerk.

23 CHAIRMAN SOULES: Why shouldn't
24 the originals go directly from the clerk to
25 the court?

1 HONORABLE C. A. GUITTARD:

2 Well, the rule as it now provides is, it
3 doesn't say who does it except it says when
4 the trial -- when the appellate court orders
5 an exhibit up it should order the reporter to
6 send it up.

7 MS. WOLBRUECK: Yeah. That's
8 what it says in there.

9 HONORABLE C. A. GUITTARD: Now,
10 that ought to be consistent.

11 CHAIRMAN SOULES: That's right.

12 HONORABLE C. A. GUITTARD: So
13 the proposal here is that the reporter --
14 since the exhibits are a part of the statement
15 of facts and it's the duty of the court
16 reporter to file the statement of facts, he
17 files copies of the exhibits unless there is
18 an order, and if there is an order, the
19 proposal is that he, the court reporter, send
20 them up.

21 MS. WOLBRUECK: That would be
22 fine.

23 MS. LANGE: My comment would be
24 that it would be less confusing, I would
25 think, on the appellant's end receiving the

1 exhibits with the statement of facts. How
2 those two get together, you know, but --

3 MS. WOLBRUECK: I think if
4 David is in agreement with the court reporter
5 doing it, I think we would be.

6 MR. JACKSON: Are we talking
7 about documentary exhibits or physical
8 exhibits?

9 CHAIRMAN SOULES: Both.

10 HONORABLE C. A. GUITTARD:
11 Documentary. Yeah. Both.

12 MR. JACKSON: Both?

13 CHAIRMAN SOULES: Both.

14 MS. WOLBRUECK: I don't think
15 it's really an issue between us. I think
16 right now it does say if the appellate court
17 orders it, the reporter does it, the court
18 reporter does it. So maybe just stay in
19 consistency with that.

20 HONORABLE C. A. GUITTARD:
21 Okay.

22 CHAIRMAN SOULES: Okay. So we
23 will clarify it to say that the reporter has
24 this responsibility.

25 HONORABLE C. A. GUITTARD: Very

1 good.

2 CHAIRMAN SOULES: Make it
3 express in all necessary places.

4 HONORABLE C. A. GUITTARD:
5 Right.

6 CHAIRMAN SOULES: Okay.

7 HONORABLE C. A. GUITTARD: And
8 I don't think there is any place other than
9 Rule 51(1) that would be involved in that.

10 JUSTICE CORNELIUS: I guess --
11 Luke, I guess we are not covering that
12 situation that we talked about once before
13 about contraband, weapons and whatnot. We had
14 a problem with it in my court because by
15 statute those are --

16 MS. WOLBRUECK: I think it
17 should.

18 JUSTICE CORNELIUS: Okay.
19 Well, who sends them up?

20 PROFESSOR DORSANEO: Whoever
21 has them.

22 JUSTICE CORNELIUS: Well, the
23 sheriff has --

24 HONORABLE C. A. GUITTARD:
25 Yeah. If the sheriff has something, I guess

1 they order the sheriff to do it.

2 JUSTICE CORNELIUS: Well,
3 that's what I say. That's not said in the
4 rules.

5 HONORABLE C. A. GUITTARD: Or
6 does the sheriff give it to the court reporter
7 and he --

8 CHAIRMAN SOULES: What does the
9 rule say now that we think covers this
10 problem?

11 HONORABLE SAM HOUSTON CLINTON:
12 Last sentence.

13 PROFESSOR DORSANEO: Last
14 sentence.

15 CHAIRMAN SOULES: Says what?

16 PROFESSOR DORSANEO: Says if
17 that's the situation that the trial court or
18 the appellate court may order the exhibit to
19 be delivered. I would read that may order
20 anyone."

21 JUSTICE CORNELIUS: It doesn't
22 say who, but I guess it depends on who has
23 them.

24 PROFESSOR DORSANEO: Anyone who
25 has them.

1 CHAIRMAN SOULES: Is that
2 person the custodian?

3 JUSTICE CORNELIUS: Well, by
4 statute they are --

5 HONORABLE SAM HOUSTON CLINTON:
6 "If the exhibit is in the custody of a person
7 other than the clerk," which would be the
8 sheriffs and deputies and DPS and everything
9 you are talking about, I suppose.

10 CHAIRMAN SOULES: Then they
11 should say that the court should order the
12 custodian to send it to the court.

13 JUSTICE CORNELIUS: Well, it
14 just says it may order the exhibits to be
15 delivered.

16 CHAIRMAN SOULES: Order the
17 custodian to deliver it.

18 JUSTICE CORNELIUS: Order the
19 custodian to deliver it.

20 PROFESSOR DORSANEO: You could
21 say that, or we could change custody to
22 "possession" because the custody sounds like
23 somebody is supposed to have it, and I'm
24 reading this as if the appellate court learns
25 that somebody has it and they want it, they

1 can order them to get it over there.

2 CHAIRMAN SOULES: But who is it
3 talking about?

4 PROFESSOR DORSANEO: Whoever.
5 If it's me.

6 JUSTICE CORNELIUS: Whoever has
7 it.

8 HONORABLE C. A. GUITTARD:
9 Well, that's not involved in this proposal.

10 JUSTICE CORNELIUS: You want to
11 change "custody" to "possession"?

12 PROFESSOR DORSANEO: Well,
13 either way. Change "custody" to "possession"
14 and make it be implied that you can order
15 whoever has possession to do it or add your
16 language to it.

17 CHAIRMAN SOULES: Or just send
18 it.

19 PROFESSOR DORSANEO: Huh?

20 CHAIRMAN SOULES: Or just send
21 it. If it's in the possession of another
22 party, order the party who has possession to
23 deliver it to the court.

24 JUSTICE CORNELIUS: Order that
25 party. If it's in the possession of another

1 party, then they order that party to deliver
2 it to the appellate court.

3 PROFESSOR DORSANEO: Done.

4 CHAIRMAN SOULES: Okay. Done.
5 Okay. What's next?

6 HONORABLE C. A. GUITTARD: All
7 right. Are you ready for (c)?

8 CHAIRMAN SOULES: Yes, sir.

9 HONORABLE C. A. GUITTARD: The
10 next one then is what?

11 PROFESSOR DORSANEO: 989.

12 HONORABLE C. A. GUITTARD: 989?
13 All right. On page 3. Now, this is Professor
14 Carlson's suggestion, and she says she would
15 like all the times for deadlines with respect
16 to requesting findings of fact, amended
17 findings of fact and so forth, to run from the
18 time of judgment like other appellate steps
19 do. Our committee didn't really address that,
20 but it did remedy, we think, the main concern
21 that Professor Carlson had about not having
22 enough time to file your request for
23 additional findings by stating that in 20
24 days. Now, if Professor Carlson would like
25 some other action on her part of the

1 committee, well, I think she should be
2 recognized now.

3 CHAIRMAN SOULES: Elaine.

4 PROFESSOR CARLSON: Luke, I'm
5 satisfied that the suggestions they made
6 beginning on page 989 through page 993 have
7 been sufficiently discussed either by the full
8 committee or the subcommittee, and I think we
9 had the sense of the committee today on those
10 few matters that are still open questions that
11 we are going to go back and revisit, and maybe
12 in the interest of time we might want to move
13 on.

14 CHAIRMAN SOULES: Have you been
15 satisfied then with --

16 PROFESSOR CARLSON: Yes. I'm
17 satisfied.

18 MR. ORSINGER: Well, they have
19 been reported -- Luke, Richard Orsinger. They
20 were reported back to committee for
21 evaluation. They were not finally resolved as
22 I understood it. The committee was supposed
23 to look into the prospect of a timetable that
24 ran from the date of signing of judgment, or
25 was that proposal completely rejected?

1 HONORABLE C. A. GUITTARD: I
2 don't -- I don't recall if that was discussed
3 with request for finding, but maybe it was.

4 PROFESSOR CARLSON: I think
5 since we are going to revisit this as a
6 committee I hate to spend a whole lot more
7 time on it.

8 CHAIRMAN SOULES: All right.
9 Let's just leave it with the committee then.

10 HONORABLE C. A. GUITTARD:
11 Okay. We will go on to --

12 PROFESSOR DORSANEO: Page 6.

13 HONORABLE C. A. GUITTARD:
14 -- the bankruptcy. Judge Nye says that in
15 Corpus Christi they have a provision there
16 what the court does administratively with
17 cases where one of the parties is in
18 bankruptcy. The Dallas court also has a local
19 rule about that.

20 CHAIRMAN SOULES: This is 994?

21 HONORABLE C. A. GUITTARD: Yes.
22 994. Our joint committee has had several
23 proposals. It actually had some drafts but
24 has not made a final draft of that. If this
25 committee thinks we should do that, we will go

1 ahead and do that. The problem is, what does
2 the court do when one of the parties is in
3 bankruptcy? Does it hold the appeal? Does it
4 just stay the appeal? And what happens to the
5 appellate deadline during that time?

6 One of the proposals we have before us is
7 that if the bankruptcy stay comes while a
8 deadline is running and then the stay is
9 lifted, you don't just give the party the
10 additional time that's left, that
11 wasn't -- that didn't last before, but you
12 start it running again so they would have a
13 fair chance to get that done, and that's one
14 of the principal things that our proposal
15 would do, and if this committee would like us
16 to, we will work out that problem and present
17 the draft to this committee.

18 JUSTICE CORNELIUS: Don't we
19 have that draft complete already?

20 HONORABLE C. A. GUITTARD:
21 Well, we have a pretty good draft, but
22 Professor Dorsaneo was going to work out some
23 of the details on it, and so it's in his
24 hands. You want to speak on that?

25 MR. ORSINGER: Luke?

1 PROFESSOR DORSANEO: Well, if
2 we need a rule on it, which we probably do,
3 the question needs to be resolved as to what
4 the automatic stay actually is meant to stay
5 under federal law, which is not completely
6 clear, and whether we should have complete
7 correspondence with that or some other
8 principle that is more straight forward. From
9 our standpoint I think at the committee level
10 we were discussing whether our state rules
11 simply ought to, when there is a bankruptcy
12 proceeding involving any of the parties to
13 abate the entire proceeding, whether or not
14 federal law requires that because that's
15 simple; or something more complicated than
16 that, abate the proceedings as to one or more
17 persons because federal law requires that
18 much, although perhaps not the complete
19 obedience or suspension of the proceeding.

20 But my comments should make it clear to
21 you why we don't have a proposal ready for you
22 to vote on right now. It is a complicated
23 matter which -- that we have been working on.
24 We can probably have something ready by
25 January for full committee consideration, but

1 we weren't ready to present that now.

2 HONORABLE C. A. GUITTARD:

3 Right.

4 CHAIRMAN SOULES: Well, suppose
5 a party wins a judgment but not the judgment
6 they want, so they are going to appeal, and
7 the judgment debtor takes bankruptcy without a
8 lift of stay the party who wants to appeal and
9 perfect their appeal against a bankrupt can't
10 go forward.

11 PROFESSOR DORSANEO: That's
12 right.

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

15 CHAIRMAN SOULES: And we don't
16 know whether the appellate timetable expires
17 anyway because the appellate timetable is not
18 stayed.

19 HONORABLE C. A. GUITTARD:
20 Right. Well, is it?

21 CHAIRMAN SOULES: Or maybe it
22 is.

23 HONORABLE C. A. GUITTARD: We
24 should specify that ground.

25 CHAIRMAN SOULES: And it is

1 unclear. So what do you do? What if they
2 decide to take -- well, anyway. That's the
3 problem.

4 HONORABLE C. A. GUITTARD: We
5 will have a proposal if you want us to.

6 PROFESSOR DORSANEO: Now, the
7 harder issue is whether the bankrupt can take
8 the benefit of the stay and not prosecute an
9 appeal. In a sense if you look at the entire
10 proceeding, the entire proceeding is against
11 the debtor, but if you look at the appellate
12 part of the proceeding, that part of the
13 proceeding being prosecuted by the debtor is
14 not against himself. It's for the debtor.

15 CHAIRMAN SOULES: And that can
16 depend on whether it's a Chapter 7 or Chapter
17 11.

18 PROFESSOR DORSANEO: Yes.

19 CHAIRMAN SOULES: If you have
20 got a Chapter 11 DIP, they can probably do
21 anything they want to do.

22 PROFESSOR DORSANEO: I
23 anticipate that our committee will come out
24 with a simple rule that doesn't involve itself
25 in all of this federal complexity, that it

1 just says something like if there is a
2 bankruptcy as to any party to the trial
3 court's final judgment the matter is abated.

4 CHAIRMAN SOULES: The appellate
5 timetables are suspended?

6 PROFESSOR DORSANEO: Uh-huh.

7 HONORABLE C. A. GUITTARD: And
8 then start again from the beginning.

9 CHAIRMAN SOULES: Richard
10 Orsinger.

11 MR. ORSINGER: Apart from the
12 question of whether we should comply with or
13 whether we should comport with federal
14 bankruptcy law or be more expansive, one of
15 the things we considered was that when the
16 stay is lifted, or if it's determined by the
17 bankruptcy court the stay doesn't apply or
18 whatever, there ought to be some act that
19 occurs in the court of appeals that alerts
20 everyone that the Texas timetables are
21 starting to tick again, some kind of order,
22 some kind of motion and order saying that we
23 are back in action, the timetables are reset
24 to zero, and your timetables are running.

25 I think that we have got to draft

1 something because as I -- just this morning we
2 were having a conversation that those of us
3 who have had this experience are getting
4 different experiences depending on what court
5 of appeals we are in. So I think the
6 subcommittee ought to come up with some sort
7 of proposal rather than let it just be local
8 option, which is what it is right now.

9 PROFESSOR DORSANEO: We can
10 treat this as a priority item and put it on
11 the very top of our list to not be a part of
12 the cumulative report because I hope we are
13 putting that to bed, but to be a separate
14 matter to be reported on in January.

15 CHAIRMAN SOULES: And I don't
16 know what considerations need to be given to
17 the criminal process either. I mean, we are
18 writing the appellate rules for criminal and
19 civil cases, so maybe this could be something
20 that could apply only to civil cases.

21 MR. ORSINGER: And Luke, if I
22 may, also there is some complexity in the
23 family law area. If you are trying to collect
24 alimony or child support in certain
25 circumstances, the stay does not apply. In

1 other circumstances the stay does apply, but
2 you are entitled to have it lifted, but those
3 are so complex that, you know, probably the
4 subcommittee will prefer to just say if anyone
5 files a notice of bankruptcy we are going to
6 abate until something happens to make it clear
7 that we can go ahead with the appeal.

8 CHAIRMAN SOULES: And that's
9 going to be an order from the bankruptcy judge
10 because what else could it be?

11 HONORABLE SCOTT BRISTER:
12 Nonsuit of the bankrupt party.

13 CHAIRMAN SOULES: Termination
14 of the bankruptcy.

15 HONORABLE SCOTT BRISTER:
16 Various things can --

17 MR. ORSINGER: Severance?
18 Could you sever?

19 CHAIRMAN SOULES: Okay. So we
20 do need some recommendation --

21 HONORABLE C. A. GUITTARD: All
22 right.

23 CHAIRMAN SOULES: -- to deal
24 with Judge Nye's question there.

25 HONORABLE C. A. GUITTARD: Next

1 on page 994 Judge Nye suggests that the Court
2 of Criminial Appeals should adopt rules for
3 appeals by the State, and we haven't taken any
4 action on that. We didn't know what to do. I
5 don't know whether you want us to do that or
6 not. Perhaps Judge Clinton should comment on
7 that.

8 HONORABLE SAM HOUSTON CLINTON:
9 I don't have any -- considering that the
10 number of appeals that the State is getting
11 and filing, and successfully in most
12 instances, I don't know that the State has got
13 any problems.

14 HONORABLE C. A. GUITTARD:
15 Well, we will just forget it then if it's no
16 problem.

17 HONORABLE SAM HOUSTON CLINTON:
18 See, 44.01, which gives the State the right to
19 appeal pretty well specifies everything it has
20 to do in order to get to an appellate court,
21 and then from that point on the briefing rules
22 and all are in common because they are the
23 appellant. Every time it says "appellant,"
24 well, there they are. I haven't detected any
25 problem.

1 HONORABLE C. A. GUITTARD: Very
2 good.

3 HONORABLE SAM HOUSTON CLINTON:
4 Except one, and I've already touched on that.
5 There is not much we can do about it because
6 it's in the statutes. It talks about a trial
7 court entering a judgment, the trial judge
8 enters a judgment. If a trial judge ever
9 enters a judgment, I'd like to see it. That's
10 what the clerks do. The Legislature handed us
11 a spoiled potato on that one.

12 CHAIRMAN SOULES: So Judge
13 Clinton, between the statute itself and the
14 existing rules you feel like this problem as
15 far as --

16 HONORABLE SAM HOUSTON CLINTON:
17 The State has never complained it's got any
18 problems on appeal. Unless it loses.

19 CHAIRMAN SOULES: Okay. Then
20 you feel there is nothing needed on that point
21 at this time?

22 HONORABLE C. A. GUITTARD: Next
23 on page 995 the proponent, Katherine Kinser,
24 suggested that there be some sanctions in the
25 appellate court. She's particularly concerned

1 about when the opposing party makes a -- has
2 an ex parte communication with the court
3 without notifying the opponent.

4 CHAIRMAN SOULES: We have gone
5 to somebody else now, haven't we?

6 HONORABLE C. A. GUITTARD: We
7 dodged that. Of course, there are rules.
8 There are penalty provisions in Rule 84 for
9 the court of appeals, and 182(b), that is
10 damages for delay, but apparently Ms. Kinser
11 wants something a little more comprehensive of
12 that. So we suggested that just be referred
13 to the Task Force on Sanctions.

14 PROFESSOR DORSANEO: Or
15 somebody.

16 HONORABLE C. A. GUITTARD: Or
17 somebody.

18 PROFESSOR DORSANEO: It's a
19 one-page letter, Luke.

20 HONORABLE C. A. GUITTARD: Page
21 995.

22 CHAIRMAN SOULES: Did we skip
23 something of Judge Nye's letter?

24 HONORABLE C. A. GUITTARD: No.

25 CHAIRMAN SOULES: Okay. They

1 suggested that higher courts adopt a rule
2 regarding the filings made by fax machine.
3 "For your reference we have enclosed our
4 internal ruling."

5 HONORABLE C. A. GUITTARD: Oh,
6 well, we have got that here somewhere, don't
7 we?

8 MS. DUNCAN: We did skip it.
9 At the top of page 6.

10 CHAIRMAN SOULES: That goes
11 later?

12 MS. DUNCAN: And I'd like to
13 say it was not my letter on page 993 of the
14 agenda. I think it's David Beck's, but it's
15 not mine.

16 HONORABLE C. A. GUITTARD: I
17 thought I saw your signature on that, but what
18 do the records show?

19 MS. DUNCAN: Not a big problem.

20 HONORABLE C. A. GUITTARD: Oh,
21 yeah. Well, we did skip that. That's on page
22 993 and 994. Judge Nye suggests -- what did
23 he suggest?

24 MS. DUNCAN: Judge Nye's
25 proposal is on 994, the first block indent

1 paragraph, filing by fax in appellate courts.

2 HONORABLE C. A. GUITTARD: In
3 other words, there is some sort of statutes
4 about fax filing, and there apparently was
5 a --

6 CHAIRMAN SOULES: That's
7 someplace else.

8 HONORABLE C. A. GUITTARD:
9 There was a committee back in 1990 or sometime
10 that wanted to wait and see how those -- how
11 the faxes worked before they did anything, and
12 we haven't taken any action but to suggest
13 that the proposal could be coordinated with
14 any proposal to amend Texas Rules of Civil
15 Procedure 74 to allow electronic filing. In
16 other words, if the committee with respect to
17 filings in the trial court comes up with
18 something like that, well, perhaps we ought to
19 look at it for the appellate rules as well.

20 CHAIRMAN SOULES: Okay. So --

21 HONORABLE C. A. GUITTARD: If
22 we are ready to go on, let's go to 997. Frank
23 Evans wants us to do something about the
24 impact of a mandamus and other extraordinary
25 proceedings. He thinks that the courts of

1 appeals get too much of that. I think we
2 discussed that in our committee and decided
3 that that wasn't a big problem with the courts
4 of appeal. We didn't know what to do if it
5 was. So we didn't take any action on it.

6 JUSTICE CORNELIUS: It may have
7 been a problem, but I don't know what we can
8 do about it.

9 MR. ORSINGER: How about just
10 denying all of them?

11 HONORABLE SCOTT BRISTER: Deny
12 them all. Easy.

13 MR. ORSINGER: Just get a big,
14 red stamp that says "denied."

15 HONORABLE C. A. GUITTARD: So
16 we don't propose any action be taken on that.

17 When we don't propose any action unless
18 somebody speaks up here we might as well just
19 go on. So let's go on to 997, another of
20 Judge Evans' proposals. All he says, he wants
21 a better system for making unpublished
22 opinions of greater benefit to the Bar and the
23 judiciary, and we don't know what to do about
24 that either. One of the proposals might be to
25 publish all opinions, and I don't think we

1 want to do that. How else make them of
2 greater benefit unless you adopt the New
3 Jersey practice of having a professional
4 committee rather than the court determine what
5 opinions are published. We discussed that,
6 and we didn't want to do that either, and so
7 we recommend that no action be taken.

8 MS. DUNCAN: I guess I dissent
9 from that or I don't remember discussing it.
10 Over the last 10 months I have heard more
11 complaints from litigants and attorneys about
12 unpublished opinions than any other single
13 subject. My proposal that I haven't
14 completely thought out yet, some of the courts
15 put them in WESTLAW, some don't.

16 I guess my -- I don't think we can
17 publish all of them when 80 percent are going
18 unpublished. Speaking as a solo practitioner
19 there is no way I could afford the books
20 anymore, and a lot of other people couldn't as
21 well. So I guess my halfway in between not
22 completely thought out proposal would be that
23 unpublished opinions at least be put on Weslaw
24 and that they be citable. It is a big problem
25 for a lot of people. I speak for myself and

1 also for other people that I have talked to.

2 CHAIRMAN SOULES: This
3 committee has been through this more than
4 twice in the last 10 years and other than the
5 change to have published those opinions that
6 are subject to the Supreme Court review we
7 have always left it where it is. Again and
8 again.

9 MS. DUNCAN: But in those
10 discussions I don't know that the proposal was
11 ever made that they be put on Weslaw and that
12 Rule 90 be changed to permit citation of --

13 CHAIRMAN SOULES: Rule 90 be
14 changed to permit citation was a serious
15 subject in those discussions.

16 MS. DUNCAN: But not if they
17 are on Weslaw. The two were never combined I
18 don't believe, or at least in the one time I
19 remember hearing the discussion. All I'm
20 saying is that unpublished opinions are
21 creating a tremendous sense of dishonesty in
22 the judiciary for a lot of litigants and a lot
23 of lawyers, and we are losing credibility on
24 the unpublished opinion issue.

25 CHAIRMAN SOULES: This is about

1 a three-hour discussion if it goes like it has
2 in the past. I assure you. I mean, it just
3 goes on and on, who's going to pay for the
4 books if I've got to -- if they can be cited,
5 I have to know about them. I have to buy
6 them. I have to have access to them.

7 MS. DUNCAN: It's a serious
8 problem.

9 CHAIRMAN SOULES: Why don't we
10 go past this and come back to it after we try
11 to get some of the other things done maybe?

12 HONORABLE C. A. GUITTARD:
13 Okay. Page 998 has to do with the appendix
14 for criminal cases which makes some provision
15 for a supplemental transcript, and Judge Nye
16 thinks that that just ought to be eliminated,
17 and if you get a supplemental transcript, you
18 just get it according to the regular rules,
19 but what we have not -- we still have that
20 under consideration. So we don't have any
21 really recommendations to this committee at
22 this time.

23 HONORABLE SAM HOUSTON CLINTON:
24 Can I supplement that a minute?

25 HONORABLE C. A. GUITTARD: Yes,

1 please.

2 HONORABLE SAM HOUSTON CLINTON:
3 He also says that -- he refers to a rule that
4 says if you are going to retain it, we ought
5 to modify the current rule now referring to
6 45, and that's been corrected in 55, as if
7 that caused people onerous problems, but
8 anyway. It's now 55, which is the correct
9 rule.

10 HONORABLE C. A. GUITTARD: Do
11 you think we need to do anything, Judge
12 Clinton?

13 HONORABLE SAM HOUSTON CLINTON:
14 No, sir, I don't. Supplemental transcript is
15 specified for -- to serve its purpose, and
16 it's been with us ever since about 1978 or 9
17 for sure and not given anybody a problem that
18 I can tell.

19 HONORABLE C. A. GUITTARD: Very
20 well.

21 HONORABLE SAM HOUSTON CLINTON:
22 They are very rare, too, by the way.

23 HONORABLE C. A. GUITTARD: Page
24 999, Charles Spain inquires with respect to
25 the certificate of mailing which is now in our

1 Rule 4(c). "Does a 'certificate of mailing by
2 the United States Postal Service' refer to
3 Form 3817 in U.S. Postal Service Domestic Mail
4 Manual? Is a Form 3800, receipt for certified
5 mail, included?"

6 Well, we decided that our rule is
7 definite enough and that we didn't want to
8 examine those things and see what they meant,
9 and so we don't propose any action on that.

10 MS. DUNCAN: Can we clarify,
11 though, for the record that the certificate of
12 mailing is a particular thing, and it's in the
13 rules, and you can figure out what it is?

14 HONORABLE C. A. GUITTARD:
15 Well, what do you propose?

16 MS. DUNCAN: Nothing.

17 HONORABLE C. A. GUITTARD:
18 Okay. The next one, the next one has been
19 cured about that the mailbox rule applies only
20 to a motion for rehearing or any matter
21 relating to taking an appeal or writ of error
22 and so forth. The rule as we now have it
23 applies to any documents. That would cure
24 that concern.

25 The next is on page 1004 which has to do

1 with sealing the records.

2 CHAIRMAN SOULES: Well, now,
3 wait a minute. There was a lot in Spain's
4 letter that hadn't been addressed here.

5 HONORABLE C. A. GUITTARD:
6 Well, they relate to separate rules, and we
7 have separate reports on each one.

8 CHAIRMAN SOULES: Oh, okay. I
9 gotcha. Okay. Thank you.

10 HONORABLE C. A. GUITTARD:
11 Okay. The styling of 4, Tom Leatherbury
12 proposes that we adopt a rule for the
13 appellate court with respect to sealing of
14 records, and he has a draft here. We have had
15 some additional drafts of that that haven't
16 been reported on yet. We are still working on
17 that. If this committee wants us to -- wants
18 us to complete that draft and present it,
19 well, we will be glad to do that.

20 PROFESSOR DORSANEO: It's
21 slightly less tricky than bankruptcy but
22 roughly equivalent to degree of difficulty.

23 MS. DUNCAN: And considerably
24 more volatile.

25 HONORABLE C. A. GUITTARD: I

1 believe Mike had some -- Mike, do you have
2 some suggestions about that? Should we do
3 something about that or not?

4 MR. HATCHELL: Where are we?

5 HONORABLE C. A. GUITTARD: We
6 are on page 1004 with respect to sealing of
7 records.

8 MR. HATCHELL: No. No. That's
9 the first I've heard of this.

10 MS. DUNCAN: No, it's not.

11 MR. ORSINGER: Well, I can
12 comment on that.

13 CHAIRMAN SOULES: Are we
14 generally in a situation here with the
15 miscellaneous docket that the committee
16 doesn't have a lot of proposals or not? I
17 know David Beck has a report he's ready to
18 give us on Rules 1 to 165a. Should we go on
19 with this, or should we put it off today?
20 What do you think?

21 HONORABLE C. A. GUITTARD: We
22 can put it off unless there is something the
23 committee wants us to work on meanwhile.

24 CHAIRMAN SOULES: Okay.

25 PROFESSOR DORSANEO: There are

1 some specific things we could take up quickly,
2 Mr. Chairman.

3 CHAIRMAN SOULES: Well, we have
4 got to go through all of this before we close
5 the appellate rules. Every bit of this has
6 got to be gone through.

7 HONORABLE C. A. GUITTARD:
8 Well, we waited too long to do it.

9 CHAIRMAN SOULES: I mean, we
10 can send rules to the Supreme Court, but they
11 will be temporary interim rules until we go
12 through -- as I understand our charge it is to
13 address each of these with thorough review and
14 action or no action, if that's our vote, and
15 I'm just not sure if you are ready to do that.
16 If you are, let's go forward. You-all have to
17 tell me because I haven't been in the
18 subcommittee meetings.

19 HONORABLE C. A. GUITTARD:
20 There are some things that we have
21 disapproved. There are some things that we
22 have set on our docket and are still working
23 on. There are some things we haven't taken
24 any action on at all.

25 CHAIRMAN SOULES: What would

1 help you most? For us to go forward?

2 HONORABLE C. A. GUITTARD: I
3 guess that would help us most, but if you have
4 something that's -- these things are not of
5 pressing consequence, most of them. If you
6 have some other things that are of more
7 pressing consequence, perhaps we ought to go
8 forward with that.

9 PROFESSOR DORSANEO: This
10 report does say what it says about whether we
11 recommend anything or not.

12 CHAIRMAN SOULES: Okay. Okay.
13 Well, what do you recommend about Tom
14 Leatherbury? He's talking about opinions and
15 orders.

16 HONORABLE C. A. GUITTARD: I
17 think perhaps we ought to go ahead and draft
18 something and put it before this committee.

19 MS. DUNCAN: That's something
20 that's in progress. Bill has made a draft.

21 HONORABLE C. A. GUITTARD:
22 Right. It is.

23 MS. DUNCAN: And it's a
24 difficult thing to resolve.

25 HONORABLE C. A. GUITTARD:

1 That's right.

2 CHAIRMAN SOULES: Okay. So
3 this is under consideration?

4 HONORABLE C. A. GUITTARD: Yes.

5 CHAIRMAN SOULES: Okay.

6 HONORABLE C. A. GUITTARD: Page
7 1007. Judge O'Connor wants us to do something
8 about what to do about filings with the clerk
9 after close. We have done that, so let's move
10 on beyond.

11 1011, there ought to be a provision that
12 the trial court could find the date a party
13 receives the notice of judgment in the Rules
14 of Civil Procedure 306(a)(4), and it is
15 already in the appellate rules, and the trial
16 rules 306(a) should be conformed. Is that
17 right, Bill?

18 PROFESSOR DORSANEO: Yes. It
19 should be conformed as is 306(a) or if we ever
20 get to the revision of that part of the rule
21 book as a larger project it ought to be done
22 where 306(a) goes. I thought we had actually
23 already voted on that in this committee
24 previously, but it didn't take effect. The
25 proposal is to add information to 306(a) that

1 appears in Appellate Rule 5 in order to make
2 them exactly the same because they deal with
3 the same problem and otherwise deal with the
4 same problem in exactly the same way. You
5 have to look at Appellate Rule 5(b)(5) to see
6 what's missing from 306(a)(5), or maybe it's
7 (4).

8 HONORABLE C. A. GUITTARD: Why
9 don't we just decide today to put in 306(a) or
10 any subsequent reincarnation of 306(a) the
11 language that's now in the appellate rules?

12 CHAIRMAN SOULES: All right.
13 Will you-all do that because the chair of the
14 306(a) committee is not here for me to assign
15 that to?

16 PROFESSOR DORSANEO: We will do
17 it.

18 CHAIRMAN SOULES: Okay.

19 HONORABLE C. A. GUITTARD: The
20 next, page 1014, Dick Countiss wants us to
21 adopt a federal system of transmitting the
22 record to the appellate court. I guess he's
23 talking about transmitting the original papers
24 to the appellate court. That was our original
25 proposal. This committee voted it down, and

1 so I guess that's disposed of.

2 The next, 1016, we have already talked
3 about that, who files the exhibits with the
4 appellate clerk. We decided today that it
5 would be the court reporter.

6 1017, Judge Nye suggests that the
7 references in this rule should be to the
8 district, not the supreme judicial district.
9 The court of appeals district it should be,
10 and I think that's already been done in our
11 committee.

12 Next is 1018. Judge Nye suggests that
13 the clerk should be able to decline to file
14 the record and the court should be able to
15 dismiss if there is no fee paid, and I think
16 we have taken care of that by our provision
17 that if -- that we adopted last time, I think,
18 that if no fee is paid the clerk sends the
19 notice, and if he -- and if it's not paid
20 within a certain time, then he refers back to
21 the court, and they make an appropriate order,
22 which presumably would be dismissal of the
23 appeal without a fee.

24 Page 1019, we talk about what happens
25 when the -- Judge Nye wants something done

1 when the -- to prescribe a procedure where you
2 take it to another court because the original
3 court doesn't have -- is not available, and I
4 think we have passed on that last time as
5 well.

6 PROFESSOR DORSANEO: And this
7 time.

8 CHAIRMAN SOULES: Right.

9 HONORABLE C. A. GUITTARD:
10 Yeah. And this time. Okay. Page 1020.
11 Charles Spain wants to have a certificate of
12 conference with respect to the motion practice
13 of the appellate court like they have in the
14 trial courts. We concluded in our committee
15 that that should not be required and that they
16 just take up more trouble than they are worth
17 and that there weren't the same reasons for
18 requiring those in the appellate courts as
19 there were in the trial court. So we
20 recommended the disapproval of that
21 recommendation. If there is no dissent, we
22 will go on.

23 Page 1022, Rule 20. Charles Spain says
24 that since the new rules for admission to the
25 Bar now govern the pro hac vice admissions in

1 the appellate court, will nonadmitted
2 attorneys tendering amicus curiae briefs have
3 to comply with Rule for Admission to the Bar
4 19? Well, we didn't think that was of
5 sufficient importance to have a general rule
6 for. The courts of appeals could handle that
7 on an ad hoc or local basis. So we
8 disapproved that suggestion.

9 1025A, Dick Countiss wants some
10 restrictions on filing of amicus curiae
11 briefs. Apparently he has had to answer too
12 many of them, and he suggests some changes.
13 First, a time limit to file an amicus, require
14 they file a motion for leave to file, and
15 require the amicus curiae to serve everybody
16 with the brief, and don't let him file more
17 than one. Well, we considered that, and we
18 declined to approve it. We thought that there
19 is -- the appellate courts can pretty well
20 take care of that, and we didn't see any
21 reason to do that. Okay.

22 MS. DUNCAN: Can I also point
23 out that the rules require that all papers be
24 served?

25 HONORABLE C. A. GUITTARD:

1 Sure. As far as filing is concerned, that's
2 taken care of already.

3 CHAIRMAN SOULES: Service.

4 MS. DUNCAN: And I think we
5 have all had the problem of not getting amicus
6 briefs, but I think we have done all we can do
7 on that.

8 PROFESSOR DORSANEO: We
9 discussed and voted on changes for Appellate
10 Rule 20 last time with respect to amicus
11 briefs as well. We dealt with that subject at
12 some length.

13 HONORABLE C. A. GUITTARD: On
14 page 1027, questions whether an unverified
15 contest should be sufficient to require the
16 appellant to make further proof of his
17 inability. We have taken care of that by our
18 Rule 45(e), which would eliminate the
19 requirement that the contestant file an oath
20 to contest the proper action.

21 Page 1029, Judge O'Connor says that the
22 filing of the request for findings and
23 conclusions should not extend the time for
24 filing a notice of appeal. Well, we have
25 taken care of that.

1 PROFESSOR DORSANEO: The notice
2 of limitation of appeal.

3 HONORABLE C. A. GUITTARD: By
4 limited appeal, yes. Well, have we taken care
5 of that?

6 PROFESSOR DORSANEO: Yes. We
7 have taken care of this problem, I believe,
8 everywhere it appears.

9 HONORABLE C. A. GUITTARD:
10 Including this Rule 40(a), 40(a)(4)?

11 PROFESSOR DORSANEO: Yes.

12 HONORABLE C. A. GUITTARD: Or
13 40(a)(5).

14 PROFESSOR DORSANEO: In fact,
15 we have taken care of it in formal bills of
16 exception as well. Isn't that right, Lee?

17 MR. PARSLEY: Yes.

18 HONORABLE C. A. GUITTARD: And
19 that's the next part here by Judge O'Connor on
20 page 1032. He thinks that filing of the
21 request for findings should extend the time
22 for filing a formal bill of exception, and we
23 have taken care of that, too? Have we not?

24 MR. ORSINGER: Justice
25 Guittard, I'm not sure that you have because

1 the proposed language which is on page 1 of
2 this handout --

3 HONORABLE C. A. GUITTARD:

4 Uh-huh.

5 MR. ORSINGER: -- says that the
6 proposed rule is, is that, if a timely motion
7 for new trial, motion to modify, request for
8 findings, or motion to reinstate is filed,
9 formal bills are due within 60 days. I think
10 they are due 60 days without that, and they
11 should be due 90 days, if I am not confused.
12 Aren't formal bills due normally 60 days and
13 then if there is a timely motion for new trial
14 then they are due at the end of 90?

15 PROFESSOR DORSANEO: Yes.

16 MR. ORSINGER: But on page 1 of
17 our handout here, the very first page of what
18 we are working through, we comment on the
19 motion to modify's effect on the formal bill,
20 and look at the language. It says that if all
21 of these criteria are met then they are due
22 within 60 days. It looks like we have
23 eliminated the additional 30 days.

24 MR. YELENOSKY: 90.

25 MS. DUNCAN: I think that's in

1 the --

2 MR. ORSINGER: But I haven't
3 been able to locate this in our underlying
4 rules.

5 MS. DUNCAN: I think that's
6 contained within the ellipsis, but I'm not
7 sure.

8 MR. ORSINGER: It says shall be
9 filed within 60 days, so we have actually
10 retrograded. Do you see what I'm saying?

11 CHAIRMAN SOULES: Did you find
12 the place, Bill?

13 PROFESSOR DORSANEO: Yes. Let
14 me look here. Go on.

15 CHAIRMAN SOULES: Well, let's
16 stop just a minute and check on that and see.

17 MR. ORSINGER: It makes a
18 reference to Rule 52(c)(1), but Rule 52(c)(1)
19 doesn't exist anymore. It was --

20 PROFESSOR DORSANEO: Well --

21 HONORABLE C. A. GUITTARD:

22 That's another problem.

23 MR. ORSINGER: It may have been
24 moved somewhere, but it doesn't exist now as
25 just one sentence.

1 HONORABLE C. A. GUITTARD: It
2 does not appear in this cumulative report.
3 That's what you are saying?

4 MR. ORSINGER: Yeah. In other
5 words, we don't have a 52(c)(1) anymore, but
6 if it says this, it says the wrong thing.

7 PROFESSOR DORSANEO: It doesn't
8 say that.

9 MR. HUNT: But look on page 73
10 of the cumulative report, at 11. I think the
11 90 days is already there.

12 PROFESSOR DORSANEO: Yeah.
13 This little report is mistaken.

14 CHAIRMAN SOULES: So the
15 subcommittee's primary report has it correct at
16 90 days.

17 MR. ORSINGER: Well, let me say
18 this. If what Don is saying is correct, the
19 subcommittee's report, it's a Rule of Civil
20 Procedure not a Rule of Appellate Procedure so
21 I would question why we are --

22 PROFESSOR DORSANEO: Well, we
23 don't want to talk about that now.

24 MR. ORSINGER: We don't want to
25 talk about it.

1 PROFESSOR DORSANEO: Let's just
2 assume that it hasn't been moved yet. Our
3 proposal with respect to Appellate Rule 52 is
4 to move it for civil cases. Our proposal that
5 we are not presenting to this committee today
6 is to move it for civil cases into the Rules
7 of Civil Procedure altogether. We don't
8 actually have to do that. Okay. But the best
9 and most complete fix would be not only to
10 change it but to move it. We are not talking
11 about moving it today. We are only talking
12 about changing it, and trust me. We will
13 change it where it appears.

14 MR. ORSINGER: But, Bill, I
15 have a problem with appellate deadlines not
16 being in the appellate rules but being in the
17 trial rules. Now, I don't object if you have
18 them in both places, but if I was a
19 practitioner, I would look for appellate
20 deadlines in the appellate rules and trial
21 deadlines in the trial rules, and what you are
22 giving me is appellate deadlines in the trial
23 rules.

24 HONORABLE C. A. GUITTARD:
25 Well, I think now the apparent thing is to put

1 it both places.

2 MR. ORSINGER: I don't object
3 to that because then they are going to find it
4 if they look, but I think it's not fair to put
5 an appellate deadline in the trial rules and
6 not in the appellate rules because then they
7 won't know what it is. They won't be able to
8 find it.

9 PROFESSOR DORSANEO: All right.
10 If and when we ever propose to put it only in
11 the trial rules, which we now will not do --

12 MR. ORSINGER: Okay. Great.

13 PROFESSOR DORSANEO: -- you can
14 say that. Thank you for the sharp eye because
15 we wouldn't have wanted to make that mistake.

16 MS. DUNCAN: If that's the
17 case -- and I'm saying this jokingly -- all
18 the charge rules also need to be duplicated in
19 the appellate rules.

20 MR. ORSINGER: No. I don't
21 agree with that at all.

22 MS. DUNCAN: 52 is a
23 preservation rule.

24 MR. ORSINGER: Well, I'm more
25 concerned about the timetables. The now

1 current rule of 52 is just one little sentence
2 about preserving error, but we have to be
3 careful that we have our appellate deadlines
4 in our appellate rules where everyone would
5 think they might be.

6 CHAIRMAN SOULES: Okay. What's
7 next?

8 PROFESSOR DORSANEO: Let me say
9 this one thing for the record. For our
10 purposes here today and our cumulative report
11 where it is, you can assume that Appellate
12 Rule 52 as proposed to be redrafted in the
13 cumulative report has not been presented and
14 that it would be the text of current Rule 52
15 with the changes that we are approving now.

16 MR. ORSINGER: I see. Okay.

17 HONORABLE C. A. GUITTARD: I
18 think this next thing that is -- I think we
19 have omitted a page or something in here. We
20 were concerned about -- oh, whether the -- oh,
21 we were charged with the question of dealing
22 with this Guerra problem, Guerra versus
23 somebody, where the -- have we already taken
24 care of that?

25 PROFESSOR DORSANEO: Uh-huh.

1 Uh-huh.

2 HONORABLE C. A. GUITTARD:

3 Okay. Well, let's go forward to 1035 then.

4 The proposal is that the rule should clarify

5 the time for paying the cost when improper

6 notice has been given, and that is, otherwise

7 he shall not be entitled to prosecute the

8 appeal without paying the costs or giving the

9 security within the time allowed by Rule 41.

10 Rule 40(a)(3)(e) should read "If no written

11 signed order is made on the contest." Rule

12 40(a)(3)(f) should read, "He shall be required

13 to make such payment or give such security

14 (one or both) to the extent of his ability

15 within the time provided by Rule 41(a)."

16 Now, our present rule on this, this has

17 to do with a party unable to pay costs, and

18 our Rule 45(a) is a partial adoption of this

19 recommendation, and we have no further

20 recommendations about it.

21 Okay. Rule -- page 1035. There is a

22 problem here in the criminal cases as to

23 whether there is some conflict with the

24 court -- with the statute, and our committee

25 concluded that there may be a conflict but

1 that since it's a statute we can't do much
2 about that, and so we don't make any
3 recommendation for any change, and we would
4 like to have Judge Clinton's suggestions about
5 that, if we can.

6 CHAIRMAN SOULES: This is on
7 1036?

8 HONORABLE C. A. GUITTARD:
9 1035.

10 MS. DUNCAN: 1035.

11 CHAIRMAN SOULES: 1035. Excuse
12 me. Judge Clinton.

13 HONORABLE SAM HOUSTON CLINTON:
14 I was waiting for your look. Judge Nye's
15 letter, I noted, was dated in January of 1990.
16 Since then the court has handed down two
17 opinions. I can't think of the name of both
18 of them, but one of them is Davis from just
19 last year, and it answers most of the
20 questions that he raises, and I suppose that's
21 the answer to that.

22 HONORABLE C. A. GUITTARD:
23 Well, should -- a question is whether in the
24 light of those opinions there should be some
25 change in the rules for clarity purposes so

1 there would be a ready reference to it.

2 HONORABLE SAM HOUSTON CLINTON:

3 I think the opinions are themselves
4 clarifications of the rule.

5 HONORABLE C. A. GUITTARD:

6 Okay.

7 HONORABLE SAM HOUSTON CLINTON:

8 And say what you have implied but not stated,
9 and that is, the statute that gave us the rule
10 abating power precluded us from enlarging on
11 any rights, or diminishing as far as that
12 goes, of the rights of the parties, and these
13 two opinions more or less cite that and also
14 more or less implement it. We are not
15 answering all the questions but most of them.

16 CHAIRMAN SOULES: So you think
17 nothing needs to be done in the rules on this?

18 HONORABLE SAM HOUSTON CLINTON:

19 I don't think so. No. Davis, and I have
20 forgotten the name of that other opinion. I'm
21 sorry.

22 CHAIRMAN SOULES: Okay.

23 HONORABLE C. A. GUITTARD: Are
24 you ready to go ahead?

25 CHAIRMAN SOULES: Yes, sir.

1 HONORABLE C. A. GUITTARD: All
2 right. Page 1037 with respect to the contest
3 to an affidavit, which is now our Rule 45, but
4 Judge Nye suggests that the rules should read,
5 "If a timely contest to an affidavit in lieu
6 of bond is timely sustained..." Also, the
7 rule should provide the consequences if the
8 court finds and recites that the affidavit is
9 not filed in good faith. Well, our committee
10 considered that and didn't think it was
11 necessary that they necessarily imply that
12 it's effective only if timely, that the
13 contest be effective only if timely, and we
14 didn't think that was necessary. Now, as to
15 whether the trial courts should find that the
16 affidavit is not filed in good faith, we made
17 no recommendations about that. So we voted to
18 disapprove all of it as unnecessary. Anybody
19 think there should be some change there?

20 CHAIRMAN SOULES: Did you make
21 the, I guess, typographical change for 1036?

22 It's just got an extra word in there,
23 "or," that doesn't belong.

24 PROFESSOR DORSANEO: Uh-huh.
25 We will do that.

1 CHAIRMAN SOULES: Okay.

2 PROFESSOR DORSANEO: But the
3 other comment on this business about the
4 contest and affidavits in lieu of bond, our 45
5 is so different from the rules that Judge Nye
6 is writing about that most of his suggestions
7 have gone away because of the redrafting of
8 the rule in its entirety.

9 CHAIRMAN SOULES: Okay. So the
10 problem has gotten resolved some other way in
11 most cases?

12 PROFESSOR DORSANEO: Uh-huh.

13 CHAIRMAN SOULES: Okay.

14 HONORABLE C. A. GUITTARD: The
15 next one is 1038. Judge Nye says that Rule
16 42, which has to do with 42(a), which has to
17 do with accelerated appeals, this should
18 specifically state whether the time limit
19 required in ordinary appeals to file a motion
20 for extension to file a perfecting instrument
21 or the record is required to be followed in
22 the rule. I think we passed on that this
23 morning and concluded that it should be
24 subject to the motion -- the extension
25 provisions in the regular rules. So that's

1 been taken care of.

2 Okay. Page 1039. Judge Nye says, "Does
3 this rule really mean that an appellate court
4 may modify its decision after issuing a
5 mandate, other than to correct clerical
6 errors?" And our reply to that was, yeah,
7 sure. Let them do it. But we think that the
8 word "decision" should be changed to
9 "judgment" in the last sentence of draft
10 43(g).

11 PROFESSOR DORSANEO: Well, it
12 says "decision," which is kind of vague. So
13 we thought "judgment," and then in another
14 place we thought, well, what if it's an
15 interlocutory appeal? That won't be a
16 judgment. Then we think it's "order," and now
17 I'm back to thinking that "decision" is just
18 fine.

19 HONORABLE C. A. GUITTARD:
20 Okay. Just leave it like it is then.

21 CHAIRMAN SOULES: All right.

22 MR. ORSINGER: Luke, can I make
23 a comment here?

24 CHAIRMAN SOULES: Yes. Richard
25 Orsinger.

1 MR. ORSINGER: This last topic
2 touched on kind of a sleeping issue, which is
3 how long after the decision can the court of
4 appeals amend its judgment and the Dallas
5 court I think in an opinion signed by more
6 judges than were actually sitting on the court
7 split 7 to 6, if I recall, about that, and we
8 had some discussion at the subcommittee level
9 about whether we ought to prescribe for some
10 plenary power period for the court of appeals
11 or not and then we just kind of dropped it and
12 did nothing with it.

13 HONORABLE C. A. GUITTARD:
14 Really, I think you're right, Richard, and the
15 plenary power is another problem that we have
16 pending before our committee that we haven't
17 resolved yet, and I think when that's resolved
18 this -- it would resolve this. The court
19 ought not to be -- can't change its judgment
20 after plenary power expires, but until then,
21 why not? Okay.

22 MR. ORSINGER: So we are still
23 working on plenary power, right?

24 HONORABLE C. A. GUITTARD:
25 Right. Right.

1 PROFESSOR DORSANEO: That's
2 right behind bankruptcy and publication.

3 MS. DUNCAN: I sort of think
4 that's the way it should be.

5 HONORABLE C. A. GUITTARD: Now,
6 page 1040, the proposal is that -- if we go
7 back to one of those proposals that Judge Nye
8 made several years ago -- Rule 44, which has
9 to do with -- Rule 44, which is a criminal
10 rule, isn't it?

11 PROFESSOR DORSANEO: That's
12 what we just talked about a little while ago.
13 Judge Clinton was talking about it. We have
14 already taken care of that.

15 HONORABLE C. A. GUITTARD:
16 Okay. That was taken care of. 1041 says here
17 it was proposed by Sarah Duncan. Did you
18 actually propose this one?

19 MS. DUNCAN: I actually did.

20 HONORABLE C. A. GUITTARD:
21 Proposed Rule 46(a) provides that an appellant
22 file a bond securing payment of the cost of
23 the statement of facts and transcript to
24 perfect his appeal. Because an appeal bond or
25 deposit inures to the benefit of the court

1 reporter and clerk, the Texas courts have held
2 that these officers may not condition
3 preparation or delivery of the statement of
4 facts or transcript on advance payment. Well,
5 as probably the committee knows, we have now
6 required advance payment. That requirement
7 has been approved by this committee. So that
8 concern is taken care of; is that right,
9 Sarah?

10 MS. DUNCAN: Yes, sir.

11 HONORABLE C. A. GUITTARD:
12 Okay. 1043. Judge Nye again. Rule 46(e).
13 "This rule should also include making
14 arrangements for payment to the trial clerks,"
15 and we have taken care of that, and this
16 committee as has approved it.

17 Okay. Page 1044 relating to Rule 48.
18 The rule goes on to say that with leave of
19 court an appellant may deposit a negotiable
20 obligation of any bank or savings and loan
21 chartered by the government of the United
22 States or any state thereof in lieu of the
23 other kind of security that Rule 40(a)
24 provides, and our committee considered that
25 and disapproved it because they believe that

1 would create too many problems. Sarah.

2 MS. DUNCAN: Maybe I missed
3 this day. And I'm not proposing anything
4 specific or that we do it right now, but I
5 have heard from several of the clerks that the
6 whole negotiable obligation rule puts an
7 incredible burden on them to try to determine
8 what's acceptable and what's not acceptable,
9 and that's really beyond what they consider to
10 be their purely ministerial function. The
11 same is true with approving different
12 sureties. So maybe we could just put on the
13 agenda below bankruptcy, below 76(a), that
14 some day somebody needs to figure out who
15 needs to be deciding what is proper security
16 for preventing enforcement of a judgment and
17 that it shouldn't be a ministerial officer
18 such as the clerk.

19 HONORABLE C. A. GUITTARD:
20 Well, you are on the court of appeals now. Do
21 you want to do it?

22 MS. DUNCAN: I'm not on there
23 yet.

24 HONORABLE C. A. GUITTARD:
25 Well, we didn't have any answers to that.

1 Now, if this committee wants us to study it
2 further, this is a little bit apart from this
3 specific proposal, I guess, but I guess it
4 would be within the scope of our charge. If
5 there is no further --

6 CHAIRMAN SOULES: Let's see.
7 Should we say cash or negotiable obligation of
8 the government?

9 PROFESSOR DORSANEO: Sarah
10 wants to move "with leave of court" right
11 after "cash."

12 MS. DUNCAN: No. I want --
13 actually what I would propose is that every
14 security arrangement be approved by the trial
15 court and not by the clerk.

16 HONORABLE SCOTT BRISTER: Oh,
17 so we have to do it instead of the clerk.

18 MS. DUNCAN: Well, you are in a
19 better position to do it than the clerk, and
20 you have got greater immunity than the clerk,
21 and you've got more knowledge of the law than
22 the clerk, in many instances. Not in all.
23 There are some trial clerks that know a whole
24 lot more law than some trial judges, but yeah.
25 I don't think -- and David Garcia would put

1 his body and soul into this one because it's a
2 big problem determining who is a sufficient
3 surety and what is an acceptable bond and on
4 down the road.

5 CHAIRMAN SOULES: Well, that's
6 not Brewer's pitch, though.

7 HONORABLE C. A. GUITTARD: No.
8 That's right.

9 CHAIRMAN SOULES: The rule says
10 proposed -- require that the appellant pay the
11 clerk and pay the court reporter.

12 HONORABLE C. A. GUITTARD:
13 Right.

14 CHAIRMAN SOULES: So now we are
15 down to whatever the abominable costs are on
16 appeals.

17 HONORABLE C. A. GUITTARD: Or I
18 guess, does this apply to supersedeas bonds?

19 CHAIRMAN SOULES: No.

20 MS. WOLBRUECK: No. So is that
21 rule even necessary? Is Rule 40(a)?

22 MS. DUNCAN: Well, if I can
23 disagree, I think it is part of what
24 Mr. Brewer is saying. He's asking why leave
25 of court is required to file a negotiable --

1 to file a negotiable obligation of any bank or
2 savings and loan association chartered by the
3 government, et cetera, et cetera, why leave of
4 court is required in that instance but it is
5 not required if they are filing cash or a
6 negotiable obligation of the government of the
7 United States of America.

8 CHAIRMAN SOULES: This does
9 apply to supersedeas. I was wrong when I said
10 that. It does apply to supersedeas.

11 HONORABLE C. A. GUITTARD:
12 That's why we left it.

13 MR. ORSINGER: There is no cost
14 bond any more.

15 CHAIRMAN SOULES: Okay. Well,
16 when these words were added it was the sense
17 of the committee that the obligation of the
18 United States government or negotiable
19 instrument, like a certificate of deposit was
20 the only thing that was really discussed of
21 the bank, should be permitted because they
22 would draw interest as opposed to cash.

23 MS. DUNCAN: That's right, but
24 we have created two types of negotiable
25 securities that can stand in place of a surety

1 bond or cash. On the one hand we have got
2 cash or negotiable obligation of the U.S.
3 government. On the other hand we have
4 negotiable obligations of banks and savings
5 and loans. If it's a negotiable obligation of
6 the U.S. government, leave of court isn't
7 required. If it's a negotiable obligation of
8 a bank or savings and loan, leave of court is
9 required.

10 And he is asking why is leave of court
11 required in the latter instance, and the
12 answer, I think, is that we are less sure of a
13 negotiable obligation by a bank or a savings
14 and loan than we are of a negotiable
15 obligation of the United States government,
16 and all I'm saying is that we are requiring
17 the clerk to determine between the two, which
18 in these days of complicated debt instruments
19 is not necessarily an easy thing to do.

20 CHAIRMAN SOULES: Well, the
21 court's got to pass on it first.

22 MS. DUNCAN: Only if it's a
23 negotiable obligation of a bank or savings and
24 loan. Not if it's a negotiable obligation of
25 the United States government.

1 CHAIRMAN SOULES: Nobody is
2 worried about that or was. Now, if it's a
3 T-bill or something like that, everybody can
4 say that's as good as cash.

5 MS. DUNCAN: I understand that.

6 CHAIRMAN SOULES: That was the
7 discussion.

8 MS. DUNCAN: I understand that.

9 CHAIRMAN SOULES: That's why
10 this was written this way.

11 MS. DUNCAN: I understand that,
12 but things have gotten a lot more complicated
13 than T-bills.

14 MR. ORSINGER: Luke, what Sarah
15 is saying is that the clerks are bothered
16 about trying to figure out whether this
17 instrument is an instrument of the government
18 or the instrument of a private financial
19 institution. It's admitted that once it's
20 determined it's an instrument of the
21 government that the court doesn't need to be
22 involved, and once it's determined that it's a
23 private financial institution, the trial court
24 must be involved, but she's saying that David
25 Garcia is complaining that they are hitting

1 him with all kinds of weird financial
2 documents that you can't really tell from
3 looking at them whether they are a U.S.
4 government obligation or a private financial
5 institution obligation.

6 MS. DUNCAN: It's gotten very
7 complicated.

8 MS. WOLBRUECK: He's right.
9 This is a problem.

10 MR. ORSINGER: And you know,
11 like TIGR's, Merrill Lynch and others are
12 offering secondary documents or secondary
13 instruments that represent government bonds,
14 but they aren't government bonds. They are
15 actually the full faith and credit of Merrill
16 Lynch, is what's being put up, even though
17 it's triggered to like a zero coupon U.S.
18 government bond. So if somebody comes forward
19 with one of those, and Sarah is saying maybe
20 if you are doing anything other than putting
21 up cash --

22 MS. DUNCAN: Or a T-bill.
23 T-bill is easy.

24 MR. ORSINGER: -- then go to
25 the trial court and have the trial court

1 figure out whether this is a U.S. government
2 instrument or whether it's a private
3 instrument.

4 CHAIRMAN SOULES:

5 Ms. Wolbrueck, what is the problem that you
6 are encountering?

7 MS. WOLBRUECK: The problem is
8 actually the responsibility put upon the clerk
9 in determining which and if the trial court
10 should take the action or not, which is
11 exactly what Sarah was saying, in trying to
12 make that determination, and it is quite
13 difficult in today's financial institutions,
14 and for a period of time when all the banks
15 and savings and loans were failing a cashier's
16 check and a money order were not always
17 negotiable obligations because there were
18 problems with those. So, you know, we have
19 gone through a lot of errors, and there is a
20 great deal of difficulty in making these
21 determinations.

22 CHAIRMAN SOULES: Well, CD or
23 money order --

24 MS. WOLBRUECK: And I'm not
25 sure who needs to be doing it.

1 CHAIRMAN SOULES: CD or money
2 order or a cashier's check would have to get
3 the court approval, and this was meant to mean
4 a direct obligation, not secondary mutual
5 funds based on government obligation, but this
6 was put in in 1986, but I remember when it was
7 discussed, and this was meant to be a direct
8 obligation of the United States government, a
9 T-bill or something if there is some other
10 kind of bill, but it's the government is
11 obligated to pay directly.

12 MS. WOLBRUECK: I know, but we
13 have all had discussions with attorneys on it.

14 CHAIRMAN SOULES: Send it over
15 to the judge.

16 MR. ORSINGER: Well, it seems
17 to me that the clerk could avoid the problem
18 by just -- if it's anything weird looking just
19 refuse to approve it.

20 MS. WOLBRUECK: Which is what
21 we do.

22 MR. ORSINGER: And then make
23 them go talk to a district judge, and then if
24 the judge orders you to take it, then take it.

25 MS. DUNCAN: But that's part of

1 the problem. What if I walk -- I would never
2 do this, but what if someone were to walk in
3 at 4:59, and they have got a 45 million-dollar
4 judgment against them, and somebody is getting
5 ready to take out their writ of garnishment
6 and freeze all their accounts, and they have
7 got what is, in fact, a negotiable obligation
8 of the United States government, but it
9 doesn't look like one. It's some type of a
10 mortgage that's, you know, a direct obligation
11 by the United States government, but it looks
12 like a private mortgage, you know, those funny
13 securities they have got now, and the clerk
14 says, "No, it's not a T-bill. It's not cash.
15 I'm not going to take it." You can't find a
16 trial judge, and all of the sudden all of
17 their assets are frozen. What I'm saying is
18 the judge has greater immunity in that
19 situation than I think the clerks perceive
20 that they have.

21 CHAIRMAN SOULES: Well, if it's
22 that much of a problem, then leave of court
23 ought to be put ahead of anything but cash.
24 That was not perceived to be any kind of a
25 problem the way that this was written, but if

1 it is, then leave of court ought to come ahead
2 of anything other than cash. Everybody agree
3 with that? Okay. Then let's make that
4 change.

5 HONORABLE C. A. GUITTARD: All
6 right. It doesn't require any further work by
7 our committee then? Just --

8 CHAIRMAN SOULES: Just move
9 "with leave of court."

10 "Deposit cash or with leave of court" and
11 everything else -- a Merrill Lynch obligation
12 is not even one of the things that can be used
13 under 48(a) because that's not chartered --
14 that's not a bank or S&L chartered by the
15 government.

16 MS. WOLBRUECK: I have had
17 attorneys offer letters of credit, and that's
18 not a negotiable obligation.

19 CHAIRMAN SOULES: Well, if it
20 goes to the judge everybody can argue about
21 it. Okay. So that takes care of paragraph
22 one. Paragraph two, I don't know what he's
23 talking about, whether a bank will honor a
24 check. That's not even -- it says the judges
25 have better things to do than worry about the

1 things that clerks are worried about. This
2 sense is -- I mean, this probably involves a
3 dispute. Clerks probably don't have the power
4 to resolve the dispute, and the judge does.
5 Where else can it go other than to the judge?

6 MS. DUNCAN: I take it we can't
7 also then look at what we are doing with
8 supersedeas bonds and clerks in the same way
9 we just looked at 40(a)?

10 CHAIRMAN SOULES: Sure.

11 MS. DUNCAN: We have had
12 several requests to do that.

13 CHAIRMAN SOULES: Well, why
14 don't you write it up?

15 MS. DUNCAN: I don't know what
16 to write. I mean, it's -- do you want the
17 clerk to continue to have to decide what's a
18 sufficient surety and a sufficient amount, or
19 do you want every supersedeas bond to have to
20 be approved by the trial court?

21 CHAIRMAN SOULES: Okay. As far
22 as the sureties I think we have got -- we have
23 attacked the quality of the surety to stand
24 good for a sizable judgment. There are
25 provisions that come back in and attack

1 whether or not -- in court and say, "This
2 surety is not good. The clerk's approved it,
3 but it's not good enough."

4 MS. DUNCAN: Well, but that
5 doesn't really resolve the clerk's prior
6 responsibility to decide whether or not to
7 approve it.

8 CHAIRMAN SOULES: Elaine
9 Carlson.

10 PROFESSOR CARLSON: Aren't
11 there commercial surety rating publications?
12 I mean, it's not like they do this in a
13 vacuum.

14 MS. DUNCAN: No. But what
15 happens when you don't have a commercial
16 surety? What happens when you have Joe Blow
17 who has good and sufficient property subject
18 to execution within the county and the clerk
19 looks at it and they go, "I don't know if they
20 do or not."

21 CHAIRMAN SOULES: Then
22 disapprove it. Then disapprove it.

23 PROFESSOR CARLSON: Yeah.
24 Disapprove it.

25 CHAIRMAN SOULES: It says

1 insufficient surety approved by the clerk, and
2 if the clerk doesn't approve it, it's just not
3 approved.

4 MS. WOLBRUECK: I've done that
5 many times.

6 CHAIRMAN SOULES: And Bonnie
7 says she's done it many times. Okay. Let's
8 go on with this.

9 MR. YELENOSKY: Luke, before
10 you go on to the next one --

11 CHAIRMAN SOULES: Steve
12 Yelenosky.

13 MR. YELENOSKY: I just wanted
14 to point out on the one just immediately
15 previous to that, the two before that talk
16 about the new draft makes clear that it's
17 advance payment to the court reporter and the
18 clerk, and just in re-reading the proposed
19 language I just wanted to point out to the
20 subcommittee I think it's still ambiguous as
21 to whether it's an advanced payment.

22 PROFESSOR DORSANEO: No, it's
23 not. That was just shorthand. It's advanced
24 payment or arrangement for.

25 MR. YELENOSKY: Right.

1 PROFESSOR DORSANEO: Advanced
2 arrangement for or advanced payment for. It's
3 not really advanced payment. We used that as
4 a shorthand expression.

5 CHAIRMAN SOULES: Steve's
6 saying that the draft doesn't make that clear.

7 MR. YELENOSKY: Well, the draft
8 to me seems to just place the obligation for
9 payment and then the end of the sentence as
10 far as timing refers to on completion of the
11 statement of facts. It seems you would be in
12 literal compliance to say, "Yeah. I am ready
13 to pay you on completion." It may be just the
14 way I'm reading it, and maybe it's not worth
15 the time for everybody to look at, but when I
16 read the sentence it wasn't clear to me that I
17 would be obligated to pay in advance or make
18 arrangements acceptable to the court reporter,
19 if that's what's meant.

20 HONORABLE C. A. GUITTARD: I
21 think that's probably -- I think you have
22 probably got a good point there.

23 MR. YELENOSKY: Maybe it should
24 say, "Shall either pay in advance or make
25 arrangements acceptable to the official court

1 reporter or to the clerk," if that's what's
2 meant. I mean, I'm not saying that's what I'd
3 prefer, but the way I read it, it doesn't seem
4 to say what it purports to say in your
5 comments.

6 PROFESSOR DORSANEO: Well, we
7 have used the language in the rules right now
8 about arrangement to pay.

9 HONORABLE C. A. GUITTARD:
10 Well, he's concerned with whether it should be
11 paid in advance before the reporter starts his
12 work or as stated here on completion of the
13 statement of facts.

14 MR. YELENOSKY: See, "either
15 pay..." and that seems to be modified by
16 "...upon completion of the statement of
17 facts." And I go to the court reporter and
18 say, "Yeah. I'm ready to pay you, on
19 completion." That doesn't seem to comport
20 with the timing.

21 HONORABLE C. A. GUITTARD: I
22 think you have a point there. This
23 contemplates that the reporter has to do it,
24 but that he can hold it and not file it --

25 MR. YELENOSKY: Right.

1 HONORABLE C. A. GUITTARD:

2 -- until the money is paid, and we were just
3 picking up the language we had before, but I
4 guess maybe that requires some change, I
5 think.

6 CHAIRMAN SOULES: I think the
7 next one is taken care of by 49, and if the
8 obligation becomes questionable, you have got
9 ways to go to court and fix that. Is that
10 where you-all came out on that last paragraph
11 of Brewer's letter?

12 Okay. Next.

13 HONORABLE C. A. GUITTARD: The
14 next one is 1046, and this is from our
15 distinguished Justice Nathan Hecht that asks,
16 "Why can't the transcript be composed of
17 original documents instead of copies, saving
18 the parties the clerk's cost of copying the
19 file? Isn't this the federal practice?" If
20 you recall, that was our original proposal,
21 and I think it was stemmed from this
22 suggestion from Judge Hecht, but Ms. Wolbrueck
23 talked us out of that. She said it wouldn't
24 save us any money, and so this committee
25 disapproved the suggestion, and I don't

1 suppose there is anything else we should do
2 unless we want to reconsider that.

3 JUSTICE HECHT: Okay.

4 Overruled by the clerk.

5 HONORABLE C. A. GUITTARD: Page
6 1047. Judge Osborn wants to change the rule
7 that says the clerk should go ahead and file
8 the transcript without any designation except
9 insofar as additional documents are
10 designated, and I think one of Judge Osborn's
11 problems was that the Rule 51(a) says "live
12 pleadings" and clerks -- some of the clerks,
13 at least. I'm sure this doesn't apply to
14 Ms. Wolbrueck, but some of the clerks don't
15 know what a live pleading is, and we fixed
16 that part of it by providing that instead of
17 saying "live pleading" 51(a) says "last
18 amended" or last -- or "last petition" or
19 "last pleading" or something thereto which the
20 clerk ought to be able to understand.

21 Otherwise than that we thought it ought
22 to be left the same way, and the clerk
23 ordinarily sends up those -- or routinely
24 sends up those documents that are listed in
25 51(a) and any others designated by the

1 parties, and if the party goes -- if it goes
2 on up and the appellant wants to designate
3 something else, of course, he can, and it goes
4 up in a supplemental transcript.

5 CHAIRMAN SOULES: That's taken
6 care of.

7 HONORABLE C. A. GUITTARD: We
8 think that's taken care of. 1051, Judge Nye
9 says, "The clerk is required to retain a
10 duplicate of transcript for use by the parties
11 with permission of the court. This rule
12 should specify which court." The trial court
13 or the appellate court? And I think that our
14 current report, 51(c), says "trial court," and
15 that takes care of that. Next is 1052.

16 CHAIRMAN SOULES: The trial
17 court approves the withdrawal of the
18 transcript from the --

19 HONORABLE C. A. GUITTARD: No.
20 Retains a duplicate.

21 CHAIRMAN SOULES: Oh, okay.

22 HONORABLE C. A. GUITTARD: In
23 criminal cases the trial court retains a
24 duplicate.

25 CHAIRMAN SOULES: Okay. Okay.

1 HONORABLE C. A. GUITTARD: Now,
2 our chairman has proposed that when either a
3 timely request, objection, or motion points
4 out distinctly the matter complained of a
5 grounds of the complaint specific enough to
6 support the conclusion that the trial court
7 was made fully aware of the complaint, no
8 waiver of error will occur by any failure to
9 preserve error in the trial court, and these,
10 I think our committee thinks that is a good
11 proposal, and we propose we incorporate it in
12 the rules that we have now that are in Rule 52
13 or whatever else rule is put into place.
14 Right, Bill?

15 PROFESSOR DORSANEO: That's
16 right. You know, "consider adding to proposed
17 Civil Procedure Rule 321" should be amended by
18 saying "consider adding to current rule,
19 current Appellate Rule 52(a)" or whatever
20 successor may ultimately take its place.

21 MR. MCMAINS: His actual
22 comment suggested that it be deleted out of
23 the charge rules. Is that what you are
24 suggesting?

25 PROFESSOR DORSANEO: No.

1 CHAIRMAN SOULES: If I may, I
2 suggest that. Yes. Does it need to be in the
3 charge rules if it's in the appellate rules?
4 It doesn't matter to me if it's in both
5 places.

6 MR. ORSINGER: Luke, Richard
7 Orsinger. We have specific language in the
8 charge rules about when the complaint is
9 sufficiently specific to preserve error, and
10 we've stepped away from all the existing court
11 of appeals caselaw and everything else, and I
12 don't think that this rule applies, frankly.
13 I don't think that any standard that we put in
14 this rule controls how specific the objection
15 needs to be.

16 CHAIRMAN SOULES: Okay. I take
17 out that deletion, suggestion to be deleted
18 then.

19 MR. ORSINGER: That's just my
20 opinion, but --

21 CHAIRMAN SOULES: I will
22 withdraw it.

23 MR. MCMAINS: Well, but I also
24 point out that it is different than our charge
25 rules. I mean, such that -- I mean, you're

1 talking about just adding it in, and I'm just
2 saying that this is different than the concept
3 that's in our charge rules, and so I don't
4 want it to conflict is what, I guess, I'm
5 getting at.

6 CHAIRMAN SOULES: Anne Gardner.

7 MS. GARDNER: I'm not sure I
8 understand either. I think it would be a
9 really good idea to include the language from
10 Rule 52(a) somewhere in the trial court rules.
11 Is that what you are proposing?

12 Okay. Yeah. My impression is that a lot
13 of trial attorneys do not know about Rule
14 52(a), and they think that if there is not a
15 specific rule in the Rules of Civil Procedure
16 that they don't have to preserve error.

17 HONORABLE C. A. GUITTARD:
18 That's why we proposed writing 52(a) into the
19 trial rules and perhaps keeping it in 52(a) as
20 well.

21 MS. GARDNER: Both places.
22 Yeah. I agree.

23 CHAIRMAN SOULES: Okay.

24 MR. ORSINGER: One other
25 question. Should we except -- and

1 e-x-c-e-p-t -- this rule from applying to the
2 charge? Is anyone worried about Rusty's
3 concern that we have two different standards
4 of specificity and that they might create
5 confusion when they both apply?

6 PROFESSOR DORSANEO: I don't
7 think Luke was suggesting that it be different
8 standards.

9 MR. ORSINGER: No. No. Rusty
10 is saying -- I say they are different
11 standards.

12 PROFESSOR DORSANEO: We can
13 make them the same. I'm assuming the Chair's
14 suggestion is that 52(a) should be made as
15 clear as the charge rules that would come with
16 respect to the nature of the complaint.

17 CHAIRMAN SOULES: Right.

18 HONORABLE C. A. GUITTARD: We
19 can do that.

20 MR. ORSINGER: Interesting.

21 MS. GARDNER: Anne Gardner
22 again.

23 CHAIRMAN SOULES: Anne Gardner.

24 MS. GARDNER: Is there any
25 particular reason why this proposed draft is

1 phrased in the negative as saying if this is
2 done, then no waiver of error will occur as
3 opposed to phrasing in the positive like 52(a)
4 is now, that you must do it in order to
5 preserve error.

6 CHAIRMAN SOULES: Yes. To keep
7 from finding waiver, waivermania. My word,
8 waivermania.

9 MR. ORSINGER: Well, Luke,
10 Richard Orsinger again. This is not the total
11 rule. This is the sentence you add on to the
12 beginning part that tells you how you preserve
13 error.

14 CHAIRMAN SOULES: Yes.

15 MR. ORSINGER: Yeah.

16 CHAIRMAN SOULES: Or somewhere
17 in there, which I would leave to Bill and
18 Judge Guittard. Okay. Next.

19 HONORABLE C. A. GUITTARD: All
20 right. Page 1059, Judge Cohen proposes the
21 court reporter should have the duty to file
22 statement of facts and move for extension, if
23 needed. Now, of course --

24 CHAIRMAN SOULES: Help me out
25 because I'm on 1053. Is that --

1 HONORABLE C. A. GUITTARD: We
2 are now at 1059.

3 CHAIRMAN SOULES: What happened
4 to 1053? That's not -- we don't have to look
5 at that? I guess this is --

6 MR. ORSINGER: Luke, I believe
7 we moved and adopted earlier today that a
8 request for findings will have the same effect
9 on all appellate timetables and plenary power
10 as a motion for new trial, and I believe that
11 Michael O'Connor's letter is complaining that
12 it only has -- under the current rules is only
13 partially effective to extend deadlines.

14 CHAIRMAN SOULES: Okay. So
15 this is correct. This is fixed by our earlier
16 work?

17 MR. ORSINGER: I believe that
18 the resolution we adopted this morning, the
19 make of equivalent, will eliminate the whole
20 problem.

21 CHAIRMAN SOULES: Okay. Then
22 that does get us to 1059.

23 HONORABLE C. A. GUITTARD: All
24 right. 1059 has already been taken care of
25 because we do place on the reporter the duty

1 to file the statement of facts, and there is
2 not reason to move for any extension
3 because --

4 MS. WOLBRUECK: Judge Guittard,
5 I just wanted to make one comment that really
6 doesn't pertain to this rule, but I just
7 remembered that a court reporter had contacted
8 me about not being notified when a notice of
9 appeal is filed, and occasionally the 60 days
10 may pass before an attorney has contacted them
11 about preparing the statement of facts, and
12 you know, and so their timetable is already
13 moving before they actually know that
14 something has been on appeal. Now, we try to
15 notify our court reporters if we get a notice
16 of appeal, but you know, that doesn't always
17 happen with all courts, and anyway, that was
18 just a concern of some of the court reporters,
19 and I'm not sure -- David, I haven't mentioned
20 it to him. I don't know if that can be
21 addressed anywhere.

22 MS. DUNCAN: The rules require
23 that the request for preparation of the
24 statement of facts be made in writing to the
25 court reporter at or before the time for

1 perfecting the appeal.

2 MS. WOLBRUECK: Okay. So that
3 is there. Okay. Yeah. That's all then.
4 Okay. I just wanted to make sure that that
5 was all clarified since that was pointed out
6 to me.

7 HONORABLE DAVID PEEPLES: Luke?

8 CHAIRMAN SOULES: Judge
9 Peeples.

10 HONORABLE DAVID PEEPLES: I
11 question whether the language in revised Rule
12 11 is explicit enough to change a pretty
13 entrenched practice, which is the litigant,
14 the appellant, has to file the motion and get
15 the record up there.

16 HONORABLE C. A. GUITTARD: We
17 have it also in Rule 53.

18 HONORABLE DAVID PEEPLES:
19 53(f)?

20 MS. DUNCAN: It's all over the
21 place.

22 HONORABLE C. A. GUITTARD:
23 53(k) on page 25.

24 HONORABLE DAVID PEEPLES: It's
25 been my experience that a lot of lawyer time

1 is wasted on this and appellate court time,
2 too, and usually the court reporter is the
3 problem, and I just question whether we have
4 told them clearly enough in these revised
5 rules that they are the ones that have to do
6 it, and that the burden is on them to get an
7 extension.

8 HONORABLE C. A. GUITTARD: How
9 would you say it any --

10 HONORABLE DAVID PEEPLES: Well,
11 it doesn't say "move for an extension," does
12 it?

13 HONORABLE C. A. GUITTARD:
14 Well, we have abolished extensions.

15 HONORABLE DAVID PEEPLES: Okay.

16 HONORABLE C. A. GUITTARD:
17 Under Rule 56 if it doesn't come in within a
18 certain time the court reporter -- I mean, the
19 appellate clerk inquires where is the
20 statement of facts, and then if he doesn't get
21 a reply in a satisfactory time or doesn't
22 file, then he refers it to the court, and the
23 court can dismiss it or proceed without a
24 statement of facts or whatever.

25 PROFESSOR DORSANEO: Or just

1 get the court reporter to do it.

2 HONORABLE C. A. GUITTARD:

3 Yeah. The main thing is to holler at the
4 court reporter and get him to get it done,
5 whether it's 60 days or whatever.

6 CHAIRMAN SOULES: Are you
7 saying the appellate court can dismiss the
8 appeal if he doesn't get the statement of
9 facts done?

10 HONORABLE C. A. GUITTARD: No.
11 But it can proceed without it.

12 HONORABLE DAVID PEEPLES: Just
13 as bad.

14 MR. YELENOSKY: So you
15 wouldn't have a --

16 CHAIRMAN SOULES: What are you
17 saying, Judge Peeples?

18 HONORABLE DAVID PEEPLES: Well,
19 I'm saying that I think court reporters --
20 largely because they are overworked and their
21 judges keep them in the courtroom all the
22 time, that's a real drag on the appellate
23 process, and it's just rampant, and I just
24 question whether this is going to get the job
25 done, but if clerks and judges do contact

1 court reporters directly and talk to them,
2 maybe that will do it.

3 HONORABLE C. A. GUITTARD: They
4 have got to contact the reporter to make the
5 request and to make arrangements for the fee,
6 I guess.

7 HONORABLE DAVID PEEPLES: Well,
8 I'm talking about after all that's done, and
9 the reporter keeps, "I've got so much work I
10 can't do all of these records. Give me some
11 more time. 120 days."

12 HONORABLE C. A. GUITTARD:
13 Well, we struggled with that question. What
14 do you do with a reporter that doesn't get his
15 work done? Well, there is various things you
16 can do. I guess you can put him in jail. Our
17 committee worried about it and didn't know
18 exactly what you do in that sort of situation,
19 and we didn't have any solution for the
20 problem. Sarah, do you have any?

21 CHAIRMAN SOULES: Sarah Duncan.

22 MS. DUNCAN: I would just like
23 a point of clarification, I guess. It was
24 never my understanding that the court of
25 appeals could proceed without a statement of

1 facts if the court reporter does not file it
2 in what the court and the clerk consider to be
3 a timely fashion. The rule as written says,
4 "The clerk shall refer the matter to the
5 appellate court, which shall make an
6 appropriate order to avoid further delay and
7 preserve the rights of the parties," and I
8 don't consider going up without a statement of
9 facts preserving the rights of the parties.

10 HONORABLE C. A. GUITTARD:

11 Well, if the appellant doesn't make his
12 request and that's the reason the court
13 reporter hasn't done the action, nobody asked
14 him to, well, the court can proceed without a
15 statement of facts.

16 MS. DUNCAN: Right. But I
17 didn't understand that to be the only
18 circumstance in which the court could proceed
19 without a statement of facts. If all we're
20 talking about is court reporter delay, the
21 parties shouldn't pay the penalty for that --

22 HONORABLE DAVID PEEPLES: No.

23 MS. DUNCAN: -- by going
24 forward without a statement of facts.

25 HONORABLE C. A. GUITTARD:

1 That's the reason we said appropriate order.
2 It wouldn't be an appropriate order to go
3 ahead with it if it's not the party's fault.

4 MS. DUNCAN: That's why I just
5 wanted that clarified on this record.

6 CHAIRMAN SOULES: Well, is the
7 rule clear on that, though? If not, it needs
8 to be.

9 PROFESSOR DORSANEO: The rule,
10 which would be 56(c) in this draft at page 28,
11 is clear except that it is not clear what the
12 appropriate order to avoid further delay and
13 preserve the rights of the parties would be.
14 I think we are assuming that it involves some
15 type of coercion on the reporter to get the
16 record finished as the normal thing that it
17 means, but it isn't articulate as to what
18 would get the job done. I suppose cutting the
19 pay in half and then cutting it in half again
20 and then cutting it in half again would
21 expedite matters.

22 CHAIRMAN SOULES: Was the rule
23 written so that if you applied it literally
24 that the court could proceed to decide factual
25 and legal sufficiency questions without a

1 statement of facts; therefore, you're out?

2 PROFESSOR DORSANEO: No.

3 MR. ORSINGER: No.

4 PROFESSOR DORSANEO: But the
5 construction of it that might not be apparent
6 to everyone would be that if you have done all
7 that you should have done to get the statement
8 of facts from the court reporter, it would not
9 be an appropriate -- under the rules it would
10 not be an appropriate order preserving your
11 rights to proceed without the statement of
12 facts that you wanted to have before the court
13 of appeals. You have to understand that it's
14 not -- wouldn't be appropriate to tell the
15 party who did its job, that did its job, that
16 they have to proceed without a statement of
17 facts.

18 MS. DUNCAN: And one reason we
19 used this somewhat vague language of
20 "appropriate order" is that nobody seems to be
21 very sure what authority a court has to
22 discipline the court reporter or what means of
23 coercion they can use. I mean, in federal
24 court we know they can dock their pay. We had
25 a lot of discussion about whether a court of

1 appeals in Texas has that authority, and we
2 don't want to restrict the courts of appeals
3 in terms of what an appropriate order might be
4 in a particular case. I mean, there are cases
5 in which court reporters are put in jail, and
6 they are told that as soon as they finish the
7 statement of facts they will be released.
8 That might be an appropriate order in a
9 particularly egregious case.

10 CHAIRMAN SOULES: Where is the
11 rule that you are reading about, Bill?

12 PROFESSOR DORSANEO: It's
13 No. 26(c) on page 28, now would work if 90
14 days have expired and there isn't a record,
15 the clerk of the appellate court would start
16 checking with the reporter. That's what we
17 are talking about. If after 30 days the
18 statement of facts has not been received, the
19 clerk goes to the the court, and says, "Well,
20 I was supposed to get the statement of facts
21 from the reporter but it's not here, what do
22 we do now?" And I guess the -- in some places
23 with some reporters the court would know what
24 they do now is they get very tough. With
25 other reporters they would know that they ask,

1 well, what could the problem be?

2 CHAIRMAN SOULES: Well, it
3 looks to me like the only time they can
4 dismiss the appeal and proceed without a
5 statement of facts is if the appellant failed
6 to ask for a statement of facts.

7 MR. YELENOSKY: Or to make
8 arrangements to pay.

9 CHAIRMAN SOULES: Or pay.

10 HONORABLE SAM HOUSTON CLINTON:
11 Well, if you read the last sentence even then
12 I don't believe it says that. Now, if no
13 statement of facts has been filed by then, it
14 will give the appellate court on motion and
15 notice or on the court's own motion shall
16 after reasonable opportunity to cure or
17 failure to cure may consider and decide to
18 appeal without a statement of facts. It
19 doesn't say dismiss it.

20 PROFESSOR DORSANEO: Right.

21 Yeah.

22 MS. DUNCAN: Well, and then you
23 just get into the questions of whether a
24 request to prepare the statement of facts six
25 months late can reasonably be cured today, or

1 whether there has already been a reasonable
2 opportunity to cure and there was a failure to
3 cure.

4 HONORABLE C. A. GUITTARD: The
5 court has to consider the circumstances and
6 decide what to do.

7 MS. DUNCAN: Right.

8 CHAIRMAN SOULES: Okay. Where
9 are we? 1059? And that's taken care of by --
10 isn't it, by the main report?

11 HONORABLE C. A. GUITTARD: Yes.

12 MR. ORSINGER: Luke?

13 HONORABLE C. A. GUITTARD: Oh,
14 yeah. That's taken care of.

15 CHAIRMAN SOULES: Richard
16 Orsinger.

17 MR. ORSINGER: I would like to
18 propose that we change the language from "and
19 preserve the rights of the parties," which I
20 think does not make it clear you cannot
21 dismiss, and borrow language out of Rule 81
22 right now which permits the court to reverse
23 in the event that a party was probably
24 prevented from making a proper presentation of
25 the case to the appellate court. Why don't we

1 just borrow that concept, and say that the
2 court can issue an appropriate order to avoid
3 further delay and to permit the proper
4 presentation of the case to the appellate
5 court? That means that they can do something
6 curative to allow the appeal to go forward,
7 but they cannot do anything to the detriment
8 of the party who's seeking appellate review.

9 CHAIRMAN SOULES: Why don't
10 you-all take that up in committee?

11 HONORABLE C. A. GUITTARD:
12 Okay. I hope somebody knows what we are going
13 to do in committee.

14 PROFESSOR DORSANEO: I will. I
15 am making notes. There are things we could do
16 there. We could make the appropriate order
17 directed to the court reporter or "appropriate
18 order to obtain" language. So the Braker
19 language, the record or statement of facts.

20 CHAIRMAN SOULES: The Braker is
21 here that the court can do something that
22 would prejudice the rights of the parties, and
23 that's what we are trying to avoid.

24 MR. ORSINGER: We also, though,
25 need to recognize that if the statement of

1 facts is lost irretrievably, then it is likely
2 they will need to reverse. So we wouldn't
3 want to limit the court's power just to do
4 something to the court reporter if it got
5 burned up in a fire or the court reporter
6 died.

7 JUSTICE CORNELIUS: That's
8 covered by another rule, though.

9 MR. ORSINGER: It is?

10 MS. DUNCAN: Yeah.

11 MR. ORSINGER: Okay. No sweat.

12 PROFESSOR DORSANEO: The main
13 idea here is -- what Judge Peeples was talking
14 about was one of the main ideas of this
15 report, is that the responsibility for the
16 record is no longer going to involve moving
17 for extensions of time. That's just going to
18 be done in the court of appeals to eliminate
19 that procedural step involving counsel when
20 really the court shouldn't need that motion in
21 order to put pressure on the reporter.

22 CHAIRMAN SOULES: Well, you-all
23 work on that because that's the main reason
24 that needed to be clarified.

25 HONORABLE C. A. GUITTARD:

1 Okay.

2 CHAIRMAN SOULES: Okay. 1061.

3 HONORABLE C. A. GUITTARD:

4 1061. Judge Cohen suggests that 80(c) be
5 amended to authorize the court of appeals to
6 abate the appeal and remand the case to the
7 district court to conduct a hearing on any
8 issue the court of appeals deems necessary in
9 order to decide the appeal properly. We
10 decided that that was a good proposal, and we
11 have it on our agenda. We have not yet got
12 any draft to put before this committee.

13 CHAIRMAN SOULES: Okay. So
14 you're working on that one?

15 HONORABLE C. A. GUITTARD: We
16 are working on that one. If you want us to
17 finish with that, then we will.

18 CHAIRMAN SOULES: Sure.

19 HONORABLE C. A. GUITTARD:

20 Okay. 1062 says -- it has something to do
21 with requirement to reasonably explain delay
22 in the request, and our answer is that the
23 proponent's proposal is disapproved as
24 unnecessary because 52 -- TRAP 54 is being
25 deleted and TRAP 56 has to do with what

1 happens when a statement of facts doesn't come
2 in. So we propose no -- we think no further
3 action is needed there.

4 Okay. And next is 1065, and that
5 suggests to change "number of the supreme
6 judicial district" which has already been
7 changed to "court of appeals district," and no
8 further action is required there.

9 1069, a proposal by Judge Nye to allow
10 the clerk to add additional counsel on
11 request, and our proposed 4(b) which is now
12 7(a) provides for lead counsel to receive
13 notices and allow another attorney to be
14 designated, and no further action is necessary
15 there.

16 Now, the next one has to do with Rule 61,
17 which has to do with disposition of all papers
18 with reference to the appropriate statutes
19 governing disposition. We have been studying
20 that. We don't think Rule 61 as it stands
21 now, which applies only to cases of dismissal,
22 is adequate in that rule. We asked Ken Law,
23 who is a clerk of the Austin Court of Appeals,
24 to look into that, and he thought that the
25 statute with respect to records pretty well

1 takes care of that, but we think probably that
2 Rule 61 should be repealed, and if anything is
3 put in its place, something should be put
4 there that would affect -- would it affect,
5 emphasize, point out the provisions of the
6 statutes with respect to disposition of
7 records. So we can proceed with further
8 consideration then if the committee wants us
9 to do it.

10 CHAIRMAN SOULES: Ken says that
11 the statutes give them the authority that they
12 need?

13 HONORABLE C. A. GUITTARD: I
14 think so. I really haven't looked at the
15 procedural aspects of that, and in other
16 words, who should make the determination as to
17 whether records should be preserved and where?
18 We are not altogether satisfied yet because we
19 haven't had an opportunity to study it as to
20 whether the statutes would allow some
21 implementation of this --

22 CHAIRMAN SOULES: So you-all
23 are working on that problem?

24 HONORABLE C. A. GUITTARD:
25 Right.

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CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD:

Judge Nye's next provision -- and I think Judge Nye and Charlie Spain are the champion proposers. When an extension of time is requested for the filing of the transcript, the facts relied on to reasonably explain must be supported by affidavit of the trial clerk, but since we don't have any such motions anymore we don't think that's necessary.

The next has to do with Rule 74(a), page 1072. They want us to specify the type for the briefs. We have debated that at some length in connection with Rule 4(e), proposed Rule 4(e), and we have come up with a solution which may not be entirely satisfactory, but at least we acted on it. So we don't propose any further action be taken.

1074 proposes, Rule 74 at page 1074, proposes an applicable standard of review for the points of error be prescribed, and we didn't see that that's necessary. So we recommended that that be disapproved. Appellate courts -- I don't know that standards of review are all that procedural.

1 Appellate courts talk about that all the time.
2 I don't know that we can do anything by a rule
3 that will be of any value there. So we
4 recommended we disapprove it.

5 Rule 1076 with respect to -- on page 1076
6 with respect to TRAP Rule 74(a) recommends
7 that the 74(a) dispenses with the addresses of
8 parties represented by counsel. Well, we have
9 already taken care of that, and so no further
10 action is required.

11 1078 talks of one of these -- the first
12 one is one of these concerns about designating
13 the district that's the supreme judicial
14 district, which is taken care of, and the next
15 question is whether the rule with respect to
16 length of briefs should apply in both civil
17 and criminal cases, and we understood that
18 Judge Clinton has said that that's not
19 something that the criminal courts are
20 interested in, and so we just disapproved
21 that. Right?

22 HONORABLE SAM HOUSTON CLINTON:
23 Yes, sir. That's right.

24 HONORABLE C. A. GUITTARD:
25 Okay. Maybe the courts of appeals might like

1 to have something along that line. The next
2 is Rule 1079 about putting the -- what?

3 CHAIRMAN SOULES: Request for
4 oral argument on the cover of the brief.

5 HONORABLE C. A. GUITTARD:
6 Yeah. And we asked Judge Cornelius to poll
7 his confreres on the courts of appeals to find
8 out whether they wanted that done, and
9 they -- and I believe you reported that they
10 would prefer that; is that right?

11 JUSTICE CORNELIUS: Right.
12 Right.

13 PROFESSOR DORSANEO: Do they
14 want it in the right-hand corner, in the
15 middle, or on the bottom? My understanding is
16 they all want it, and they all want it in
17 different places.

18 HONORABLE C. A. GUITTARD: Does
19 it make any difference?

20 JUSTICE CORNELIUS: We did have
21 some difference of opinion on that. I can't
22 remember just what the consensus was.

23 Some said that they didn't want it in the
24 upper right-hand corner because that's where
25 they stamped that it was final and so --

1 HONORABLE C. A. GUITTARD:

2 Well, if you just -- could you put it in the
3 lower?

4 JUSTICE CORNELIUS: I would say
5 the lower.

6 HONORABLE C. A. GUITTARD:
7 Well, why don't we put that? But that's where
8 you put the parties' names and the counsel.

9 CHAIRMAN SOULES: Why don't you
10 just put it on the cover of the brief?

11 HONORABLE C. A. GUITTARD:
12 Would cover of the brief be enough?

13 JUSTICE CORNELIUS: Yeah.

14 PROFESSOR DORSANEO: They are
15 going to make a local rule, though, and say
16 put it on the right-hand corner.

17 CHAIRMAN SOULES: It's 5:30,
18 and some of us have got to get cars out of
19 parking by 6:00. Probably we ought to shut
20 down for today. We are going to be in the
21 State Bar building tomorrow. 8:00 o'clock.

22 HONORABLE C. A. GUITTARD: 8:00
23 o'clock?

24 CHAIRMAN SOULES: 8:00 o'clock.

25 MS. SWEENEY: Mr. Chairman --

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MR. GALLAGHER: What is the agenda for tomorrow?

CHAIRMAN SOULES: I think we are going to need to finish these appellate rules because the Supreme Court wants us to get this completed so they can go to work on it and then David Beck is going to give a report on Rules 1 through 165a, and Steve Susman wants to give a report on discovery, but we may not get to that.

(Whereupon the proceedings were adjourned at 5:30 p.m. until November 19, 1994, as reflected in Volume III.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on November 18, 1994, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$ 1,432.00.
CHARGED TO: Sowles & Wallace.

Given under my hand and seal of office on this the 22nd day of November, 1994.

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