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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 16, 1994

(MORNING SESSION)

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Taken before D'Lois L. Jones, Certified Shorthand Reporter in Travis County for the State of Texas, on the 16th day of September, A.D., 1994, between the hours of 8:40 o'clock a.m. and 12:35 p.m. at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

SEPTEMBER 16, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
David J. Beck
Honorable Scott A. Brister
Ann Tyrrell Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring Jr.
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable David Peeples

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Paul N. Gold
David B. Jackson
Kenneth Law
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

Doyle Curry
Hon. William Cornelius
Hon. Doris Lange
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Denise Smith (with David Perry)
Jim Parker
Mollie Anderson (with Mike Hatchell)
Jeff Thompson (with Steve Susman)
Diana Thompson (with Steve Susman)
Jim Parker

SUPREME COURT ADVISORY COMMITTEE
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CHAIRMAN SOULES: Let's be convened. It's about 8:40. We want to welcome a new member of our committee, Ken Laws. Those of you who have had a chance to shake hands with Ken, he's a new member of the committee. It will be his first meeting.

Welcome, Judge Clinton. We are going to start this morning with the appellate rules, and we will work until lunch on the appellate rules and then we will start with discovery and sanctions. You saw the agenda and then go on from there, but we appreciate all of you being here.

Judge Guittard has prepared this memorandum. It's dated September 7. It should be in your materials, one of the items that Holly asked you to bring. It says "Report of the Appellate Rules Subcommittee," and so forth. That's what you are going to be working from, Bill? Bill and Judge Guittard; is that right?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. I am just going to turn it over to you, Judge Guittard, to make your report, and we will

hear comments as we go, persons who feel like you need to express yourselves on anything as we go along so that we kind of take things as they come up in the report, Judge Guittard, if that's okay.

HONORABLE C. A. GUITTARD: Thank you, Mr. Chairman. First I want to say that the chairman said I prepared this report. Of course, the one that actually did the work was Lee Parsley, the Supreme Court staff attorney, and so I want to make sure and give him credit. The other thing I wanted to say is that we are very happy to have Ken Law on our subcommittee. Ken is, as most of you know, is the clerk of the Third Court of Appeals in Austin, and he has already made a whole lot of suggestions that we are going to have to deal with, and most of them have merit unfortunately. I was hoping that -- so we are going to have to deal with those.

Now, if you will look at this cumulative report, and I will direct you to page 5 of the report. This has to do with the problem of when the courthouse is closed. There has been some writing by the Supreme Court on that, but

we thought it best to write it into the rules, and you will notice the underlined part here under Rule 5. I will read it. "When the act to be done is the filing of a paper in court and the clerk's office is closed or inaccessible on the last day of the period so computed the period extends to the end of the next day other than a Saturday, Sunday, or legal holiday on which the clerk's office is open and accessible. Proof of closing or inaccessibility of the clerk's office may be made by a certificate of the clerk or counsel or by affidavit of a party. Whenever a party has a right or is required to do so within the prescribed period after the service of a notice or other paper and the notice of paper is served by mail, three days shall be added to the prescribed period."

I think that's explanatory, Mr. Chairman. I move the approval of that proposal.

CHAIRMAN SOULES: Okay. Where is the counterpart in the Rules of Civil Procedure?

MR. PARSLEY: Rule 4, I believe.

HONORABLE C. A. GUITTARD: Perhaps the committee should consider a similar provision in the Rules of Civil Procedure.

CHAIRMAN SOULES: Well, I think we ought to change the language to track Rule 4. I think we have got ambiguous language here, but in concept I think it's fine.

HONORABLE C. A. GUITTARD: Any other comments?

CHAIRMAN SOULES: I mean, you can't extend the period if the next day is a Saturday, Sunday, or legal holiday; is that right?

HONORABLE C. A. GUITTARD: And if that's true, then it goes to the next day after that.

CHAIRMAN SOULES: It doesn't say that.

HONORABLE C. A. GUITTARD: "Extends to the end of the next day other" -- next day afterwards would be the next day.

CHAIRMAN SOULES: Let's just

use Rule 4. We know what that means.

MR. ORSINGER: Richard Orsinger. Let me comment that I really don't agree that you have to add three days for a fax transfer because fax transfer is tantamount to hand delivery, and yet under Rule 4 you have got to add three days for fax transfer. So I think we ought to revisit the question of whether you ought to add three days for a fax.

CHAIRMAN SOULES: I think that's in these notebooks that we have never gotten to yet. There is a suggestion to do that. Actually, sometimes you have to add four if it's a fax.

MR. ORSINGER: Really? Because it's after 5:00 o'clock?

CHAIRMAN SOULES: In El Paso. It's after 4:00 in Houston, so I mean, it's really messed up.

PROFESSOR DORSANEO: This is Bill Dorsaneo, and I have a suggestion. Why don't we just take out "other than a Saturday, Sunday, or legal holiday" from this draft?

HONORABLE C. A. GUITTARD: That

sounds all right to me.

PROFESSOR DORSANEO: If we do that, then this draft will actually be clearer than Rule 4, which should be interpreted the way this is drafted, but I'm not sure that the courts have actually gotten there. Our proposal is a simple rule that says if you can't file it because it's closed or inaccessible you get until tomorrow.

CHAIRMAN SOULES: That would work. Seems like it would work to me. Okay. The motion has been made to adopt this deleting the words "other than a Saturday, Sunday, or legal holiday." Second?

PROFESSOR CARLSON: Second.

CHAIRMAN SOULES: Elaine Carlson.

HONORABLE C. A. GUITTARD: If the committee rules it doesn't have to be seconded, does it?

CHAIRMAN SOULES: Any discussion? Okay. Those in favor show by hands.

Opposed? Okay. That's unanimously in favor, unopposed.

PROFESSOR DORSANEO: This is Bill Dorsaneo again. What we are doing here as a combined committee is now presenting things that have not been previously considered by the SCAC. There are approximately 20 of them, and then we will move to things that have been considered but were resubmitted to us for reconsideration and then on to new matters.

HONORABLE C. A. GUITTARD: Next we will go to page 8, Rule 13(i), failure to make a deposit. The present rule is rather cryptic. It says "If the required deposit for cost is not tendered the clerk may decline to file the record, motion, or petition, or the court may dismiss the proceeding." We would propose substituting for that, "If any deposit required by this rule is not tendered" -- perhaps instead of "deposit" we ought to use the word "fee." What do you think about that, Ken?

MR. LAW: Yes. There is a little bit of confusion over the difference between deposit for costs and a filing fee, and there is some philosophy, so possibly if

we went ahead and called it a fee --

HONORABLE C. A. GUITTARD: It's not a deposit if you can't get any of it back.

MR. LAW: That's right, and you can't. We won't let you have it.

HONORABLE C. A. GUITTARD: Well, I would propose then that instead of "deposit" the word "fee" be used. "If any fee required by this rule is not tendered when required the appellate clerk shall notify the appellant or other moving party, and if the fee is not tendered within 10 days after receiving such notification the clerk shall refer the matter to the court for appropriate action."

MR. LAW: One of the problems, I believe, that we discussed in the last meeting was the Government Code describes certain costs for deposits and then there are fees are created by the Supreme Court by rule, and so there is a conflict of those terms, but as far as the clerk's office is concerned we consider them all fees and none of them refundable. For now, I mean, for practical purposes we couldn't possibly track them any

other way.

HONORABLE C. A. GUITTARD: Well, I would explain that the rest of Rule 13 is going to have to be revised, but for the present all we are placing before the committee is this paragraph (i), and I move it's adoption with the change of the word "deposit" to "fee."

CHAIRMAN SOULES: Any opposition?

MR. LOW: I think we need to raise the question. I mean, deposit has a long-standing meaning. I mean, it might be a fee or a deposit. We consider a deposit -- I mean, why wouldn't it be any fee or deposit? I mean, either way.

HONORABLE C. A. GUITTARD: Well, are there any deposits made in the court of appeals?

PROFESSOR DORSANEO: There are not. They are all fees.

MR. ORSINGER: Except they are all called deposits.

PROFESSOR DORSANEO: They are called deposits. That's the problem.

MR. LOW: That's my point. I am just telling you that it's such a long-standing thing. I mean, that's fine, but it creates difficulty. If you put "deposit or fee," then there would be no confusion.

HONORABLE C. A. GUITTARD: Well, I think perhaps your point is if they use "deposit" anywhere else it ought to be made uniform. They all ought to say "deposit," or they all ought to say "fees."

MR. LOW: And I don't know here every time that term is used. So I am saying here if you incorporate the term "any deposit or fee is required" it would take two more words.

CHAIRMAN SOULES: Any problem with that?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: That's done.

MR. LOW: And then we don't have to worry about whether somebody used "deposit" in the code of such-and-such.

CHAIRMAN SOULES: Any opposition to Buddy's suggestion? Okay. So we will say both, "deposit or fee," "fee or

deposit," whichever way you wish.

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

CHAIRMAN SOULES: Okay. With that change is there any opposition to the paragraph on failure to make deposits on page 8? Being no opposition that will be unanimously approved.

HONORABLE C. A. GUITTARD: Now look at page 9, or actually it's the bottom of page 8 and top of page 9. Let see. "Court of appeals unable to take immediate action." You know, this rule says that if the court where the case is filed or should be filed is unable to take immediate action you go to the next -- you go to the nearest court of appeals, and you can get action there, but it doesn't say what shall be done after you get there. Does that other court keep it from then on, or does it send it back to the original court, or what does it do?

So this would spell it out to help you-all at the top of page 9 adding to that rule the following language: "Any action taken under this rule by a court other than

the one in which the appeal or original proceeding is filed or if not filed would have jurisdiction of it has the same effect as if taken by the other court. After taking or denying such action the court so acting shall as soon as practicable send a copy of its order and the documents presented to it or copies of them to the court on whose behalf the action was taken, and that court shall proceed with the matter whenever a quorum is available." Mr. Chairman, I move the adoption of this rule or this proposal.

CHAIRMAN SOULES: Okay. Any discussions? Any opposition to this? Okay.

MR. MCMAINS: What this basically does is say that whatever the court does that supposedly required immediate action even if it's on the merits that they still lose jurisdiction of it once they have done it. Is that right?

HONORABLE C. A. GUITTARD: Well, they send it back, and it's just as if the original court had done it.

MR. MCMAINS: Well, I understand, but what I am saying is -- but

they wash their hands of it right then and there?

HONORABLE C. A. GUITTARD: Right.

MR. MCMAINS: I mean, my concern is if it was something that required immediate action in the beginning, then that means that the motion for rehearing of it would have to go to the other court.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: If they were open.

HONORABLE C. A. GUITTARD: If they are open.

MR. MCMAINS: Well, does it say "if they are open"?

HONORABLE C. A. GUITTARD: Yes. It says "as soon as a quorum is available."

MR. MCMAINS: Well, but it says, "The court so acting shall as soon as practicable send a copy of its order on behalf...and that court shall proceed with the matter whenever a quorum is available."

HONORABLE C. A. GUITTARD:

Yeah.

MR. MCMAINS: So what it sounds like is that only the initial action is within the jurisdiction of the acting court, and then they send it back immediately even if the other court isn't ready to act. You see what I am saying? That's what it says in my judgment, and my concern is that if -- and I don't know. I have been involved in cases where people thought it was that immediate, but it very seldom turned out to be that immediate in terms of the Court's attitude, but the problem is that if it was so immediate to warrant that in the first place that it shouldn't be -- why should you be deprived of a quorum to --

HONORABLE C. A. GUITTARD: Well, of course if --

MR. MCMAINS: I mean, do you bounce it back? Again, is this a -- it seems silly to me that if the clerk -- does the clerk recertify that there still isn't everybody available and then you go back again on the motion for --

HONORABLE C. A. GUITTARD:

Well --

MR. MCMAINS: I am just wondering if the court shouldn't keep it until such time as the quorum is available.

HONORABLE C. A. GUITTARD: Well, how are they going to know whether it is available or not?

MR. MCMAINS: Well, the way they knew in the first place was the clerk certified it. So it seems to me that it's up to the clerk to notify them when they are available.

HONORABLE C. A. GUITTARD: Well, if the clerk certifies that again they have to go through the same thing again, don't they? The court can act for that court as long as the original court is certified not to be available.

MR. MCMAINS: Well, but again, it looks like they act, then send the papers back.

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

MR. MCMAINS: And then if the clerks says -- and somebody says, "Okay. I

want to file a motion for rehearing."

HONORABLE C. A. GUITTARD: And then if the original court --

MR. MCMAINS: And the original court is still not available.

HONORABLE C. A. GUITTARD: In the unlikely event, well, it would be the same way again.

MR. MCMAINS: I mean, all I am saying is so now you are sending it back up to them again and renumbering. It just --

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

MS. DUNCAN: Just the plain truth of the matter.

HONORABLE C. A. GUITTARD: You have to solve the problem some way, and that's the submission we came up with.

MR. LOW: The only other way you could do it would be if the court -- excuse me. I'm sorry.

HONORABLE C. A. GUITTARD: Go ahead.

MR. LOW: If the court -- they don't favor just jumping from one court of

appeals to another, putting in there that as soon as two justices are available they shall certify to that court because if the clerk knows about it, send it back. In other words, I understand Rusty's point, and that way they have the language. That would automatically have the language. Is that what you are talking about, Rusty?

MR. MCMAINS: Right.

MR. LOW: That some of the judges -- it will be the duty of the clerk in that court to know that as soon as they are available they shall certify their availability, and it will automatically go back.

HONORABLE C. A. GUITTARD: Well, I think maybe we can revise the proposal to incorporate that suggestion. Would that satisfy your concern?

MR. MCMAINS: Yeah. That's the only -- my only concern was that it looked -- I mean, we are kind of imagining things that would be happening anyway.

HONORABLE C. A. GUITTARD: Yeah. Yeah.

MR. LOW: Yeah.

MR. MCMAINS: Which is what's hard to figure out other than perhaps some kind of onerous temporary injunction or temporary restraining order or something, or mandamus.

HONORABLE C. A. GUITTARD: The question then would be does the court that's acting continue with jurisdiction until it gets some sort of certificate from the original court that it's ready to act, or the original court might just sit or let them do it. Is that the way we want it done?

MS. DUNCAN: And if a certificate is made by counsel would the justices of the original court even know to certify to the transferee court that they now have a quorum and are ready to sit?

CHAIRMAN SOULES: What's wrong with letting it work just the way it's written here? If you send it back -- and in most cases that's going to work. By the time it gets back to the first court unless there has been a nuclear bomb or something like that they will be there and ready to go to work.

HONORABLE C. A. GUITTARD: Yeah. We sometimes have problems writing the rules to take care of every conceivable case rather than taking care of 99 cases out of 100. I think this wouldn't be bad.

CHAIRMAN SOULES: But you are over there for emergency relief. You go get your emergency relief, and then they send it back to the court, and they still need some more, and the court's not there. You can ask the clerk to certify again and go back, but in the meantime probably the court is going to be back in session, seems like to me, and that's what this is designed to take, to work.

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

MR. MCMAINS: Well, except that the point is that in every conceivable case where everybody is claiming that they have an emergency right to relief and they go to this other court, then in the same case in exactly those kind of cases, whatever you can imagine they would be, the other side is going to claim that it's an emergency that they have a rehearing or a reconsideration or a motion to

vacate or whatever it is that they are doing. And the idea that once that the court acts on something that they say, "Okay. We are going to grant leave to file a mandamus. We are going to grant a stay of all proceedings, and now we send it back to the other court."

And now you want to file -- now what basically you're saying is, okay, so now you file your motion to vacate that order because you are getting ready to go to trial the next day. Then you file that in a court which didn't hear it, which ain't prepared to hear it, and that's -- I mean, that is exactly the kind of situation that is going on here, and all I'm saying is that it seems to me that the very same circumstances that would require immediate action would require that basically that that court retain the jurisdiction until those circumstances had passed, as unusual as that is. I mean, I don't know that a clerk is just going to haul off and certify the unavailability of his judges.

HONORABLE C. A. GUITTARD: What's the present practice?

PROFESSOR DORSANEO: Or is

there a practice?

MR. MCMAINS: There is no practice.

MR. ORSINGER: How often does this happen?

CHAIRMAN SOULES: The clerks talk and the judges talk. That's what happens in the real world. We have just had a motion for leave filed, and two of our judges are disqualified because they both own Exxon stock, and it involves Exxon so we can't hear it, and they grant emergency relief.

MR. MCMAINS: Yeah. But if that's the case there is no reason for it to ever to go back to that.

MR. ORSINGER: Well, the governor is going to appoint a retired judge to fill up that court of appeals, so it's going to be solved in a week or so.

MR. LOW: I tell you an example. We had one of our judges -- we have three in Beaumont. We had one of them on military, another one was on vacation, and another one had gone to a family emergency and not a single one of them was there, and a case

was going to trial, and they were trying to mandamus over some discovery, and I won't burden you with telling you how it worked out, but if it worked out like this someone would have to certify -- the record on mandamus is pretty thick because it comes from Brazoria County, and it's a lawsuit in Louisiana, and it took quite some time to read that, and if you had something else arising out of that there would be no reason for the original judge, the judge that decided that, ought to have to decide, and so issues like Rusty is talking about --

HONORABLE C. A. GUITTARD: I don't know how to draw a rule that would provide for that sort of thing, and this seems to be --

MR. LOW: I don't know either other than what Rusty is suggesting.

PROFESSOR DORSANEO: This is Bill Dorsaneo again. I think the issue really would be, that we could vote on, is whether this rule ought to be redrafted to provide that the transferee court, if that's what we are going to call it, could entertain a motion

for rehearing if it wanted to. We could add it by language at the end, you know, "provided that the transferee court may entertain a motion for rehearing."

MR. MCMAINS: It's not really just a question of -- I mean, I think technically it would apply to a rehearing. It could be, for instance, a modification of the order entered. I mean, it may be that the emergency aspect of it is that if the court of appeals decides to issue an order. For instance, if they want a stay of proceedings on a discovery matter and they issue just an automatic stay of everything, it may be that there are very extensive discovery matters going on that are unrelated to the issue on mandamus, and all you want to do is to get a modification of the stay order. Now, that I suppose, technically qualifies as a motion for rehearing, but any attempt to -- and so if broadened to include that I think that would probably solve my major concern.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think it would

be a better suggestion to say that jurisdiction will remain in the transferee court until somebody presents it with a certificate that the first court is available, and then if someone else wants to intervene or come back they can do that, and if the opposing party says, "No, the first court is available," if they get over there with the certificate, the transferee court knows to send the entire matter back to the original court. That way you don't debate over whether the motion you have got is ancillary to something that's already been granted, and you put the duty on the litigants to bring the certificate that the first court is now available, and if somebody objects to the fact that it's in the Tyler court instead of the Dallas court and that the Dallas court is now available, then they can jolly well get a certificate over there saying that the Dallas court is now available.

PROFESSOR DORSANEO:

Mr. Chairman, I suggest we vote on these options and then draft it because this can't be using up all of our time on this non-event

rule.

CHAIRMAN SOULES: All right. Why don't you state how you see the division of the house?

PROFESSOR DORSANEO: One, leave it like it is; two, put a proviso that the transferee court may entertain a motion for rehearing; three, the Orsinger approach.

HONORABLE C. A. GUITTARD: The Orsinger approach would be accomplished this way: "After taking or denying such action on certificate by the transferor court that it is available the court so acting shall as soon as practicable send it back." Is that right, Richard?

MR. ORSINGER: Yeah. That's right.

CHAIRMAN SOULES: Well, that doesn't say that the transferee court has jurisdiction, ongoing jurisdiction. Maybe it does, maybe it doesn't.

MR. MCMAINS: No, it doesn't.

CHAIRMAN SOULES: Well, I thought that's why you wanted it to stay at the original court, so you would have ongoing

jurisdiction for a motion for reconsideration.

MR. ORSINGER: You would want that. That's the whole point is to keep from going back to the first court two or three or four times to get certificates that say the same thing.

CHAIRMAN SOULES: We are talking about either, one, leave it like it is; two, put a proviso that they can entertain a motion to reconsider, whatever their action was; and three, that they would just have ongoing jurisdiction over the matter until they were notified that the transferor court had the capacity to act.

Okay. Those are the three options. Those in favor of one, leave it like it is, show by hands. Eight.

Okay. Those who favor just adding a proviso which limits the court's further action to reconsideration of whatever its prior action was, show by hands.

MR. MCMAINS: You say limits it?

CHAIRMAN SOULES: It's a proviso that says the court can reconsider

whatever it did before. Okay. Those in favor of that show by hands. Okay. There are no hands on that, and then those in favor of a provision in here that says that the transferee court shall have continuing jurisdiction until the transferor court somehow notifies it that the transferor court is ready to take the case back, and the language of that is going to have to be written, but that's the concept. Six. Eight to six leave it like it is.

PROFESSOR DORSANEO: I think what perhaps we ought to do, Lee, is to draft it both ways for the court to look at and see what they like. Judge, you think that will be all right?

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

The next is on page 9, the same page, with respect to the evidence on motions. The problem is whether a lawyer or the counsel should be required to make an affidavit. There is one school of thought that says that if you -- if the lawyer makes a representation to the court, that ought to be taken as true.

There is the accompanying thought that, well, lawyers are going to swear to whatever they have to anyway, but in any event this would solve that problem by dispensing with the oath so far as lawyers are concerned.

So the subdivision (d) of the rule would provide "Motions need not be verified except that a motion dependent on facts not in the record or ex officio known to the court or within the personal knowledge of the attorney citing the motion must be supported by affidavits or other satisfactory evidence."

Mr. Chairman, I move adoption of that one.

CHAIRMAN SOULES: Any opposition to that?

MR. MCMAINS: The only question I have, does this basically modify then the notion that motions for extension need to be supported and need to be verified?

MS. DUNCAN: Yes.

HONORABLE C. A. GUITTARD: Yes.

MR. MCMAINS: That is what you are talking about?

HONORABLE C. A. GUITTARD: Yes.

If it's matters within the attorney's knowledge, then his representation is enough. Okay.

CHAIRMAN SOULES: Does he say "I represent this on my personal knowledge" or not?

HONORABLE C. A. GUITTARD: Well, isn't there a general rule that what the lawyer represents to the court is taken as true and then as being within his knowledge?

CHAIRMAN SOULES: It depends on what it is. Not in pleadings. I can file a Plaintiff's Original Petition, and I am not saying -- I am contending everything in there is true, but I am not representing that it is.

HONORABLE C. A. GUITTARD: Well --

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: In response to your thing, Luke, the rule on affidavits is if it's not apparent from the language that you use in the affidavit that it's based on personal knowledge then you have to assert that it's based on personal knowledge, at

least for summary judgment and special appearance and whatnot. The other comment I wanted to make is that are we saying now that a motion for extension on the statement of facts does not require an affidavit of a court reporter?

MS. DUNCAN: You are not going to be filing those.

HONORABLE C. A. GUITTARD: We have abolished those motions.

MR. ORSINGER: The correspondence that's between the court reporter and the clerk?

HONORABLE C. A. GUITTARD: There will be -- of course, there is the motion for extension for filing those appeals, for instance.

MR. ORSINGER: Okay. But this colloquy that goes on between the court reporter and the clerk to get the record filed no longer requires affidavits from the court reporter as to why they don't do the statement of facts?

HONORABLE C. A. GUITTARD: No. No.

MR. MCMAINS: It requires intervention of the attorneys.

HONORABLE C. A. GUTTARD: No. That wouldn't --

CHAIRMAN SOULES: One at a time. Go ahead.

HONORABLE C. A. GUITTARD: If it's within the personal knowledge of the attorney, that's one thing. If you have to rely on the court reporter for it, it looks like you have to get his affidavit.

CHAIRMAN SOULES: Okay. Any further discussion on this? Buddy Low.

MR. LOW: I have a question, and I go for clarity. I mean, I am not so sure when it is --

CHAIRMAN SOULES: Rusty, your discussion, she can't hear the speaker when you are talking behind her. If you are going to talk, move away from the court reporter.

MR. LOW: I am not sure when it is within your personal knowledge or what. I tend to favor the federal rule if the attorney signs something that you are certifying it, but this doesn't just do it that way. It says

certain things then might have to be -- if the attorney is saying he might have to swear to it, well, I guess he couldn't swear to anything if it wasn't within his personal knowledge, but when he's -- it's reported by phone -- if this is clear then I have no objection to it. It's just not clear to me what situations I have to give an affidavit in. Maybe that's just me. I tend to favor that if the attorney signs it, he certifies.

HONORABLE C. A. GUITTARD: Right.

MR. LOW: And if the attorney signs it, he ought not to have to swear to it. That's what I favor.

HONORABLE C. A. GUITTARD: That's the point.

MR. LOW: But this doesn't necessarily say that. So I will say no more. I'm confused, but everybody else may not be.

PROFESSOR DORSANEO: It relaxes the oath requirement in the circumstance when you could make an oath under current law. In other words, a lawyer couldn't swear to it if he or she didn't have personal knowledge of it

under our current practice. So this eliminates at least one technical requirement without attempting to try to build in a Federal Rule 11 or a Texas Rule 13 deal.

MR. LOW: But is this going to be clear? I mean, when a lawyer has to swear to it and when he doesn't. I mean, I guess he --

PROFESSOR DORSANEO: Well, a lawyer can't swear to it.

HONORABLE C. A. GUITTARD: He can't swear to it if he doesn't know it.

MR. LOW: Personal knowledge, I know. But there is a -- I mean, well, the question in my mind, what is personal knowledge? I talked to somebody's secretary, and he's at a funeral. I can't get a hold of him, and I know this secretary. Is that within my personal knowledge that he's at a funeral or has to attend a funeral? I mean, I have read it in the paper. I mean, just I know it. I mean, do I have to go get an affidavit from the preacher that he's gone to a funeral? I mean, wouldn't it be simpler if the lawyer could just sign it and doesn't have

to swear to it, and that's not within his personal knowledge, I mean, in the sense that he's there seeing him.

HONORABLE C. A. GUITTARD: How would you propose it be drafted?

MR. LOW: I would propose doing it that -- doing away with affidavits by lawyers.

HONORABLE C. A. GUITTARD: I mean, what -- just say "motion need not be verified," period?

MR. LOW: No. Motions that are -- upon which a factual basis for such motions stated by the attorney doesn't have to be sworn to, but I'll leave it as it is. Maybe I am the only one confused. I will go along with that. I will withdraw the request.

CHAIRMAN SOULES: The only question I have is I don't know what's in Buddy's personal knowledge. I may not even know what's in my personal knowledge.

MR. LOW: Yeah. That's the question I have.

CHAIRMAN SOULES: I'm like you. And are we going to get into satellite

litigation about whether or not an unverified filing was or was not within the personal knowledge of the attorney? Therefore, the motion is ineffective. Especially one that would be filed for the purposes of extending the appellate court's jurisdiction.

Okay. Those in favor of --

MR. MCMAINS: May I ask one other thing?

CHAIRMAN SOULES: Yes, sir. Rusty.

MR. MCMAINS: Is it just the grammatical part of it?

MR. ORSINGER: I have a problem with that, too.

MR. MCMAINS: Because actually I think what it actually is doing is everything, all of these phrases, are essentially supposed to be modified by "not." I mean, there is supposed to be a "not" before each of the disjunctives because the last two disjunctives are actually in the affirmative unless you read in the "not" that appears on the first line. See what I am saying?

MS. DUNCAN: And that's

particularly --

MR. MCMAINS: It is an exception. Yeah. It says "Except that a motion dependent on facts" and then actually you are saying "not" almost colon, you know, "in the record, not ex officio known to the court or not within the personal knowledge must be supported by affidavit or other satisfactory" --

MR. ORSINGER: I would propose that we put a parenthesis little (i), parenthesis double (i), and parenthesis triple (i) to make it clear that those are three instances in which the verification requirement is not required because to me this is -- without the commas this would require, I think, a verification even when the attorney has personal knowledge the way it's written. It seems to me.

PROFESSOR DORSANEO: Maybe.

MR. MCMAINS: Well, I think the sense of it is obvious that, I mean, something that's ex officio known to the court should not be something you have to swear to, but in order to get that sense you have to put a

"not" in front of it. You either have to borrow the first "not" or you have to put it in every place.

CHAIRMAN SOULES: Okay. We will, as soon as we can, fix the grammar. Those in favor of (d) show by hands. Thirteen.

Those opposed? It's unanimously approved.

HONORABLE C. A. GUITTARD: Let's go to --

CHAIRMAN SOULES: You are not going to oppose that, Buddy?

MR. LOW: No. I'm confused, and everybody else must not be, and I am not going to vote against something when I have been voted that I am confused. So I stand corrected.

CHAIRMAN SOULES: Okay. Next, Judge.

HONORABLE C. A. GUITTARD: On page 25 -- well, no. On page 10, amicus curiae briefs, we are making no change to that except to require that the amicus curiae who is hired by somebody divulge who he is hired

by. So it would say that "The brief shall identify the person, association, or corporation on whose behalf the brief is tendered."

I move the approval of that proposal.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I have been concerned at the practice that some people engage in of a party litigant drafting an amicus brief and then circulating it for signatures by third parties. I have always been bothered by that practice. I don't know if that bothers anybody else, but if it does, could this language be interpreted to require that if the brief is drafted by a party and then offered for signing by nonparties that that would need to be disclosed? No one is hired in that situation, but I know of instances where a party will draft an amicus brief and then pass it around for signatures from nonparty lawyers, and I have always thought that that was misleading to the court.

PROFESSOR DORSANEO: Wouldn't you read this language as saying that if that

happened you would have to identify the person who tendered you the brief for signing as the person on whose behalf --

MR. MCMAINS: No.

PROFESSOR DORSANEO: -- it's tendered?

MR. ORSINGER: No.

MR. BABCOCK: I wouldn't read it that way.

MR. MCMAINS: No, I would not. One of the problems in the amicus area is that a lot of times the people are hired by somebody but they file the briefs on behalf of somebody else. Now, this rule doesn't require that you disclose who you are hired by anyway.

MR. ORSINGER: But just say "tendered on behalf of the appellant or the petitioner"?

MS. DUNCAN: No.

HONORABLE C. A. GUITTARD: No.

MR. MCMAINS: No.

MR. ORSINGER: You mean the name of the amicus --

MR. MCMAINS: No. It's the name of an association or an organization, but

there are a number --

MS. DUNCAN: A third party to the litigation.

MR. MCMAINS: There are a number of organizations that are -- there are a number of entities, corporations, that will pay for an amicus brief to be filed on behalf of what is basically a trade corporation, for instance, in order to put in a bunch of names. Actually it's paid for by a person who may even be tangentially involved in the litigation, but they are going to identify because they have gotten clearance from their board of directors or whatever of the trade organization to tender it on behalf of the trade organization to look like that there are 800 corporations that support this brief, and that's what they -- and that's what they do, and most of the time -- I mean, you don't need this rule.

That is what they are doing, but it also isn't true. Now, this rule doesn't do anything about the truth of whether or not that's a position taken by the trade organization or of the individual, you know,

whoever it is that it's tendered on behalf of in terms of who it's paid for by.

MR. BABCOCK: But what isn't true about it, Rusty?

CHAIRMAN SOULES: Excuse me. Tommy Jacks, you had your hand up, and I will get to Alex and then I will get back here.

MR. JACKS: It seems to me we are opening up a can of worms by trying to do anything by rule about that fact of life, and I think this committee ought to take notice of the fact that appellate courts aren't stupid. They understand that there are campaigns for amicus briefs. They know it when it's happening. It's obvious from the brief on whose behalf it's being submitted, but rather than get the courts in the business of trying to police the activities of nonparties in that regard when their interests are manifest anyhow, I mean, I think appellate courts regard amicus briefs with the weight that they are due, which sometimes is considerable and other times is nil, but I don't see it as anything we need to try to regulate by the rules of practice.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: I was going to say what Tommy was going to say and also add that sometimes that happens not because of business interests. There are times at the law school that someone will want to file an amicus brief and take it around to some other people on the faculty and see if we agree with the position and will also sign it as an amicus. I didn't pay for it. I didn't do it, but I agree with what it says, so I will sign it, and I don't think we should stop that. So I agree with Tommy. Let's leave it alone.

CHAIRMAN SOULES: Chip.

MR. BABCOCK: Yeah. I agree with that as well. The only thing that seems to me is misleading is if somebody's name is on that brief who didn't consent to it, and that's a whole different problem that this rule doesn't even touch. So I say leave it alone.

MS. DUNCAN: I agree with that position, but I do think there needs to be a statement of interest in the brief, and that's

all that this amendment, at least from my perspective, was designed to address.

CHAIRMAN SOULES: But it doesn't really address it. I think that an amicus should have to state the interest of the amicus or counsel who submits a brief and the source of any compensation received for preparing the brief.

PROFESSOR DORSANEO: I agree with that.

MR. ORSINGER: I would agree with that, too.

CHAIRMAN SOULES: That really gets to the meat of the coconut.

HONORABLE C. A. GUITTARD: I will agree with you. That's acceptable to me and to our committee, I suppose.

MR. ORSINGER: That would also include, I presume, a situation where you have a case like that that's still at the court of appeals level and you want to file --

CHAIRMAN SOULES: Sure.

MR. ORSINGER: -- an amicus at the Supreme Court and disclose that you have a case that would be influenced by the decision?

CHAIRMAN SOULES: Yes, sir. I think so.

MR. ORSINGER: I think that's fair to the Supreme Court if you did that.

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

PROFESSOR DORSANEO: I think we can adopt the nature of the interest of the amicus curiae and --

CHAIRMAN SOULES: It should disclose any interest of the amicus or counsel in the outcome of the appeal and the source of any compensation for the amicus brief.

PROFESSOR ALBRIGHT: Well, the point is if I file a brief --

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: I'm sorry. I filed a brief in a case in the Supreme Court on behalf of the Texas Association of Business, Jobs for Texas, et cetera. What is their interest in the outcome? Well, we usually make a statement that, you know, these are corporations who are very interested in what happens to venue in the state of Texas, but I would hate to get in the situation

where, well, they haven't disclosed that Conoco has four cases in South Texas, Shell has three cases in South Texas, XYZ has two cases in South Texas. I think if you say they have to disclose their interest in the litigation, you know, I think the court knows that they are interested in the issue because it clearly affects them, but if you make it too technical, then I think you could make it very, very difficult. I think I agree with Tommy. Courts aren't stupid, and they know what's going on.

PROFESSOR DORSANEO: They are not stupid, but they can be fooled.

CHAIRMAN SOULES: We are a friend of the court because we want to be sure that my case pending in the court of appeals doesn't get messed up by your decision. That's okay I guess to be a friend of the court on those terms, but it's not just somebody taking a position of an important public interest.

PROFESSOR ALBRIGHT: But does every corporation in the Texas Association of Business have to go through and figure out how

many venue cases they have pending?

CHAIRMAN SOULES: Not if you are just filing it on the association.

PROFESSOR ALBRIGHT: What if you say if you disclose who's paying for it and who are the amicus curiae? It seems like you have solved your problem without going into further detail.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: I agree that the courts aren't stupid, but the courts can't know that a particular amicus has a pending case as of the date of filing that brief, and that to me would be very relevant information, and I don't need to know the style and the cause, but there would be a big difference between X corporation who files this brief simply because they are interested in the issue and it may come up, and X corporation who has a pending case involving precisely that issue that's going to have a big impact on X corporation, and I don't -- I just don't see anything wrong with requiring the amicus to fairly disclose to the court what its true interest in the outcome is.

PROFESSOR ALBRIGHT: My only concern is that it get too technical so it gets people who are filing amicus briefs in good faith in trouble because they didn't make some technical disclosure.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: It seems to me naive to think that anybody files an amicus brief who doesn't have an interest in the outcome of the case before the court. I don't think that there are just in general friends of the court, and furthermore, the reason for not requiring it is that we ought not to require people to do things unless there is a real good reason to require them to do it. It's just one more thing you have got to do. If the court wants to know further than that you are filing an amicus, they can write you a letter and say, "Do you have any interest in this?"

CHAIRMAN SOULES: After the Austin court almost blew up broad questions in EB I wrote an amicus brief in support of the petition for writ of error and had absolutely no interest in it, and I imagine a lot of

other people did, too. I had no interest in -- I don't even do family law.

MR. LATTING: Okay. I will back off of my -- there are a few public expression people like you and law professors that do that.

HONORABLE C. A. GUITTARD: Well, if that's true, you can so state.

MR. LATTING: But none of the scurrilous people I represent ever want to file amicus briefs.

CHAIRMAN SOULES: They don't get any money for it either.

MS. DUNCAN: That's probably true, Joe.

MR. LATTING: The courts know why people file amicus briefs, and what difference does it make whether you have a case pending if the strength of your argument ought to control the validity of the brief.

CHAIRMAN SOULES: Okay. Anything else on this?

Okay. We have got -- the committee has moved to adopt Rule 20 as written, right?

HONORABLE C. A. GUITTARD:

Well, we would accept your suggestion.

CHAIRMAN SOULES: Okay. To substitute the disclosure of any interest of the amicus or counsel in the outcome of the case and the source of any compensation to counsel for preparing the amicus brief.

HONORABLE C. A. GUITTARD: Right. Right.

CHAIRMAN SOULES: So that's the motion up or down.

MR. LATTING: Well, can I ask a question? Are we going to define what "any interest" means because I think that is a very questionable phrase?

CHAIRMAN SOULES: We are going to vote without doing that. So cast your vote without having that definition.

HONORABLE PAUL HEATH TILL: Say it again.

CHAIRMAN SOULES: The change in Rule 20, Judge, would be to add a requirement that the brief and amicus brief disclose any interests of the amicus or counsel for amicus in the outcome of the case or the appeal and the source of any compensation to counsel for

preparing the amicus brief. Okay. Those in favor show by hands. Nine.

Those opposed? Ten. Fails by a vote of 10 to 9.

MR. LATTING: Now, may I ask about whether we can have a vote on the source of funds? That one doesn't bother me. What bothered me was the "any interest" because of how wide and deep that is, but I don't have any objection to having an amicus divulged if it's being paid for by somebody to file an amicus. I think that's pretty straight forward.

CHAIRMAN SOULES: Are you making that motion?

MR. LATTING: Yeah.

MR. ORSINGER: I will second that.

CHAIRMAN SOULES: Moved and seconded. Those in favor show by hands.

Opposed? That passes 11 to 8.

Okay. Next, Judge Guittard.

HONORABLE C. A. GUITTARD: Next on page 25 is Rule 54 that's been a stumbling block for a good many appellants, which

requires they have a certain time to file the record. Under our system as previously approved by the committee the record wouldn't be filed by counsel but by the clerk and the court reporter, and if it's not filed in a certain time then the appellate court clerk has responsibility to inquire and ride herd on the reporter or clerk and get the record up there.

So there would be no particular time requirement for filing it. There would simply be in the Rule 56 as we have provided subsequently a rule directing the appellate court clerk after a certain period of time to inquire and make an effort to get the record in the court and then we will consider those provisions further when we present Rule 56, but the present proposition is simply to repeal Rule 54 which requires certain time in which to file records. I move the approval of this repeal. Perhaps we should wait and consider that in connection with Rule 56.

PROFESSOR DORSANEO: I think so.

HONORABLE C. A. GUITTARD:

Okay. Let's go on then. Rule 55 has to do with amendment of the record on page 26, and it's modified to conform to that same scheme that the appellate clerk should -- "If anything material from the record is omitted from the transcript, the trial court, the appellate court, or any party may by letter direct the clerk of the trial court to prepare, certify, and file in the appellate court a supplemental transcript containing the omitted papers."

Subdivision (b), "Inaccuracies in the Transcript. If any defect or inaccuracies appear in the transcript, the clerk of the appellate court shall return it to the clerk of the trial court, specifying the defect or inaccuracy and instructing the clerk to correct the transcript and refile it in the appellate court.

"(C), Inaccuracy in the Statement of Facts. Any inaccuracies in the statement of facts may be corrected by agreement of the parties; should any dispute arise after filing in the appellate court at to whether the statement of facts accurately discloses what

occurred in the trial court, the appellate court shall submit the matter to the trial judge, who" -- I guess we ought to have "who" rather than "which" -- "who shall after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court."

I move the approval of that proposal.

CHAIRMAN SOULES: Any objection?

MR. ORSINGER: Could I comment or inquire?

CHAIRMAN SOULES: Comment. Richard Orsinger.

MR. ORSINGER: Now the Courts of Appeals typically will not supplement the transcript after oral submission. This would eliminate any distinction before or after, or it could be during the briefing period? I mean, during the opinion writing stage?

HONORABLE C. A. GUITTARD: Sure.

MR. ORSINGER: Okay.

MR. LATTING: Luke, I have a question.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Is there a reason for requiring the clerk of the court of appeals to return the transcript to the district clerk? It might just need supplementation of some minor addition. As I read it, taken literally, this would require the return of the entire transcript. I was just wondering.

HONORABLE C. A. GUITTARD: Well, if there is any inaccuracies, if there is anything wrong with it, it ought to be sent back and corrected, is the theory here.

MR. LATTING: If any defect --

HONORABLE C. A. GUITTARD: Now, if it needs something else, omissions, that's subdivision (a). They could get a supplement.

MR. LATTING: Okay.

CHAIRMAN SOULES: Any others? Ken Law.

MR. LAW: Your Honor, the first part of this proposed Rule 56 talks about receiving a copy of the notice from the clerk. Did you mean to skip over the rewrite of Rule 40 that we discussed about possibly having

that notice sent to the appellate clerk, or has that been disposed of?

HONORABLE C. A. GUITTARD: We haven't reached that in this section. I think that's a matter for us to consider, though, and I think it's proper of you to bring it up.

CHAIRMAN SOULES: Okay. Any opposition to 55(a), (b), or (c) as written?

Okay. There being no opposition that will be unanimously approved.

HONORABLE C. A. GUITTARD: Now, Rule 56 which begins on page 27 is sort of the guts of the proposal about the record, and it has to do with the duties of the appellate clerk. We have already approved Rule 18, I think it is, which requires the appellate clerk to monitor the record, and so I will read this proposal.

Subdivision (a), "On Receiving Notice of Appeal. On receiving a copy of the notice of appeal" -- that goes -- now, Ken has the idea, with which I sympathize, that although the Rule 40 as previously proposed says the notice of appeal should be filed with the trial court and the trial judge and the trial court clerk

then sends a copy to the court of appeals, then I think the committee needs to decide whether it should be done that way or whether the notice should be filed in the appellate court and a copy sent to the trial court, but that's another matter to be considered.

This assumes that it's filed in the trial court and a copy sent to the appellate court. "On receiving a copy of the notice of appeal from the clerk of the trial court, the clerk of the appellate court shall endorse on it the time of receipt and determine whether it complies with the requirements of Rule 40 and was filed within the time described by Rule 41(a)(1). The clerk shall send notification of receipt of the notice of appeal to the attorney in charge for all parties shown in the notice of appeal or by any proof of service of the notice and by any docketing statements filed in accordance with Rule 57."

The problem there is that if the clerk sends the notice he has to know who to send the notice to, and you don't have a transcript there to give the names of the parties. So the clerk has to find out some way where that

information -- or who the parties are. So this says that there are several ways of getting it since the notice of appeal will not state the names of the parties other than the appellants. Then his source of the names of the parties is, first of all, the --

PROFESSOR DORSANEO: Proof of service.

HONORABLE C. A. GUITTARD: -- proof of service of the notice of appeal, which under Rule 4 doesn't necessarily have to be filed before the notice itself is, and so that might not be available, but our proposal with respect to Rule 57 is to require a docketing statement which would state the names of all the parties. So the clerk then is required to send a copy of receipt of notice of appeal to all copies -- to all parties that appear on any of those documents.

Subdivision (1), "Proper and Timely Notice. If it appears to the clerk that the notice of appeal is proper in the court of appeals and timely, the clerk shall file it and docket the appeal in the order of receiving the notice," and then it gives the

present provision with respect to how it's docketed. The court shall be assigned -- "the case shall be assigned a docket number consisting of four parts separated by hyphens" and so forth, as that doesn't change the present practice there.

Subdivision (2), "Defective or Improper Notice. If it seems to the clerk that the notice is defective or that it was not filed in time, the clerk shall notify the parties and the trial court clerk of the defects so that the defect may be remedied if it can be. If after 30 days from such notification no proper notice of appeal has been received, the clerk shall refer the matter to the appellate court which shall make an appropriate order."

Subdivision (b), "On Receiving the Record. On receiving the transcript from the trial court clerk or receiving the statement of facts from the reporter the appellate court clerk shall determine whether the transcript complies with the requirements of Rule 51 and whether the statement of facts complies with the requirements of Rule 53. If so, the clerk shall endorse on each the date of receipt,

file it, notify the parties of the filing and the date. If not, the clerk shall endorse on the transcript or say by the facts the date of receipt, return it to the trial court clerk or reporter specifying the defects and instructing the clerk or reporter to correct the defects and return it to the appellate court."

Now we get to the part about whether no record has been filed. "On the expiration of 120 days after the date of judgment is signed" -- and in some cases perhaps it ought to be sooner than that. For instance, if it's an interlocutory appeal we will deal with that question later on. "On expiration of 120 days after the date the judgment is signed without a proper transcript or statement of facts being filed the clerk shall so notify the parties and the trial judge, trial court clerk, or reporter. If after 30 days from such notification no proper transcript or statement of facts is received, the clerk shall refer the matter to the appellate court which shall make an appropriate order to avoid further delay and preserve the rights of the

parties.

"If the trial court clerk's failure to file the transcript were the result of the appellant's failure to pay the clerk's fee for the transcript and appellant has not filed an affidavit of inability to pay the cost as prescribed by Rule 45 the appellate court on motion and notice or on the court's own motion after notice to the appellant after reasonable opportunity to cure and failure to cure may dismiss the appeal for want of prosecution."

In other words, whether you file a record would not be a matter of jurisdiction but a matter of want of prosecution as is the filing of the brief. "If the transcript has been filed but no statement of facts has been filed because the appellant has failed to request the statement of facts or designate the evidence to be included or has failed to pay the reporter or recorder's fee to make satisfactory arrangements for payment and has not filed an affidavit of inability to pay the cost as provided in Rule 45, the appellate clerk on motion and notice or on the court's own motion after notice to appellant and after

reasonable opportunity to cure and failure to cure may consider and decide the appeal without a statement of facts."

Then it's thought that these provisions would obviate the requirement, any other requirement concerning the time for filing the record, and therefore, Rule 54 would be repealed. Mr. Chairman, I move the adoption of both of those proposals.

CHAIRMAN SOULES: Okay. Discussion? Sarah.

MS. DUNCAN: Sarah Duncan. I am concerned about the extent to which the proposed rule gives the clerk authority to determine whether the notice of appeal is proper and timely and to notify the parties of defects. We have Rule 71 now which provides that technical defects not raised within 30 days are waived if they can be waived, and this seems to conflict with that because the clerk is now apparently determining that a technical defect that could be waived is not going to be waived because the clerk's not going to file it.

If for instance, I mail my notice of

appeal on the last day for perfecting appeal and it's not received in the trial court until five days later, it's stamped "received." The clerk of the trial court has the envelope. They look at it. They say it was mailed on the last day. It's timely. Fine. The clerk of the appellate court isn't going to know that just from having received a copy of the notice of appeal -- and I had this happen in El Paso recently. They are going to say, "That's not timely filed. Your appeal is getting ready to be dismissed." I think we are putting an awful lot of responsibility on the clerks that they would probably rather not have and that I personally would prefer remain with the court and the parties.

HONORABLE C. A. GUITTARD: The idea here, of course, is that the clerk should notify the parties if there is any problem with notice on its face so that it can be cured and that the clerk should send it back and notify the parties that he sees this defect. Now, if it's not -- if he's not correct about it then, of course, the party can -- the appellant can file some sort of

motion with the court to have the notice properly accepted, but the main thrust of the proposal is that you don't just let the case go and then come back later with a motion to dismiss the appeal for want of jurisdiction because of some technical defect. You ought to have an opportunity to cure that.

MS. DUNCAN: And I don't have so much a problem with the notification of the defect. I have a problem with not filing it if the clerk thinks there is a defect.

HONORABLE C. A. GUITTARD: Well, if the defect is remedied, then the court clerk files it as of the time it's tendered.

CHAIRMAN SOULES: Ken Law.

MR. LAW: If the rule is changed to make the notice of appeal the perfecting instrument then you really have simplified things because the way it is now the district clerk is burdened with examining the bond, and most of the time they don't even have enough information to determine whether or not the bond is correct. When it comes to us in the transcript if we find a problem with

the bond, we write the attorneys, contact them regarding the defect, and we order -- I don't want to say hundreds, but frequently we have to ask the attorneys in the case of private bonds to get a supplemental or in the case of surety bonds where they didn't name all the appellees to get corrections.

So if the rule is going to be done away with regarding perfection, that makes this particular instrument the instrument of perfection, and it's easier to examine than that darn bond is, and it will also relieve the district clerks from this defective problem.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: And as a practical matter the clerk is not about a hundred miles away from the chief judge or the judge. I have never heard of a clerk questioning a bond or an instrument was sufficient that didn't go to the judge. So it's going to go to her attention, but we know where it's going to end up is the judge, and I think that's the proper way to do it.

MR. LAW: He's giving away our

secrets, but that's the truth. We will exceed the advice of our staff before we would do anything about that.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Sarah, I think from the way that I am reading this is you are reading some things into this language that really it doesn't say. This defective or improper notice, it doesn't say that the clerk may refuse to file the notice of appeal. It possibly could be better worded if it said "it seems to the clerk the notice is defective or that it was not tendered for filing in time, the clerk shall file the notice of appeal and shall notify the parties," but I would read it that way at this point already.

MS. DUNCAN: My concern is subparagraph (1). I mean, it's done a few places, but for instance, in subparagraph (1) it says, "If it appears to the clerk that the notice of appeal is proper in the court of appeals and timely the clerk shall file it and docket the case," which would say to me as a clerk if I determine either that it's not

proper or that it's not timely I shouldn't file it because I am not given another alternative here.

PROFESSOR DORSANEO: And what you are worried about is that if you are notified that it hasn't been filed and now you have to worry about getting it filed as of the date it was tendered for filing?

MS. DUNCAN: I am not sure under our new scheme what effect does it even have to file a notice of appeal in the appellate court? The way I have understood the scheme we were working on was that it would have basically no jurisdictional effect at all. The jurisdictional effect would be simply that it was filed in the trial court pursuant to the rule and that nobody is going to make a determination. They are just going to file it, but this rule seems to be changing that a little bit, and I am just not sure.

PROFESSOR DORSANEO: Well, I would recommend and I think everybody would agree we could change the language to say that if it's defective or improper the clerk of the appellate court still files it and doesn't

just throw it away or put it in an envelope and send it back.

MS. DUNCAN: Well, but we have had the same problem with supersedeas bonds.

MS. WOLBRUECK: The district court clerk does the same thing. Upon our receipt of the notice of appeal we will not make the determination also if it has been timely filed by the postmark or if it's not properly postmarked, but we would also file it and send it on to the clerk of the court of appeals.

PROFESSOR DORSANEO: Why don't we change it to say that it's filed, and you are notified, and it has whatever effect it has when it's filed?

MS. DUNCAN: That's great.

PROFESSOR DORSANEO: Will that be all right, Judge?

HONORABLE C. A. GUITTARD: Okay.

PROFESSOR DORSANEO: So the language change would be something like this: "If it seems to the clerk" -- and this is in paragraph (2).

MS. DUNCAN: Why don't we just take out that whole preparatory phrase?

PROFESSOR DORSANEO: "...that the notice is defective or that it was not tendered for filing in time the clerk shall file the notice for appeal and notify the parties."

HONORABLE C. A. GUITTARD: That involves a question of where the notice is filed. Is the notice filed in -- the notice is already filed in the trial court.

PROFESSOR DORSANEO: Well, say "file it in the appellate court."

MS. DUNCAN: What I would propose is that we strike the clause beginning in subparagraph (1) beginning with "if" and going through "timely," and simply say, "The clerk shall file the notice of appeal."

PROFESSOR DORSANEO: That would work as well because then the second paragraph deals with the defective.

HONORABLE C. A. GUITTARD: Okay.

MS. DUNCAN: And we have the same consideration in proposed Rule 56(a)

where we say that the clerk is to determine whether the notice of appeal complies with the requirements of Rule 40 and was filed within the time prescribed by Rule 41(a)(1), and I propose that we simply strike that.

PROFESSOR DORSANEO: Sarah, what was that second part that you said? It trailed off from my hearing.

MS. DUNCAN: In 56(a), page 27, beginning where it says "and," first sentence, leave as-is, "On receiving the copy of the notice of appeal from the clerk of the trial court the clerk of the appellate court shall endorse on it the time of receipt," but strike the remainder of that sentence.

HONORABLE C. A. GUITTARD: Why? Why strike it?

MS. DUNCAN: Because we are again putting the responsibility on the clerk of the appellate court to determine --

PROFESSOR DORSANEO: Well, that's whose job it is to handle all of this now, whose in charge.

HONORABLE C. A. GUITTARD: But clerks of appellate courts do that now with

respect to the bond; do they not, Ken?

MR. LAW: Yes, sir. We probably overreach sometimes, but if we find it necessary -- and of course, counsel can certainly file motions to attack all of these things and bring them to issue anyway if we miss it.

HONORABLE C. A. GUITTARD: Sure.

CHAIRMAN SOULES: Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: I was under the impression that notice of appeals filed in the trial court vest jurisdiction in the appellate court. So why is the commotion here about what happens to the copy filed in the appellate court?

PROFESSOR DORSANEO: Fear.

HONORABLE C. A. GUITTARD: The problem is --

HONORABLE SAM HOUSTON CLINTON: I mean, when you have got all of these anyway. That's my idea.

HONORABLE C. A. GUITTARD: The problem is it's filed in the trial court. If

it's proper --

HONORABLE SAM HOUSTON CLINTON: Well, excuse me. If it's proper, but it still vests jurisdiction, doesn't it? Subject to somebody saying "wait a minute." In our case you have got to do certain things subject to somebody saying, "Well, you haven't done this. You haven't done that," but that's usually a party opposing it. Otherwise --

HONORABLE C. A. GUITTARD: Well, for instance, if it's late then --

HONORABLE SAM HOUSTON CLINTON: Well, I'm not talking about that. I am just talking about the effect of filing a motion with the clerk of the trial court. A notice of appeal has always, you know, provided jurisdiction without regard to what happens with what the clerk of the appellate court does with the copy, and that's why I am a little confused here about everybody emphasizing so much about what happens to the copy in the court of appeals.

CHAIRMAN SOULES: Judge Clinton has really got his finger on the button here. It doesn't make any difference what the clerk

does at the court of appeals other than maybe say I think there might be a question of your jurisdiction because the notice of appeal was late to the trial court. Once it's been filed in the trial court, it's over. It should go up and get filed with the record, and if that appeal can be dismissed for want of jurisdiction, why should we have to go through -- are we just telling the clerk of the court of appeals "Check this out when it gets there"?

HONORABLE C. A. GUITTARD: Sure.

CHAIRMAN SOULES: "And advise your court whether or not you think your court has jurisdiction."

Why go through all this filing, receipt, and so forth then to get that done? Just tell them, "Look at it. See if your court has jurisdiction. If you don't think it does, tell your court it may not, but file it all anyway."

PROFESSOR DORSANEO: Well, what it says here is look at it, and if there is a problem, you are supposed to warn the parties

so that they can fix it.

MS. DUNCAN: And that part is fine.

PROFESSOR DORSANEO: If it can be fixed and that's a friendly kind of a thing.

CHAIRMAN SOULES: But do it after it's been filed.

PROFESSOR DORSANEO: And then if there is some big serious problem like it hasn't been filed on time, or it would be hard to imagine what the other problem would be. Okay.

CHAIRMAN SOULES: Uh-huh.

PROFESSOR DORSANEO: Then refer to the court for appropriate action. We took out the part that suggested in the other rule that the clerk could dismiss the case.

CHAIRMAN SOULES: Yeah.

PROFESSOR DORSANEO: And I think this is a workable and friendly thing if handled in the way that it's even written now, or it could be maybe cleaned up a little bit, and the clerk looks at it, tells you "I think you're late. I think you need to do this."

You either do it, if you can, or you go to the court and say, "Well, I think you're wrong, Mr. Clerk."

What else can you do with the system? Because the clerk really is the one who's going to be monitoring. The clerks are going to have to work together on this record business, and they have to start somewhere, and they ought to start at the beginning.

MS. DUNCAN: At this point in time if I could point out the clerk of the appellate court has no transcript. They have no record of the proceedings in the trial court. They can't determine if this appeal bond was timely filed. They have no basis for determining any of that. They have no basis for determining whether the cause number is correct. They have no basis for determining whether the style is correct, the attorneys, the recitation of when the motion for new trial was overruled. They have no basis for doing any of that based on this copy of the notice of appeal.

And if they have internal procedures for determining whether the appellate court has

jurisdiction, I presume they will continue to follow them regardless of whether we change the notice of appeal procedure or not, but this is creating -- I mean, I understand that it's intended to be friendly, but I don't think I am the cause of the problem, but I seem to run into an awful lot of clerks and parties who are simply looking for a way to clear their dockets, and they are using cost bonds and notices of appeal as a way to do that, and I think we are giving them another opportunity to do that here, and that's my position.

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest that in subdivision (1) we simply -- it's subdivision (1) on top of page 28. We simply strike "shall file it and" so it says that the clerk shall -- "if it appears that the notice of appeal is proper in the court of appeals the clerk shall docket the appeal" and so forth. Okay. Well, that gets rid of any problem about whether the thing is filed or not. Now, as far as the information concern, that goes to the next rule that we proposed with respect to a

docketing statement.

CHAIRMAN SOULES: I don't think that's getting to Sarah Duncan's concern, if it was intended to get to that.

HONORABLE C. A. GUITTARD: Sarah says that the clerk has no basis on which to make that determination. Well, the docketing statement is supposed to give that information.

CHAIRMAN SOULES: Do we say that?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: The problem is the docketing statement doesn't go with the notice under the way we have it drafted it now.

MS. DUNCAN: And it's just a docketing statement. It's not a copy of a filed instrument in the trial court. It's just an attorney's representation of when the motion for new trial was overruled, of when a JNOV motion was filed, whatever.

PROFESSOR DORSANEO: Which you don't even want him to swear to anymore.

MS. DUNCAN: That's right. I don't want him to have to swear to it, but I also don't want the clerk determining whether they have jurisdiction over my appeal based upon the representations of opposing counsel. I would prefer that they do that on the basis of the appellate record.

CHAIRMAN SOULES: It seems to me like maybe this is backwards. Why should the appeal be docketed or the papers be filed and the appeal docketed and then if it appears to the clerk or the court that there is a defect, they should notify the parties and so forth? This seems to make the assessment of the notice of appeal a predicate for filing and docketing the appeal. I agree that the clerk should be pro-active and the court should be proactive if there appears to be a defect in some of the appellate process, particularly something that there might be an answer to, before they dismiss the appeal for want of jurisdiction and that they should be somehow induced to ask some questions or send out some notices, but it doesn't seem to me like that process should be a predicate to

filing and docketing, filing the papers and docketing the appeal.

HONORABLE C. A. GUITTARD: Well, that would be the result if you strike out the word "file"; would it not?

CHAIRMAN SOULES: Well, now, Judge, what I would say is if the clerk gets it, the clerk files it.

MS. DUNCAN: I mean, we already --

CHAIRMAN SOULES: Don't do anything. Just if he gets it, he files it.

PROFESSOR DORSANEO: Just say "On receipt of the notice of appeal the clerk shall docket the appeal."

CHAIRMAN SOULES: "File the notice and docket the appeal."

HONORABLE C. A. GUITTARD: Well, the notice is filed in the trial court.

CHAIRMAN SOULES: Well, "the clerk shall file it." What is "it"?

MR. MCMAINS: The copy.

CHAIRMAN SOULES: The copy. Okay.

HONORABLE C. A. GUITTARD: The

copy.

CHAIRMAN SOULES: "Upon receipt of the copy the clerk shall file the copy and docket the appeal."

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Ken Law.

MR. LAW: I believe one of you, Bill or someone, mentioned awhile ago, or Judge, really about the only issue to be decided would be timeliness, and we won't have in the copy a copy of the file-mark from the district clerk 'til we get the transcript anyway. So we won't really be able to determine that anyway, and secondly, the biggest -- I think what we are aiming at here is trying to get as early as possible an identification of all the parties and attorneys involved so we can properly notice them as to what's going on.

Right now we would have to rely mostly on the bond, which is quite frequently defective in terms of identifying parties, and we write lots of lawyers wanting to know who Bill Smith, et al, are on bonds. So the notice of

appeal rule that prescribes what goes into the notice of appeal, really we are just looking for parties, people, attorneys, so that we will know who to notice as the appeal develops, and that's what -- we are not looking for an excuse to try to reject anything. We are looking for a proper assemblage of information to get our computers spitting out the right notices.

HONORABLE C. A. GUITTARD: Mr. Chairman, let's consider this in connection with the notice of appeal provision in section -- in Rule 40(a)(2) which says "The notice of appeal shall state: (1), the number and style of the case in the trial court or the court in which it's pending; (2), the date of the judgment or order appealed from and that appellant desires to appeal; (3), the names of all appellants filing the notice; (4), the court to which the appeal is taken."

Now, the notice could be defective for noncompliance with any of those matters without -- it doesn't state the date of the judgment, for instance. Then you send it back, and if it can properly be amended to

supply that then presumably the appellant will do it, but presumably there is at least that much information that the appellate clerk can look at to determine whether or not he should proceed with -- the appeal should proceed or whether or not there is some problem that needs to be cured. So then what additional information is required by the docketing statement might also be relevant.

CHAIRMAN SOULES: Do we still give notice to all parties of the trial, of the judgment?

PROFESSOR DORSANEO: Yes. The notice is to be served in accordance with Rule 4. Rule 4 provides for proof of service, and it provides for service. Well, pardon me. It provides for proof of service that would identify by name each person who you served it on, and it requires each document, including the notice of appeal, to be served on all parties to the trial court's final judgment.

HONORABLE C. A. GUITTARD: But you don't know exactly when that proof is going to be.

PROFESSOR DORSANEO: It's

almost always going to be just right with it. It doesn't -- you're right. It doesn't technically have to be, but it almost always is going to be like it is on every pleading.

CHAIRMAN SOULES: Responding to you, Judge Guittard, and then I will get to Mike. I guess my immediate reaction to that is, okay, if you file it anyway and it's defective, so what? You can still go through the correction process after it's been filed.

HONORABLE C. A. GUITTARD: Sure.

CHAIRMAN SOULES: And we are not --

HONORABLE C. A. GUITTARD: But it has been filed in the trial court, and there is no reason to require it to be filed in the appellate court. If the filing is the jurisdictional fact, the appellate court has received it, and it's in the record, but any filing it has up there has no significance unless we change the rule to provide that the notice is originally filed in the appellate court.

PROFESSOR DORSANEO: I am going

to end up agreeing with Sarah on this and that the way to fix this in light of your suggestions, Luke, is to say that in (a) we do take out "and determine whether it complies with the requirements of Rule 40, was filed in time," and to say in (1) that "upon receipt of a copy of the notice of appeal the clerk shall docket the appeal."

And then (2) is still all right. It just becomes obviously friendly then, and I think that's consistent with what everybody is saying and with Judge Clinton's point about what's really important, filing it in the trial court, and if there is a problem and the clerk turns it up, it can be fixed. It can be fixed.

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: I agree with Sarah's approach. The principal reason we are going through this process is just to get notice out to the parties, but let me also suggest so that we don't have sort of a double hit in terms of defects in the record, why don't we also move subparagraph (2) down to

(b)? It seems it becomes much more meaningful for the court to conduct a review about defects and late filings when it actually gets the transcript as real documents there.

PROFESSOR DORSANEO: That makes good sense as well.

HONORABLE C. A. GUITTARD: Well, the problem about that is that --

MR. MCMAINS: It could be too late.

HONORABLE C. A. GUITTARD: -- if there is some defect that can be cured, it ought to be cured within the time where time allowed and that, of course, you can file a motion to extend the time for filing a notice of appeal, and within that time you can cure some defects, and if you wait 'til the record is filed, then that time has passed.

CHAIRMAN SOULES: Anyone else?

MS. BARON: I am getting confused now. It seems to me that once you file the notice of appeal you have met your time deadline whether it is defective or not, and then curing is just a matter of working it out between the parties and the court, but so

I am not sure there is a 15-day deadline.

CHAIRMAN SOULES: Unless it's late.

HONORABLE C. A. GUITTARD: Unless it's late.

MS. BARON: Huh?

CHAIRMAN SOULES: Except when it's late.

MS. BARON: Except when it's late. Right.

CHAIRMAN SOULES: All right. Do we have a consensus now on how this should be written and arranged? Anyone have anything else to suggest to the committee on this?

HONORABLE C. A. GUITTARD: Bill, why don't you propose it?

PROFESSOR DORSANEO: Well, to repeat, I think the way to satisfy everybody's concern without getting anyone's concern about what you should do violated at the same time would be to change the first sentence of (a) the way Sarah Duncan suggested earlier by eliminating the last part "and determine whether it complies with the requirements of Rule 40 and was filed within the time

prescribed by Rule 41(a)(1)." For the reason that the language, although intended to be friendly, suggests that the clerk has the ability to be more than friendly, to be determinative.

Then in subparagraph (1) we could change that language to embrace Luke Soules' suggestion that the clerk of the court of appeals dockets the appeal on receipt of the copy of the notice of appeal, taking out the propriety and timing concepts. Then wherever it would be placed, and perhaps it should be a separate paragraph but perhaps not (b), the defective or improper notice language with the possibility of changing that a little bit, but I basically think it's okay if the other two changes are made.

CHAIRMAN SOULES: Well, why don't you-all draft this in committee? But does that get everybody's concerns? Any further comment on this?

Will those in favor of them drafting then to meet those concerns show by hands?

Opposed? Okay. That's unanimous.

HONORABLE C. A. GUITTARD: Now,

the rest of the rule then, does that motion include the rest of the rule?

CHAIRMAN SOULES: The rest of the rule. Yes.

HONORABLE C. A. GUITTARD: Very well.

PROFESSOR DORSANEO: That was one of the biggest items.

CHAIRMAN SOULES: Did we deliberately -- I know we eliminated the cost or the bond on appeal by, what, saying there was going to be a deposit and the party had to pay for the transcript and the statement of facts, right? But did we say there is not going to be any security for the underlying trial court costs, costs of court?

HONORABLE C. A. GUITTARD: We discussed that. The draft before the committee originally provided that there be some procedure for securing the cost in the trial court. The committee expressly voted against that as I recall.

PROFESSOR DORSANEO: On the theory that that's already been paid, and it's unnecessary, and it would just be used as a

tool to get somebody out of there.

CHAIRMAN SOULES: Well, let me ask one of the trial court clerks if the court costs are supposed to be paid by the losing party but a lot of them have been paid by the prevailing party, does the clerk refund to the prevailing party the deposits that the prevailing party made before they get the money from the losing party?

MS. WOLBRUECK: No.

CHAIRMAN SOULES: Don't have to?

MS. WOLBRUECK: No. We do not have to do that. Again, and the words "deposit" and "fee" have changed throughout the years to where really we do not collect a deposit anymore. Those are actual court costs that are due, and we keep those.

MR. LAW: And on the appellate level we just award it in judgment.

CHAIRMAN SOULES: Okay. So that just leaves the parties where they stand all the way up through the appellate process?

MS. WOLBRUECK: Yeah. If there are --

CHAIRMAN SOULES: I gotcha.

MS. WOLBRUECK: Yeah.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Before we pass this rule on I don't think we have really addressed anything in (b) or (c), and there may be nothing in there to discuss, but I don't think we discussed it, and now is probably the best time if anyone has any -- I don't have anything to say but I think we probably ought to look at (b) and (c) before we pass it.

CHAIRMAN SOULES: (B) and (c) on what page?

MR. ORSINGER: 28.

CHAIRMAN SOULES: 28. Okay. Anybody going to have anything on (b) or (c)? David.

MR. JACKSON: I would just like to tag three words in there. You know, we are going to have a lot of discussion later probably about the merits or demerits of tape recorders versus court reporters and right now the words "or the recorder" --

HONORABLE C. A. GUITTARD: If we don't adopt the rules with respect to electronic recording, well, of course, that would have to be eliminated.

MR. JACKSON: Right. I just wanted to tag those because right now there is no statutory basis for having a recording.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: That's down here in the bottom. Of course, some places they do have a recorder so and if you didn't have one I guess --

MR. JACKSON: But it's under special exceptions to Government Code 52.

CHAIRMAN SOULES: The recorder's fee. Okay. I gotcha. Thank you.

Anything else? Elaine Carlson.

PROFESSOR CARLSON: I have had several justices out of the Houston Court of Appeals express concerns over subsection (c) and its failure to expressly address the authority of the appellate courts to act when the failure to file the record is due to a dilatory or a nondiligent court reporter and

wondered whether we were just -- I notice the explanation does address that and just for the record would like to know are we relying upon the inherent contempt power of those courts, or those justices asked me to communicate or ask whether there was any thought to putting some teeth in other alternative methods of enforcing preparation of the record such as a negative sliding scale for the court reporters of the like. They expressed a fear that an inordinate amount of court time might be spent in trying to track down the record if there was no real incentive for the reporters to timely prepare the record.

PROFESSOR DORSANEO: It says "to make an appropriate order."

HONORABLE C. A. GUITTARD: I think that that's a point well taken. Our committee, perhaps you will recall, considered what do you do in the case of the reporter who doesn't prepare the record?

Well, what do you do now? I don't know. I think the suggestion has considerable merit as to how you deal with recalcitrant or unavailable reporters. Our committee didn't

attempt to deal with that, and if anybody has a good suggestion about that, I think we ought to consider it.

CHAIRMAN SOULES: And think about that for the next 10 minutes while we give the court reporter a break.

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

CHAIRMAN SOULES: Okay. We were going to use that time to think about what?

HONORABLE C. A. GUITTARD: About the rest of Rule 56, I think, and see if anybody had any suggestions about it.

CHAIRMAN SOULES: Okay. Let's go to work.

HONORABLE C. A. GUITTARD: Are there any other suggestions with respect to proposed Rule 56?

CHAIRMAN SOULES: Are there any other suggestions now then with proposed rule --

MS. DUNCAN: 56.

CHAIRMAN SOULES: -- 56 on

page 27? Or 57 on page 28.

HONORABLE C. A. GUITTARD: Well, I will explain 57.

MS. DUNCAN: Well, hold on on 56.

CHAIRMAN SOULES: Okay. Sarah has got something on 56.

MS. DUNCAN: As Judge Guittard pointed out earlier the 120 days only works in certain types of cases, and we may want to say instead of a specific time deadline, date deadline, we might want to say "on expiration of an appropriate time."

HONORABLE C. A. GUITTARD: I think we need to consider in our committee some variation of that time. I think we would want to change it on interlocutory appeals. If we have electronic statement of facts that would depend, and of course, we don't have any. That's another question, but I think we ought to reconsider that, and the adoption of this rule as it stands would be without prejudice to any modification of that kind.

CHAIRMAN SOULES: Are you saying that you're going to draft something

that would change the appellate timetable for an electronically recorded statement of facts?

HONORABLE C. A. GUITTARD: I'm saying that would change -- as it is now it would not change it.

CHAIRMAN SOULES: Okay. That's what we are voting on.

HONORABLE C. A. GUITTARD: But the point is how soon does the clerk start the process of inquiring? It's not a question of jurisdiction of the appellate court or anything like that, but how soon does the clerk get in touch with the people down there and say "Get this thing up there." If it was an electronic statement of facts maybe he ought to do that a little sooner. See what I mean?

CHAIRMAN SOULES: I do. Sarah Duncan.

MS. DUNCAN: As I read subdivision (c) in the context of the new scheme it does change the time for filing a statement of facts in an interlocutory appeal or electronic statement of facts.

HONORABLE C. A. GUITTARD: It

does as written?

MS. DUNCAN: Because there is no -- there is no time limit now. It's up to the appellate court and the court reporter as to when this statement of facts will be filed if I am understanding what we have done correctly.

HONORABLE C. A. GUITTARD: Well, adoption of this rule here now would be without prejudice and consideration of that. Professor Carlson is working on a rule with respect to interlocutory appeals and should consider that in connection with that. Okay?

MS. DUNCAN: But in answer to Luke's question I think this does change the time for filing statement of facts, statements of fact, in cases involving electronic records because now we have got a presumptive 120 days --

HONORABLE C. A. GUITTARD: Right.

MS. DUNCAN: -- for filing.

HONORABLE C. A. GUITTARD: Right. If adopted now, it would say the same time as any other record. Okay.

CHAIRMAN SOULES: And that's basically what the Supreme Court has finally said.

PROFESSOR DORSANEO: But for the interlocutory or the accelerated appeal we are going to need to change that 120 days probably to 30.

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. Anything else on Rule 56, pages 27 and 28?

Okay. With those changes, all in favor show by hands.

Those opposed? That's unanimous in favor.

HONORABLE C. A. GUITTARD: The next item is Rule 57, the docketing statement. Now, since the appellate court will not have a record until sometime after the notice of appeal is filed they need information about the appeal, including the names of all the parties and so forth, as soon as they can get it, and this rule would require the appellant to provide that information and then would permit the other parties to supply additional information.

Subdivision (a), "Upon receipt of the notice of appeal the clerk shall send to the appellant a docketing statement form which shall include a request for the following information." Now, before we get into the specifics of the information I think the committee should consider alternatives here. One is that the appellant as soon as the notice of appeal is filed should simply file this docketing statement with the information required in the rule without receiving any notice or form from the appellate court.

As drawn it would require the appellate clerk in order to regularize this and make uniform this practice would send out to the appellant a form which the appellant would fill out and then return as provided here. So I think the committee ought to make -- ought to consider which way they go on that.

I will proceed then with the provisions of the rule, the specific provisions, the specific information required. "(1), if the appellant filing the statement is represented by attorney, the name of the appellant filing the statement, names, addresses, and

telephone, telecopier numbers, State Bar of Texas identification number of the appellant's attorney in charge and of one other attorney to receive copies of papers if so designated by the attorney in charge."

Second, "If the appellant filing the statement is not represented by an attorney, the name, address, and telephone number of the appellant; (3), the date the notice of appeal was filed in the trial court." That's, of course, a crucial date.

"(4), the date of the judgment or other order appealed from as signed; (5), the date of filing of any motion for new trial, motion to modify the judgment, request for filing of facts, or motion to reinstate." All of those events would affect the appellate timetable.

"(6), the names of all other parties to the trial court's judgment, the names, addresses, telephone number, telecopier number of their attorneys in charge in the trial court; (7), the names, address, and telephone number of any party to the trial court's judgment other than appellant not represented by an attorney, and if the address and

telephone number is not known, that the appellant has made a diligent inquiry but has not been able to discover the address and telephone number; (8), the general nature of the suit, personal injury, breach of contract, temporary injunction, et cetera, and whether the appeal should be advanced for submission or is accelerated pursuant to Rule 42 or other rules or statutes.

"(10), whether a statement of facts has been requested; (11), whether appellant intends to seek temporary or ancillary relief pending the appeal; (12), the date of filing of any affidavit of inability to pay the costs of appeal, the date of notice of the affidavit, the date of any order overruling the contest; (13), any other information required by the court of appeals.

"(B), within ten days after receiving the docketing statement form the appellants have filed and served the docketing statement.

"(C), any party may file a supplemental statement supplementing or correcting the docketing statement."

Mr. Chairman, without regard

to -- without prejudice to a subsequent consideration of additional items to be added to the docketing statement I move the adoption of this proposal.

CHAIRMAN SOULES: Okay. May I ask a question? Is this intended in any way to be a jurisdictional issue?

HONORABLE C. A. GUITTARD: No.

PROFESSOR DORSANEO: No. It's administrative only.

HONORABLE C. A. GUITTARD: Absolutely not.

CHAIRMAN SOULES: And do we say that?

PROFESSOR DORSANEO: The idea of having the notice of appeal contain the minimal things that it contains and the docketing statement as a separate and distinct item is meant to demonstrate that.

CHAIRMAN SOULES: Do we say that?

HONORABLE C. A. GUITTARD: Well, I guess maybe we -- if that's unclear, maybe we ought to say it.

CHAIRMAN SOULES: I think we

ought to say it.

HONORABLE C. A. GUITTARD: All right.

MS. DUNCAN: Can't we just say as a final sentence what you just said, Luke?

CHAIRMAN SOULES: Anywhere you want to put it as long as --

MS. DUNCAN: "The docketing statement is not jurisdictional, but is intended for administrative purposes only."

PROFESSOR DORSANEO: Put that in (d).

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: And then the other question, I realize in (5), in 57(a)(5) on page 29, there has been probably an effort to identify all post-trial motions that might extend the trial court's plenary power.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: I don't know whether it is comprehensive. For example, suppose we call this, what we filed, a motion to amend the judgment or a motion to correct

the judgment.

HONORABLE C. A. GUITTARD: Motion to modify.

CHAIRMAN SOULES: Is it?

PROFESSOR DORSANEO: Yeah.

HONORABLE C. A. GUITTARD: Yeah.

PROFESSOR DORSANEO: Part of what's going on here is that we changed Rule 329(b) to use the word "modify" only to encompass every one of those series of words.

CHAIRMAN SOULES: Okay. The only thing, what I would suggest and it may not be worth doing, is to say "or other motion extending the trial court's plenary power."

HONORABLE C. A. GUITTARD: I don't have any objection to that.

PROFESSOR DORSANEO: No. I don't either.

HONORABLE C. A. GUITTARD: Are we concerned with the court's plenary power or with the appellate timetable here? It's the same concept, of course, but I would think it would be more appropriate to say "any other motion that would affect the time for filing."

CHAIRMAN SOULES: Whatever.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Whatever is the best way to say it. Just so we get comprehensive inclusion of whatever the nature --

HONORABLE C. A. GUITTARD: "Or any other motion that would affect the appellate timetable."

CHAIRMAN SOULES: That would extend the time -- pardon?

MS. DUNCAN: Just say perfect.

CHAIRMAN SOULES: "Extend the time to perfect the appeal"?

MS. DUNCAN: I would prefer to say "that could affect the appellate timetable."

MR. MCMAINS: The only thing that perfects the appeal is the notice of appeal, and that's what prompts the docketing statement. I mean, I don't know why you are worried about putting in there things about extending the time to perfect the appeal.

CHAIRMAN SOULES: Well,

suppose --

MR. MCMAINS: But it's only for administrative purposes. I mean, if that's what you are saying in there, I mean, I don't know that it makes -- really makes any difference one way or the other.

CHAIRMAN SOULES: Well, I think 57(a)(5) is there to inform the clerk whether there has been anything post-trial that extended the time for perfecting the appeal or extended the plenary power of the court.

HONORABLE C. A. GUITTARD: "Or any other matter that could affect the time for filing the notice of appeal or perfecting the appeal," time for perfecting the appeal.

CHAIRMAN SOULES: Okay. That's fine. Those are the only problems I had. Rusty McMains.

MR. MCMAINS: Well, you are looking at it from the standpoint of you want to give the clerk information in case the notice of appeal comes in, you know, like 90 days after the judgment is signed, but what happens if the notice of appeal comes in the day after the judgment is signed? You don't

have to file all of those things yet, and so all I am wondering about is why -- the timing here is that once you get the notice of appeal received then you are supposed to go ahead and -- the clerk theoretically is going to send this out.

HONORABLE C. A. GUITTARD: Yes.

MR. MCMAINS: And you are then supposed to answer this. Well, you haven't done any of this stuff yet, and it says that you have to do it -- you are supposed to do it within -- send it back within 10 days after he sends it out to you. So basically, I mean, you could basically be 15 days out from the judgment. You could even be 15 days out from the verdict and not have a judgment in reality because you could have a premature notice of appeal. I assume you haven't done away with that either. So, I mean, I am just -- again, I know it's for administrative purposes, but I am wondering why do we have a time limit that kind of assumes that everybody is waiting until the last minute, which may be a legitimate assumption, but it's frequently not the case when people frequently file their

appeal bonds right after the fact, just so they don't forget it.

CHAIRMAN SOULES: It says "the filing of any motion." I mean, I don't think you have to go back and amend this if you file them later, but maybe you do. You had your hand up, Ken, and then I will get to Sarah. Ken Law.

MR. LAW: If I understand Rusty correctly, one of the reasons this is important to us is you know that the appellate courts try to confer jurisdiction. They don't necessarily try to run it off, and the trend is, of course, if anybody has tried to invoke the jurisdiction at the appellate court, we want to docket it fully. We want to deal with it fully and notice everybody fully, and if it's a dismissal because the notice is filed late, then we want everybody to know, and that's why it's administrative in nature, and my suggestion is it has no procedural value at all other than that.

The 10 days is exactly what you said. We are all like that. We have got to have a deadline. You ought to come in on Thursdays

and Fridays when it's time to file motions for rehearing and it's the last day around our court. I can't let anybody off because they just pour in, and the district clerks get all their filings, you know, at 5:00 o'clock or 4:45. It's just the nature of the business. We need some sort of -- and there's really no penalty for failure -- I hate to mention that but --

MR. MCMAINS: No. I understand that.

MR. LAW: In show cause remedies, you know, the court has some common law or whatever type authority to invoke.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: I was just going to say that in the event of the situation Rusty has posited if somebody wants to they just file a supplemental statement. If the court wants one, they ask for one. I don't think that this presumes these things have been filed. It's just that if they have been, the clerk would like to be informed of those filings.

HONORABLE C. A. GUITTARD: But

subdivision (c) says "Any party may file a statement supplementing or correcting the docketing statement." So that would allow any additional information to be supplied in that fashion.

MR. MCMAINS: I understand. Now you get to the other question of, okay, you have a rule. You have said it's for administrative purposes only. It doesn't have any other effect, and there appears to be, therefore, no enforceability requiring that it be returned. So what happens if everybody just ignores it?

MR. LAW: You get a nasty letter.

MR. MCMAINS: You have pissed off the clerk.

HONORABLE C. A. GUITTARD: Well, yeah. Or perhaps the case could be dismissed for want of prosecution if you don't file the docketing statement. I don't know.

CHAIRMAN SOULES: Maybe they eat up 10 minutes of your oral argument talking to you about it.

MR. MCMAINS: No. I mean, I am

just trying to be realistic about this. I mean, if this is information that the clerks need to have and it makes sense that it is, since they don't have the record yet.

MR. LAW: And you know, I sympathize with what Sarah said awhile ago. A lot of us are trying to be user-friendly, and in my particular case I used to practice law, and I hated to see federal court come to me always knowing I was going to get battered or beat at the court or clerk's door, and this is more of that user-friendly stuff, and we don't need another penalty to impose on anyone, and generally nearly all attorneys and even pro se people, when they get a letter saying we have got to have this, they help us out.

HONORABLE C. A. GUITTARD: Mr. Chairman, I would like to call on Ken Law to express his views as to whether the docketing statement should be in response to a form sent out by the clerk or whether the appellant should have the duty to file a docketing statement with all of this information in it immediately after he files the notice of appeal. Ken, would you --

MR. LAW: Yes, sir. Thank you, your Honor. I appreciate the consideration of the committee in the rule that allows, of course, 14 intermediate appellate courts, and what we are really doing here is feeding a computer, and eight of us are all on the same system, but some are on different systems; therefore, they may want to add some requests to the docketing statement.

And the second thing is, of course, that would mean -- it would necessarily mean we will have to send it out once we receive a copy of the notice of appeal, and we would really prefer to be in charge of that rather than requiring attorneys or the district clerk or whoever to keep the stack around that may get changed, if I understood your statement correctly, Judge. We would just prefer to mail it out when we had notice because we may make some modifications. We may drop some things. We may add some things.

HONORABLE C. A. GUITTARD: Well, then you would just as soon have it the way it stands here?

MR. LAW: Yes, sir. Because it

leaves the door open for each appellate district to add or take away if they want to.

HONORABLE C. A. GUITTARD: Of course, if the rule required this information in any event, then the rule ought to provide that the appellate court could send out a request for additional items, but you would prefer just to have it just like this?

MR. LAW: Yes, sir. It looks fine to me.

HONORABLE C. A. GUITTARD: Very well.

CHAIRMAN SOULES: Any opposition to 57 then?

MS. WOLBRUECK: Mr. Chairman?

CHAIRMAN SOULES: Bonnie Wolbrueck.

MS. WOLBRUECK: I just had -- (a), the very first line says "the clerk." Should that clarify which clerk? I think it would be helpful if it would say "the appellate clerk."

HONORABLE C. A. GUITTARD: I think you are right. "Clerk of the appellate court."

PROFESSOR DORSANEO: Should we also in light of Ken's comments say "the clerk may"? "The clerk of the court of appeals may say"? Is it the case that some courts of appeals will not want this administrative job?

MR. LAW: That's entirely possible. I have haven't talked to all 14 of them.

PROFESSOR DORSANEO: Do we want to require them to do it? Well, probably we can't do that.

MR. LAW: This rule is in the nature of really what's good for -- it's for our own good. I can't imagine a clerk not wanting it. I really can't. So I guess it's just up to the committee what you-all think about requiring or not. It's for their own good.

HONORABLE C. A. GUITTARD: Well, I guess we can put "may" in there. "The clerk may send to the" -- "the clerk of the appellate court may send..."

MR. LAW: The only thing about that is I see Rusty's wheels turning about it takes a little of our teeth away and a little

bit of the bluff away if I have to write a nasty letter if you put "may."

CHAIRMAN SOULES: Well, that would be done because (b) says "within 10 days after receiving it the appellant shall respond."

MR. LAW: Your Honor, I would propose that you leave it "shall."

HONORABLE C. A. GUITTARD: All right. We will leave it "shall."

MR. LAW: And if the clerk doesn't want to make someone comply strictly with it, then that's their decision.

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

CHAIRMAN SOULES: Anything else on 57? Mike Hatchell.

MR. HATCHELL: I have two comments, Luke. First, to your comment about subdivision (5). If we are really trying to encompass within that subdivision those motions that affect the appellate timetable, the appellate courts have not been able to figure out what those motions are, and I think we would be a whole lot better off referring

to the rules rather than trying to globally describe the motion, and that could probably be redrafted. Secondly --

HONORABLE C. A. GUITTARD: Well, Mike, I would suggest that we could simply add "or any other matter that could affect the time for perfecting the appeal."

MR. HATCHELL: Well, I don't want to get into all the cases that have tried to construe what a motion to modify is, but they are at a diametrical conflict right now unfortunately, and the courts don't know what they are. So all I am saying is if you would reference the rule, a motion filed under a rule, that seems to me this would be somewhat surer.

HONORABLE C. A. GUITTARD: Okay. I don't have any objection to it.

MR. HATCHELL: Secondly, I would like to ask Ken to comment about in subparagraph (3) would it also aid your court if subparagraph (3) were to indicate the manner of filing of the notice of appeal such as if it were mailed, the date that it was mailed or if it was--

MR. LAW: Yes. It would. That would be helpful if we use a mailbox rule.

MR. HATCHELL: Of course, you could tailor that under this rule anyway. You could tailor the form to include that information, but it might be helpful on a statewide basis. And that's all I have.

CHAIRMAN SOULES: Could you give us some specific language, Mike, for the suggestion on (a)(3)?

MR. HATCHELL: Well, I would just put in parenthesis, "(f)(3), if notice of appeal is filed by mail, the date the notice of appeal was mailed."

HONORABLE C. A. GUITTARD: And I would suggest say "and if by mail, the date of mailing."

MR. HATCHELL: That's right.

CHAIRMAN SOULES: All right. Anything else on 57?

Okay. Is there any opposition to 57 now as we have commented and rewritten?

No opposition. That's unanimously approved.

HONORABLE C. A. GUITTARD: Very

well. The next one then has to do with -- on page 39 with respect to Rule 130(b), successive applications for writ of error. There is a possibility that if several applications are made there -- or several motions for rehearing are filed there is a problem about when a succeeding application may be made. So this rule would provide, as you see it there on page 39, "or within 10 days after the filing of any preceding application, whichever is the later date." Make sure that nobody is caught without time to file that succeeding application.

PROFESSOR DORSANEO: I think the idea is that if you agreed to an extension you could agree -- for the application you could agree yourself out of the ability to file a successive application.

CHAIRMAN SOULES: Without this?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: But with this you don't?

PROFESSOR DORSANEO: With this you have the 10 days. So what we did, it used to be like this and then we made it 40.

MR. MCMAINS: Right. Right.

PROFESSOR DORSANEO: Not realizing that somebody could agree to extend the original one or could be extended and then you're too late.

CHAIRMAN SOULES: Okay. Any opposition to this rule?

PROFESSOR DORSANEO: Shouldn't be.

CHAIRMAN SOULES: This is 130(c). No opposition. That's unanimously approved.

HONORABLE C. A. GUITTARD: Okay.

PROFESSOR DORSANEO: 131.

HONORABLE C. A. GUITTARD: 131.

PROFESSOR DORSANEO: Page 40, 41, and 42.

HONORABLE C. A. GUITTARD: Right. I point out that the rules with respect to the briefs have been incorporated here. In other words, you have points or issues instead of simply points, that a summary of the argument would be permitted, and there is one other matter here that would

be different, and that's subdivision (e) on page -- no subdivision --

PROFESSOR DORSANEO: (J).

HONORABLE C. A. GUITTARD: (J).

PROFESSOR DORSANEO: On 42. I guess the first thing is really to remind people that, okay, the application would look like -- correct me if I am wrong, Judge -- what already has been voted up for the briefs.

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

PROFESSOR DORSANEO: We would have parallel language for issues presented in lieu of the point of error language that we have now, and the same summary of argument thing that's already been approved for briefs in the courts of appeals would be parallel in the application.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: So the only really new, new thing is this (j) on page 42.

HONORABLE C. A. GUITTARD: And

in that connection it should be remembered that one of the parties to the trial court's judgment may after it gets the opinion of the court of appeals may for the first time become aware that his interest might be affected by this appeal, and therefore -- and he ought to have some remedy if he opposes it. So this would give him an opportunity to file an application of his own in the Supreme Court.

So subdivision (j) would read "Any party to the trial court's judgment that has not appeared in the court of appeals may file an intervening application for writ of order opposing any appellate relief he or she deems adverse to his or her rights or interest within the time allowed for filing an application or may file a response to any application within the time allowed for filing a response. Such a party may also file an intervening motion for rehearing within the time allowed for a motion for rehearing or within 15 days after receiving a copy of any judgment or opinion granting such relief."

CHAIRMAN SOULES: Any opposition to (j) on page 42? Discussion?

Okay. That's unanimously approved.

PROFESSOR DORSANEO: Pam has some.

CHAIRMAN SOULES: I'm sorry. I didn't see you. Did you have your hand up, Pam?

MS. BARON: There is still a capacity for waiver in all of this, right, I mean, by not participating in the court of appeals?

PROFESSOR DORSANEO: I think so.

MS. BARON: They don't have a right to ask for a permanent relief at this point other than to complain, I suppose, of new things that have developed at the court of appeals level; is that correct?

I mean, this isn't giving them some new right they wouldn't otherwise have that wasn't procedural?

PROFESSOR DORSANEO: That was our intention, that we want to give them a procedural mechanism for intervening if they have the right to intervene, if they haven't already bypassed their opportunity to

participate in the proceeding.

MR. MCMAINS: But it doesn't say that.

PROFESSOR DORSANEO: No. But we are not perfect, and we have just said it now.

MR. MCMAINS: What I am getting at is can you put in a sentence basically which says that this section in the rule would not authorize the party to improve his position from where he was at the trial court judgment? You know, it doesn't give him a right to complain of the trial court judgment if he didn't appear in the court of appeals?

HONORABLE C. A. GUITTARD: I don't think there would be any objection to such a provision, would there, Bill?

MR. MCMAINS: That's what you are talking about, isn't it, Pam?

MS. BARON: Yeah, it is.

CHAIRMAN SOULES: I think if -- see if this would work to say "you may file an intervening" -- it's in the second line. "You may file an intervening application for writ of error opposing any

appellate ruling that he or she deems adverse to his or her rights or interest." Now, what that's intended to mean, I think, is appellate relief different from what was in the trial court.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: So but it doesn't say that.

HONORABLE C. A. GUITTARD: It wouldn't permit him to ask for something that hadn't been presented before.

CHAIRMAN SOULES: So if we said "appellate relief changing the judgments of the lower court" would that work?

MS. BARON: I think this is probably okay. I just wanted to make sure I guess on this record that it doesn't grant some new rights, but clearly you have waived it if you haven't filed an appeal in the court of appeals if you are complaining about something in the trial court's judgment.

CHAIRMAN SOULES: Unless this resuscitates it.

MS. BARON: Well, right.

MR. MCMAINS: Yeah. And that's the problem.

PROFESSOR DORSANEO: Maybe we could say "any appellate relief in the Supreme Court."

CHAIRMAN SOULES: I don't know what you're talking about. You are complaining about the appellate relief of the court of appeals that changes your --

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

CHAIRMAN SOULES: -- trial court status.

HONORABLE C. A. GUITTARD: Opposing appellate relief, well, that wouldn't include adding some complaint of the trial court judgment that hasn't been made. One question I think we ought to consider here is whether or not the rule that requires assignment for a variant motion for rehearing in the court of appeals as a predicate for an application for writ of error should apply to this.

Now, if this party that doesn't think he's affected -- of course, he could file a

motion for rehearing in the court of appeals if he wakes up in time, and I think we ought to consider whether a motion for rehearing should be required as a predicate for this kind of intervention. If that's true, then we ought to provide in connection with the motion for rehearing that he could appear at that time, but I don't know if that would be necessary. He could in any event, but if you assume that this fellow is taken by surprise, maybe you ought not to have to do that. So as it stands here he wouldn't be required to.

CHAIRMAN SOULES: Parties appearing in the court of appeals do not have to file a motion for rehearing in order to bring forward an application. I think we ought to just treat everybody the same, don't make any exceptions.

MR. MCMAINS: Yes, they do. Don't they?

HONORABLE C. A. GUITTARD: Yes, they do.

MR. MCMAINS: Yes. You do have to file on that motion for rehearing.

PROFESSOR DORSANEO: Yeah. We

do. We went back to that.

HONORABLE C. A. GUITTARD: We decided to -- yeah. I remember Rusty's argument that sent us back on that part.

PROFESSOR DORSANEO: Well, maybe we should work on this intervention paragraph a tiny bit more because who we are trying to protect is somebody who has not appeared in the court of appeals and who didn't have an opportunity to oppose the appellate relief that was awarded to someone who's become an adversary.

HONORABLE C. A. GUITTARD: Well, anybody that's part of the trial court's judgment would have had an opportunity, I suppose. That would rule everybody out.

PROFESSOR DORSANEO: We almost have to go back to Rule 74 to look because we say -- the way it would work under Rule 74 now is if you are a party to the trial court's judgment then you find out what's going on when the briefing process starts, and you should be provided a copy of a brief which you ought to be able to read, and it ought to indicate that there is some relief that is

sought against you or that would affect you. It's possible that it wouldn't and that you wouldn't be made an appellee or cross-appellee and that the court of appeals would just do something on its own.

MR. MCMAINS: Yeah.

PROFESSOR DORSANEO: And I guess it's that last thing that we are trying to guard against here, but only that last thing.

MR. MCMAINS: But don't the rules require that the clerk send a judgment of the court of appeals, the opinion and judgment, to all parties to the trial court judgment?

HONORABLE C. A. GUITTARD: Yes.

PROFESSOR DORSANEO: Yes.

MR. MCMAINS: So, I mean, I understand you're saying that, well, that's not enough notice, but in reality why isn't that enough notice?

CHAIRMAN SOULES: I think it is. Sarah Duncan.

PROFESSOR DORSANEO: That's when you are allowed to intervene if you get

this and you say "What?"

MR. MCMAINS: Well, I know, but what I am getting at is if you do that then why don't you file a motion for rehearing, and you are just a regular petitioner because if you didn't have any complaint to the original trial court judgment you didn't have to do anything in the court of appeals anyway, and if they change it and affect you and that's the first time it shows up, then you are just an ordinary petitioner. I mean, you have a right to make a motion for rehearing and say "I don't like what you did to the judgment."

PROFESSOR DORSANEO: We have to say that in the motion for rehearing part because it's not altogether clear to me any party affected by the judgment is allowed to file a motion for rehearing.

CHAIRMAN SOULES: Okay. Sarah Duncan.

MS. DUNCAN: Maybe I am off base on this. I thought this was simply a holdover from the notice of appeal that we rejected, that being that only those people who were named in the notice of appeal were

appellants and appellees. Now that we have rejected the concept of basically every appeal being an appeal limited to those parties named in the notice of appeal I just don't think this is a problem if everybody is a party to the appeal unless and until they are dismissed, and if anybody wants to do anything to protect their rights, they need to do it in a timely fashion, whatever that is, and I just -- I don't see the need for an intervention procedure if everybody is already in. I mean, how do you intervene if you are already a party?

PROFESSOR DORSANEO: Well, call it something else, but still you need to tell somebody that they can do something.

MR. MCMAINS: Well, if the explanation that is given in this rule -- the explanation that's given in this rule does suggest that somehow they were not parties to the appeal, and I think that is, therefore, a holdover to what has now been rejected as being a way of limiting who the parties to the appeal are. So I think that the purpose for this really doesn't exist once you have

rejected that notion.

MS. DUNCAN: Right.

MR. MCMAINS: Isn't that right, Mike?

MR. HATCHELL: Yes. Well, I mean, this again gets back to a philosophical debate that we have among some of us as to whether or not there can be someone who's not a party to an appeal. I mean, either you are an appealing party or you are an appellee. I mean, if you haven't been aggrieved by the judgment you are an appellee, and the problem I have with this is the notion in this rule is that, okay, it gives some sort of notion to the -- or validity to the concept that, number one, if I am a party aggrieved by the judgment and I didn't appeal, that somehow or another when the judgment is issued out of the court of appeals I get to do something.

Okay. Well, now we all know that that's not right, and secondly, if you want to protect somebody who generally thought he wasn't involved in the appeal but the court of appeals does something bad to him, which can happen, they get notice of the judgment, and

they have -- and they then are an aggrieved party and are entitled to file a motion for rehearing, and in my judgment must file a motion for rehearing in order to proceed further in the Supreme Court. So what is the use or utility of this rule other than to just really look like we are creating a class of parties who can just do nothing until the Supreme Court level and then come running in and get relief.

PROFESSOR DORSANEO: Well, I don't know if I am speaking for anybody other than myself, but not to spend a lot of time on this, but if that's what everybody thinks, that's acceptable. We will just withdraw this (j).

HONORABLE C. A. GUITTARD: Yeah. I agree.

PROFESSOR DORSANEO: And hope that people are smart enough to realize that they can file a motion for rehearing even though they have filed nothing before and that they must in order to file an application, which they can do.

CHAIRMAN SOULES: My mind

doesn't have that just as clear as yours, Mike.

HONORABLE C. A. GUITTARD: The problem seems to be, as Mike and Sarah suggested, goes back to the original philosophical problem that if the appellant doesn't really attack the trial court's judgment in a manner that would affect some other party to the judgment, and should he have to hire a lawyer to monitor all phases of the appeal and keep up with it just as if his interests were viably affected all along? Must he just assume that the appellate court might rule against him even though the appellant doesn't ask the court to rule against him?

That's the philosophical basis for this, and under this proposal if he is in that position and the court of appeals rules against him in a manner that the appellant hasn't asked him to do then he ought to have some -- then perhaps a motion for rehearing is not an adequate remedy. Maybe it is. If it is considered adequate remedy then this is not needed.

MR. MCMAINS: I think what we were trying to say is that -- or what our opposition to it is, is that if the intent is not to be able to get any -- to modify the trial court judgment, I mean, that's why theoretically these people are not parties. They are satisfied with the trial court judgment, even though it may be partially adverse to them but maybe they are satisfied overall. Then obviously if the court of appeals judgment -- the first time that they are going to be affected is if the court of appeals judgment -- and nobody cares whether they are reading the briefs or not, but if the court of appeals judgment says something that adversely affects them more so than the trial court judgment did, they clearly have a right to file a motion for rehearing, and they haven't waived anything by not having complained of it before.

PROFESSOR DORSANEO: They also have a short period of time to do it in.

MR. MCMAINS: I don't disagree with that.

PROFESSOR DORSANEO: And they

are not going to be lawyers. They are going to be people.

HONORABLE C. A. GUITTARD: They haven't hired a lawyer.

MR. MCMAINS: I like the rule of exclusion there. They are going to be human, huh? Is that what you are saying? Not animals.

CHAIRMAN SOULES: All right. So --

MS. BARON: Luke? Luke?

CHAIRMAN SOULES: What everybody is assuming here or what they know is that if the court of appeals judgment affects a party who has not participated in the appeal at all, just been gone except for receiving copies of papers from the parties and copies of orders and judgments and notices from the court, that's all they have done, and then they find out that they have been prejudiced by the court of appeals judgment they can then become active in the appeals. Everybody says that? I don't think that's all that clear.

MR. MCMAINS: Yes. I don't

think there is any question about that.

MR. LATTING: Why don't we say so if it's not clear?

CHAIRMAN SOULES: Then and that's fine. Maybe that's another way -- where do we say that? Sarah, where do we say that?

MS. DUNCAN: We say "any party desiring a rehearing of any matter determined by a court of appeals or any panel thereof must file a motion for rehearing" in Rule 100(a). That's any party of any matter.

PROFESSOR DORSANEO: We better say "any party to the trial court's final judgment."

CHAIRMAN SOULES: That's fine.

MS. DUNCAN: That's fine.

MS. BARON: Luke?

CHAIRMAN SOULES: Pam. Excuse me. Pam Baron.

MS. BARON: I think the equities here are not as ghastly as people think, and it's really a question of whether you have to get a lawyer within the first 30 days of getting the court of appeals judgment

or the first 60 days. You are still going to have to get a lawyer to look at the judgment to know whether you are adversely affected, but you have got 15 days to file your motion for rehearing, and a lawyer will know you have 15 days in which to file a motion for extension to file your motion for rehearing. Eventually a lawyer is going to have to look at this if you can't tell on the face of it that you have been adversely affected. It's not a question of avoiding lawyers. It's a question of, you know, do you have to get them in 30 days or 60 days, but you are still going to have to do it to get the application filed.

CHAIRMAN SOULES: As long as we say "any part of the trial court's judgment" like you said there so that it's clear anybody can jump in any time they feel like they need to, it's no problem.

PROFESSOR DORSANEO: Okay. I move to amend Rule 100 that's not in this package by making it clear that not just a party to, quote, "the appeal" but a party who has been a party all along and who therefore is also a party to the appeal can move for

rehearing.

MR. LATTING: Second.

CHAIRMAN SOULES: Seconded. Any opposition to that?

MR. MCMAINS: Well, again, we are not looking at that rule right in front of us, but the problem I have is that when you say that any party may raise any matter to the court of appeals if you are doing that permissively, that's not true to modify the trial court's judgment in their favor if they haven't previously participated in the court of appeals. So I am not --

PROFESSOR DORSANEO: Any party could have already waived it, too. Anyone who was there could have waived it by not having a point of error. So I don't think we need to make that say that. Okay. I don't think there is any suggestion that you have original rights for the first time, okay, on rehearing. Because it's well-established that that's not so.

CHAIRMAN SOULES: Okay. All in favor of what Bill just suggested hold up your hands, please.

MR. MCMAINS: Does that include retraction of (j)?

PROFESSOR DORSANEO: Of (j).

CHAIRMAN SOULES: 15. Those opposed? There is no one opposed, so that will be unanimous that you are going to withdraw (j) and correct -- and fix Rule 100 as you suggested.

PROFESSOR DORSANEO: Next one, 137 on 43.

HONORABLE C. A. GUITTARD: Wait. And the rest of Rule 131 then is approved; is that correct?

MS. BARON: I'm sorry. What? Rule 131?

HONORABLE C. A. GUITTARD: Yeah.

MS. BARON: I have one comment.

HONORABLE C. A. GUITTARD: All right.

MS. BARON: In subsection (c) on statement of the case, and this is something that I think maybe the subcommittee could think about, but the example in there, this is a suit for damages in excess of $1,000

for personal injuries. That is not a good example. It's not informative. It's not useful, and when people put that in their brief it doesn't help the court at all. So maybe just putting a different example in there might improve the quality of briefs.

HONORABLE C. A. GUITTARD: Very well. Now, we didn't undertake to change that, of course, you understand.

MS. BARON: Right.

HONORABLE C. A. GUITTARD: But if you want to propose an amendment I think we would probably consider it.

MS. BARON: Okay. Well, I will try to think of a better example.

MR. MCMAINS: Why don't we put the example in the comment or something as opposed to in the rule?

MS. BARON: Or just take the example out.

MR. MCMAINS: We don't ever have any examples anywhere else in the rules.

HONORABLE C. A. GUITTARD: I don't see any problem in striking the example.

MS. BARON: Okay. I would go

for that.

CHAIRMAN SOULES: Anybody want to retain the example? No one does, so it goes as far as our recommendation to the Court.

Anything else on 131? Okay. Anyone opposed to 131 then as it now stands with the changes we have recommended? If not, there being none, it's unanimously approved.

HONORABLE C. A. GUITTARD: Very well. Then we next go to 137. In Rule 74 we provided for a reply by the appellant in the time and so forth, and there has been no previous rule on that. Likewise, in the court of appeals -- in the Supreme Court we are providing here in Rule 137 on page 43 that the petitioner may file a brief in reply to the respondent's brief confined to the issues and points in the application of writ of error.

"The petitioner's brief in reply shall not exceed 25 pages in length, exclusive of pages containing the table of contents, index of authorities, reply points, or issues, and any addendum containing statutes, rules, regulations," or the like. That's the same as

we have approved with respect to the reply briefs in the court of appeals.

CHAIRMAN SOULES: Any opposition?

MR. MCMAINS: What rule is it? I'm sorry.

PROFESSOR DORSANEO: 137 on page 43.

MS. BARON: I just have a question.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: Neither of these rules have a suggested time for filing; is that correct?

MS. DUNCAN: No. 74 does.

PROFESSOR DORSANEO: Yeah. 74 does have a time.

MS. BARON: 74 does? Okay.

CHAIRMAN SOULES: Where is that?

MS. DUNCAN: Page 36, subdivision (1). No. It's not there.

MR. MCMAINS: Is the intention of this rule to limit the number of briefs that may be filed?

HONORABLE C. A. GUITTARD: Limit the size of it.

MR. MCMAINS: No, no, no. I mean is basically --

PROFESSOR DORSANEO: I think the intention is to suggest you could file one as a matter of right. If you read into that you can file one as a matter of right but you can't file more than one as a matter of right, I suppose so.

MR. MCMAINS: Well, I am just trying to figure out what the purpose of it is. I mean, in the federal rules it's very specific what you can do, and you can't do any more than that without leave of court and when you do it, and our practice historically has basically been that after the first two briefs it's whatever anybody decides they want to do whenever they do it, subject to whatever the local rules are, most of which allow filing of anything you want to file up to the date of submission, and all I was trying to figure out is if this was designed to say we will let the petitioner file, the respondent file, and the petitioner reply, and that's it. Because it

would seem that the function of putting a reply in is to say there isn't anything else authorized. I mean, that's the way I would infer it. If that's true, then it seems to me we should put in the rule that says, "No other brief shall be permitted except upon leave of court" or something.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: Well, and this gets me back to my original opposition to the 25-day period provided in (1). In my view one of the best and most useful functions of a reply brief is during preparation for oral argument and immediately preceding oral argument. You always find new cases. You always have new ideas about how a case should be analyzed and what cases are pertinent to that analysis, and I, frankly, think if we say that after the reply brief no further briefs shall be filed except on leave of court, we are going to be limiting counsel without leave of court even from refining analysis and adding additional case cites, and we are adding one more motion, one more, you know, sitting on your hands waiting for the court to

tell you whether you can file this brief, and that's at a period of time when you are trying to get ready for oral argument.

PROFESSOR DORSANEO: Why do we need to clear everything up since one problem creates another problem, and your response that if we change it this way then we will have to add that? This is now clear that you can file a reply, and the Supreme Court historically doesn't care about time. Maybe they care about it now for these kinds of things, but historically they don't, and it would just be nice to know that you can reply to it without filing a motion for leave, and beyond that something else may or may not be permissible.

HONORABLE C. A. GUITTARD: There was also a discussion in our committee with respect to 74(l) that there is a problem when the appellant comes up with a reply brief on the day of submission and that takes his opponent by surprise. The idea was that he ought to do it within 25 days after he gets the appellee's brief so the appellee may be prepared, and that's the reason that it was

done that way in the court of appeals. Now, I don't know whether that same consideration applies in the Supreme Court or not. Maybe it does, and if so, we ought to make both rules alike.

CHAIRMAN SOULES: I think both of these, particularly the 25-day one is very harmful. I mean, if you wanted to come back --

MS. DUNCAN: In Rule 74.

CHAIRMAN SOULES: -- 10 days before, this is in Rule 74, you want to say 10 days before oral submission or something like that but what if the Supreme Court of Texas -- you file this, and the Supreme Court of Texas comes out with a case that either kills you or makes your day and that comes out 30 days before oral submission. Can we brief that? What do we do with that?

MS. DUNCAN: At the discretion of the court.

CHAIRMAN SOULES: I mean, typically we wait on reply briefs to some reasonable time before oral argument. We don't take them to the oral argument because

we hope the court is going to read them ahead of time on whichever side we may be, and I don't think that you are -- I don't think any appellate lawyers, I think, are going to be particularly surprised by a brief filed on the day of oral submission if they are ready for oral argument and have been getting their case prepared for citing. I think the later the better as long as it's in before oral argument. Sarah then Buddy.

MS. DUNCAN: Part of what I think the problem is here is that we don't have in state court a 28(j) procedure like we have in federal court, which is an extremely useful way to notify the court of new authorities without going through the whole briefing process and starting another round-robin of briefs.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: I tell you, I don't know what the rule says, but the way we do it if the Supreme Court comes -- we file our reply brief in time, but if the Supreme Court comes out with something, we write the court with a copy to the other lawyer and inform the

court, and what they do with it, they want to consider it or not, we don't brief it, but we would ask you consider this case that has just come out. So I don't know if the court -- I don't think the court of appeals is going to throw it in the wastebasket.

HONORABLE C. A. GUITTARD: Yeah. The discussion in our committee was if there is a recent authority come out that the practice has been for counsel just to file a letter, just to send in a letter saying to the court, "This case just came out and may affect this decision," and this rule would not prevent that.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: I don't know that we have that procedure and I -- most of the people I have ever briefed with or against don't file 28(j) letters in state court. They file a whole new brief.

CHAIRMAN SOULES: We file 28(j) letters in state court so that the court won't think it's a brief because we don't know whether we can file a brief, but we probably can file a letter. So that's what we are

doing. If we are going to change that, we have got to be careful about saying that an appellant can't file another brief beyond 25 days after the appellee's brief is in because then what is the court -- I agree with Buddy. If somebody submits a Supreme Court case the court is probably going to look at it, but is it a violation of the briefing rules to do so or not? You shouldn't have a rule that would suggest that we are violating the briefing rules to do that, I think, but anyway that's out there for you-all to think about.

HONORABLE C. A. GUITTARD: The discussion in our committee had to do with whether or not we should limit the time after the appellee's brief was filed or by reference to so many days before oral argument, and that's an alternative we might consider. For instance, 10 days before oral argument, it ought not to be filed later than that or 7 days, whatever.

CHAIRMAN SOULES: Or say either party --

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: -- can file a supplemental brief not later than 10 days before oral submission.

MR. MCMAINS: The only problem with that, again, is that you have got -- one party may not be intending to and then the other party filed one, but on the last day, and so it's not like you can turn around and respond, you know, in five hours when they have been working on it for six months.

MS. DUNCAN: That's a problem.

MR. MCMAINS: I mean, if you are going to have a succession authorization based on appellant/appellee, who has the burden and so on, then it ought to be -- you ought to be entitled to some time, and so one of the problems we are getting is saying "to the time of oral submission." You would have to either designate it by party or do something to where nothing was coming in on the day of.

CHAIRMAN SOULES: Pam Baron and then Sarah Duncan.

MS. BARON: I am kind of agreeing with Bill that maybe if it's not

broke we shouldn't try to fix it. I think that extra briefs are working okay, but if we put it in the rule now everybody is going to think they are going to have to file a reply brief whether they want to or not or feel it's needed, and the courts are just going to be burdened with these briefs that parties have a right to file and feel like they have to.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: It is somewhat broken. We have had one fairly lengthy emotional opinion out of Houston. I would suggest that a reply brief within 25 days of the appellee's brief is fine if we will go ahead and provide a 28(j) procedure up to the moment of submission provided copies are provided to the court and all counsel.

PROFESSOR DORSANEO: We have got a provision for amendment or supplementation upon such reasonable terms as the court may prescribe. We have got a specific provision, proposed submission briefs.

MS. DUNCAN: But that's again -- my concern is that, again, is just

another brief, and it seems like there are a lot of people out there now that every time a brief is filed they have got to file another brief in response and they are going to raise all of this new stuff, and so then the other people start filing briefs, and we are just getting hundreds of briefs in cases, but if you confine them the way Rule 28(j) confines you in federal court there is not a whole lot you can say. I mean it's a pretty restrictive rule.

PROFESSOR DORSANEO: Why don't we put that on the agenda?

MS. DUNCAN: Well, I think part of the concern is the 25-day period or no period, if we have a 28(j) procedure or we don't. The two kind of go hand in hand.

HONORABLE C. A. GUITTARD: Well, this Rule 137 doesn't provide for a 28-day period.

MR. MCMAINS: No.

HONORABLE C. A. GUITTARD: So the question now before the committee is whether that rule should be adopted without any time requirement.

CHAIRMAN SOULES: Okay. Any further discussion? Those in favor show by hands. Hold them up again, please.

Opposed? No one is opposed.

HONORABLE C. A. GUITTARD: Are we ready to go to the next one, Mr. Chairman?

CHAIRMAN SOULES: I guess we are if -- I guess we are forever past the 25-day limit in the court of appeals.

MR. MCMAINS: No, we haven't -- we weren't on that at the point. We were on the 137.

CHAIRMAN SOULES: Is everybody happy about the 25-day response time limit in 74?

PROFESSOR DORSANEO: I think we need a time limit. It could be before submission, but I don't think we just leave it open for somebody to bring a brief to me and hand it to me on oral argument.

CHAIRMAN SOULES: What's the difference in the Supreme Court?

MS. DUNCAN: There is none.

MR. LOW: Who is going to need any time limit anyway?

MS. DUNCAN: That's part of what's so incongruous about these two rules, is that in the Supreme Court, which may be the more serious argument, in quotes, you can be handed a reply brief a minute before oral argument, but we are saying in the court of appeals for some reason you can't be.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: Well, there is a difference because in the Supreme Court your first concern is whether or not the writ is going to be granted, and you need to get yours in there before they act, and you don't know when that's going to be, and I don't think we ought to require the court to wait 25 days for another brief before they do that. That's kind of what it comes down to.

The court of appeals is going to have to decide the case. They have got a regular time schedule, and there you could set some sort of limit, and it could be before argument if you have argument or submission day, in which case argument isn't requested, but that won't work in the Supreme Court. That's what it comes down to.

CHAIRMAN SOULES: Okay. What's next?

HONORABLE C. A. GUITTARD: Next is Rule 184 on page 45, which has to do with remand by the Supreme Court for consideration of complaints about sufficiency of evidence which the Supreme Court has no jurisdiction to pass on, and it deals with the problem raised in the Supreme Court case of Davis against the City of San Antonio in which the Supreme Court held that since we haven't heard here anything before about remand for consideration of factual insufficiency points we are not -- we are just going to render it.

So the -- but this proposal has to do with permitting a remand to the court of appeals whenever a further consideration of insufficiency points would be appropriate. So it simply adds that here, and it will change the rule as it announced in Davis against City of San Antonio. So "If the judgment of a court of appeals shall be reversed, the Supreme Court may remand the case either to the court of appeals from which it came or the trial court for another trial."

And then the amendment would follow, "In order to obtain a remand to the court of appeals for consideration of factual sufficiency points or other points briefed but not considered by the court of appeals it is not necessary that such points be briefed in the Supreme Court if a request is made for such relief in the Supreme Court either originally or on motion for rehearing."

In other words, if the Supreme Court reverses the appellate rule that's been favored by the opinion of the court of appeals but that's now reversed, he ought to be able to ask the Supreme Court to send it back to the court of appeals and consider points which haven't been considered before because of the now appearingly -- appearing erroneous judgment of the court of appeals.

CHAIRMAN SOULES: And the committee then moves to add this sentence to 184(c)?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Any opposition to that? Discussion?

That's unanimously approved.

HONORABLE C. A. GUITTARD: Now, I think we need to consider now the problem of electronic recordings. Now, the committee doesn't have any real opinion as to whether electronic recordings are proper. There are two problems with electronic recordings. One is technological, whether we get a true recording and so forth, and the other is raised by our legal problems in the rules that have raised some -- in these ad hoc rules or whatever you call them that the Supreme Court has for certain courts that have caused some problems.

So the purpose of the amendment is to cure these legal problems which are otherwise -- which have been encountered really without respect to whether or not the electronic recordings should be done. I suppose the electronic recording thing is probably in its infancy, and there is an argument to be made that the rule should be open to further developments along that line, and with that in mind our committee has proposed certain changes in the rules that would allow that to be done and would not

foreclose the use of electronic recordings but would remedy the problems that have arisen because of other rules, like the time for filing the record, that have caused difficulty with those cases.

CHAIRMAN SOULES: Where are those rules proposed? What page?

PROFESSOR DORSANEO: Here you go.

HONORABLE C. A. GUITTARD: Well, the first one, we first have to go back to the trial court rules, which would be rule 264 on page 62, and this rule would basically adopt the present provisions in those special rules that the Supreme Court has adopted with certain minor modifications, and it would incorporate them into the civil rules rather than just leaving them in the special rules that a lot of people may not know anything about.

PROFESSOR DORSANEO: And that 264 also -- did we talk about this, Judge? The official reporter part, putting that in 264, or did we never talk about that either?

HONORABLE C. A. GUITTARD: Yes.

Yes. I think we ought to talk about that. The rule heretofore has -- the appellate rules have provided what the official reporter should do, and this -- it occurs to our committee that that ought to really be in the trial rules rather than the appellate rules.

So subdivision (a) of Rule 264 would simply incorporate into the trial court rules what has previously been provided in the Rules of Appellate Procedure, and then the provision for electronic recording would be subdivision (b) of Rule 264, and there will be other provisions that I will call the committee's attention to in Rule 53 which has to do with the statement of facts and Rule 74 which has to do with the appeal. This is the part of it that applies in the trial court, and as I say, this rule is taken essentially from the model rule or special rule that the Supreme Court has passed for certain courts.

Paragraph (1), "Any court may elect to make an electronic recording in lieu of a stenographic record of the court's proceedings. The electronic recording shall be the official record of that proceeding and

no stenographic record shall be required of any proceeding recorded electronically in accordance with this rule."

I believe some of the courts have held that even though you have electronic recording you have to have a statement of facts that transcribes all of that, and this would make it clear, as I think the original intention was, that you don't have -- that you don't require a stenographic record as a part of your statement of facts.

Rule subdivision (2) has to do with the recorder. "If an election to use the electronic recording is made, the judge shall designate one or more persons as court recorders." And this is an addition which our committee has suggested: "If the court sits in only one county the recorder shall be a deputy clerk of the court."

In other words, it's sort of like trial courts now. They operate with clerks that are -- or with deputy clerks that are appointed by the district clerk. They operate with bailiffs that are appointed by the sheriff. They usually are -- the relation

between the judges and those officials are usually harmonious enough that they can -- that that situation works out in a satisfactory manner.

The idea is that the recorder should also have some official status and be subject to administration of someone other than just the judge so that if the court sits in only one county that recorder should be a deputy clerk, and the rest of the rule that has to do with what the recorder does is taken from the special rules.

"The court recorder's duties shall be assuring that the recording system is functioning properly, that a complete, distinct, clear, and transcribable record of the recording is made; (b), making a detailed, legible log of all proceedings while recording showing the number and style of proceedings before the court, the correct name of each person speaking, the event being recorded, that is, voir dire, opening, direct examination, cross-examination, and so forth, and all offers, admissions, and inclusions of exhibits. The log shall state the time of day

of each event, the counter number or other indication on the recording device showing the location on the recording where the event is recorded.

"(C), filing with the clerk the original log and a typewritten copy of the original; (d), taking, marking, and filing with the clerk after closing the evidence all exhibits admitted or offered in evidence; (e), storing or providing for storage of the original recording to assure its preservation and accessibility; (f), prohibiting or providing for denial of access to the original recording by any person without written order of the judge of the court;

"Or (g), preparing or obtaining a certified duplicate of the original recording of any proceeding upon full payment of any reasonable charge imposed therefore at the request of any party to the proceeding or at the direction of the judge of the court or of any appellate judge before whom the proceeding is pending, subject to the instructions of the judge of the court; and (h), performing such other duties as may be directed by the judge

presiding."

Now, I would suggest that before we take any action on this we ought to go forward and discuss the related rules that have to do with the rules in the appellate court. On page 19 Rule 50 would be amended, and there would be various other rules throughout the appellate rules that refer to court reporters in which the word "recorder" ought to be added if this procedure is approved, but we won't go into all of those specifically, but there are some provisions that the committee should consider.

Rule 50(e) would be amended. It would be a little broader than simply electronic recordings but "If the appellant has made a timely request for a statement of facts but a significant portion of the court reporter's notes and records have been lost or destroyed without the appellant's fault or if the proceedings were electronically recorded and the recording or a significant portion thereof have been lost or destroyed or a significant portion of the proceedings are inaudible without appellant's fault and the parties cannot agree on a statement of facts, the

appellant may be entitled to a new trial unless the parties agree on a statement of facts."

Then we go to the next rule, which would be 53(j) from the -- in the rule relating to the statement of facts on page 24, and that is also taken from the special rules. "The statement of facts on appeal from any proceeding that has been recorded electronically in accordance with Rule 264(b) of the Rules of Civil Procedure shall be (1), a standard recording labeled to reflect clearly the contents and numbered if more than one recording is required, certified by the court recorder to be a clear and accurate duplicate of the original recording of the entire proceeding; (2), a copy of the typewritten and the original logs filed in the case certified by the court recorder; and (3), all exhibits arranged in numerical order and a brief description of each," and that would be in the statement of facts.

Now, the next provision has to do with briefs on page 35 and 36 Rule 74(h) would be added with respect to electronic statement of

facts there on page 35. "When an electronic statement of facts has been filed the following rules shall apply."

First, appendix. "Each party shall file with the brief one copy of an appendix containing a typewritten or printed transcription of all portions of the recorded statement of facts and one copy of all exhibits relevant to the issues raised on the appeal." In other words, the party that's appealing, the appellant, in his brief needn't have a complete transcription of all of the proceedings in the trial court, but he can have a transcription made by anybody, any typist or anybody, of the portions that are relevant.

"The appellee's appendix need not repeat any of the evidence included in the appellant's appendix. Transcription shall be presumed to be accurate unless objection is made. The form of the appendix and transcription shall conform to any specifications of the Supreme Court concerning the form of the statement of facts."

Second, presumption. "The appellate

court shall presume that nothing omitted from the appendices filed by the parties is relevant to any of the issues raised or the disposition of appeal. The appellate court has no duty to review any part of the electronic recording." As an appellate judge I don't want to go get that recording and try to figure things out from that.

"(3), Supplemental Appendix. The appellate court may direct a party to file a supplemental appendix with any additional portions of the recorded statement of facts and may grant a party leave to do so.

"(4), Inability to Pay. If any party is unable to pay the cost of an appendix and files the affidavit provided in Rule 45 and any contest to the affidavit is overruled the recorder shall transcribe or have transcribed such portions of the recorded statement of facts as the party designates and shall file it as that party's appendix.

"(5), Inaccuracies. Any inaccuracies in the transcription or recorded statement of facts may be corrected by agreement of parties. Should any dispute arise after the

statement of facts or any appendices are filed as to whether any electronic recording or transcription of it accurately discloses what occurred in the trial court the appellate court may resolve the dispute by reviewing the recording, or the court may submit the matter to the trial judge who after notice to the parties and hearing shall settle the dispute, make the statement of facts or transcription conform to what occurred in trial court.

"(6), Costs. The actual expense of the appendices but not more than the amount prescribed for official reporters shall be taxed as costs. The appellate court may disallow the cost of portions of the appendices that it considers surplusage or that do not conform to the specifications prescribed by the Supreme Court."

Then we go to -- I believe that would pretty well take care of it. So the committee would move that the proposal with respect to recorded statement of facts be approved by this committee.

CHAIRMAN SOULES: Okay. Judge, first question, if I may, is there any

difference in the time for filing an electronic statement of facts or filing an --

HONORABLE C. A. GUITTARD: No.

CHAIRMAN SOULES: -- ordinary statement of facts?

HONORABLE C. A. GUITTARD: Of course, we have repealed by our earlier action today any time requirement for filing a statement of facts.

HONORABLE F. SCOTT MCCOWN: Mr. Chairman?

CHAIRMAN SOULES: And then -- okay. Judge.

HONORABLE F. SCOTT MCCOWN: I have one suggestion on page 63 in (d)(2). I don't know if this is in the present Supreme Court model order but I think it may be a new requirement where it says "If the court sits in only one county the recorder shall be a deputy clerk of the court."

HONORABLE C. A. GUITTARD: Yeah.

HONORABLE F. SCOTT MCCOWN: I think there is a little ambiguity, and I understand from your comments that you intend

for the recorder to be an employee of the clerk.

HONORABLE C. A. GUITTARD: Yeah.

HONORABLE F. SCOTT MCCOWN: And I think there is some ambiguity here because under the statutes the district judge hires his own court reporter, and this could be opening the interpretation that the judge hires the court reporter but that the court reporter will be a designated deputy clerk of the court, but setting the ambiguity aside if the intent of this is to make the recorder a deputy clerk I would recommend strongly against that for two reasons.

Right now the judge hires his own court reporter, and that's an employee of the court, and if we want to encourage electronic filing if we say to the judge that the district clerk gets to hire the recorder, then the judge is going to say "I am not using electronic filing in my court," and I think that how well district clerks and district judges get along they may be very polite to each other in the presence of the court of appeals judges, but

in the courthouses they don't get along that well.

And it's going to create a real problem of dual supervision, and while it's true that there is dual supervision of the clerks now the relationship between the court reporter and the judge is a much -- it's a much more intimate, more hardworking kind of relationship, and I think that dual supervision will be a real problem. If I was a judge, I wouldn't want the clerk to be telling me who my reporter was going to be, and I would encourage us to delete that and just leave it the way it is.

HONORABLE C. A. GUITTARD: I have no objection to deleting it if there is any real objection.

CHAIRMAN SOULES: So what is going to be the official capacity of the recorder?

HONORABLE F. SCOTT MCCOWN: Well, he would have the same official capacity that the reporter has now, which is we say --

CHAIRMAN SOULES: Does the rule say that, though, Judge? What official

capacity does this rule contemplate the recorder have or say he will have?

HONORABLE F. SCOTT MCCOWN: It says, "The judge shall designate one or more persons as court recorders." So they would be the court recorder just like the present stenographer is the court reporter. Now, it's true that they wouldn't be regulated by a CSR board. We wouldn't have that kind of regulation, but they would be an officer of the court appointed by the judge pursuant to the rule as the court recorder. They don't administer oaths. So I don't see any advantage to -- the only advantage I see if they were a deputy district clerk is if they could administer oaths, which they wouldn't be doing anyway in this function. I think the trial judges would be real resistant to using electronic recording if it meant they didn't get to pick and control the recorder.

CHAIRMAN SOULES: Judge, I have no disagreement with you about that at all, and I don't think anyone here does. The appellate courts have to be able to lay their hands on this person, this recorder who is not

doing their job, somehow like they lay their hands on the court reporter who is not doing their job, and essentially they get that because, I guess, of some official capacity that the court reporter has. We need to have a similar official capacity on the recorder. I think that was the purpose of saying it would be a deputy clerk was so there would be an authority, a line of authority, and that's all -- we need to have a line of authority, whatever it may be.

HONORABLE F. SCOTT MCCOWN: Well, I agree with you.

CHAIRMAN SOULES: You give a good reason why it shouldn't be the clerk. What should we put in place?

HONORABLE F. SCOTT MCCOWN: Well, right now with the court reporter what you have got is that they are the official court reporter appointed by the judge. The judge signs an order appointing him as the court reporter, as the official court reporter and so, you know --

CHAIRMAN SOULES: I guess there is a mechanism for that somewhere.

HONORABLE F. SCOTT MCCOWN: Well, the mechanism is very similar to what we have got here in (b)(2). It's a statute that says the judge shall pick the court reporter. I think we just -- you know, we just need to say, "The judge shall designate one or more persons as court recorders." You know, you could say "who will be officers of the court subject to the control and direction of the court."

CHAIRMAN SOULES: As long as we do that, I have got no problem.

HONORABLE C. A. GUITTARD: If that language would help, we can add it and strike that second sentence in sub (b)(2).

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: I would like to go back to square one a little bit. I thought that the reason that we had electronic recordings at all was so that we did not have an additional layer of personnel in the courthouse that the trial judges would have to spend money on, and one of the reasons in addition to the reason that Luke mentioned you

have a deputy clerk is to eliminate a class of employees and the burden on that particular court's budget. If we are now going to have a layer of separately employed court recorders who do nothing but fiddle with tapes, it seems to me like we ought to consider whether or not to have electronic recording at all and go back to square one.

CHAIRMAN SOULES: Alex, you first.

PROFESSOR ALBRIGHT: We addressed some of these issues about whether to do electronic recording or nonstenographic recording in the discovery subcommittee when we talked about nonstenographic depositions, and one concern that we had is about the accuracy of the transcription of the recording, and the way we resolved it ultimately in the deposition rule that we have, the nonstenographic recording rule, is that in order to use a nonstenographically recorded deposition at trial it has to have a transcript that is certified by the person who makes the recording and who is also responsible for having it transcribed, and

they have to certify that it is -- the same certification that Rules 205 and 206, and I think David Jackson can help me out on that.

But then the person who is responsible for the recording is also responsible for an accurate transcription of the recording. Therefore, they are more likely to make sure the nonstenographic recording is as good as it possibly can be since they are the ones who have to certify that the transcription is accurate. What we decided is that if there is no tie between the person who transcribes it and the person who is making the recording they may very well make a lousy recording that nobody can understand, and so that was what our concern was.

So you have the authority -- in this rule, the appellate rule, you have the parties making the transcription and by submitting it to the court saying it's accurate, but if you have the person who is responsible for making the recording also responsible for the transcription and they have to certify it, then we felt like it was more likely that it would be an accurate and good record.

CHAIRMAN SOULES: All right. These rules are written exactly to the contrary.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: The person who makes the recording has zero responsibility for ever providing anything in writing, and it says that. That's expressed here.

PROFESSOR ALBRIGHT: That's exactly right, and all I'm doing is I am saying we addressed, I think, what is essentially the same issue in the deposition rules as to, you know, when you have an electronic recording if you are never going to use it you don't care. The problem is when you are going to use it, and you have got to use it, and it has to be transcribed to use it, and so who is going to be responsible for that transcription?

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think it's also important to note that under the appellate rules on page 19 under the lost and destroyed record if you don't get a good record you get

an automatic new trial. Now, I guess -- I think that probably is generally the present rule, and I know I have been in the situation of having a shorthand reporter who died before a trial was transcribed, and it creates a lot of problems, but with modern stenographic reporting that's much less likely to be a problem now.

What I am concerned about is under (b)(1) is there -- it seems to me that it should require the agreement of the parties in order to have the electronic recording because the parties are undergoing a significant risk. For example, if a battery goes out or there is some electronic problem that is not perceived at the time, the parties may be undergoing a substantial extra risk of having to retry a case. Now, it may be that in a lot of situations if it's a routine matter that's not going to be a big problem, and a lot of people may want to agree to it, but it may also be that if it's a major case the parties may not want to run that risk, and it seems to me that this should be not simply something that is done merely by election of the judge but

should require the agreement of the parties.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: Well, I have got no problem with the way the rules are written if the judge picks the recorder because the judge isn't going to want to retry it much more than the parties are. In fact, maybe less, and the judge is going to make sure that he has got a good, technical person who is doing a good job, and you know, you always run a risk that something is going to happen to the record, but I think this is an experiment. It's at the judge's option, and I think the rules adequately provide for that for a low cost way to do it.

But to address Mike's point if it's not the deputy clerk then we are not saving any money. I think we ought to leave that to be worked out between each group of judges and their own commissioner's court. If the judges are going to be likely to -- in each local situation to be able to bargain best with the commissioner's court as to what works in that county and what that county wants to pay for, if we simply say, however, that the district

clerk is the one in charge of the recorders and I as the judge lose the ability to control the record in my courtroom and whether those people are doing a good job and whether they are producing a good record, I don't think I would buy into it.

CHAIRMAN SOULES: Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: As I understand it the basis for all of this is in the civil rules, but some of these others that we are now talking about on the TRAP rule it's my understanding also apply in criminal cases. Now, my court has been spooked by some of these electronic recordings. We are not -- most of my brothers don't like them. So if you are going to have these civil bases brought over into the criminal we may very well want to opt out of that.

CHAIRMAN SOULES: Okay. I think that we need to then write that accordingly that anything that's effective -- that contemplates the utilization of an electronically recorded statement of

facts needs to be carved out and apply to civil cases only because that may be the only way we can really accommodate the Court of Criminal Appeals and the TRAP Rules that we --

HONORABLE SAM HOUSTON CLINTON: Until adopted by the rule of the Court of Criminal Appeals or something like that. The view may change as this equipment becomes more sophisticated and workable, but we just had bad experiences with it. We do it by separate order, too, Judge, and our experience has not been pleasant at all.

CHAIRMAN SOULES: David Jackson, and then I am going to come around the table.

MR. JACKSON: I just want to say a few things about the basic concept of it, and I am a court reporter, so you can tell I am prejudiced about this. On several -- this is not in it's infancy. Alaska has been through it. They did it in 1960 because they couldn't get court reporters to come to Alaska. So the next state was New Mexico that tried it. They went through the process of getting in tapes in their civil

courts, decided that it was too expensive to get them transcribed because it just took too long to get it done.

So they even changed their rule in New Mexico to make it where you couldn't transcribe the tapes. That's the way they would save the money is make it a rule that you couldn't transcribe the tapes. So you sent the tapes directly to the appeals court. The appeals court finally said, "We don't want any more tapes coming up here," and New Mexico now has no tapes in civil court. They are back to court reporters with computer-aided transcription.

The state of Alabama just recently did a year-long study on the feasibility of tapes in courts, and their judges council there has just in the last month or so come up with the resolution that they want CAT in the courtrooms and not tape recorders. So if we are going to try this -- I think we are wasting a lot of time trying it. I think we need to look at Alaska, New Mexico, Kentucky, Alabama, and Maryland, the states that have tried it, to find out what their experience is

with it and maybe learn something from something that's already happened.

HONORABLE C. A. GUITTARD: Well, that's the experience in Maryland?

MR. JACKSON: Maryland built a courthouse specifically designed for tape recorders. They built the courthouse, spent a lot of money on it. That's been one of the more successful, quote-unquote, tape recording examples, but they have got a lot of money invested in their test in the fact that they have built a courthouse in Rockville, Maryland, around the tape recording system.

You still -- even if you have got a perfect tape recording system you have the credibility factor of the tape getting from the tape recorder to the transcribing surface, whether or not that transcribing surface is liable for the credibility of the transcript. If they don't hear something, if you say "res judicata" or "res ipsa loquitur," the tape transcriber if they don't want to sit and try to listen and look up in Black's Law the spellings of those words can just put "not audible" or "inaudible" or whatever they want

to put.

So if you don't tie in the credibility of the transcript with the tape you are going to have lawyer time at the end sitting down listening to tapes, getting into a battle of the tape recording. One lawyer who is not going to want something on that tape going to the appeals court is going to try to find everything else in that transcript that's wrong with it and try to point a hundred examples to where that tape is not accurately transcribed, and you may never hear the instance that he is objecting to because it may be perfectly clear on the tape, but if he can get the entire tape thrown out, he's accomplished what he set out to do.

CHAIRMAN SOULES: John Marks.

MR. MARKS: In civil litigation I agree with David Perry. If we are going to have it, it ought to be by agreement of parties because they are the ones that are going to have to pay the ultimate expense of retrying the case if something is wrong with that record, and so if we have anything like that I think the parties should first agree

upon and go from there, and it may save money, you know, in smaller cases, you know, the 85 percent that people talk about, it may be best to have tape recorders, but it ought to be something that the parties agree to and not something that is forced on them.

CHAIRMAN SOULES: Come around here. Anyone? Richard Orsinger.

MR. ORSINGER: I would suggest that having it by agreement of the parties is impractical because my experience is that a court is either going to have a court reporter or they are going to have a court recorder, but they are not going to have a court reporter that works part-time and a court recorder that works part-time, and they are got going to have two employees that work full-time when neither one of them have jobs to keep them busy all day long. So if you say that it's going to be by agreement of the parties, as a practical matter you are going to have to have a court reporter full-time, and I don't know where you would find the money to pay for a court recorder unless the parties decided to come up with the money.

Secondly, I don't think it would be wise for this committee to make a policy decision about whether we should continue or mandate or ban tape-recorded trials without finding out from the trial judges who do this whether it's working or not. Now, we heard from Justice Clinton that they don't like it on the Court of Criminal Appeals, and I don't know why, but we have one court in San Antonio that's been recording now for at least five years, and I know the court recorder, and I know the trial judge, and neither one of them have had any problems that I am aware of. I think that they are very satisfied with the system. I have never talked to anybody that appealed out of the court that has ever had a problem with that.

So I think that if we are actually going to engage in a policy debate about whether we ought to have electronic recorded statements of fact or not we ought to go around and find out. We have had one court in Dallas, one court in Houston, one court in San Antonio, and maybe others that I am not aware of, and let's ask the people who have been doing it

for five years whether it's working or not, and if it is working, then maybe we can feel more comfortable, and if it's not, maybe we ought to back away from it.

The last thing I would like to say is that in the Valley they have a lot of mask writers, and the mask writers are just giving electronic statements of fact anyway. They put a mask over their face, and they talk into the mask, and they repeat what they hear being said, and they have backup microphones. They have one in front of the judge, supposedly one at each counsel table, and one up by the witness, and when the statement of facts goes up for a mask writer, they rely principally on their own recorded tape, which is a repeat of everything that's said in the courtroom. Only they are talking into a mask that's over their face so nobody can hear what they are saying, backed up by these microphones sitting around the courtroom where you can hear the voices bouncing off the walls, and you hear them from a long distance.

Now, they can't get certified shorthand court reporters for all of the courts they

have in the Valley, and so they have to use these mask writers, and I have one appeal involving a mask writer that died before the statement of facts was done, but for those guys down there, they have electronic statement of facts even though we don't think they do, and they call them court reporters, which I think it is a certified type of reporter, aren't they?

MR. JACKSON: They are certified under the Court Reporters Certification Board, and they go take the test just like court reporters go take the test.

MR. ORSINGER: But they are still creating an electronic statement of facts.

MR. JACKSON: No, it's not.

MR. ORSINGER: What's the difference?

MR. JACKSON: The big difference is it's going through their brain first, and they know whether or not they understood what was said and know when to stop and ask somebody to repeat something. They are not just turning over the tape backup that

they are making in the room for somebody to take and interpret what they want to from the tapes and then just say it's not their fault because the tapes are not good. With mask writers it's going through their mental process. They are accountable for that transcript, and they are signing that statement of facts.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: As a member of the committee I would like to agree with Richard and say that we are making a policy decision here, and I don't know enough facts, and I think it would be a good idea to have the people who are in charge of this issue survey the courts that have used this and come tell us what their experience has been because I wouldn't suggest it otherwise.

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Yes. Judge Guittard.

HONORABLE C. A. GUITTARD: Our committee didn't attempt to make that policy decision. We understand that the Supreme

Court has some interest in continuing the process and that the Supreme Court ultimately would make that decision. Our concern was that if you are going to have it, we ought to clean up the rules, and that's what we have undertaken to do. So I think, perhaps, we present this to this committee with the idea that subject to a general decision by the Supreme Court as to whether they are going to allow it or not.

And so far as the court recorder being a deputy clerk, well, we are willing to withdraw that part of it, and just go with these rules as presented and as amended or otherwise revised by this committee subject to the policy decision by the Supreme Court as to whether they have it or not. Then the Supreme Court could make such investigation as they think proper. I understand Judge Brister is a member of this committee. He is not here today. He is one of those judges that uses it and likes it. In Maryland I talked to the chief judge of the appellate court there. He thinks it works just great there. So there is a lot of information that could be assembled

that our committee didn't try to go into, and so I don't think that -- and we have not proposed that that policy decision be made.

CHAIRMAN SOULES: That's the only thing you can get in bankruptcy court in San Antonio is electronic recordings, and they seem to work okay for us.

MR. LOW: Magistrates.

CHAIRMAN SOULES: David, did you have something else? I have got a different subject here.

MR. PERRY: Well, I just wanted to respond to what Judge Guittard said in this way: I think all of us understand that the Supreme Court is in the process of investigating whether and how much and under what circumstances to go to electronic recording. The problem with the proposed Rule 264(b)(1) is that as written it would say that any court may elect to do this without any restrictions, and if that were enacted, then you could have any judge without any limitations, without having the proper kind of equipment, and without having personnel who are properly certified in the use of it, just

going to this on a helter-skelter basis. It was my -- I did not understand that that was what the committee was recommending or what anybody is proposing to be done at this time.

CHAIRMAN SOULES: Buddy.

MR. LOW: Go to Cold Springs, Texas, or someplace that --

CHAIRMAN SOULES: You'll have to start over. The court reporter couldn't hear you.

MR. LOW: Go to St. Augustine or where I am from, someplace like that, and the judge decides his nephew has got a new Sony or something. I mean, I just think there ought to be some kind of guidelines. It's just I completely agree with David, and I would get up in the situation like that and say, "Wait, Judge. I don't want this." Well, you won't have a choice. I just think we ought to be very careful, and if we are going to do it, there ought to be some pretty good guidelines like David was talking about.

CHAIRMAN SOULES: We have got two things going right now. We have got special orders from the Supreme Court of Texas

regarding certain trial courts that give them the authority to use these recorders exclusively of reporters. In that the parties have no choice, but those are special orders that the Supreme Court rendered and signed some time ago. Here we are talking about making statewide rules that would supplant those orders, and they couldn't supplant a specific court order anyway, but I suppose in recommending the statewide rules we could condition them on agreement of the parties and see what the Supreme Court does. I have another problem on -- yes, sir, Judge.

HONORABLE SAM HOUSTON CLINTON: Let me ask, does the Supreme Court require that there be a transcript made?

CHAIRMAN SOULES: No.

HONORABLE SAM HOUSTON CLINTON: No?

CHAIRMAN SOULES: And the tapes are filed with the courts of appeals.

HONORABLE SAM HOUSTON CLINTON: Maybe that's where we made our mistake. We required that it did, and the only capital case -- the only full-fledged case that we

have had involving that was a capital case, and it started about eight years ago, and we never got a completed record, a transcription, and we had to just send it back. So that's the bitter experience we have had.

CHAIRMAN SOULES: Okay. On (1) on 35, let me get to this, and this is sort of a problem, Judge, that we have that may result because there isn't a transcript required, and there is not going to be one as I understand it, but one court of appeals has held that when the parties transcribed what the parties felt was the germane testimony to either factual or legal sufficiency -- or maybe both, I can't remember -- that because the party did not transcribe all of every tape that they fell under the presumption that there was something in the statement of facts that would be germane to the factual or legal sufficiency point and they couldn't review it on a partial statement of facts.

Now, they had all the tapes but they didn't have every tape, every word of every tape transcribed. Now, it is true under the law that the entire recorded statement of

facts and all exhibits are relevant to the issues raised on appeal if those issues are legal or factual sufficiency issues. Does this (1) or (1) -- it's (h)(1) on page 35, require a party to transcribe every word on every tape to put to the court of appeals if questions of legal or factual sufficiency are raised?

HONORABLE C. A. GUITTARD: I don't think so, and we perhaps ought to --

CHAIRMAN SOULES: Well, we are going to need to say that.

MR. ORSINGER: Well, look at (2).

CHAIRMAN SOULES: That doesn't make any difference because you can't have a -- that's the same thing on a -- when you go up on a limited statement of facts, but you still can't raise, even though the rules say differently, what the case --

HONORABLE C. A. GUITTARD: Subdivision (2) --

MR. ORSINGER: Smith Vs. Connor, wasn't it?

HONORABLE C. A. GUITTARD:

-- is supposed to take care of that.

CHAIRMAN SOULES: But it doesn't under the other rules.

PROFESSOR DORSANEO: We are going to change that, too.

CHAIRMAN SOULES: Well, if we are going to change that, too, maybe we will fix that, but right now factual or legal sufficiency you have got to take up every exhibit and the entire record.

HONORABLE C. A. GUITTARD: We have already passed on 53(d) that would cure that problem in an ordinary case.

CHAIRMAN SOULES: All right.

MS. DUNCAN: Page 23.

MR. HATCHELL: Luke, you are falling into the trap that the courts have fallen into by believing that the appendix is the statement of facts. The recording is the statement of facts, so there is nothing omitted. The problem that you are reading is just a court that got it all messed up.

CHAIRMAN SOULES: I know, and fortunately it wasn't my case, but the next one might be. So, you know, we are typing up

the whole thing every time because who's next? Who's next in that barrel, you know? Where does 53 fix this?

MR. ORSINGER: Page 23.

PROFESSOR DORSANEO: 53(d), page 23.

CHAIRMAN SOULES: "The same presumption shall apply with respect to any point including a request..."

"The same presumption shall apply with respect to any point included in the request that complains of legal or factual sufficiency, insufficiency of the evidence." Okay.

PROFESSOR DORSANEO: Except for criminal cases.

CHAIRMAN SOULES: Well, that may fix the whole thing then. If that's true, then we can -- then that takes care of my problem. Richard.

MR. ORSINGER: I would like to ask Justice Guittard to look at on page 63 paragraph (b)(1), and that first sentence there, as David Perry pointed out before, suggests to me that we may be pre-empting this

Supreme Court court by court order situation and now making it local election with the judge on a case by case basis, and if that's so, then we are probably making a policy decision here that we don't --

HONORABLE C. A. GUITTARD: Well, the Supreme Court is going to adopt this and by adopting it it would supersede these special rules.

MR. ORSINGER: Okay. Then I think we are.

PROFESSOR DORSANEO: These special rules are more purvasive than you think, too.

MR. ORSINGER: I think that we are making a policy decision in this proposal at least recommending to the Supreme Court that all courts in Texas can now go to electronic statement of facts on an ad hoc basis.

HONORABLE C. A. GUITTARD: We are asking the Supreme Court to make that policy decision. Right.

CHAIRMAN SOULES: Okay. We have got about 10 more minutes, then we are

going to break for lunch and start on discovery. I'd like to take this a step at a time and then, Joe, I will hear from you, but let me tell you what we are going to try to do in the next 10 minutes, and if nobody disagrees, we won't do it. First, decide whether we are willing to have these rules -- recommend these rules to the Supreme Court just as they are written, where every court does its bidding about electronic recording.

HONORABLE C. A. GUITTARD: Now, that should be subject to the withdrawal of the part about the clerk, the recorder being a clerk.

CHAIRMAN SOULES: And whoever this person is -- to start off, if we have recorders, we will write into the rules that these recorders are going to be employees of the court, of the judge, I guess, and that they will have some official capacity so that there is a hierarchy or an authority where they can be contacted by the appellate courts or the trial courts in some way similar to what current court reporters -- what we are

doing with the current court reporters. So assume that we are going to do that.

Next -- and I think that everybody is in agreement with that. Is there anybody who disagrees with that? Okay. Everybody agrees with that.

Next, these rules are written so that each court will make its own decisions about whether to have a reporter or a recorder. There wouldn't be any special order needed from the Supreme Court of Texas, and there wouldn't need to be any agreement of the parties. I want to find out how many are in favor of that, and then I want to go to the next one. How many are in favor of having recorders but only where there is agreement of the parties? Okay. So that's the path we are going to go through.

MR. YELENOSKY: Isn't there another choice there?

CHAIRMAN SOULES: Another choice. Okay. What would the other choice be?

MR. YELENOSKY: Well, the other choice is to say we are not prepared to make a

policy decision or to advise the Supreme Court as to the policy decision. If you choose to have electronic recording, here is the rule, and if you choose to have it done court by court, here is the rule.

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

MR. ORSINGER: It should be the same rule in both cases.

MR. YELENOSKY: Because I don't think anybody is comfortable making a policy decision.

MR. LATTING: That was my concern that I understood was answered by Judge Guittard that we are not making a recommendation, and I am specifically suggesting we not make a recommendation until we -- unless we get a report hearing how this has worked, and if we pass any of these rules, until then I am going to hope that we will say we are not making a recommendation on the merits of it.

HONORABLE C. A. GUITTARD: Mr. Chairman, I would suggest, as I indicated before, that these rules be subject to the

Supreme Court's determination as to whether electronic recording should be allowed but that it be presented to the Supreme Court on the basis that if they are allowed, these rules will apply.

CHAIRMAN SOULES: That's what I understand we are doing. We are trying to give the Supreme Court a message from this committee how do we feel about this so that they can take that into consideration as they go forward and whatever they do about recorders in the courtroom.

MR. YELENOSKY: But, Luke, to follow-up on that --

MS. DUNCAN: Luke, you-all just said two exactly different things.

MR. YELENOSKY: -- the first sentence still has to change because --

CHAIRMAN SOULES: Steve, will you start over for me, please?

MR. YELENOSKY: The first sentence does make a policy decision. I just think it does because it says "any court." I mean, I can't vote for this without feeling that I am voting to recommend to the Supreme

Court that it give discretion to each court. If you change that first sentence and give it, you know, either present options there or leave it out indicating that that's for the Supreme Court to fill in, then fine.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: If I understand what Steve's saying, I agree with him, but it seems to me that what we are saying is -- and what I would like to say to the Supreme Court is we are not advising you about what is best to do with electronic recording. If you are going to continue your present experiment -- and they themselves are in an experimental phase with special orders -- we recommend that your special orders be these rules because these rules are designed to integrate with the TRAP rules. When you decide, if you decide, to go statewide with electric recording, then we have got the rule for you which integrates with the TRAP rules.

And I think that's what Judge Guittard is saying, and then what they can do with (b)(1), they can have(b)(1) say, whenever we give a

special order, this is what it will be, or they can have (b)(1) say at the point they decide to go with electronic recording just exactly what it is, but we wouldn't be buying off on telling them which way to go.

CHAIRMAN SOULES: Okay. We have got six more minutes of appellate rules. Do we get this to closure, or do we keep talking? It doesn't make any difference to me, whatever you say. John Marks.

MR. MARKS: If we are going to make some recommendations along these lines it seems to me that we need to have or recommend some sort of certification procedures so that if a court is going to do it it's got to be certified by somebody that knows what they are doing and not leave it up to the recorder but somebody else who comes in and said, "Okay. This passes the mustard."

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, one of the problems I have with the idea that we can just tender this and say, "This is the rule you should follow if you are going to make the

decision to do it," is I don't think that this is the rule they should follow. From a technological standpoint there are no guidelines, and what we are saying is that we should not have -- we are basically saying if you adopt electronic court reporting or electronic recordings, don't worry about any guidelines. Let everybody figure it out.

I would never recommend to the Supreme Court that you adopt a rule which says they can record on any kind of equipment they can dig up in any secondhand pawn store, and nobody has to test it, nobody has to certify it, nobody has to verify it, and we don't have to worry about what the technological capacities of the equipment are. I think that's ridiculous, and yet that's where we are now. That's what the special orders, in fact, do. The special orders don't have any technological limitations either.

CHAIRMAN SOULES: Right. David Perry.

MR. PERRY: I think the problem we have got is that the rule that is being proposed presupposes that we know what the

technology is and know what the rules need to require when, in fact, we don't. I think most of us believed that if electronic recording was going to be authorized there would be a lot of stuff that ought to be in this rule about certification and things like that, but it's not here because we don't know what it is, and it would appear to me that it is premature for the rules to be adopted governing electronic recording until somebody has made an organized decision as to what those rules need to be.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: I agree with that except that we are requiring people to follow rules that haven't been published, and we are dismissing their appeals when they don't comply with unpublished rules, and I think that the genesis of this at least was not that we know the details because the Supreme Court hasn't told us but that it's simply not fair to require people to comply with a whole set of rules that's very different from the TRAP rules and not have those be published rules.

MR. PERRY: Well, then why

doesn't the committee write a brief set of rules that is specifically limited only to the courts that are subject to the ad hoc electronic recording rules?

MS. DUNCAN: Well, we can do that, but that still doesn't fill in all of the gaps in electronic recording procedures that are left from the Supreme Court's order.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think we can get around the whole problem just by taking out the first sentence of (b)(1), and we will let the Supreme Court decide what courts and when are going to go to electronic, but whichever they are this is a set of rules that they will follow from the standpoint of getting your statement of facts to the court of appeals because we definitely need to have some kind of set of rules that's fair because appeals are being dismissed all the time because they are not making their 15-day deadline and everything else. If we just take that first sentence out, don't we eliminate the whole problem? We don't take a position

on whether it ought to be every court or one court in each city, but whatever court it is is going to follow the same set of rules statewide in terms of the statement of facts to the court of appeals.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I would recommend doing something like that, eliminating in the title "Election," and I am not sure exactly what we could replace it with, but the first sentence would be a sentence in my view that would be changed to provide that any court that is authorized by law to make or to authorize the making of an electronic recording in lieu of a stenographic record of the court's proceeding, you know, may do so in accordance with this rule or some language like that. Now, that doesn't make these rules very good, but they are not very good now, and you can't find them. It's better to have them not be very good and subject to scrutiny than published as appendices to various courts of appeals opinions.

MS. DUNCAN: You are still going to look at the rule and not know.

PROFESSOR DORSANEO: Well, I can't fix everything right now.

HONORABLE C. A. GUITTARD: You are talking about making prescriptions of technological requirements which I am not sure the Supreme Court wants to make, and I'm sure we couldn't figure out.

MR. YELENOSKY: That's right.

MR. ORSINGER: Well, we don't need to.

CHAIRMAN SOULES: Lunchtime. The appellate rules are closed, and we will get back to them another time.

PROFESSOR DORSANEO: Actually we have now covered everything in the appellate rules report except for the civil procedural companion rules.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 16, 1994, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,034.00 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 26th day of September, 1994.

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D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/94

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