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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

MARCH 17, 1995

(AFTERNOON SESSION)

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Taken before D'Lois Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 17th day of March, A.D., 1995, between the hours of 1:20 o'clock a.m. and 5:30 p.m. at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

ORIGINAL

MARCH 17, 1995

MEMBERS PRESENT:

Luther H. Soules III
Prof. Alexandra Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Joseph Latting
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Richard R. Orsinger
David L. Perry
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Honorable Anne T. Cochran
Charles F. Herring
Donald M. Hunt
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas A. Leatherbury
Gilbert I. Low
John J. Marks, Jr.
Robert E. Meadows
Harriett E. Miers
Honorable David Peeples
Anthony J. Sadberry

EX OFFICIO MEMBERS PRESENT:

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

EX OFFICIO MEMBERS ABSENT:

Doyle Curry
Paul N. Gold
Honorable Doris Lange
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
MARCH 17, 1995
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CHAIRMAN SOULES: All right. We will go to work, and we will go to work on the appellate rules now. We were at -- let's see. If I have kept inventory here, we have covered number -- okay.

MR. BABCOCK: The Chair is trying to get our attention.

CHAIRMAN SOULES: Let's see. We have taken care of, what, one, two, three --

HONORABLE SARAH DUNCAN: Did we do one?

HONORABLE C. A. GUITTARD: We didn't do one.

HONORABLE SARAH DUNCAN: I'd like to do one.

CHAIRMAN SOULES: All right. Let's do one.

HONORABLE C. A. GUITTARD: All right. Let me put one before you. This question I don't think has been discussed in this committee, and that is whether or not briefs and also statements of fact and transcripts may be printed on both sides of the paper. The proposal is to permit that,

provided that the paper won't allow the printing to show through and provided the brief will lie flat when open. The thought is there that that would make it just like any sort of book you could open and would save half of the paper and half of the storage space, is to simply permit briefs and statement of facts and transcripts to be printed on both sides of the paper, making sure that there is no reduction of legibility or inconvenience of handling. So that's the proposal.

MS. SWEENEY: So moved.

CHAIRMAN SOULES: Been moved. Second?

MS. BARON: Second.

CHAIRMAN SOULES: Discussion? Sarah Duncan.

HONORABLE SARAH DUNCAN: Yeah. So long as both provisos are in there.

HONORABLE C. A. GUITTARD: Right.

HONORABLE SARAH DUNCAN: What I anticipate that to mean is that we are going to continue to get transparent paper that's

going to be duplex and --

HONORABLE C. A. GUITTARD: Well, send them back.

HONORABLE SARAH DUNCAN: Right. As long as that proviso is in there.

CHAIRMAN SOULES: Okay. Where do you want to put that?

HONORABLE C. A. GUITTARD: In rule --

PROFESSOR DORSANEO: It would be in 4(d).

CHAIRMAN SOULES: On page 7?

PROFESSOR DORSANEO: On page 7. Somewhere on page 7.

CHAIRMAN SOULES: Let's see, "and shall use only one side of each sheet."

HONORABLE C. A. GUITTARD: Strike that.

CHAIRMAN SOULES: Strike that.

HONORABLE C. A. GUITTARD: And say it may be on one -- both sides of the sheet provided -- I don't like "provided."

"Both sides of the paper if it's bound so it's to lie flat when open and the printing does not show through the paper."

JUSTICE CORNELIUS: Did the appellate rules subcommittee approve this?

HONORABLE C. A. GUITTARD: I think so.

PROFESSOR DORSANEO: I'm always against it, but...

JUSTICE CORNELIUS: Well, I'm against it, too. I hate to go against my fellow subcommittee vote if we voted on it.

MR. ORSINGER: I don't think we voted on it. I don't recall voting on it.

CHAIRMAN SOULES: Well, it's been moved and seconded. Any discussion about this now? So, Judge Cornelius, you want to give us your view?

JUSTICE CORNELIUS: I don't think we ought to do it. I believe it will be abused if we do, and I don't know how we could really enforce something that calls for it to lie flat when it is open. I mean, there is so many variations, and I'm afraid there will be so many attempts to comply with the rule that are unsuccessful that it will make it a very difficult and cumbersome thing. I would rather just leave it like it is.

HONORABLE C. A. GUITTARD: Can't you just send the brief back under that Rule 4, what is it?

JUSTICE CORNELIUS: Well, we could, but I doubt if we would do it very often.

PROFESSOR DORSANEO: My point is my secretaries and I have great difficulty operating on both sides of a page. I deal with it many times before it is bound, and I will drop it on the floor and spend a lot of time trying to put it back in order, and I think that that is my main reason for not liking it.

MR. ORSINGER: That's because you're a professor.

CHAIRMAN SOULES: Anyone else have any comment about this?

All right. Those in favor of deleting "shall use only one side of each sheet" and in lieu thereof put "may be printed on both sides of the paper if bound so as to lie flat when open and the print on one side will not show through the other side." Those in favor show by hands. 13.

Those opposed? Four. Vote is 13 to 4 to make the change.

CHAIRMAN SOULES: When did we go to this one side rule anyway?

HONORABLE C. A. GUITTARD: I don't know.

MR. BABCOCK: Snuck it by you.

CHAIRMAN SOULES: I can't remember. I know when I was a briefing attorney we used to have nice printed -- we would get something from a big firm like yours, Chip, printed on both sides.

HONORABLE C. A. GUITTARD: While we are on the subject I guess we ought to consider whether that ought to apply also to the transcript and the statement of facts.

CHAIRMAN SOULES: Bonnie, do you have any thoughts on whether it should apply to the transcript?

MS. WOLBRUECK: I have no objections to it. I know that in some of the smaller counties they may not have the copy machines that do the automatic two-sided copying.

HONORABLE C. A. GUITTARD: They

don't have to.

MR. ORSINGER: It's not required. It's permitted.

MS. WOLBRUECK: Okay. It's just permitted?

MR. ORSINGER: Uh-huh.

MS. WOLBRUECK: Okay. I would see no problems with it if it's not required.

HONORABLE C. A. GUITTARD: David?

MR. JACKSON: I think it's a great idea.

CHAIRMAN SOULES: Where does that go?

HONORABLE C. A. GUITTARD: It would go in the order concerning the --

CHAIRMAN SOULES: What page?

JUSTICE CORNELIUS: I have never seen a statement of facts that would lie flat.

PROFESSOR DORSANEO: 177 is where it begins.

HONORABLE SARAH DUNCAN: But wouldn't it be nice to.

JUSTICE CORNELIUS: If you

could.

CHAIRMAN SOULES: Rule 1.

PROFESSOR DORSANEO: It's on page 176 in paragraph (c).

CHAIRMAN SOULES: 176, paragraph (c).

PROFESSOR DORSANEO: For the statement of facts. For the transcript we have to back up.

CHAIRMAN SOULES: "Each separate hearing shall be bound in a separate volume or as many volumes as necessary to prevent too thick," and then we will make the same and --

PROFESSOR DORSANEO: No. One side. It's in (c).

CHAIRMAN SOULES: "And printed" --

PROFESSOR DORSANEO: On one side only.

CHAIRMAN SOULES: "On opaque and unglazed white paper." And then we will insert from page 7. Okay. And where is the next one?

MR. PARSLEY: I think it would

be on page 171, Luke.

PROFESSOR DORSANEO: Right.

MR. PARSLEY: But there is no provision now regarding it at all.

CHAIRMAN SOULES: 171?

PROFESSOR DORSANEO: It doesn't say "one-sided." It just has to lie flat.

CHAIRMAN SOULES: "In such a manner that when open transcripts shall" -- let's me see. Do we have binding on this other?

MR. ORSINGER: Luke, does this apply to transcripts or just statement of facts and briefs?

HONORABLE C. A. GUITTARD: Both.

MR. ORSINGER: Can I comment on the transcript?

HONORABLE C. A. GUITTARD: Okay.

MR. ORSINGER: In my experience the transcripts have always been bound at the top, and unless we are going to bind them on the side we may have to worry about the fact that you may have to turn the transcript one

way and then turn it back the other.

JUSTICE CORNELIUS: Exactly.

MR. ORSINGER: Do you see what I am saying?

HONORABLE C. A. GUITTARD: If it's on 11 by 8 1/2 paper, well, perhaps it ought to be by the side. Why should the transcript as distinct from any other paper be bound at the top? Only if it's a 14 by --

MR. ORSINGER: 8 1/2 by 14.

HONORABLE C. A. GUITTARD: That's the only reason for binding it at the top.

MR. ORSINGER: And by law there is not supposed to be anything that size anymore, right?

HON. C. A. GUITTARD: Right.

MR. ORSINGER: By rule.

HONORABLE SARAH DUNCAN: I move that we require that transcripts be bound on the left-hand side.

PROFESSOR DORSANEO: Where is Judge Clinton?

HONORABLE F. SCOTT MCCOWN: No.

MR. JACKSON: Here is the

reason.

HONORABLE F. SCOTT MCCOWN: You can't require transcripts to be bound on the left-hand side because the rule that requires 8 1/2 paper is relatively new, and in many, many cases, particularly family law cases, you are going to have papers that are the old legal size, and that's going to be true for years to come.

CHAIRMAN SOULES: Okay. Right now on the transcript we don't say where it has to be bound or what size it has to be. How many in favor of leaving it alone? Well, Sarah really moved the other way. Six.

How many in favor of binding it on the left-hand side and --

HONORABLE SARAH DUNCAN: And 8 1/2 by 11.

CHAIRMAN SOULES: Pardon?

HONORABLE DUNCAN: On 8 1/2 by 11.

CHAIRMAN SOULES: And 8 1/2 by 11. Six. Then I haven't stated it very well because I can't get -- the division of the house looks like a tie. State what you want,

Sarah, and then we will vote on it up or down.

HONORABLE SARAH DUNCAN: I would like to have the transcript 8 1/2 by 11, bound on the left side. If the papers are in excess or on 14-inch paper then they be reduced to fit 8 1/2 by 11.

CHAIRMAN SOULES: And printed on both sides, permit printing on both sides?

MR. ORSINGER: Optional.

HONORABLE C. A. GUITTARD: Optional.

CHAIRMAN SOULES: Okay. Does everybody understand what Sarah's proposing?

HONORABLE F. SCOTT MCCOWN: Let me just --

CHAIRMAN SOULES: Does everybody understand what she is proposing? Okay. I assume you do. Now, discussion?

HONORABLE F. SCOTT MCCOWN: Let me just point out that in a lot of counties the clerk is not going to have access to a copier that readily reduces, and in many cases you are going to have paper that's legal size because of the age of the case or because people have filed on legal size paper. You

have got clerks that are going to have a stock of binders they have invested in. They have been doing it that way forever, and you are asking them to make a change for what purpose? And you're asking them to bear a cost that they don't bear now for what purpose?

CHAIRMAN SOULES: Okay. Well, now, let me say this. We have got in the rule right now on page 171, "The clerk shall make a legible copy on 8 1/2 by 11-inch paper of all such proceedings, instruments, and other papers and arrange the copies in ascending chronological order by date and so forth." So right now the way the rule is written without this then Sarah's idea of 8 1/2 by 11 is already written into the rules on page 171. Now, that doesn't mean we can't change it, but it's already there. David.

JUSTICE CORNELIUS: But it's not being followed.

CHAIRMAN SOULES: David Jackson first and then I will get to you, Judge.

MR. JACKSON: The reason we bind exhibits at the top is probably the same reason that the transcript would be bound at

the top. It's made up of a compilation of documents. They could have marginalia on either the right or left-hand margins. If you start punching holes in the side, you start taking away a lot of information that's on the page, and when you punch it at the top it's usually a letterhead or something up there that you are not really destroying any information by punching it and binding it at the top as opposed to down the side. If they set up their margins for a half-inch margin or whatever and you start bunching holes and binding on the side, you can't read it.

CHAIRMAN SOULES: So when you bind exhibits you bind them at the top?

MR. JACKSON: We bind them at the top.

CHAIRMAN SOULES: Judge, I was going to recognize you next.

JUSTICE CORNELIUS: I was just going to observe that the rule requires 8 1/2 by 11, but it is not followed.

HONORABLE SARAH DUNCAN: It doesn't require it now.

CHAIRMAN SOULES: Well, this is

a new -- this isn't in the current rule, is it?

HONORABLE SARAH DUNCAN: This is new. This is new.

JUSTICE CORNELIUS: Oh, I thought you meant it was in the current rule.

CHAIRMAN SOULES: But it's in the text of what we have already discussed in the past.

JUSTICE CORNELIUS: I see. Already adopted.

CHAIRMAN SOULES: But it's not in the current rule. Okay. Who wants to go next? Bonnie.

MS. WOLBRUECK: I would agree with Judge McCown. Personally it would not matter to me, but I know in many clerks' offices it would certainly cause a problem with regard to not having access to a copying machine. It does require extra expense for the purchase of that type of machine to reduce those legal size documents to the 8 1/2 by 11.

And the binding, I agree with David Jackson also in as far as where they are bound because as long as you can guarantee that the

pleadings are all submitted with a large enough margin on the side to where we would copy them and they are bound to where they would still be legible then it would not be a problem.

CHAIRMAN SOULES: Even these little desktop copiers now do size reductions. That might not -- maybe some clerks' office would have an old machine that didn't, but they virtually all come with that now. I don't know whether there would be any out there that would have to be replaced or not.

MS. WOLBRUECK: I am not sure either. Personally I am not sure, but I do know that counties are not real progressive sometimes with the purchasing of equipment.

CHAIRMAN SOULES: I mean, a 600-dollar copier will reduce today, but that may not make any difference anyway. Richard Orsinger and then Sarah.

MR. ORSINGER: My comment is not directly on Sarah's motion, but it's indirectly on Sarah's motion. If we are going to have two-sided copies of any documents that are bound at the top, I will put $5 on the

table right now that nine out of ten times you are going to have to turn it back and forth as you flip the pages because most people are used to laying something down and then turning it sideways, and now they are going to have to lay it down and then flip it, and it may be that after a while somebody will catch on, but I can't imagine anything that would be more disruptive to an appellate judge than to be unable to read a simple petition or a motion or something like that without having to constantly turn it. So if we are going to permit two-sided copying with binding at the top, I think we ought to have a proviso that it can be read without flipping it, and those are not my words that I am suggesting but my concept.

CHAIRMAN SOULES: Okay. Sarah.

HONORABLE SARAH DUNCAN: If it's 8 1/2 by 14, in my view we can't have duplex pages. It's hard enough to read a transcript as it exists now without adding that to it. Second, the only thing we have in our files now that's 8 1/2 by 14, transcript, and it is a pain in the neck. I mean, a desk

is only so big, and when you have got ten volumes of transcript and five briefs and a statement of facts, those transcripts just don't fit anywhere.

I think most copiers today have reduction on them. You know, if they have got a supply of old covers, they can cut them off, but this is the only thing left in the practice that's 8 1/2 by 14. You have to configure your file cabinets for 8 1/2 by 14, not 8 1/2 by 11. You have to buy a larger size Read-well. I mean, it just goes throughout the process. We are conforming everything in the process around these few 8 1/2 by 14 pages, and that makes no sense to me.

CHAIRMAN SOULES: Anything else? Are we suggesting that the statement of facts change, that you could print the exhibits on both sides and bind them at the top? Or there is really not any discussion about the exhibits.

HONORABLE C. A. GUITTARD: Well, if they are copied and lie flat, you can bind them on the left side. That wouldn't obliterate anything.

CHAIRMAN SOULES: Unless there is something in the left-hand margin or the right-hand margin.

MS. DUNCAN: Yeah. But there are things in -- I mean, as a practitioner I have lost more that was in the top than I have ever lost that was on the side.

In the Fifth Circuit everything is 8 1/2 by 11. Everything is bound on the left, and I don't remember ever having lost anything of significance because it was bound on the left.

CHAIRMAN SOULES: In the statement of facts rule we don't speak about how exhibits are to be presented, do we? Is that right?

HONORABLE C. A. GUITTARD: Except they are supposed to be copied. They are not supposed to be original unless there is an order.

HONORABLE SARAH DUNCAN: Exhibits are sort of a hard thing to dictate because they come in all shapes and sizes.

CHAIRMAN SOULES: That's right.

MR. ORSINGER: Sometimes even charts that are three feet by three feet.

CHAIRMAN SOULES: Okay. Sarah, once again, state your proposition.

HONORABLE SARAH DUNCAN: I move that we require that transcripts be prepared on 8 1/2 by 11 paper, bound on the left-hand side. They may be duplexed if they will lie flat when open, and opaque paper is used.

CHAIRMAN SOULES: Any further discussion? Those in favor show by hands. 12.

Okay. Those opposed? To six. Okay. 12 to 6 that passes, and could we get a insert page on that today or tomorrow? Just take a page out of what we have got here, write in where you want it, where you want it said, and what you want said. Maybe, Sarah, you could write it on page 171.

HONORABLE C. A. GUITTARD: Lee has a draft of that already.

MR. PARSLEY: I don't have it here, but yes, I have got a draft, and I will get it for you.

CHAIRMAN SOULES: Okay.

MR. PARSLEY: I will have it for tomorrow morning if that's okay.

CHAIRMAN SOULES: If you will just interline it on page 171 and give me a new page 171. We will put it in here for Holly to start because we intend to get this to the Court next week in redline, of course. Okay.

HONORABLE C. A. GUITTARD: And about the statement of facts, are we going to do that the same way?

CHAIRMAN SOULES: We already did that.

HONORABLE C. A. GUITTARD: All right.

CHAIRMAN SOULES: I put that in already.

HONORABLE C. A. GUITTARD: And Lee has a draft of that as well.

CHAIRMAN SOULES: Well, what I was going to do on that, look at page 176.

MR. PARSLEY: You just want it written in and copied so you can insert it?

CHAIRMAN SOULES: Well, I have already got this written up for Holly on that part.

On 176(c), "The statement of facts shall

be typed or printed on..." Strike "one side only of" and pick up "opaque and unglazed white paper not less than 13 pound weight, 8 1/2 by 11 inches in size and may be printed on both sides of the paper if bound so as to lie flat when open and the print on one side will not show through the other side." Just what we wrote out for the other one.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: For briefs. So that takes care of the statement of facts and briefs, and I need your input, Lee, on the transcript.

What's next? We did two, correct? And we did three.

PROFESSOR DORSANEO: Seven.

CHAIRMAN SOULES: And did we do four?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: And that is Rule 7. Okay. So we are going to do Item 4 on the subcommittee report right now. Either you, Bill, or Judge Guittard can speak to that. What page should we be looking at in

the materials?

PROFESSOR DORSANEO: 14.

CHAIRMAN SOULES: Page 14.

PROFESSOR DORSANEO: Well, let me talk about this attorney in charge draft first by making sure, does everybody have one of these?

HONORABLE C. A. GUITTARD: Extra page.

PROFESSOR DORSANEO: Extra pages.

HONORABLE C. A. GUITTARD: Single page.

PROFESSOR DORSANEO: Let me just say generally that in dealing with the attorney in charge concept those of us on the appellate rules committee, especially a small vocal group, became concerned that the attorney in charge would indicate to the public at large more responsibility than perhaps the attorney in charge has with respect to the handling of the matter. So that sent us back to drafting a little bit more detailed provisions concerning the entire concept. And with respect to the details, I'd

ask Judge Guittard or Lee or whoever to explain the specific details.

HONORABLE C. A. GUITTARD: Well, I would say that instead of saying that the attorney in charge of the trial court is deemed to be the attorney in charge on appeal, the rule would say, "The attorney in charge for a party in a proceeding in an appellate court, other than an appellant, is the attorney whose signature first appears on the first document filed on behalf of that party in the appellate court. Any party may designate an attorney in charge or a different attorney in charge by filing a notice stating the name, mailing address, telephone number, telecopier number, and State Bar of Texas identification number of the attorney being designated as the attorney in charge. The attorney in charge may also designate one other attorney for that party to receive notices and a copy."

Now, subdivision (b) is a little bit of a change. It says, "All communications from the court or other counsel with respect to any proceeding in an appellate court shall be sent

to the attorneys in charge for all parties to the proceeding. If no attorney in charge has been designated by, or identified for, a party in accordance with paragraph (a), the clerk of the court of appeals may send the notice of the filing of the notice of appeal to the attorney in charge for that party in the trial court."

In other words, it doesn't say he's deemed to be the appellate attorney in charge on appeal, but simply that the notice, a copy of the notice, may be sent to him. Now, here is an innovation that I believe Richard Orsinger is primarily responsible for, and that is the question of whether or not an attorney in the trial court should be -- should have the burden to proceed with the appeal unless he goes through the motion to withdraw procedure. The concept is that the attorney have a -- the trial attorney should have the right to withdraw as a matter of right.

I presume that means the case where he has not been employed to carry on the appeal, and if so, this would give him that right, the

notice of the non-representation, subdivision (3). "If the attorney in charge of the trial court is sent the notice of the filing of the notice of appeal by the clerk in accordance with paragraph (b), that attorney may, within 15 days of receipt of the clerk's notice, file a notice of non-representation in the appellate court." In other words, he doesn't have to file a notice of motion to withdraw, merely a notice that he is not representing the party anymore.

"The notice of non-representation shall state: (1) that the attorney is not representing the party on appeal, (2) that the future communications by the court or other counsel should be sent directly to the party, and (3) the name and last known address and telephone number of the party. The attorney filing the notice shall certify that a copy of the notice or non-representation was served on the party. If the attorney does not timely file the notice of non-representation, that attorney shall be deemed to be the attorney in charge for the party." Of course, that's to be understood in light of the rules that any

party can designate a new attorney in charge at any time. Steve.

MR. YELENOSKY: Yeah. Judge Guittard, my question is what's the consequence of failing to file a notice of non-representation within the 15 days, and how could that change what is or is not a contractual relationship between the attorney and the client as to representation?

CHAIRMAN SOULES: Richard, you want to respond to that?

MR. ORSINGER: Yeah. There were two views at the subcommittee level and from my conversations here today I would say at the committee level. Some people believe that if you sign on to handle a trial proceeding that you are obligated to handle the appeal whether you want to or not. Another position is, is that you are obligated to handle it unless your contract specifically excludes it.

MR. YELENOSKY: Right.

MR. ORSINGER: And then the third view is that you are not obligated to handle the appeal just because you agreed to

represent at the trial.

MR. YELENOSKY: Well, let's say your contract does specify that it does not include any appeal. I would assume you have a responsibility if you are getting notice from the court to make the client aware. Regardless of what it says here you would have a malpractice responsibility, but if you fail to notify the court within 15 days, I don't think how -- I don't see how you could change the responsibility vis-a-vis the client other than your responsibility to pass on notice to the client unless you make sure the court is directing it to them.

MR. ORSINGER: Well, I would agree, and I certainly don't want there to be any legal duty when it's been exempted. And by the way, just in case anyone cares, Texas Disciplinary Rule 1.02, which has to do with scope and objectives of representation, Comment 6 talks about this exact situation, and it has as an example, and I will quote, "For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client," that

means you lost so it wouldn't apply to winners, "but has not been specifically instructed concerning pursuit of an appeal the lawyer should advise the client of the possibility of appeal before relinquishing responsibility in the matter."

MR. YELENOSKY: That's clear.

MR. ORSINGER: I don't want anything in this rule that would arguably create a legal duty to represent when you don't actually have one in law.

MR. YELENOSKY: Well, then that's why I think that I don't understand the purpose of this because if you don't have a paragraph (c), the attorney has a responsibility, you have read the rule, to make sure that the client understands what his or her rights are and to pass along information from the court until he or she makes sure the court's communicating directly with the party or his or her new attorney. So what does (c) do except appear to create a attorney-client relationship after 15 days?

MR. ORSINGER: I initially was in favor of not having the trial lawyer deemed

anything for purposes of appeal, but the source of this change came from Ken who said we often don't know who to mail notices to when an attorney has not made an appearance in the appellate court, and this represents a kind of a compromise between the view that the trial lawyer should automatically be the lawyer on appeal unless something is done to change that --

MR. YELENOSKY: Right.

MR. ORSINGER: -- versus there being no lawyer.

MR. YELENOSKY: Well, you would send it to the trial lawyer, I would assume, until you hear from the trial lawyer otherwise, and I would think it's incumbent on the trial lawyer to tell you otherwise, and I don't understand --

CHAIRMAN SOULES: That's the problem. That's the problem he raised. He doesn't know what to do.

MR. LAW: Many times the trial lawyers -- I mean, the lawyer is going to not respond at all to us, to our cards and notices. If they are no longer representing

the client, they don't let us know. They just don't answer our mail. It happens a lot.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: Yes, sir. Bill Dorsaneo.

PROFESSOR DORSANEO: In some of our earlier drafts on this -- and we spent an enormous amount of time working on this Rule 7, probably 50 or 60 hours in time altogether, but in some of our earlier drafts we tried to limit the concept of attorney in charge by saying that that is -- and this was part of our discussion about what that means in the contract context -- to say that that means that you have responsibility for receiving and transmitting notice, and we could add that same thought to the end of the last sentence in this proposed paragraph (c), and would that solve your problem, Steve?

MR. YELENOSKY: Well, my only -- yeah.

PROFESSOR DORSANEO: "For the purpose of receiving and transmitting information or notices received from the

court."

MR. YELENOSKY: It would solve my problem if we got rid of the 15-day provision and said that the trial attorney is responsible for communicating and transmitting notice to his former client until such point as he has notified the court or something along those lines because what is the significance of failing to notify the court within 15 days? What happens on the 16th day?

MR. ORSINGER: You're the attorney in charge.

JUSTICE CORNELIUS: For the purpose of receiving notices.

MR. YELENOSKY: For the purpose of receiving notices and then how do you get out of that?

HONORABLE C. A. GUITTARD: Then you file a motion to withdraw.

MR. YELENOSKY: Then you're stuck with a motion to withdraw.

JUSTICE CORNELIUS: Non-representation.

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: I

remember researching this once for you. I believe it was for Conzer, and it was my understanding at that time that it doesn't matter what we do in this rule. You are the attorney on appeal until you withdraw and that the court is not obligated to let you withdraw.

MR. YELENOSKY: Well, I don't know if that's the jurisprudence in Texas or not. I'm concerned if it is because, you know, I see that who represents on appeal is a question of contract between the client and the lawyer. And are we saying that you have become the attorney in charge for purposes of notice on the 16th day even if they have gone out and retained somebody else and that attorney has failed to notify the court?

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT MCCOWN: My concern about this is that -- and I am not sure that I agree with Sarah about what the law is. I went and researched this once because it comes up a lot, and my understanding is that a lawyer's obligation as far as the court is concerned terminates with

judgment. Now, he may have obligations under contract with the client but that his obligation to the court terminates at judgment, and there are many, many, many cases that are over with for all practical purposes because the lawyer has lost touch with his client or his client's not going to participate anymore in this litigation. You have got an uncollectable or unenforceable judgment, and we are making a lot of work for the lawyer, and we are putting the lawyer to a lot of expense if we require him to do anything.

It seems to me that we ought to just say that when you appeal you can send notice until there is an attorney in charge to the client at his last known address or to the other party at their last known address. Put the onus on the party. Send the notice direct to him at his last known address, and until he has got an attorney that appears he gets notice direct. Leave the lawyer out of it.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I am not

real happy with that either just because of my experience in the type of practice that I have done and some of the clients that we have represented, and I think we would have a real concern that notice would be going directly to the party. Where I work now at Advocacy that could be a real concern if you have somebody with a mental disability, for instance, and no guardian.

So I don't know that what I am suggesting at this point makes sense; but on the other hand, I am concerned, for instance, at Advocacy that somehow we could end up with one of our 20-some-odd attorneys out there could end up attorney in charge on appeal when we have quite explicitly said in our retainer agreement that it doesn't cover appeal. We have notified the client at the end of the case that we are not representing on appeal and these are the deadlines, but somehow somebody has missed the 15th day to notify the court.

HONORABLE SARAH DUNCAN: And I am not saying that would not be good cause that would let a court permit you to withdraw.

All I'm saying is that whatever the responsibility is to the court -- and I didn't research that. I researched the responsibility to the client. That it does require a withdrawal either in a trial court or in the appellate court, that you don't have this gap that I think is concerning Ken in terms of who do we send notice to.

And when I said that I don't think the court is obligated to let you withdraw the situation that a friend of Luke's has was they had a client that quit paying, and the attorney wanted to withdraw, and we were not able to say that he could. It was a motion to withdraw, and you are at the mercy of the court.

PROFESSOR DORSANEO: Well, there are a couple of other things we could do. We could change -- to take Scott McCown's point we could change paragraph (b) to either replace "attorney in charge for the party in the trial court" with "party," or put both of them in there and let them sort out their deals altogether. Now, the difficulty I think that gave rise to this entire problem is when

we married the concept of attorney in charge with the withdrawal of counsel concept by putting them in the same rule. Now, we might be able to achieve essentially the same result eliminating paragraph (c) if we just put paragraphs (a) and (b) over in Rule 4 when we talk about service, and then it wouldn't look like the attorney in charge is somebody who needs to withdraw, but it still kind of would, and we have worked on this for a long time. Let's finish it.

CHAIRMAN SOULES: Well, there are two relationships that have to be severed somehow after final judgment. One is the relationship you have with the courts, and the other is the relationships you have with your clients, and what Richard is talking about over there reading out of Rule 1.02, that's premised on the basis that you have an agreement up front that you have a limited -representation. If you don't have an up front limited representation, you don't even get the benefit of what you are reading.

MR. ORSINGER: That's right.

CHAIRMAN SOULES: You are just

stuck. It's the tar baby, and the same, you have a relationship with the court. So we have got to provide something. You are something. Why don't you call yourself something?

HONORABLE SARAH DUNCAN: You're stuck.

CHAIRMAN SOULES: You have a relationship with the client. You have a relationship with the court. You may not want to be called the attorney in charge. You may want to be called something else, but you have capacities and responsibilities in both of those capacities, and to have a path that spells out what you do seems to me to be the right way to approach this instead of just lingering. As in the study that we did, there really aren't very many answers out there other than you're stuck. The tar baby's got you. You don't got it.

So what I have said is just the way it is, I think, and so we have to -- we either come to grips with it, or we ignore it, and there has been a whole lot of work done. We might as well try to see this through. So

what do we do to try to see it through, given all of that? Scott McCown.

HONORABLE F. SCOTT MCCOWN: Well, I agree with you, Luke. I think we need an answer, whatever it is, but let me just point out, though, to kind of -- I don't know if it clarifies our thinking or confuses it, but none of us would think that two years after a judgment was final if the opposing party filed a bill of review that we, the lawyer, could simply be served that document and that we would have any obligations to the client, I don't think.

CHAIRMAN SOULES: I do.

PROFESSOR DORSANEO: Well, I think there is actually even case law suggesting the contrary of that.

HONORABLE F. SCOTT MCCOWN: Let me give you another example. Family law case, divorce, it's over. Two years later a motion to modify is filed. It has to be personally served on the client. Do you think that you have any continuing obligation as the lawyer on the divorce in absence of being retained again?

CHAIRMAN SOULES: Is there something in the family law statute that cuts you loose? Why do they have to be served again personally?

HONORABLE F. SCOTT MCCOWN: They have to be served personally.

MR. ORSINGER: But the family code requires a citation on a motion to modify.

HONORABLE F. SCOTT MCCOWN: Just like the bill of review.

MR. ORSINGER: It didn't originally, but this problem came up, and so we required a citation even though it's a, quote, "motion" and not a petition.

HONORABLE F. SCOTT MCCOWN: The bill of review has to be served again personally.

CHAIRMAN SOULES: And you are served -- do they serve the lawyers, too?

MR. ORSINGER: No. No.

HONORABLE F. SCOTT MCCOWN: No.

MR. ORSINGER: There is not a family lawyer that I know of in the state that thinks you have a duty to handle a

modification after the judgment's gone final in the case where you were the lawyer.

HONORABLE F. SCOTT MCCOWN: What about in enforcement actions?

MR. ORSINGER: That comes up all the time. Can they serve postjudgment discovery? Can they serve postjudgment motion for contempt? Do you continue as the attorney of record after the judgment?

HONORABLE F. SCOTT MCCOWN: And it could be years after the judgment. I don't think so.

CHAIRMAN SOULES: I do.

HONORABLE F. SCOTT MCCOWN: I think the law is when the judgment is final that that terminates the lawyer's obligation and that postjudgment stuff has to be served on the client.

PROFESSOR DORSANEO: We are never going to agree about what the law is. What kind of a rule do we have?

CHAIRMAN SOULES: Postjudgment discovery does not have to be served on the client. It can be served on the attorney of record. That's clear as crystal.

MR. YELENOSKY: I have a suggestion that maybe will work.

HONORABLE F. SCOTT MCCOWN: I don't think that's right.

MR. YELENOSKY: In the federal system you file a notice of appearance and indicate affirmatively that you are into the appeal. Could we flip it and say that an attorney who is representing on -- initially the notice will be sent to the attorney in charge from the trial court, and I guess, indicate that an attorney who's going to continue on the appeal needs to notify the court within a certain period of time, or after that period of time all notices are sent to the party. That would take care of my problem initially. That would solve the problem of a client who's not going to be capable of dealing with the notice up front, and therefore, the attorney will get that notice. At the same time it takes care of the problem of being stuck with it because you have missed 15 days or at least being stuck with filing a motion to withdraw and et cetera.

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: I would suggest that we are not attempting to deal here with the attorney's duty to the client. I think that that's something that we can't deal with by this rule. I think what we are dealing with is the relation between the attorney and the court and to whom should the notices be sent, and the rule as drafted here simply says that you send the notice to the attorney that was in charge in the trial court unless he, within 15 days, files a notice to the court saying that he's not been employed or that he's not representing the party on appeal. In that event either you have a new designation of a new party under subdivision (a) of a new attorney on appeal or you have to send the notice to the individual client if there is no attorney representing him, and this rule makes that clear, it seems to me.

MR. YELENOSKY: I think it does make it clear. I guess I am more comfortable with the presumption that unless the attorney

affirmatively indicates that he is representing on the appeal that at some point the clerk starts sending notice just to the party, but I mean, I can live with it either way. It's just that, you know, there can be an incongruity there between what's clear between the client and the attorney just because 15 days passes without some action.

CHAIRMAN SOULES: One other piece of this, suppose the clerk does start sending papers to my client but not to me, and my client is on a cruise and for the next 60 days. What happens? I'm expecting to hear something.

MR. YELENOSKY: Well, if the rule is that initially notice is sent to you and that if you want to continue to receive notice you need to basically give notice of appearance to the court or tell the court, "Yeah, continue to send it to me," then that's not a problem because your law office will get that notice and will continue to have notice sent to you.

CHAIRMAN SOULES: So I have to affirmatively do something to stay on the

mailing list?

MR. YELENOSKY: Yeah. Well, the alternative is what's written here, which is you have to affirmatively do something to say, "I have no responsibility here."

CHAIRMAN SOULES: Okay. Sarah Duncan.

HONORABLE SARAH DUNCAN: That's my point is -- and I rarely disagree with Judge Guittard. I don't think this rule merely governs the attorney's relationship with the court for notice purposes now that subsection (c) is in there. As Steve says, if he files a notice of non-representation with the court I think your words were "I have no responsibility with respect to this." I don't think we can decide that by rule. I don't think it's appropriate that we decide it by rule unless somebody is going to do a brief on exactly what an attorney's responsibilities are postverdict.

I mean, having a notice of non-representation in the rule to me implies that that attorney successfully terminated that relationship, and I don't think we can do

that by rule, and I don't think we should do it by rule.

CHAIRMAN SOULES: Well, you can get off the mailing list, but you can't cancel your malpractice exposure by doing this.

MR. YELENOSKY: No. I think you could just say it's a notice provision, and the question is what's the default and when does it begin to operate? It doesn't have anything to do with the contractual representation, and you're right, and this can't change the contractual representation agreement. The question is, do initial notices go to both, one, and is there any switch after a certain period of time?

The way this is written notice goes to the attorney and stays with that attorney forever until he does something affirmatively, which places the burden on the attorney who has made it clear he has no responsibility vis-a-vis the client.

The other default would be to say you send notice to the attorney, and if he has not affirmatively indicated "I am in this case," then notices are going to go to the party.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: In my view (c) is in here because there are lawyers or were lawyers on the subcommittee that thought you had the duty unless there was some reason you got out of the duty.

HONORABLE SARAH DUNCAN: That's right.

MR. ORSINGER: And this is a way of forcing people to announce to the world that they are getting out of the duty.

MR. YELENOSKY: Uh-huh.

MR. ORSINGER: Now, I don't personally believe that they have the duty, but that's just my opinion. Now, you could accomplish the notice problem by just simply saying communications will be sent to the attorney in charge on appeal, and if there is no attorney in charge on appeal, then they will go to the attorney in charge in the trial court until such time as the attorney in charge in the trial court sends to the appellate clerk the address of the client and the statement that correspondence should go directly to the client.

MR. YELENOSKY: That was my original proposal.

MR. ORSINGER: Then it's just a pure notice issue.

MR. YELENOSKY: Right. You take out the 15 days.

MR. ORSINGER: (C) does more in my view than pure notice. (C) is in my view the rules recognizing the view that you have a duty to represent, and that is why if you don't come forward and say for some unusual reason, "I don't have a duty," then you are, quote, "deemed" to be the attorney in charge, and I think that malpractice lawyers will use that. I think it will be down on the grievances filed down at the courthouse and everything else, and I think that this is something of substance that we are talking about, which is why we have fought it.

MR. YELENOSKY: Well, the other thing, I mean, originally my proposal was take out the 15 days, and basically the attorney is on-line for passing along communications, whatever his contractual relationship on representation, until such time as he or she

straightens out with the court you need to be communicating with the party, and the way that's clear is even if you had this 15-day rule, and let's say you sent in your notice within 15 days. I am not on this case, and the clerk at the court somehow missed that, and on day 30 you got something from the court that clearly hadn't been sent to the party as it should have. I think you still have an obligation to pass that along to your client until such time as you get it straightened out with the court.

PROFESSOR DORSANEO: You can do that at the end of this (c) by saying "shall be deemed the attorney in charge for the party for the limited purpose of receiving and transmitting communications from the court or other counsel with respect to the proceeding in the appellate court until a notice of non-representation containing the information set forth in this paragraph is filed."

MR. YELENOSKY: Okay.

PROFESSOR DORSANEO: And that's a lot of engineering.

MR. YELENOSKY: But, well, how

does the 15 days help things? What does that do other than --

PROFESSOR DORSANEO: Because you give somebody a time to get off their duff and do it instead of just saying they do it when they feel like it, and they have the responsibility of being the attorney in charge for sending this information on until they get it done.

CHAIRMAN SOULES: Does it have to be that short, though? I mean, during this period of time the record isn't even put together in most cases.

PROFESSOR DORSANEO: No. It doesn't have to be that short. It could be longer.

HONORABLE C. A. GUITTARD: Perhaps we ought to put something in the rule to this effect: "This rule does not govern the attorney's duty to the client but only the identity of the attorney to whom notices should be sent."

CHAIRMAN SOULES: And then I think another concern that Richard has is we are using "attorney in charge." When we use

that term in the trial rules we mean the lawyer that's got responsibility for the case, and that's more than just a lawyer who's a mailbox.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: And that bothers me to use those words if I am just a mailbox. I don't want to be in charge. I may have to be a mailbox.

PROFESSOR DORSANEO: Well, I'm thinking somebody asks me, and when I want to say "no" they say, "You were the attorney in charge, weren't you?" And I want to say, "Huh-uh."

MR. YELENOSKY: Yeah. Yeah.

PROFESSOR DORSANEO: I am not going to want to say "yes" if I really wasn't responsible, but if I can say, well, only for the purpose of receiving notices and transmitting them, and I did that until I filed my notice of non-representation.

MR. ORSINGER: But why do you even need to use the words "attorney in charge" for someone who is merely a conduit of mail? Why can't you just say send the mail to

that person until they tell you to send it directly to the client and give you an address?

CHAIRMAN SOULES: Say like we do in the trial rules that the party may be served by serving his trial lawyer until something else happens.

MR. YELENOSKY: It seems to me the thing that makes the attorney get off his duff, and maybe this is my assumption, is that as long as he doesn't get off his duff and pass it along to the court he has potential liability there.

PROFESSOR DORSANEO: He's probably on a cruise, too, is the problem.

CHAIRMAN SOULES: God, I wish. Pam Baron.

MS. BARON: I'm confused. The way I read the rule you have already done something affirmative with the court of appeals to be sent the notice during the -- either the attorney that signed the notice of appeal if you are the appellant or if you are the appellee you are the attorney whose signature appears first on a document

filed in the appellate court. Is that not right?

MR. ORSINGER: No. No. Once you file a document you're the attorney in charge on appeal. We are concerned about the people who are the appellees who were lawyers in the trial who haven't done anything in the appeals court.

MS. BARON: Well, am I reading the rule wrong? I mean, what it says is that for the -- "unless another attorney is designated the attorney in charge for a party, other than an appellant, is the attorney whose signature first appears on the first document filed on behalf of that party in the appellate court."

MR. MCMAINS: Yeah. But that's what (b) is about.

MS. BARON: Oh, okay. So I am missing the (b).

MR. MCMAINS: (B) then says if there isn't anybody identified --

MS. BARON: Oh, then there is a default.

MR. MCMAINS: Then it's the

trial lawyer.

MR. ORSINGER: But that raises the question of if the trial lawyer has never made an appearance in the appellate court we probably all agree that they should continue to be the place you mail things to until the mailing address of the client is put on record.

MS. BARON: Right.

MR. ORSINGER: But do they have duties that go beyond that, and do we call those duties attorney in charge without limitation, or do we call them attorney in charge with the sole obligation to pass mail along, or you know, what do we call them?

CHAIRMAN SOULES: Let's try to get through this a piece at a time.

MR. PERRY: Could I ask a question?

CHAIRMAN SOULES: Yes, sir. David Perry.

MR. PERRY: This is apparently only a problem that exists with regard to an appellee because if you are an appellant you had to do something to get on the list, right?

CHAIRMAN SOULES: Right.

MR. ORSINGER: True.

MR. PERRY: Now, if you were an appellee, and you haven't recovered a judgment that you are going to have to defend, now, it would appear to me that unless -- if you have recovered a judgment that you are going to have to defend, that unless you have undertaken to go through the withdrawal procedure that you're still the attorney of record and that you ought to have to get the notices, and you ought to have to do something about it.

CHAIRMAN SOULES: Let's just take this -- has anybody got a problem with (a)?

PROFESSOR DORSANEO: Rusty is going to raise his --

MR. MCMAINS: No. I just wanted to point out something to you, Bill, and I realize it's partly because of over-engineering of this paragraph, but if you actually read this paragraph along with (c) because this paragraph says the attorney in charge shall be one whose signature first

appears on the first document filed. Well, if the first document filed happens to be a notice of non-representation under (a) you have become the attorney in charge, which is certainly not intended by anybody. I am just trying to figure out a label other than "document" because I guess whether you say "document other than a motion to withdraw or notice of non-representation," but I mean, it happens several different -- there are several different ways where the first document -- if the motion to withdraw is the first document, you become the attorney in charge.

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: I think the phrase Luke just used has more significance than we were giving it. What we are talking about, as I understand it, is the attorney of record. Now, we by rule can affect who the attorney of record is, but I don't think we by rule can affect who is an attorney for what client, and that's what I think is causing the problem here, is we have all got varying views on what our responsibilities are to any given client at

any given time in any given case depending on your contract, depending on whether you have been paid, whatever, and if we stick to the concept of just trying to designate in this rule who is the attorney of record then I think it gets easier.

PROFESSOR DORSANEO: We could change that last sentence in (c) from "shall be deemed to be the attorney in charge." Say, "shall be deemed to be the attorney of record."

HONORABLE SARAH DUNCAN: Now, see, in my view the last person that was attorney of record in the trial court whether we say it in this rule or not is the attorney of record for that person throughout that proceeding.

CHAIRMAN SOULES: I would either like to just table this or take it one paragraph at a time. If we are not willing to take it one paragraph at a time then let's just table it and spend time debating it later and get on with the rest of the rules because we are getting all snarled up. If we can take it one step at a time and find out what's

wrong with it a paragraph at a time, ignore (b) through (d), has anybody got a problem with (a)? Rusty had one. Maybe we can fix it someplace else.

MR. MCMAINS: Well, the problem I had assumes that you keep --

MR. YELENOSKY: (C).

MR. MCMAINS: (C) or (d).

CHAIRMAN SOULES: Well, we don't have that yet. We are not there yet.

MR. MCMAINS: Well, it's still a problem. It says --

MR. YELENOSKY: No. It's not a problem until we get to (c) and then you would have to go back.

MR. MCMAINS: It is a problem because even without (c) you can file a motion to withdraw.

CHAIRMAN SOULES: Okay. How do you want to fix (a)? Forget the rest of them. How do you want to fix it?

PROFESSOR DORSANEO: "Other than a notice of non-representation."

"Document, other than a notice of non-representation."

HONORABLE SARAH DUNCAN: The ommission of (a) standing alone even if it is -- if they haven't -- if they are not the appellant and they haven't filed a document in the appellate court, nobody knows who to send anything to for the appellee. That's the problem with (a) in my view, and I think, isn't that what you were saying?

MR. ORSINGER: Yeah. Fixed later on.

HONORABLE SARAH DUNCAN: Rusty.

MR. MCMAINS: Yes.

CHAIRMAN SOULES: David Perry.

MR. PERRY: There are rules at the beginning of the Rules of Civil Procedure as to who is the attorney in charge and how you get to be that and how it gets to be changed. It would appear to me that those rules most logically should be carried over through the appellate process because it is one lawsuit that continues on, and it just seems to me that perhaps this is being made more complicated than it needs to be.

CHAIRMAN SOULES: Well, (a) is a virtual duplicate of the trial rules.

MR. MCMAINS: Yeah. That's the problem. The problem is, David, that some people believe, like Richard, that when the trial is over their obligations are over.

MR. ORSINGER: When the judgment is final.

MR. MCMAINS: They have ceased to be attorney in charge even though they haven't done anything to avoid it. That's where the dispute is.

CHAIRMAN SOULES: Well, I mean, whatever -- I don't want if I am hired on appeal to take the appeal, to file the notice of appeal, I want to be the attorney of charge when I file the notice of appeal, and I want everything to come to me. I don't care whether it goes to David Perry. If he hired me, I will get it to him, but now, I am responsible. He hired me because he wanted me to be responsible for that appeal. That's why it's written this way. Whoever goes of record in that new court is the attorney in charge, and everybody can know that, and you get -- that's the person that you serve, and they can designate one more, and if you do that, you

have got to serve two people like the old interrogatory rule. That's it. You don't have to serve five law firms that were in the trial court, and (a) works except for the problem that Rusty raised with something downstream, it seems to me. What's wrong with (a) other than --

MR. ORSINGER: (A) is fine.

CHAIRMAN SOULES: -- if the first item happens to be a notice of non-representation.

MR. ORSINGER: I think (a) is fine.

CHAIRMAN SOULES: Okay. Okay. Go on to (b). All communications from the court or counsel is sent to the attorney in charge. There is a typo there. "If no attorney in charge has been designated by, or identified for, the party in accordance with paragraph (a), the clerk of the court of appeals may send the notice of the filing of the notice of appeal to the attorney in charge for that party in the trial court."

Okay. That's a -- you can find out who that is, who the attorney in charge in the

trial court was.

MR. ORSINGER: That's in the docketing statement, by the way. The appellant files a docketing statement, and one of the things that's in there is the attorney in charge for all parties in the trial court.

CHAIRMAN SOULES: In the trial court at the time of judgment. If not, it ought to say that.

MR. ORSINGER: I don't know if it says that.

CHAIRMAN SOULES: But if it doesn't, it ought to say that. Okay. So what's --

MR. ORSINGER: It doesn't. It says, "and the names and telecopier numbers," et cetera, "of the attorneys in charge in the trial court." Semicolon. At Rule 57.

CHAIRMAN SOULES: Okay. I think we ought to change that to say "in the trial court at the time of judgment," semicolon.

PROFESSOR DORSANEO: I'm not sure that's the right time.

MR. MCMAINS: Yeah.

CHAIRMAN SOULES: All right. Take it out.

MR. MCMAINS: Well, the problem with that, the problem with trying to say at the time, there may be parties that really dropped out earlier but their appellate rights doesn't start until -- if it's an interlocutory order, until the final judgment.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: And you know, you may not know whether they continue to have a relationship. You just know who was there at the time that it happened. It may have been a year ago.

CHAIRMAN SOULES: Okay. Leave it vague and worry about it when the time comes, when the practicalities come up. So (b) is determined. We can figure that one out.

MR. YELENOSKY: I am fine with (b), but I suggest in adding a sentence.

CHAIRMAN SOULES: Okay. What else for (b)?

MR. YELENOSKY: The sentence I would add and then I will follow that up by

suggesting again that you eliminate (c) is just to say, "Until such time as the attorney in charge for the party in the trial court notifies the appellate court otherwise that attorney has responsibility for passing along communications to the party," or unless -- well, let me rephrase that. "If the attorney is not going to proceed as the attorney in charge in the appellate court he or she has responsibility for communications to the party until notifying the appellate court otherwise." Something like that and then eliminate (c).

MR. ORSINGER: Can I comment on that?

CHAIRMAN SOULES: Okay. Richard.

MR. ORSINGER: The concept that Steve has I am not objecting to, but I don't think we should be saying who has what duty to the client. I think we should be saying who notices can be sent to. Because that's what this rule is for.

MR. YELENOSKY: Right.

MR. ORSINGER: Who does the

clerk mail notices to, who do the other parties mail notices to. However, what you are saying is that you just continue to mail notices to the trial attorney until the trial attorney let's everyone, including the clerk, know that they are no longer going to serve as a recipient of mail, but isn't that going to be through something like a paragraph (c), and maybe what you really object to is not (c) but the fact that (c) has a timetable.

MR. YELENOSKY: I object to the timetable plus the idea that it's a notice of non-representation, which if not filed somehow implies that you are representing after 15 days. Why isn't it just a notice that -- I don't know. I mean, in the Fifth Circuit you do a notice of appearance. Say, "I'm on this case."

MR. ORSINGER: Then maybe the thing to do is to not call it "non-representation" since that implicates legal issues that we can't even determine anyway. That's going to probably depend on the contract that was signed and everything else. Let's call it some other kind of

notice, notice of mailing or something like that, but we don't want to have -- it's like David was saying before. If you're in because you were in the trial court, you're in on appeal until you withdraw. That means there are going to be a lot of motions to withdraw that are filed, and the courts of appeals are going to have to rule on a bunch of them when they are really purely ministerial, and we want to avoid trial lawyers having to file and get rulings on motions to withdraw when really all they are trying to do is give you their client's mailing address.

MR. PERRY: Well, but now, look, there is really only one way to get out of a lawsuit as long as it's still going on, and that is to withdraw.

HONORABLE SARAH DUNCAN: That's right.

MR. PERRY: And I think the conception -- to me, the obvious concept is that the attorney that is in charge in the trial court is going to continue to be the attorney in charge of the lawsuit unless they either withdraw or someone else is designated

as the attorney in charge. Now, (a) and (b) handle those concepts perfectly well, but (c) assumes that there is a way to no longer be -- (c) assumes you could execute a common law withdrawal.

HONORABLE SARAH DUNCAN: That's right.

MR. PERRY: And I'm not sure that's a very good idea.

CHAIRMAN SOULES: I don't know what anybody else uses in their contingent fee agreements. We typically put in there that we have no responsibility to appeal or retry the case, that our scope of engagement is limited to trying the case to final judgment.

MR. PERRY: Well, I think that's fine.

CHAIRMAN SOULES: Now, at that point I don't want a rule that says I'm anything.

MR. YELENOSKY: And if what you are saying is correct then, boy, a lot of attorneys have been malpracticing because all the time I know in legal services you say we are only going through the trial. You don't

then if there is an appeal have to file a motion to withdraw in the appellate court, and nobody does.

CHAIRMAN SOULES: But nobody knows that except the attorney and his client, that that engagement was contractually limited up front before there was any presumption of fraud, when there was an arm's length contract made.

MR. PERRY: Well, it seems to me, and maybe it doesn't make too much difference what the mechanism is, but as a general rule the mechanism for a lawyer to get out of a lawsuit is to touch the bases to withdraw. The notice of non-representation is almost the same thing.

MR. ORSINGER: It doesn't require a ruling of the court is the main difference.

MR. PERRY: Yeah.

MR. ORSINGER: It also doesn't concede that you have an obligation, and you have to beg permission, which is an argument we are having on the law. If I sign on to try the case and my client agrees that I don't

have a duty to appeal why does the law force me to appeal?

CHAIRMAN SOULES: It doesn't.

HONORABLE SARAH DUNCAN: It doesn't.

MR. ORSINGER: Well, David is saying it does.

HONORABLE SARAH DUNCAN: No. No, he's not. He's saying you continue to be attorney of record until you withdraw, and if your contractual agreement provides that you have no responsibilities past the expiration of the trial court's plenary period, power, then you file a motion to withdraw, and you tell the court that, and you cease being attorney of record, but the discussion here sounds as though when we talk about mailboxes and things we are talking about, we send out all of these notices, and they are going to somebody, and nothing is getting done about them, but the people at the court at least think they are going to a responsible person and something is going to happen as a result of those notices.

MR. PERRY: But the other thing

is if you have lost in the trial court, and your client is going to be the appellant.

MR. YELENOSKY: Right. That's right.

MR. PERRY: It's kind of an easy problem because you sit them down, and you say, "I wasn't hired to appeal this case. I am not going to appeal this case." You don't need to file a motion to withdraw because the case is about to be over with because it ain't going to be appealed.

Now, on the other hand, if you are going to be the appellee and the other side is going to appeal it, I think that requiring that you go through the procedure of withdrawal, which certifies to the court that the client has notice that you are getting out, and if somebody else is getting in, then we know who that is, and that sort of thing, is not an undue burden.

HONORABLE F. SCOTT MCCOWN: Luke?

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT MCCOWN: Why doesn't what Steve suggested solve the problem

if we just add a sentence to (b), and we take out (c)? Because here is -- to build on what David just said, this is a problem only if you are the appellee. You represented the appellee in trial court. Now the appellant has appealed. What are you going to do? Well, either you're going to represent the appellee in the court of appeals so you'll take some affirmative response to get the clerk your address, or you are not going to represent the appellee in the court of appeals, and you know where he is, and so you are willing to forward whatever the clerk has sent you to him and tell the clerk where the clerk can find him.

Or what happens a whole lot is you don't have any idea where he is, and all you can tell the clerk is, "I don't represent him, and here is his last known address." So why don't we just write the rule that says exactly like this last sentence that the clerk of the court of appeals may send the notice of filing to the attorney in charge for that party in the trial court. The attorney in charge in the trial court then needs to advise the clerk

that he will be entering appearance or he won't be entering an appearance, and here is the last known address of his client. I mean, that's all we are asking the guy to do, is to tell us are you going to enter an appearance or if you are not going to enter an appearance, what's the last known address of your client?

MR. MCMAINS: And what happens if he doesn't do that?

HONORABLE F. SCOTT MCCOWN: If he doesn't do that then I suppose the court --

MR. PERRY: He keeps getting mail and also puts his malpractice carrier on notice.

MR. MCMAINS: That's what I am saying. That's what goes on anyway.

MR. ORSINGER: Yeah. Well, then that's a malpractice problem. As I said, what gets him off his duff is reading the rule like that, and not doing something about it I think creates liability on your part. You didn't pass on a known address to the clerk. What was the clerk to think? Your client didn't know about it. What was he to think?

I think you are liable.

MR. MCMAINS: Well, let me also add that the notion of there is a simple appellant/appellee problem is not the sole problem because you may have either counterclaims, cross-claims, or there may be things that were developed between -- you may have lost as a defendant, but you may not have any intention of appealing because you didn't lose that much, but you won't -- you can go up, and you may have rights to affirmatively assert. There may also be filed attempts at notice of limitation appeals, which you will need to respond to, and you do not want in the short time fuse we have in those, those things going to the clients or assuming or in any way ratifying in the rules that they don't go to the trial lawyer. The trial lawyer is the one who needs to know that information and communicate it immediately.

HONORABLE F. SCOTT MCCOWN: Right. And that's why what I suggested. You send it to the trial lawyer, and you say to the trial lawyer you either need to file an appearance and become the attorney in charge,

or you need to tell us that you are not the attorney -- you are not going to be filing an appearance, and you need to give us your client's last known address.

CHAIRMAN SOULES: Let me have a little bit of your patience here and try something. Okay. We are going to relabel (c), "No Attorney in Charge." That's going to be the name of it.

MR. ORSINGER: I like that.

CHAIRMAN SOULES: "No Attorney in Charge." Okay. At the end of the first sentence in (b) we are going to paragraph, and we are going to say if no attorney in charge has been designated, you send it to the attorney in charge in the trial court. That's going to be the first sentence of (c) that begins with "No Attorney in Charge." And then we will take out the time period altogether. The attorney in charge in the trial court can send notice any time, and then the notice is going to contain what it contains, and take out the entire last sentence. So they are still not the attorney in charge, but they are getting mail, and they have got to figure out

what to do with it.

MR. YELENOSKY: Solves my problems.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Then how do they get out of that position?

MR. YELENOSKY: File a notice.

CHAIRMAN SOULES: They file -- the only thing we took out was the last sentence. The first sentence of (c) will be, "No Attorney in Charge." The first sentence will be the second half of (b). Then the second sentence will be the beginning of (c), if the attorney in charge in the trial court is sent notice and so forth.

MR. YELENOSKY: Can you read it through, Luke, how you have got it?

CHAIRMAN SOULES: Okay. Let's do the whole thing then. (C), "No Attorney in Charge." And we are going to pick up, if you will read up in (b) now, "If no attorney in charge has been designated by or identified for a party in accordance with paragraph (a), the clerk of the court of appeals may send the notice of the filing of the notice of appeal

to the attorney in charge for that party in the trial court. If the attorney in charge of the trial court is sent the notice of the filing or the notice of appeal by the clerk in accordance with paragraph" --

MR. YELENOSKY: Oh, we need to change that.

CHAIRMAN SOULES: That will come out.

HONORABLE C. A. GUITTARD: "Is sent" or "receives"?

CHAIRMAN SOULES: "If the attorney in charge in the trial court" --

HONORABLE C. A. GUITTARD: Receives.

CHAIRMAN SOULES: -- "receives the notice of the filing of the notice of appeal."

MR. ORSINGER: Why don't we just say within 15 days rather than all of this "if," "if"?

CHAIRMAN SOULES: Comma. Strike "by the clerk in accordance with paragraph (b)."

"Receives the notice of the filing of

notice of appeal, that attorney may file a notice of non-representation in the appellate court. The notice of non-representation shall state: (1), (2), (3). The attorney filing the notice shall certify that a copy of the notice" or not -- "shall serve and certify."

"Shall serve and certify that a copy of the notice of non-representation was served on the party."

MR. YELENOSKY: Shall serve and certify?

CHAIRMAN SOULES: Serve all other parties. "Shall serve the party and all other parties."

MR. ORSINGER: Is that necessary? Don't the rules require all filings to be served on the other parties anyway?

CHAIRMAN SOULES: If they do, take it out.

MR. ORSINGER: Can I make a suggestion? I like all that language, but why can't we just start it out "within 15 days of receipt of the clerk's notice"?

CHAIRMAN SOULES: No. We took

out all time length. You can file this any time.

MR. ORSINGER: Well, pardon me. You have an "if" clause at the beginning. Your previous sentence says that the notice will be sent to the attorney in charge in the trial court and then you say if the attorney in charge in the trial court receives it then within 15 days of receipt or whatever you say.

MR. YELENOSKY: Well, take out the "if."

PROFESSOR DORSANEO: We took out the 15 days.

MR. YELENOSKY: So you can take out the "if" clause, and you can begin the sentence, "The attorney in charge in the trial court may file a notice of non-representation in the appellate court."

MR. ORSINGER: Yeah. We don't need to repeat the "if" clause.

MR. YELENOSKY: Right.

PROFESSOR DORSANEO: We can even say -- we could take the "if" out altogether. You could say, "The attorney in charge in the trial court may file a notice of

non-representation."

MR. YELENOSKY: That's what I just said.

CHAIRMAN SOULES: All right. "The attorney in charge in the trial court" --

PROFESSOR DORSANEO: May file.

MR. YELENOSKY: Right. You just scratch the first three lines of what now is (c).

HONORABLE C. A. GUITTARD: You are going to let him file that at any time?

CHAIRMAN SOULES: Any time.

HONORABLE C. A. GUITTARD: Well, what if his brief is due two days later?

CHAIRMAN SOULES: That's between him and his client.

MR. YELENOSKY: Yeah. If he's liable, respond.

CHAIRMAN SOULES: This doesn't affect his malpractice.

HONORABLE C. A. GUITTARD: Well, it affects the court's administration of the matter, though, if we want somebody in there that has notice of the situation that has an obligation to file a brief.

CHAIRMAN SOULES: You can't hook him that deep.

HONORABLE C. A. GUITTARD: What?

CHAIRMAN SOULES: He's not hooked. It just goes to the party.

HONORABLE C. A. GUITTARD: Well, it goes to the party, but the party ought to have notice earlier than that that he's not --

MR. YELENOSKY: If the party doesn't --

HONORABLE C. A. GUITTARD: -- representing him.

MR. YELENOSKY: Then the party sues the attorney.

HONORABLE C. A. GUITTARD: Well, maybe so, but as far as the court is concerned the question with me is should the party have -- should the attorney have the right to tell the appellate court "I am not representing this guy anymore" without having to file a motion for leave to withdraw. It seems like to me it's perfectly reasonable to say you can do it without filing a motion to

withdraw within 15 days. After that, you file your motion to withdraw. If you have a good reason, we will let you withdraw. Now, whether or not he has a duty to his client is immaterial. The question is to whom the appellate court should look for filing briefs and notices and such.

CHAIRMAN SOULES: Okay. Let me again try to take this a piece at a time, and I will get right to what Judge Guittard's talking about after we look at this. Okay. First, with or without a time, just set that aside, is the rest of (c) now okay the way we have written it?

Okay. Now, we have got the question what period of time, if there is going to be a finite period of time, should this notice of non-representation be -- in what period of time should it be required if it's going to be finite?

MR. YELENOSKY: There is a prior question to that.

CHAIRMAN SOULES: Well, I am going to get to Judge Guittard's question right now.

MR. YELENOSKY: Well, I am talking about his question. There is a hidden question in there, which is, aren't you talking about, Judge, where somebody has accepted representation on appeal --

CHAIRMAN SOULES: No. No. Absolutely not. We are not talking about that now. We are not talking about that now.

MR. YELENOSKY: Okay.

CHAIRMAN SOULES: We are talking about that has not occurred. This is just like Brer Rabbit. He ran out there in the brier patch. He keeps on saying nothing. When does he have to say something? Anybody got a view on that? Richard Orsinger.

MR. ORSINGER: I don't think that we ought to have, I guess, status of attorney in charge arrive just by operation of law. It may well be that the client is perfectly satisfied to have the lawyer -- not pay for any legal services on the appeal but just have the lawyer serve as a conduit of all mailings and everything else and then, you know, perhaps at the time that a judgment is reversed then they file a motion for rehearing

or something like that.

I mean, why should we say that if someone wants to just sit passively and let the active parties fight that the person who's sitting passively suddenly becomes an attorney of record? Then we are telling them in this rule that they have a duty to file a brief and everything else, and why should we?

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: I understand the semantic or emotional charge that appears to be associated with the notion of attorney in charge, but our rules, our trial rules, have been reworked to refer to that, and this rule in the (b) part says not only the communication from the court but from counsel with respect to any proceeding shall be sent to the attorneys in charge for all parties.

So if you try and create a category of there is no attorney in charge in this, I mean, that's why I think we used the term. It was not to increase necessarily responsibilities or decrease them or anything else. It was simply to say it's an arbitrary notion that we are supposed to serve the

attorneys in charge. Well, we have got to have somebody that we can call on, and we are going to call them this unless they do something, and then we will have to send it to the parties if they do this, but I mean, that's what the -- the way the notice of non-representation is set up.

CHAIRMAN SOULES: Uh-huh.

MR. MCMAINS: I am not -- you know, I don't think that it's at all possible that we should allow that to be an indefinite thing that they could just send at any time.

CHAIRMAN SOULES: You are speaking then in favor of some finite time? Some finite time?

MR. MCMAINS: I mean, there needs to be, yeah, I think.

CHAIRMAN SOULES: Okay. Well, let's talk around the table about that, about some finite time or no finite time, and then we can talk about how long if some finite time prevails. Scott McCown.

HONORABLE F. SCOTT MCCOWN: Well, I agree with Judge Guittard and with Rusty. In essence the clerk of the court of

appeals is writing to the last lawyer the fellow had and said, "Are you his lawyer or is he pro se, and if he's pro se, where can we get him? We need to know." They need to know that promptly so that then they know who's in charge of this appeal, the lawyer or the client, and it ought to be 15 days.

CHAIRMAN SOULES: Okay. Anybody else? Okay. Now, we are just going to vote now, finite time or no finite time. Those in favor of a finite time show by hands. Eight.

Okay. Those opposed, no finite time? Four. Eight to four there be a finite time. How much time?

MR. ORSINGER: It needs to be after the motion for new trial is overruled because, I mean, I know we have got some problems here because you can perfect before your motion for new trial is overruled, but the trial lawyer is always going to be there until the motion for new trial is heard, and so it doesn't make any sense for us to tell them that they have to take a position, or it seems to me it doesn't until after their trial

level activities are finished, and why rush it? Why rush it to 15 days after the notice of appeal is filed when your record won't be up there for probably two or three months anyway?

HONORABLE SARAH DUNCAN: Well, we could dismiss you for want of jurisdiction without telling anybody but --

MR. MCMAINS: It's not 15 days after the notice of appeal is filed, as I understand it. It's 15 days after the notice that it was filed is sent to you by the appellate court. In other words, that's your first correspondence under our new scenario with the court of appeals.

MR. ORSINGER: True. True.

MR. MCMAINS: That's your first contact with the court of appeals.

MR. ORSINGER: When will that occur? Is that when the transcript is filed, or does that go up earlier than the transcript?

MR. MCMAINS: It's when the notice of appeal is.

MR. ORSINGER: No. I mean,

when the notice of appeal is filed in the district clerk's office how soon does there show up --

MR. MCMAINS: I don't remember.

MR. ORSINGER: See, and this doesn't say.

PROFESSOR DORSANEO: Yeah. We won't know.

MR. ORSINGER: This just says "clerk." It doesn't say.

MR. MCMAINS: Well, Bill, I mean, you tell me what your timetable is in terms of the notice.

PROFESSOR DORSANEO: When it gets there.

MR. MCMAINS: Huh?

PROFESSOR DORSANEO: When it gets there.

MR. MCMAINS: So it may not get there until the transcript does, right?

HONORABLE C. A. GUITTARD: Now, Rule 56 says --

MR. MCMAINS: I thought we sent the notice of appeal to the court of appeals earlier like we did in the federal system, but

it's been a long time since we talked about that rule.

MR. ORSINGER: No. Rule 56 is what the appellate clerk does when they receive the notice.

MR. MCMAINS: I thought the district clerk sends notice or sends it on.

HONORABLE C. A. GUITTARD: No. The district clerk sends a copy of the notice to the court of appeals.

MR. MCMAINS: Right.

HONORABLE C. A. GUITTARD: The court of appeals then sends the notice to the other parties, to all parties, that the notice of appeal has been filed in the appellate court.

MR. MCMAINS: Right.

CHAIRMAN SOULES: But when does the notice of appeal get filed?

HONORABLE C. A. GUITTARD: The notice of appeal gets filed when the appellant files that notice in the trial court.

MR. ORSINGER: How soon after that does the district clerk mail it to the court of appeals clerk?

MR. MCMAINS: It just says "promptly."

HONORABLE C. A. GUITTARD: It says "promptly," immediately.

MR. ORSINGER: So we are going to be talking about within three, five, six, seven days?

HONORABLE C. A. GUITTARD: Yeah.

MR. ORSINGER: So our deadline is going to be over two weeks after an appeal is perfected, and our motion for new trial may be floating around for 70, you know --

MR. MCMAINS: Of course, there is nothing inconsistent about notifying the appellate court that I am not going to be handling any appeal and continue to handle what is going on in the trial court.

MR. ORSINGER: Except that you may not know that before the motion for new trial is ruled upon. Most of the clients that I have don't make a decision about what they are going to do until they find out what the motion for new trial ruling is.

PROFESSOR DORSANEO: Well,

who's going to do it?

MR. ORSINGER: And so it seems to me that if you are forcing them to say I am either on this appeal or not before you are finished with amending the judgment, granting new trials, and all the rest of that stuff, then we are forcing people to automatically say "I am" just to cover the possibility that they will.

HONORABLE F. SCOTT MCCOWN: Just tie the time line to when the proceedings terminate in the trial court.

HONORABLE C. A. GUITTARD: Well, ordinarily the appellant's not going to file his notice of appeal until he has exhausted his trial court remedies, although he can possibly.

MR. ORSINGER: Could we take the later of the two of when the motion for new trial is overruled or when the appeal bond is perfected, whichever is later?

MR. MCMAINS: Well, when is our docketing statement, though? We are communicating with the court of appeals here. So the question is when the court of appeals

is going to send us anything.

CHAIRMAN SOULES: When does the docketing statement go to the court?

MR. ORSINGER: That's page 99. The court of appeals clerk sends the docketing statement to the appellant's lawyer, docketing form to the appellant's lawyer, when they receive the notice of appeal.

MR. MCMAINS: And when does he send it back?

HONORABLE C. A. GUITTARD: 10 days.

MR. MCMAINS: Okay. So the point is that the lawyer that has filed the notice of appeal, whenever that is, has already designated who -- given this list of addresses to the court of appeals at that point. See. And it doesn't matter what's going on in the trial court. I mean, there is activity going on in the court of appeals, and so it seems to me that that is the time that the court of appeals needs to know who they are dealing with.

MR. ORSINGER: Well, that means that --

MR. MCMAINS: In most cases I think it's going to be a moot point. Motion for new trial will be overruled, notice of appeal will be after that in most cases, but there are cases, perhaps, obviously in which one party will perfect earlier than another party, and so you may start the process early.

CHAIRMAN SOULES: But there is not going to be much going on in the court of appeals while the motion for new trial is pending.

MR. MCMAINS: I don't know that I have a great problem with -- I'm just trying to think in terms of what our deadlines are. What about 30 days?

CHAIRMAN SOULES: What about 90 days? I mean, get it out there until when the motion for new trial is going to be --

MR. MCMAINS: Well, because there are things that happen that can happen real quick if you are not careful. In terms of notice of limitation of appeal, for instance, which will aggravate things.

MR. ORSINGER: But really why should the appellate court care? Why is it an

obligation of the appellate court to know who's making these decisions about limiting appeal and everything else? The appellate court should only care about what's filed with the clerk in the appellate court, and here we are all of this -- we have all of this involvement in who's making what decisions about all of these issues, and in reality all we really care about is a ruling on what's filed in the court of appeals, and so now if we are injecting ourselves into the management of the postjudgment activities out of a concern of the client to be sure that their trial lawyer is not neglecting their rights on the appeal, and why is that a concern of the clerk of the court of appeals?

MR. MCMAINS: Well, there is always a concern at any level that there be sufficient notice to satisfy due process. They have got to send -- so that you have got to be able to be satisfied that the governmental entity has given sufficient notice, be it to the party or to his representer, and the same thing true with the activities by counsel, and that's what we are

trying to do, is to get adequate service by some designated mechanism.

CHAIRMAN SOULES: When does the notice of limitation of appeal have to be filed?

MR. ORSINGER: I think it's 15 days after it's perfected. We didn't change that timetable, I don't believe.

HONORABLE F. SCOTT MCCOWN: Isn't this largely not going to matter because nine times out of ten the 15 days is going to be after what's happening in the trial court is over.

When it's not, let's take the cases that it's not. You have got 15 days to decide. Well, generally speaking, you are either going to be able to tell the court of appeals that you are on the case for the appeal if there is one or you are off the case, but let's say it's a rare instance where you really can't tell them, and that has to be pretty rare at this point. So we are worried about a very rare problem. What happens when you tell the court, okay, keep sending me stuff and then it turns out when it's all said and done that you

are not going to handle the appeal? So what do you do? You file a motion to withdraw. It's at the very beginning of the case. You file a motion to withdraw. The court of appeals is going to deny it? I don't think so. So what's the problem?

HONORABLE C. A. GUITTARD: I think you're right.

HONORABLE F. SCOTT MCCOWN: If we just say 15 days, and it's not going to be a problem.

CHAIRMAN SOULES: Well, let me see if I can articulate the problem I feel. I am in the course of wrapping up a trial that I have, quote, "won," but really lost. I have got a couple of nickels in my pocket maybe, but I am done with this program, and the other side don't even like me having my couple of nickels, and they are going to appeal it. So I am still in the trial court wrestling around with motions for new trial and modifying and what have you, but I have got to go to my client and say, "Now, remember I told you I am not going to handle your appeal."

So I am going to send my notice of

non-representation. I have got to send that up right now. So I am having a confrontation with my client about doing the appeal while I'm still clearly his lawyer in the trial court, and you know, I'm not comfortable with that notion. Maybe I should be because maybe it's worse to get somehow caught up in the appeal later, but I don't want to get caught up in that appeal. So I have got to do something by whatever this rule says I have got to do it, and to me that ought to be some period of time that lets me wrap up in the trial court but early enough that the client is not going to be in some kind of jeopardy, and I don't know whether there is any way to reconcile. I don't know whether there could be a period where I am wrapping up in the trial court that the client's not getting into jeopardy on appeal already. Maybe it's -- and if there is not, then I just have to live with my heartburn.

HONORABLE F. SCOTT MCCOWN: But I think you're exactly right. That's a tough problem for the lawyer that you just identified, but doesn't he need to tell the

client, "We've gotten the notice of appeal. There are things that you need to do, and I am not going to represent you on appeal. You have got to find a lawyer"? It seems to me that issue ought to be aired, as uncomfortable as it is, as early as possible. So I think the 15 days works.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I guess I am still having trouble understanding why -- the deadline seems to me to be there from what I have heard from Judge Guittard and from Judge McCown because the court of appeals needs to know who they are dealing with, and I agree with Richard. Why do they need to know until the point where you are saying, "Well, we need to get the briefs in"? Well, what would happen at that point if the court of appeals -- if there is no brief filed, what would happen next?

CHAIRMAN SOULES: Well, I think we are all in agreement that we can't wait 'til the time the briefs are due.

HONORABLE F. SCOTT MCCOWN: But

there is lots of things that happen in an appeal before the brief is due. You can have squabbles about the transcripts. You can have squabbles about the statement of facts.

MR. MCMAINS: Motion for extension.

HONORABLE F. SCOTT MCCOWN: Sure. Motions for extension.

MR. YELENOSKY: And all of that is going to go to the attorney in charge. If he doesn't pass it along, he's got a problem. If he passes it along and the party doesn't do anything, is there going to be some communication, perhaps, with that attorney at some point where he says, "Look, I am not in the case. I am just passing this along. If you want me to follow up now, I will."

CHAIRMAN SOULES: Okay. 15 days. Elaine, do you have something else?

PROFESSOR CARLSON: Just one clarification on the 15 days, and that is, the notice of limitation of appeal would have to be filed before; isn't that correct?

MR. MCMAINS: No. It's before it's due. I don't know.

PROFESSOR CARLSON: The notice of limitation of appeal is to be filed within 15 days after the judgment is signed, not within 15 days after perfection.

MR. MCMAINS: That's right. That's right. You can actually file a notice of appeal before you file a notice of limitation.

PROFESSOR CARLSON: Sure. But you wouldn't have. So that may or may not take care of your problem of a client not knowing.

MR. MCMAINS: Yeah. Right. Or nobody that is having to deal with that issue, which is a greater problem.

CHAIRMAN SOULES: Okay. So how many in favor of 15 days? Show your hands.

PROFESSOR DORSANEO: I will vote for anything, whatever it is.

CHAIRMAN SOULES: Six in favor. How many oppose 15 days? Four. Okay. If we offered some other time period could we get a different consensus? I mean, I don't know. Is 15 days the only real logical cutoff?

MR. ORSINGER: There is no

logic to 15 days.

MR. MCMAINS: It appears to be, the way the rule reads, it's 15 days of receipt of the notice of the filing of the notice of appeal by the clerk. So it's not just, you know, 15 days from the filing of something. I mean, it's 15 days from the time you receive something.

CHAIRMAN SOULES: All right. Six to four.

MR. MCMAINS: And from the clerk identifying that there is an appeal going on. So I think, practically speaking, it is the time.

CHAIRMAN SOULES: Okay. Six to four. Then the 15-day period carries and then the last sentence stays in.

HONORABLE F. SCOTT MCCOWN: No. Take that out.

MR. MCMAINS: Well, the question is whether we have the modification suggested by Bill.

CHAIRMAN SOULES: Well, if you don't do it within 15 days, what's the consequence? That's the last sentence.

MR. YELENOSKY: That's the question.

CHAIRMAN SOULES: It seems to me like you have got to have a consequence. The last sentence goes with the 15 days.

HONORABLE F. SCOTT MCCOWN: I don't think it has to go with the 15 days. I mean, this is the rule you are supposed to do this, and if you don't do it then the court of appeals can follow up in its authority to either make you do it or punish you or whatever, but we don't have to say that you are deemed the attorney in charge.

MR. MCMAINS: I think that you have to say --

CHAIRMAN SOULES: All right. Rusty.

MR. MCMAINS: Excuse me. All you have to say is that you are deemed to be the attorney in charge for purposes of (b), which is that the court and counsel send communications to the attorney in charge.

MR. ORSINGER: Well, then why call him an attorney in charge? Why not just say that's the place --

MR. MCMAINS: Because that's the way all of our rules have been changed, to say attorney in charge.

MR. ORSINGER: Yeah. But you can't analogize to Rule 7 because Rule 7 is started by you affirmatively filing a pleading. This rule is leapt over because you filed a pleading in a different court, and they are not analogous.

CHAIRMAN SOULES: Okay. Last sentence, in or out?

HONORABLE F. SCOTT MCCOWN: Out.

CHAIRMAN SOULES: Those in favor of in show your hands.

JUSTICE CORNELIUS: Last sentence of what?

MR. YELENOSKY: (C).

CHAIRMAN SOULES: The last sentence of (c). That's the consequence of not filing a notice of non-representation. Say it or don't say it?

MR. MCMAINS: Well, what's the purpose of (c) if you don't have that in there?

CHAIRMAN SOULES: But that's a clear -- we have got a -- that's articulated. You don't like it. Some feel either there is a consequence, or there may not be a consequence.

PROFESSOR DORSANEO: So what you're saying is that some people will read it in there, and some people will not.

CHAIRMAN SOULES: That's right.

PROFESSOR DORSANEO: And the ones who will not read it in there will be the ones who will need to know about it the most.

CHAIRMAN SOULES: That's right. That's exactly right.

So last sentence in or out? In, show your hands. Eight. Out, show your hands. Four.

Eight to four it stays in. Okay. That gets us through (c). Now, any problems with (d)?

HONORABLE SARAH DUNCAN: This is unethical. This whole discusssion is unethical.

CHAIRMAN SOULES: It's what?

HONORABLE SARAH DUNCAN: It is

unethical, and I am not going to be a party to it.

MR. ORSINGER: It's only unethical if you have a legal obligation, Sarah.

HONORABLE SARAH DUNCAN: No. I think -- in fact, let me just put on the record before I leave. To send a client who is not a lawyer a notice of non-representation file-stamped by the court of appeals I think implies to most clients that that attorney no longer represents you and that that has to some extent been sanctioned by a court. I think that's contrary to the law in some situations, and it's misleading, and I don't think this is proper. I really don't. I'm sorry.

CHAIRMAN SOULES: Well, I don't think it's the intent of the committee in any way to suggest that this discharges a lawyer's responsibility to his client if he does have an ongoing responsibility, right?

MR. MCMAINS: You have affirmatively represented to the court that you don't represent them. If that's lie, then

you do have a serious problem.

CHAIRMAN SOULES: You have got two problems. You have got a problem that you still do and that you have lied about it.

MR. ORSINGER: That's probably a deceptive representation.

CHAIRMAN SOULES: I mean, we are unanimous on that. If you have an ongoing representation and you file this, this doesn't affect the fact that you still have an ongoing representation and responsibility to your client. Does anyone disagree with that?

No one disagrees with that.

MR. MCMAINS: To be fair, I think what Sarah is really trying to say is that she doesn't like the court of appeal -- or the implication that the court of appeals somehow has rubber-stamped this instrument, and I guess what that issue is, is whether or not if such a notice of representation or non-representation is sent then we don't have it. We have basically a presumption that if it's done within that time that there is no representation, and so now the party is going to start getting the communication.

The question is, should there be some kind of a procedure whereby since the party is notified should they have an opportunity to contest that, say that's not true or something? And I guess that's --

HONORABLE PAUL HEATH TILL: Well, where does this preclude them saying that if they wanted to?

MR. MCMAINS: It doesn't except it's intended to be really self-executing as distinguished from the withdrawal. That's really what her complaint is, that this is a self-executing unilateral withdrawal that does not require the consent of the client. I think our position, the committee's position, basically when we drafted it is this happens early enough in the game that if the client has any concern at all and is being notified, that that's kind of the best we could do, is find out early on that their position is that they are not represented, and at least that's better off than where they are now when they just aren't representing them and aren't telling them.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: In the circumstance where there is a final judgment and the appellee or the lawyer who would be the appellee's counsel has said to his client, "I'm not going to represent you on appeal," is the law in Texas that notwithstanding that statement to his client that he has a continuing duty?

CHAIRMAN SOULES: May be.

HONORABLE F. SCOTT MCCOWN: No.

MR. ORSINGER: That's unresolved. We have differences of opinion.

CHAIRMAN SOULES: Well, I tell you. Here. You can read 1.02 as well as I can, and if you don't have a limited engagement, you don't have an out. It doesn't give you -- there is no statement that you are out.

MR. BABCOCK: I am not taking a position. I am just wondering.

MR. ORSINGER: But, Luke, remember this is for purposes of ethics, and I am not sure that your actual true malpractice legal obligation is identical to your ethical obligation. It probably is but --

CHAIRMAN SOULES: In every malpractice case I have tried, it is. These things, they say you don't use them, but they always use them somehow.

HONORABLE SCOTT BRISTER: That's true. That's true.

CHAIRMAN SOULES: Every time.

PROFESSOR DORSANEO: What about criminal cases on this?

CHAIRMAN SOULES: They say, "Well, what is the standard in the profession?"

"Well, let me see if I can pull that out of my head if I can find it back in there somewhere. It is..." And they recite exactly what this says. Chip Babcock.

MR. BABCOCK: Yeah. Assuming that to be true, assuming that you're right and Judge McCown is wrong --

HONORABLE F. SCOTT MCCOWN: Well, but I think Luke and I were answering different questions.

MR. BABCOCK: Okay.

HONORABLE F. SCOTT MCCOWN: Because your question is, does the mere fact

you sign on as trial counsel and take a case to judgment mean you're the appellate lawyer?

MR. YELENOSKY: Right.

HONORABLE F. SCOTT MCCOWN: And the answer is that under the DRs you can preclude yourself from becoming the appellate lawyer, which is -- I agree with Luke about that. You have to do something on the DRs to preclude yourself from becoming the appellate lawyer, but that the court does not assume that you are the appellate lawyer or place the duty on you to be the appellate lawyer under the Rules of Procedure. Now, you may have screwed up in your contract with your client to make yourself the appellate lawyer as between you and your client, but to make yourself the appellate lawyer with regard to the court, you have got to do something. You are not just automatically that.

CHAIRMAN SOULES: Well, I agree with you. If you were asking me, am I the lawyer as far as the court's concerned, Chip, if that was your question, then I think maybe not; but if I am the lawyer as far as my client is concerned, which is the question I

was answering, I think so.

MR. ORSINGER: But Chip, Luke, before you go on. This ethical comment applies when you are unsuccessful in the trial court, not when you are successful. It says, "handled a judicial or administrative proceeding that produced a result adverse to the client." We are talking about an appellee. Presumably the trial proceeding was favorable to the client.

MR. MCMAINS: Well, no. You could have a result adverse to the client in terms of a judgment against them for five percent of a liability that your client is perfectly satisfied with.

MR. ORSINGER: Well, taken in the simplist case this ethical rule does not necessarily say that if you win in the trial court you have an ethical obligation to defend that favorable judgment on appeal. This says that if you lose in the trial court, you may have an ethical obligation to try to overturn that judgment on appeal. Those are different things.

CHAIRMAN SOULES: What page are

you on, again? I'm sorry.

MR. ORSINGER: Page 391. I didn't mean to interrupt you, Chip. I'm sorry.

MR. BABCOCK: No, no, no. You didn't at all, but the situation I was trying to posit was that circumstance where you have not gotten the situation resolved up front in the contract --

MR. MCMAINS: Right.

MR. BABCOCK: -- with your client, but rather after the case is concluded at the trial level you say, "I'm not your lawyer anymore," and the client says, "Oh, yes, you are."

MR. MCMAINS: Well, the problem there is, and this is the problem that I think a lot of us see more often than not, and that is that in the area of where you are doing work supposedly for a contingent fee, you know, it is presumed unconscionable to attempt to change that fee in the course of the representation once it's initiated.

Now, you have no limitations on the obligation to appeal in the beginning and

frequently most -- many contingent fee contracts have things in there about the percentage going up on appeal, which would be implicitly if not expressly an indication of your obligation, and then after you lose the case, say, "Okay. I am through. I'm tired. I don't want to spend another dime of my money." I have serious doubts that you can get out that easily --

MR. BABCOCK: Yeah.

MR. MCMAINS: -- without somebody's permission to get out. You are going to have to go someplace and say, "I cannot in good conscience appeal this because it is throwing good money after bad" or whatever.

MR. ORSINGER: There is no error in the trial or something?

MR. MCMAINS: Yeah. Whatever it is, all I'm saying is when you are confronted with that situation, which is what I see all the time, who are plaintiff's lawyers who have fees pegged, you know, as being contingent but pegged as being higher on appeal, and then they lose and then want

somebody else to appeal it and want the client to pay independently or whatever, and there is serious problems with that, in my view.

CHAIRMAN SOULES: It says, "The client has ultimate authority to determine the objectives to be served by legal representation within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation." The client has the ultimate authority unless there is a limited scope of representation.

MR. YELENOSKY: Right. But that's what we are talking about, though, right? I mean, what we are talking about is a situation where you do have a limitation of the scope from the start in the retainer agreement. I agree with you that that DR basically means that if your contract is silent as to it, you may have a problem trying to get out of it on appeal without a motion to withdraw. That's what that does.

But what we have just passed does, is says even if you have got an agreement from the start there ain't no way I am going to do this appeal. We are writing into that

contract essentially unless I fail to notify the court of appeals within 15 days after receiving notice, in which case I am deemed to be your attorney, and I am going to have to file a motion to withdraw.

MR. ORSINGER: That's true.

CHAIRMAN SOULES: Why would I use (c) if I didn't have a limited engagement?

MR. YELENOSKY: Right. But I'm assuming a limited engagement, and we are essentially saying that you can't limit your engagement to the extent that any limited engagement also requires you to notify the court within 15 days, or you're going to be stuck with a motion to withdraw.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: The thing I am worried about, though, is the circumstance where the lawyer and the client are in a disagreement, and the lawyer goes ahead under (c) and files this thing and sends it to his client. He says, "See, I'm not your attorney anymore. The rules specifically authorize me to do this, pal. So I am not your attorney. Get a lawyer, handle your appeal. It ain't

me."

MR. YELENOSKY: Uh-huh.

MR. BABCOCK: Now, I think what Sarah --

MR. MCMAINS: That was Sarah's concern.

MR. BABCOCK: What Sarah's concerned about is that we by rule are now resolving that to speak --

MR. YELENOSKY: I agree with Sarah.

MR. BABCOCK: -- in favor of the lawyer and against the client.

MR. YELENOSKY: I agree with Sarah because what I want -- but I wanted, what I have been proposing --

MR. BABCOCK: Maybe I didn't understand it before.

MR. YELENOSKY: -- and what Judge McCown proposed at one point would never talk about non-representation. It just talks about sending the notice to the attorney in charge, and I agree with Sarah that when you start getting in there and talking about non-representation you may create an

appearance that you can do this unilaterally. I just don't think we should talk about that at all in (c).

CHAIRMAN SOULES: Well, what does somebody want to do? I mean, does somebody who voted in favor of (c) now want to change their vote?

MR. BABCOCK: I want to change my vote. I voted in favor. I'm against it now.

MR. ORSINGER: Well, one way out of the trap is to back out of taking the position of whether you are or are not representing and just get down to the real core issue about where are we sending notices. That's really what we should be concerned with, frankly, is where do we send copies of notices and not who's representing who, and if we get back to the gut level question of where are we supposed to mail our stuff, we don't have to get into this issue.

MR. YELENOSKY: But that's the rut because when we got down to it everybody said, "Well, what's the consequence if you don't?" And they voted, well, the consequence

is you become the attorney in charge.

JUSTICE CORNELIUS: Only for the purpose of receiving notices, though.

MR. YELENOSKY: Well, that's true but --

MR. ORSINGER: But our rules are either creating or dismantling legal obligations, or at least it appears that that's what we are doing even though we agree we are not, and to a nonlawyer they might well think that this is some kind of adjudication that there isn't. We can avoid all of that by not purporting to take a position of when you are and when you aren't representing somebody on appeal and just say mail notices to the following address until you get a better one.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: I think we can solve all of these problems and concerns by simply adding a statement somewhere that these rules relate only to the responsibility for receiving notices from the appellate court and do not affect in any way the attorney-client relationship.

MR. BABCOCK: Or the duties imposed upon them.

HONORABLE C. A. GUITTARD: Why don't we simply say the last sentence in paragraph (c), "If the attorney does not timely file the notice of non-representation, notice and copies may be sent to that attorney"?

CHAIRMAN SOULES: Well, if I am understanding what Judge Cornelius is talking about, he's -- there wouldn't be a time for this. There would just be a recognition that the sole role of the lawyer is to be a mailbox, and we don't affect the attorney-client relationship.

JUSTICE CORNELIUS: I think you could just put a general statement somewhere. It doesn't have to be in any particular subdivision.

HONORABLE C. A. GUITTARD: That's what I proposed while ago, but that would not be inconsistent with what I just said here.

JUSTICE CORNELIUS: No. No. I think that would solve all of the concerns

about timing and consequences and everything else if you provided that this was for purposes of notices only for the benefit of the appellate court and would in no way affect the attorney-client relationship or any obligations in connection with it.

CHAIRMAN SOULES: Okay. Then just eliminating the whole notice of non-representation.

JUSTICE CORNELIUS: No. I think I'd leave that in there, notice of non-representation, or you might want to call it something else. You might want to say notice of --

MR. BABCOCK: Notice on notices.

JUSTICE CORNELIUS: Notice that I am not to -- notice of non-notice or something like that.

MR. YELENOSKY: But you can't have both of those things because on the one hand you want to diminish and say it's just who do you send the notice to.

JUSTICE CORNELIUS: Right.

MR. YELENOSKY: But on the

other hand you are saying but if you don't do it within 15 days, something is going to happen other than where we just send the notices to, and so it seems --

JUSTICE CORNELIUS: No. I didn't understand it that way. I thought if you don't do it within 15 days you just continue to get the notices, and the only obligation you have is to transmit those notices to your client. If you want to get rid of that, you write the appellate court and tell them you don't want to receive notices anymore, and here is the address of my client.

MR. YELENOSKY: Right. But then the 15 days doesn't do anything because you could just say, as I originally proposed, you send notices to that attorney until he tells you otherwise. What does the 15 days do? That's the same thing.

JUSTICE CORNELIUS: Well, that's Judge Guittard's concern, that the appellate court really needs to know fairly early in the brief writing process.

MR. YELENOSKY: But there is no consequence. If you are saying the only

consequence of me not answering in 15 days is you are going to keep sending it to me --

JUSTICE CORNELIUS: Well, that's exactly the only consequence.

MR. YELENOSKY: Well, that's exactly the same, isn't it, as saying we are going to keep sending notices to you until you tell us otherwise.

CHAIRMAN SOULES: Elaine Carlson.

MR. YELENOSKY: Isn't it?

PROFESSOR CARLSON: I am really torn between giving some protection to a trial court client to know you are no longer represented and Sarah's concern of sanctioning what appears to be perhaps an unpermissible withdrawal. Can we revisit for just a minute? Because I am tending to go back to Steve's original suggestion. What was wrong with the idea of using the notice of appearance and that if a party to the trial court's judgment does not have a notice of appearance on file by counsel, presuming then the notice goes directly to the client?

CHAIRMAN SOULES: Only what I

said. I'd like to see it. I'm more at risk than the client probably. Well, let me try this. Suppose we just say --

MR. MCMAINS: Excuse me. Let me say that --

CHAIRMAN SOULES: Go ahead.

MR. MCMAINS: What is it that you're proposing?

MR. YELENOSKY: A notice of appearance rather than a notice of non-representation. The flip.

MR. MCMAINS: I'm not sure I understand that.

MR. YELENOSKY: Well, I'm not sure what happens in the Fifth Circuit if you don't file one, but --

MR. MCMAINS: They don't send you notice of anything.

MR. YELENOSKY: Okay. You get a notice of appeal and then you are supposed to send your notice of appearance.

MR. MCMAINS: Right. If you don't send it, they keep telling you, "Send me your notice of appearance, or I'm going to quit sending you anything," and then they quit

sending you things.

MR. YELENOSKY: Right. And suppose you didn't have an agreement with --

MR. MCMAINS: So you don't know what they did.

MR. YELENOSKY: Okay. So you don't have an agreement with your client to do the appeal, and you are the appellee, and you don't file a notice of appearance.

CHAIRMAN SOULES: Let me try this since this notice of appearance is so fraught with the possibility of someone construing it as a sanction of a nonpermissible withdrawal. Okay. How about we just break out the second sentence of (b), put that under "No Attorney in Charge" and strike all -- and that's all (c) would be?

Say, (b) would be if there is an attorney in charge, you serve the attorney in charge. If there is no attorney in charge, you notice the attorney in charge in the trial court, period, and then follow that with withdrawal.

MR. MCMAINS: I think the basic philosophical difference between these two approaches is whether or not it is more

important that the party get the information or that the last known participating lawyer know what was going on in the appellate court because they either do or do not have continuing obligations, and the problem is if your paradigm for the way things work is that unless anybody has appeared, you just send it to the party, experience I think teaches everybody in this room the chances of them doing anything with it timely or intelligently --

MR. YELENOSKY: But nobody is proposing that.

MR. MCMAINS: -- are vastly remote.

CHAIRMAN SOULES: Steve, let people finish.

MR. YELENOSKY: Yeah. I'm sorry.

MR. MCMAINS: So that's why I think the notion was that we would continue to send it to the lawyers until they told us to send it someplace else, and if they did tell us to send it someplace else, like in this case with the notice of not -- they say, "I am

not representing you." That's important information for the client to know. It doesn't matter whether it's lawful that they not represent you. You just need to know their position that they are not representing you and that you need to do something about it. That you know.

When you get a notice of non-representation you know what the position is. It may well be that you are just not talking to each other at all, and there is no communication. It may be the only communication you get. That is preferable information to know and to know early on that somebody is not representing you because you then at least have a chance to protect your rights and maybe even avoid a malpractice suit later on down the line by going to somebody, and maybe it is too late.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: Luke, I like your solution to this problem with one, perhaps, friendly amendment. This second sentence in (b) says the clerk may send it, may send the notice. Shouldn't it be "shall"?

CHAIRMAN SOULES: Sure.

MR. BABCOCK: And in response to Rusty's point, I hear that; but, Rusty, if you try to get the court into the middle of the attorney-client relationship and providing adequate notices it seems like we are going to get bogged down. It's the attorney's responsibility to communicate with his client that he's no longer acting as the attorney, and I think I prefer Luke's --

MR. MCMAINS: But we are requiring that by rule. That's not required by anything else. I mean --

CHAIRMAN SOULES: How are you -- if you strike all of (c), how do you require that?

MR. MCMAINS: We have to require it. That's the point.

CHAIRMAN SOULES: And you think we should?

MR. MCMAINS: No. What I am saying, if an attorney's position is as Richard's position is, that I was hired for the trial, and that's it, and I am not doing anything else, and his position is unless I

appear in the appellate court I don't have to do anything else. Now, at least by complying with (c) when the appellate court sends him anything, and he says, "Oh, no. That ain't me," and he sends that to the client as well. That's what one of the requirements in the rule is, he sends that to the client.

At least the client knows what his position is. He may not have talked to the client since then, but at least everybody knows what everybody's position is, and the party can be sent the information since that's the only effect of this is to divert the information to the parties. In truth and in fact, it does not say anything about that it severs the attorney-client relationship. It just says now the information is going to be going to the party. Already the clerks under our rules can send information directly to parties that they don't have to send to the lawyers, and it's going to have the same effect as if they did send it to the lawyers. What I was suggesting is it's better that they be sending them to the lawyers because the parties don't know what the hell to do with

it.

CHAIRMAN SOULES: Okay. Steve.

MR. YELENOSKY: Well, sure it's better, but why do we have to write a rule that tells an attorney what he's ethically and probably obligated by malpractice to do? And Sarah is right. As soon as you start talking about non-representation and running something filed through the court, the bigger risk is the client's just going to go away and think, "Well, I guess I have lost my lawyer regardless of what my retainer agreement says."

Why can't we go with the way it is now? If your retainer agreement doesn't say it, you better watch out. Because if your retainer agreement doesn't say that you are out of the appeal, you may be stuck on a liability ground. You may be stuck ethically if your retainer agreement doesn't say that. If your retainer agreement does say it and the court sends notice to you, you still have an obligation. Even though contractually with the client you are not going to represent them, you have an obligation to pass that

along, and I would be appalled that a lawyer wouldn't do that, and maybe they won't, but what are we going to do? Write every rule to make it clear to attorneys that they should be ethical and shouldn't malpractice? I mean, that's what we are writing a rule to do.

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: It seems to me that the way I understood it, the way it exists in the rules now, is that you continue the trial attorney in charge, and if that trial attorney believes he or she has no relationship, continuing relationship, with the client, they file a motion to withdraw with the court of appeals or whatever court they are in, but at least with a motion you are telling the client, "I don't believe I am obligated to represent you anymore, and I don't want to represent you anymore," and the client's probably been around enough at that point to say, "Well, here's my response to that. Here's why I think you should have to continue representing me," and that way the client is protected through the process not only vis-a-vis the adverse party but vis-a-vis

his own attorney. The court is sitting there and is going to decide whether you get in or out, whether they are going to remand it to the trial court for an evidentiary hearing. Whatever it is, it's not unilateral by the attorney.

CHAIRMAN SOULES: Okay. Richard.

MR. ORSINGER: I think that it's a valid concern that we want to assure that the clients are being told that they are not represented. My fundamental problem is that I don't believe that the trial lawyer has established a counsel or an officer of the court relationship with the appellate court just because the other side is taking the judgment up on appeal; and what if we rather than taking a position on representation, what if we had something called a notice of non-appearance?

As ridiculous as that sounds you're filing a notice that your status as lawyer in the trial court is not going to be a formal relationship with the court of appeals, and you're notifying the opposing lawyers and

certified that you have notified your own client that you are not going to be making an appearance on behalf of your client in the appellate court, and therefore, notices should go directly to the client. Then nobody is taking a position on whether you do or don't owe them the duty. You are just telling them whether you are or are not the attorney of record on appeal.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Mr. Chairman, it seems to me that unless you -- that this idea of an unlimited right of a lawyer that's been representing the client in the trial court not to continue the appeal, it should certainly be limited to 15 days. It ought not to go on indefinitely that you can just tell the appellate court that "I am not representing this party anymore. I have just written my client that I am not."

I think you either ought to require that to be done within the 15 days, or you ought not to allow it at all. You ought to require the lawyer to file a motion to withdraw in

order to get out of it. You just ought not to have an unlimited time to say, "Oh, I'll get out." And personally I'd favor just not -- just requiring him to file a motion to withdraw. That's not such a difficult thing.

CHAIRMAN SOULES: And Richard's problem is that he believes that that raises an inference that you were stuck with the tar baby, and now you want out.

MR. ORSINGER: It's more than an inference, Luke, because if the court doesn't grant your motion, the court has just made you the attorney even though your contract may say you're not.

JUSTICE CORNELIUS: And it's a misnomer, too, because you can't withdraw from something that you were never in. Non-representation is a better term.

CHAIRMAN SOULES: Did you-all hear what Judge Cornelius said there? Scott McCown.

HONORABLE F. SCOTT MCCOWN: The other problem with requiring a motion to withdraw is it's a lot more paperwork and effort for both the lawyer and to the court,

and it increases the transaction costs of what's really a very simple inquiry, which is asking the trial lawyer, "Are you appearing in the court of appeals, and if you are not, how do we get a hold of your client?" I mean, that's all we are trying to find out. Are you appearing and if you're not, how do we -- where do we send notice to your client?

And I think the problem is that we are trying to write a rule about, well, what happens if he doesn't answer that? Forget it. Let the court of appeals take care of it. If he doesn't answer it and they want an answer, then the clerk can hound him until they get one, or they can serve a show cause order on him if he's obnoxious enough, but I mean, I don't think we have to analytically figure out a sanction to that. We just say he has got to do it.

CHAIRMAN SOULES: Anne.

MS. GARDNER: Well, I would have a broader question of how does this notice fit in with the notices that we as attorneys for appellants will be sending to the other side, to the appellee? You know,

what if there is this interim period where there is not an appearance or there is no answer from the attorney, do we -- I mean, I have never had a problem in 30 years of handling appellate cases where I -- all I have ever done is send certified copies of everything I filed to the trial attorney for the other side when I am appealing a case, and I don't think I have ever had a situation where they didn't respond and go ahead and continue until --

MR. MCMAINS: Somebody is in it.

MS. GARDNER: -- something happened, that another attorney got hired for the appeal, or they simply didn't respond, and I had affirmance on a certificate, or something like that. What's wrong with the current -- I guess, my second question in connection with that would be what exactly is the problem with the current system that we are having this philosophical problem now in changing? Why can't we continue to do what the old rule said?

CHAIRMAN SOULES: Okay. The

problem, as I understand it, that gave rise to this work that's being done was Ken Law raised the issue that the clerks don't really know who to send papers to when there is no attorney of record in the court of appeals. The rules don't provide -- don't direct the clerks to send the papers to any particular person. So let's have, he thought, a rule that tells the clerks who they can send papers to if there is not an attorney of record in the court of appeals proceeding, cause.

So we wrote that up. Take care of that by sending it to the attorney in charge in the trial court, and then that opened up all of these other issues, but Ken's problem is a real one.

And the court reporter needs to take a short break and change her paper. So we will be in recess for about 10 minutes and come back and pick up.

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

CHAIRMAN SOULES: All right. Here we go. I can't tell who's really got a

fix on this in any particular way. I know Richard has got his view that there should be an out, an easy way out based on a notice only if the lawyer feels satisfied that he has no -- he or she has no obligation for the appeal.

HONORABLE C. A. GUITTARD: Luke, I propose this.

CHAIRMAN SOULES: And that's important to him because he wants to not have some inference in the rules that there is any obligation. He wants the rules neutral as to whether or not there is any obligation for the lawyer to go forward, the trial lawyer to go forward in the appeal.

HONORABLE C. A. GUITTARD: Luke, I propose this.

CHAIRMAN SOULES: The inference of that is that he feels if the only way to get turned lose is to file a motion to withdraw, that first that suggests that he may have an ongoing obligation, and second, it may turn to reality if the motion is denied. So I think I understand some of what your concerns are, and then Steve's not here, so I guess I

won't try to restate what he was saying, and Scott's not here. So I don't know what really to do with this. Judge Guittard, what do you think?

HONORABLE C. A. GUITTARD: My proposal would be take that last sentence of subdivision (c) and reword it as follows: "If the attorney does not timely file the notice of non-representation, notices and copies may be sent to that attorney, but the attorney's obligation to his client is not otherwise affected."

CHAIRMAN SOULES: All right. Another problem that we have had here trying to make some -- trying to connect is that the court of appeals wants a brief. They want action from that party. They want to hear from the party.

HONORABLE C. A. GUITTARD: They don't want to dismiss it for want of prosecution or --

CHAIRMAN SOULES: Well, this is the appellee.

HONORABLE C. A. GUITTARD: Well, they don't want to make ex parte

decisions. They want them to appear before the court.

CHAIRMAN SOULES: That's right. But what you are suggesting -- I don't think there is any way that we can write this rule that will cause a party or a lawyer to contact the court if they don't want to. I don't think we can fix the problem that you are concerned with and Judge Cornelius is concerned with.

HONORABLE C. A. GUITTARD: That's right, but they can --

CHAIRMAN SOULES: And I think we ought to dispense with that altogether. I mean, because I just don't think we can make that happen.

HONORABLE C. A. GUITTARD: But we can give the appellate clerk some direction as to where he sends notices.

CHAIRMAN SOULES: I don't think we can make -- I mean, we can, I guess, by rule do most anything, but is it right to say that a lawyer is now attorney in charge for purposes of appeal who does nothing?

HONORABLE C. A. GUITTARD: No.

And that's not what we are saying according to my last suggestion here. It just says we send him the notices but don't otherwise affect his relationship to his client. Send him notices.

CHAIRMAN SOULES: Is it offensive to anyone to say, to recognize that -- to assume that we cannot fix the problem of getting the court the information that the court wants. So we just kind of set that aside and say, well, that's not something we are going to do here. I think that's what you're -- the effect of what you're saying is that we are just not going to try to force the party or the lawyer to do something because they are not going to anyway.

HONORABLE C. A. GUITTARD: We are not going to force him. We are going to induce him.

CHAIRMAN SOULES: How do you induce him if all you do -- he is just a mailbox. You say we are going to leave (c) in, but if that lawyer doesn't respond in 15 days, he is a permanent mailbox. How does that help the court of appeals?

HONORABLE C. A. GUITTARD:

Well, the question is what happens if we don't do that?

CHAIRMAN SOULES: Well, he's still not a counsel of record. He is not before your court. He is not attorney in charge. He is just a mailbox.

HONORABLE C. A. GUITTARD: Well, he would presumably ethically have some obligation to forward this to his client or suggest that his client get another attorney or something.

CHAIRMAN SOULES: And he doesn't.

HONORABLE C. A. GUITTARD: And if he doesn't, well --

CHAIRMAN SOULES: And the client doesn't care.

HONORABLE C. A. GUITTARD: And the client doesn't care.

CHAIRMAN SOULES: Or does care but waits until he has got a better lawsuit against his lawyer than he had on appeal.

HONORABLE C. A. GUITTARD: Well, that's just tough.

CHAIRMAN SOULES: Can we

accomplish anything other than giving Ken his address? Is there really anything else we can accomplish for the court of appeals in this rule? I don't know. I mean, I really want to try to probe that out. Because if there is not, that's the bottom line. That's all we can do, and I want to think about that.

JUSTICE CORNELIUS: I don't think there is, but I will say that, as you stated earlier, it is a real problem. My clerk has a problem knowing where to send notices.

CHAIRMAN SOULES: All right. If we arrange for a mailbox in the rule, can we say that that is about all we can accomplish for the court of appeals?

JUSTICE CORNELIUS: Yeah.

CHAIRMAN SOULES: Probably can't get, no way we can get a -- force a brief or anything from an appellee --

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

CHAIRMAN SOULES: -- who's not participating. So our objective from the perspective of the court of appeals on this is

solely to provide a mailbox. Is that agreeable with you, Judge Cornelius?

JUSTICE CORNELIUS: Yes.

CHAIRMAN SOULES: And with you, Judge Guittard?

HONORABLE C. A. GUITTARD: Yeah.

JUSTICE CORNELIUS: That was my original understanding of the rule, but we started writing it, and it just was hard to write.

CHAIRMAN SOULES: And Judge Till?

HONORABLE PAUL HEATH TILL: Well, yes. That's true, but the idea of having that mailbox is that when the notice is sent that something is going to happen, and the court -- wait a minute, and it doesn't require them to respond, but the court is sitting there, and they are looking at this, and if they are going to follow an outlined procedure of due process, they need to know that the notice was sent at least to some entity that presumably is connected with the case so when they dismiss it or do whatever it

is or remand it back, that they have done it based on some basis of procedural notice, that the event -- that the parties involved have been notified.

Yeah. It's a mailbox, but a mailbox is quite critical, and certainly not in the appellate level, but in my level, trying to figure out who to send the notice to is probably one of the most important things I have to deal with.

CHAIRMAN SOULES: Right. Well, we are going to fix a mailbox.

HONORABLE PAUL HEATH TILL: But whether they respond back or not. You know, have I sent it to the party that makes the -- that the decision that was entered is vital?

CHAIRMAN SOULES: Okay. Now, if the only thing that we are going to accomplish for the court of appeals here is the mailbox, why does there have to be any time limit on the notice of non-representation?

MR. ORSINGER: There doesn't.

CHAIRMAN SOULES: There

doesn't, does there? You don't need --

HONORABLE PAUL HEATH TILL: As long as there isn't a time limit on whatever the court is going to do, but if there is a time limit on what the court is going to do --

CHAIRMAN SOULES: The presumption in the way the rule is written is that if you send it to the lawyer and to the trial court, it's sent to the party; or he can say, "Don't send it to me. Send it to the party," and you send it to the party. Either way you have got a mailbox, and that's about all you can do, and it doesn't make any difference when because up until the time you get a notice you have got the presumption that when the trial lawyer gets it, the party got it.

JUSTICE CORNELIUS: I think the sentiment of some around here is that a time limit is necessary because that will advise the client if his lawyer thinks he does not represent him in time for the client to do something about it before he misses the deadline.

CHAIRMAN SOULES: All right.

If that is, then what is really a fair time to give a lawyer?

JUSTICE CORNELIUS: Well, it wouldn't have to be very short because we have agreed that this is just affecting appellees anyway, and of course, the appellee's brief is not required until 25 days after the appellant's brief is filed. So you have got a pretty good long period of time there. I don't see that 15 days is really very important.

CHAIRMAN SOULES: Except in the context of a limited appeal. That time period could be pretty long, and if it's going to be in the context of a limited appeal, the time period we have got, 15 days, may be too late. So we are not really fixing anything.

MR. ORSINGER: And requesting findings of fact has to be done even before your motion for new trial is due. So there are --

JUSTICE CORNELIUS: That's all going to be gone anyway.

MR. ORSINGER: That's 20 days after the date the judgment is signed. None

of this will be due until after that. So a lot of those things are gone anyway.

CHAIRMAN SOULES: Let's give the lawyers some time.

JUSTICE CORNELIUS: I would say 30 days would be plenty adequate.

CHAIRMAN SOULES: Give the lawyer some time to deal with whatever other issues they have got, get with their client and get something resolved, and 15 days really blows by me.

JUSTICE CORNELIUS: Pretty short.

HONORABLE C. A. GUITTARD: 30 is okay. 30 I don't think would be a problem.

CHAIRMAN SOULES: And no consequence. He doesn't become the attorney in charge regardless. He just goes on as a mailbox. This is just either the lawyer is a mailbox, or if he within 30 days sends you something, then the client is a mailbox, and we are doing that because we think that the client ought to have some early notice that the lawyer's opting out. Whether he has a right to do so or not, that's between the

lawyer and the client.

HONORABLE C. A. GUITTARD: Right.

JUSTICE CORNELIUS: And change the nomenclature of that notice like Richard Orsinger suggested. Change it from notice of non-representation to a notice of non-appearance to avoid any intimation that there might be an obligation there or may have ever been an obligation to represent him.

CHAIRMAN SOULES: Okay. Now I want to get to Sarah's problem after we have worked through that. How can we provide a procedure where either the trial lawyer is a mailbox, or he says, "I am not the mailbox. Send it to the client," and the client has to be told that within some period of time, but there is not a suggestion to the client that the lawyer has validly terminated the relationship?

JUSTICE CORNELIUS: I don't think there is such a suggestion, Sarah. The appellate court is not going to be ruling on this notice. They are not going to be doing anything except giving a copy of it or the

client is going to get a copy of it.

HONORABLE SARAH DUNCAN: Well, what we were talking about during break is that this really is in some measure dependent on what one's view of the substantive law is, and we obviously have some differences about what the substantive law is, and so whether you perceive a notice of non-appearance -- whether I perceive a notice of non-appearance as implying something that is or is not true as a matter of substantive law depends on what my view of substantive law is and --

JUSTICE CORNELIUS: Well, at any rate it's not the court that is doing it. It's the lawyer, and if he's wrong about it, that's between him and his client. I don't see this as the court sanctioning as whether the non-appearance is correct or not.

HONORABLE SARAH DUNCAN: Well, this changes --

JUSTICE CORNELIUS: The lawyer is representing that it is.

HONORABLE SARAH DUNCAN: -- my understanding of substantive law. Right now, as it exists today.

HONORABLE PAUL HEATH TILL: How?

HONORABLE SARAH DUNCAN: How?

HONORABLE PAUL HEATH TILL: Yeah. How?

JUSTICE CORNELIUS: Well, I don't agree, and that's why I think we ought to provide that --

HONORABLE PAUL HEATH TILL: I don't either.

JUSTICE CORNELIUS: -- this rule does not affect in any way the attorney-client relationship or the obligation thereunder but pertains to notice only for the benefit of the appellate court. Because we are never going to agree about the substantive law. It's obvious there are three views expressed here in this committee about what the substantive law on the point is, but this rule need not address the substantive law.

MR. YELENOSKY: If I may, from talking to Sarah all through the break, my understanding of what Sarah's position is, is that essentially -- and you can correct me if I misunderstood you -- that you believe that

the client wants attorney of record, is attorney of record, even if you have passed through a judgment to appeal unless a motion for withdrawal is filed, and therefore, for there even to be a mechanism of notice of non-appearance, to Sarah, changes her understanding of the law because it suggests that you can get out of the case simply by filing that. Otherwise there would be no -- or at least that you can indicate you're out of the case without going through the court. Sarah believes you always have to go through the court. Is that right?

HONORABLE SARAH DUNCAN: That was my understanding based on that research.

CHAIRMAN SOULES: Okay.

HONORABLE SARAH DUNCAN: That the fact of a judgment in the trial court does not in and of itself terminate anything.

JUSTICE CORNELIUS: It does if your contract with the lawyer says it does.

HONORABLE SARAH DUNCAN: That's right. But that's not the fact of the judgment terminating anything. That's a contract, to me.

JUSTICE CORNELIUS: Right.

CHAIRMAN SOULES: And this is not predicated, though, on the theory of ongoing representation.

JUSTICE CORNELIUS: It doesn't refer to representation at all.

CHAIRMAN SOULES: Any lawyer who uses this who doesn't have a pre-existing contract that limits his representation so that he does not have to take an appeal is crazy.

HONORABLE SARAH DUNCAN: That may be, Luke, but this implies that you can do it.

MR. ORSINGER: Can I make a comment? It may be that the client agrees to this. It may be the client says, "Look, I don't want to incur any more money. We won. I don't think it's going to get reversed, but why don't you just send me copies of everything you get?" Now, you have even got the permission of your client, but he has not told you to make an appearance in the appellate court. This isn't always going to be adverse to the client. What this really

is, is this is a statement about the relationship between the lawyer and the court of appeals, not really a statement about the relationship between the lawyer and his own client, and I think there is a dispute among us as to whether the lawyer in the trial court even has a relationship with the court of appeals, but why do we need to take a position on that?

CHAIRMAN SOULES: We are not going to resolve it.

MR. ORSINGER: Why do we even need to take a position on that?

CHAIRMAN SOULES: Sarah's feeling is, and the committee is going to have to approach this, but Sarah's feeling is that this suggests that there is not an ongoing relationship, I think.

MR. ORSINGER: More than that. It's on ongoing duty to represent them affirmatively in the case. Because we are saying they have a duty to send information along. This rule assumes that they have a duty to keep their client informed of the status of the appeal, but if that's not

enough, then we must be saying they have a duty to do more than just keep their client involved.

CHAIRMAN SOULES: We are not saying any of that. All we are saying is, court of appeals, Ken, you have got a mailbox, and it's the trial lawyer unless the trial lawyer tells you that it's the client, and if he tells you that, he or she tells you that, then your mailbox is the client. That's all this says.

MR. ORSINGER: Isn't that assuming that the trial lawyer --

CHAIRMAN SOULES: It doesn't assume anything.

MR. ORSINGER: -- is going to advise the client of what happens on appeal?

CHAIRMAN SOULES: It doesn't assume anything. It's not supposed to assume anything. It's just telling them -- trying to fix Ken Law's problem that they need an address.

HONORABLE SARAH DUNCAN: I don't think that's all it says, and I don't know what Ken's practice is now, but in every

case I have ever been involved in the practice of the clerk has been to send it to the trial -- the attorney in charge in the trial court.

CHAIRMAN SOULES: That's what he does, but he has no guidance.

HONORABLE SARAH DUNCAN: And I thought -- and when we initially worked on this rule was a long, long time ago, and I think everybody in the appellate rules committee thought all we were doing is saying that the court and opposing counsel and the client can look to the attorney to do this, not that the attorney has the responsibility or a continuing duty, but everybody can look to the trial -- attorney in charge in the trial court to handle this until he gets out or she gets out.

JUSTICE CORNELIUS: That's exactly what we meant, and that's exactly what we have done. If you think the language does not do that then let's put specific language in there that says that's what it does.

CHAIRMAN SOULES: Well, I don't think that's going to work.

HONORABLE SARAH DUNCAN: I don't think it is either.

JUSTICE CORNELIUS: Why not?

CHAIRMAN SOULES: Because that means that by this rule we are suggesting duties on the part of the addressee, and that's not what we are doing. We are not suggesting any kind of duties.

JUSTICE CORNELIUS: No. I --

CHAIRMAN SOULES: We are not suggesting that the lawyer has the responsibility to send the papers to the client even.

JUSTICE CORNELIUS: I was wanting to put language in there that would express just what you've said.

HONORABLE C. A. GUITTARD: I thought that's what I was trying to do here.

MR. YELENOSKY: And Richard may be the only one who doesn't think there is that duty. We may disagree about the duty to represent, but I am not sure if I heard you right, Richard, but I heard a suggestion that there may not be a duty to communicate to the client what you received so far.

MR. ORSINGER: No. I think there is a duty. I'm saying that I think our rule assumes a duty, and if we think we are not, I think our rule implicitly assumes that.

MR. YELENOSKY: But you think there is a duty. I think everybody here thinks there is a duty. So there is nothing wrong with assuming that there is a duty to communicate with the client. The only place we break off is the assumption that there is a duty to do more than communicate with the client, and that's where we get to the motion to withdraw.

HONORABLE SARAH DUNCAN: I am not saying that I think there is a continuing duty.

MR. YELENOSKY: Right.

HONORABLE SARAH DUNCAN: I mean, I believe what I said initially was the research I did said that you are attorney in charge until you withdraw.

MR. YELENOSKY: Right.

HONORABLE SARAH DUNCAN: And the client in that case wanted to know whether to file a cost bond, whether they had to

perfect an appeal. I don't mean to say that there is a continuing duty. I mean to say that there is a continuing attorney in charge relationship not just with the court but with everyone involved until that's terminated, as Anne said her research had showed, through a judgment that is final for appellate purposes.

MR. ORSINGER: Well, can I ask this question? What if the appeal goes to the U.S. Supreme Court and you are not licensed in the U.S. Supreme Court? Are you the attorney in the U.S. Supreme Court even though you are not licensed in the U.S. Supreme Court?

CHAIRMAN SOULES: Let's don't go that far field.

MR. ORSINGER: What I am saying is that can't be true.

CHAIRMAN SOULES: I am trying to get to whether or not we even can resolve this and -- okay. Go ahead.

MR. PARSLEY: Luke, can I offer a suggestion? And I know I am not part of this committee, but I drafted the rule. So if I can spend just 30 seconds on what we are trying to do, what I was trying to do when I

wrote this thing.

The idea is that the clerk needs somebody to send the notice to. Everybody needs somebody on the other side, and the question is, do you choose the party, or do you choose the attorney in the trial court? I think we all agree, maybe the committee should vote, that the attorney in the trial court is better than allowing an attorney to communicate directly with a party, an opposing party. So we communicate with that attorney.

We were saying in the rule -- what we were attempting to say is that if that attorney receives it as a mailbox and says, "I don't -- in my judgment I have no obligation here, and I don't even want to serve as a mailbox," should he have a right to just get out, and that was the idea of the notice of non-representation. He's saying, "I don't feel I have" -- whatever he says. He says, "I want out, and I don't even want to be the mailbox."

And your options are to make him withdraw because he is now in the clerk's computer. He is now there. There is a little hook in him

by the clerk because we made that decision. You want to send it to him and not the party. So you get a little hook in him. What does he get to do? He either has to withdraw, or we give him an automatic out, which is the notice of non-representation.

If we give him the automatic out, I limited it in terms of time, and 15 days doesn't matter to me. It came from prior drafts, but the idea there is that he shouldn't be able to use this thing two days before the brief is due, as Judge Guittard says, to say "I'll take my chances on malpractice. I am going to send in this notice today," that there ought to be some limit on that in which time he can say, "I don't even want to be a mailbox. I want to be out."

But the court has always in our rules had the right to control withdrawal, and yes, that does insert the court into the attorney-client relationship some, but the court has always been able to say -- the trial courts have always been able to say, "It's too late. You can't withdraw." And we shouldn't by rule

give him an ability two days before the brief is due to file this automatic "I'm out." That's why, in my opinion, it has to have a time frame. If you put on a time frame -- I know this is going on.

If you put on a time frame then you have to say what happens after the time frame expires. That's where my last sentence was he's deemed the attorney in charge. Maybe that's the mistake, and here is my suggestion. If we say, "If the attorney does not timely file the notice of non-representation that attorney..." Strike everything that follows in that last sentence and put, "must withdraw in accordance with paragraph (d)."

We don't call him the attorney in charge ever. We don't deem him the attorney in charge. We just say, "If you don't file this automatic out saying 'Don't treat me as a mailbox' timely," and whatever time this committee decides on I don't care. Then after that he has just got to go back to the withdrawal mechanism, and we never call him an attorney in charge.

CHAIRMAN SOULES: Okay. Well,

that gives you, Richard, a window to exercise what you think are your rights.

MR. ORSINGER: Yeah. The problem I have with that is that when you say that they must withdraw, why must they withdraw, when they must withdraw, and what are they withdrawing from?

CHAIRMAN SOULES: But you have your window.

HONORABLE C. A. GUITTARD: And suppose they don't.

MR. ORSINGER: And suppose they don't. Does that mean that they are, in fact, the attorney of record?

MR. PARSLEY: What I am saying is that this person is a mailbox, and if he decides in the first 30 days he doesn't want to be a mailbox and he just gets out automatically in 45 days or 15. After that what does he do? First we have got to agree does there have to be some time, or do we let him pull out automatically two days before the brief is due?

MR. ORSINGER: But all he is pulling out of --

CHAIRMAN SOULES: Let him finish.

MR. PARSLEY: If we decide that, we have got to go to the second question. If we decide to put a time window on it, what happens after the window expires? I think the rule has to address it or else it is inherently ambiguous, and we have created a problem in the rules instead of fixing a problem in the rules, and it seems to me that the answer to that is he just goes to (d).

We don't tell him what he's withdrawing from, what he was to begin with. He just has to go in to the court and say, "You have been sending me these notices. I have never had an obligation here. I attached a copy of my contract, and I would like to withdraw," and the appellate court says "yes" or "no."

MR. ORSINGER: Can I respond?

CHAIRMAN SOULES: Richard.

MR. PARSLEY: And I won't say anything more.

MR. ORSINGER: This is not like withdrawing two days before trial. Withdrawing two days before the brief is due

is not like withdrawing two days before trial because if there is no duty to file a brief then all you are doing is changing the mailbox on where the brief is sent. I don't have any heartburn at all over the mailbox changing two days before the brief is due or one day before the motion for rehearing is due or one day before the application for writ of error is due because all they are doing is changing a mailing address.

If you put any stock in withdrawal other than changing the mailing address then your rule implicitly is carrying with it a duty to file a brief, a duty to file a motion for rehearing, or a duty to file an application for writ of error; and that's the fundamental philosophical difference between that position and my position. I don't think that duty exists, and I don't think our rule should say it exists, and I think you implicitly do when you say that you have to withdraw if you want to change the mailing address.

CHAIRMAN SOULES: All right. But if you stay on board long enough as counsel for the party you begin to get some

duties and responsibilities.

MR. ORSINGER: Okay. Once you decide that then let's not pretend right here that we are talking about mailboxes.

MR. YELENOSKY: We're not.

MR. ORSINGER: We're not. We are talking about this rule imposing duties that some people think don't exist, and in that certain facts may as a matter of law not exist because the contract says so, and let's not delude ourselves into thinking that we are just talking about a place to mail a brief.

HONORABLE SARAH DUNCAN: That's right.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: It seems to me listening to this that your solution of about an hour ago would solve both problems. If you took the second sentence of (b) and made it (c) and deleted (c), if the attorney gets some material and he doesn't think he's the attorney, doesn't want to be the attorney, he sends -- he calls up the clerk or sends a letter to the clerk and says, "Hey, I am not the lawyer. Send it to my client."

And the court then either does one of two things. They say, "Okay," and they change it on the computer, or they say, "No. You have got to file a motion to withdraw," and that puts it into the lap of the attorney and the court, and you don't have the rule trying to adjust the position of the party vis-a-vis the client, which is the problem that I think some of the people here are having, but it seems to me that Luke's solution fixes everything, and Lee he is shaking his head so I guess he doesn't think so, but I would put it to a vote at some point before the end of the day.

CHAIRMAN SOULES: Steve.

MR. YELENOSKY: Well, I agree with that, and the only thing I would add is to start (c) where Luke said that and change the word "may" to "shall," and then if you skip (c) then you are going to follow it with the withdrawal paragraph. That does leave a gap, but I think it's a gap that can only be filled by substantive case law interpreting the duty of an attorney, and the duty of an attorney is not monolithic. It may be just a duty to communicate, but what we can do is put

in a comment essentially saying there is a gap there. This rule does not address what the duty of the attorney in charge might be or something does not affect vel non the attorney of the duty to communicate with his client and/or to represent the client.

CHAIRMAN SOULES: Okay.

MR. YELENOSKY: Then it does make it a mailbox rule that says all of this other stuff we are arguing about is a matter of professional duty and case law, if necessary.

CHAIRMAN SOULES: Okay. Let me try one other thing and then, Bill, I will get to you. What if we make withdrawal applicable to attorneys in charge as defined? So that that would just be adding the words "in charge" after attorney in the second line of (d).

MR. YELENOSKY: Where is that again? I'm sorry.

CHAIRMAN SOULES: In the second line of (d) say "an attorney in charge shall be permitted to withdraw."

MR. ORSINGER: It shouldn't be

limited to that, Luke, because you might have several attorneys, only one of whom is in charge, and the second or third tier lawyer may want to withdraw.

MR. YELENOSKY: Right. And also that might start speaking to who has to file a withdrawal motion.

CHAIRMAN SOULES: All right. All right. Bill.

PROFESSOR DORSANEO: Well, the offending sentence in the draft that was approved that is in the March 13, 1995, appellate rules report before we revisited this is the sentence that says the attorney who was in charge for any party other than the appellant in the trial court shall be deemed the attorney in charge for that party on appeal. That, the offense that that sentence gives is, in fact, cured by Luke's suggestion as Steve just indicated. The question is whether that is a sufficient cure without the notice of non-representation or non-appearance or perhaps disappearance.

I think that it would be progress just to do that small change, and I think there are a

lot of counter-arguments one way or the other about the need for the desirability of the pluses and minuses of notices of non-appearance, to leave that out, although that probably would not be my personal preference if I didn't have to talk to anybody else about it, but that would be my recommendation to you and to the committee, just to fix the offensive sentence. Maybe we change the title of the rule a little bit, too.

MR. YELENOSKY: "Attorneys and mailboxes."

MR. ORSINGER: "Place of mailing"? "Attorneys in charge, place of mailing."

CHAIRMAN SOULES: No. Let's don't start on that. Let's don't go backwards. Let's just look at -- I think we can fix this one. All right. Suppose, Richard, instead of saying "attorney in charge" we say an "attorney in charge and any other attorney of record in the appellate court shall be permitted to withdraw."

MR. ORSINGER: Yeah. That's

great.

CHAIRMAN SOULES: And I'm going to fix something else, and then we will say in (c) after the first sentence the attorney --

MR. YELENOSKY: You are talking about the old (c)?

PROFESSOR DORSANEO: You want to add the counsel of record concept?

CHAIRMAN SOULES: No, no. What I am doing is taking out of the old (c).

MR. YELENOSKY: Right. So you are talking about the new (c).

CHAIRMAN SOULES: The new (c) is gone completely. We are just talking about the second sentence of (b). Add language that makes it clear that this attorney shall not be considered attorney in charge or attorney of record in the appellate court.

PROFESSOR DORSANEO: Well, he is attorney of record. I mean, he's in the record, you know.

MR. ORSINGER: In the trial court you are not an attorney of record until you make an appearance in the trial court. So the question is are you an attorney of record

in the appellate court without making an appearance in the appellate court?

CHAIRMAN SOULES: And that's what I think you could --

PROFESSOR DORSANEO: All I am saying is it wouldn't hurt to call him an attorney of record as long as we made it clear that he wasn't in charge.

CHAIRMAN SOULES: You don't understand what I am trying to do. I am trying to make withdrawal apply only to people who have appeared in the appellate court.

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: This other guy is a mailbox, but we don't want to suggest in the withdrawal paragraph that this guy is an attorney of record.

MR. YELENOSKY: But you have done that by labeling it, "Where no attorney in charge" or "(c), No attorney in charge."

MR. BABCOCK: We haven't done that.

CHAIRMAN SOULES: But we have not said that he is not an attorney of record.

MR. YELENOSKY: Oh, okay.

MR. ORSINGER: Would you contemplate that in order to cease your status as an attorney of record you would have to have a motion to withdraw?

CHAIRMAN SOULES: No. In order to cease your status as what?

MR. ORSINGER: Attorney of record.

CHAIRMAN SOULES: In the trial court or --

MR. ORSINGER: No. In the court of appeals.

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Well, since every trial lawyer -- every lawyer that appears in the trial count is an attorney of record in the appellate court then --

CHAIRMAN SOULES: I thought you just said that was not true.

MR. ORSINGER: Oh, I thought that your definition -- well, pardon me. It was Bill's definition that if you are an attorney of record in the trial court, you are an attorney of record in the appellate court. Maybe you didn't --

CHAIRMAN SOULES: Follow me. Follow me. Okay. We are going to make withdrawal apply to the attorney in charge and attorney of record in the appellate court.

MR. ORSINGER: Yeah. That's great.

CHAIRMAN SOULES: Okay. Then we are going to go up here to what is now (c), the second sentence of (b), and say that lawyer is neither attorney in charge or attorney of record in the appellate court.

MR. YELENOSKY: Why not just say in (d) instead that an attorney in charge or an attorney who has made an appearance in the appellate court, and that would not include an attorney of record from the trial court who has not made an appearance in the appellate court? Then you don't have to redefine "attorney of record," which has a meaning already.

HONORABLE SARAH DUNCAN: If the attorney who has been receiving notices from the clerk pursuant to the second sentence of subsection (b) desires to quit receiving notices what is the mechanism by which that

would be done?

MR. YELENOSKY: I'd write a letter to the clerk and to my client.

PROFESSOR DORSANEO: It bothers me just as much as it bothers me to say that some court records are not court records that somebody who's of record and who's an attorney is not an attorney of record. Maybe it doesn't bother anybody else, but it bothers me to say that.

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: Okay. All right. Tabled. Let's get the rest of this work done. I don't think we can get this. I just don't think we can fix this. I think we are just going to have to leave the rule as is.

HONORABLE C. A. GUITTARD: You mean as originally proposed in the --

CHAIRMAN SOULES: No. We are not even going to fix Ken Law's problem. We can't fix it.

HONORABLE C. A. GUITTARD: Well, I mean --

CHAIRMAN SOULES: It just runs

us into one tangle after another.

MR. ORSINGER: We can fix it if all we want to do is provide a place to mail things, but if we want to start imposing duties then we have got fights. Why don't we just say where we mail stuff, and then Ken is happy, and the rest of us can go work on common law?

PROFESSOR DORSANEO: That was your proposal without the re-engineering.

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

PROFESSOR DORSANEO: Your original proposal just does that.

MS. GARDNER: It seems like it would go to the attorney of record in the trial court.

MR. ORSINGER: That's what Ken wants. He wants a place -- he wants authority to mail something somewhere. All the rest of this is the rest of us talking about what our relationships are to our clients.

HONORABLE C. A. GUITTARD: Which we never had in mind when we wrote it.

MR. ORSINGER: Except that the

word "attorney in charge" floated to the surface.

MR. YELENOSKY: Well, why can't we just leave it like it was in (d) and just say, "An attorney shall be permitted to withdraw." And you know, whether an attorney needs to withdraw, be he the attorney in charge or the attorney of record or whatever, is another question, but an attorney who seeks to withdraw does it in this fashion.

HONORABLE C. A. GUITTARD: Well, when we say leave it as it is are we talking about (a) as it appears on page 14 of this cumulative report?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: No. We are talking about -- either we are going to have to -- I don't know how to address these problems. As soon as we say that (c) will be no attorney in charge, and if no attorney in charge, send it to the trial lawyer, then the question comes up, well, then what if the trial lawyer wants it sent to the party?

MR. YELENOSKY: Why do we have to say in the rule?

CHAIRMAN SOULES: Well, somebody just said if the trial lawyer wants off the hook, what does he do?

MR. YELENOSKY: He sends notice to the court that I had a retainer agreement that said I was only going through the trial. Please send any further --

CHAIRMAN SOULES: Well, then why not keep (c) in there except for pieces of it?

HONORABLE SARAH DUNCAN: I don't think our clerks, at least, would quit sending you notices just because you send them a letter saying, "We don't want any more."

MR. YELENOSKY: They wouldn't.

HONORABLE SARAH DUNCAN: I think they would tell you that if you want off the hook you file a motion to withdraw, and the court will consider it in due time.

MR. ORSINGER: Oh, Sarah, we can't not change the rules because the clerks won't follow the new rules.

HONORABLE SARAH DUNCAN: I don't think they think they have and I am not sure that they have authority to quit sending

notices simply because that's what the attorney tells them.

CHAIRMAN SOULES: Well, as soon as we say the trial lawyer can get out by telling the clerk something then we get into, well, when does the trial lawyer have to say that, and then we get into the issue, well, he ought to have to say it in time so that his attorney-client relationship is well-served. So we write in -- we hook right back into the attorney-client relationship.

MR. ORSINGER: Yeah. That's a value judgment that we are making that we want to butt into this attorney-client relationship, and we don't need to make it.

CHAIRMAN SOULES: That's the only reason we are putting the time on it now, is because we are saying the client ought to know.

MR. YELENOSKY: But we don't need to know when the attorney has to do it. All we need to know is the clerk is going to send it to the trial attorney and then what happens from there if he notifies the court clerk or doesn't notify the court clerk. You

know, if he notifies it, they send it to the other party. We don't have to be concerned about when he might do that. The consequence of him not doing it at one time or another is a matter between him and his client.

CHAIRMAN SOULES: But Sarah's point is, I think, if the trial lawyer has a way out of being a mailbox, we ought to say that.

MR. YELENOSKY: Okay.

MR. ORSINGER: And I don't have a problem with that. I think that's a good idea. All I'm saying is --

CHAIRMAN SOULES: Why should it have any time frame on it?

MR. ORSINGER: I don't see why because it's just a place to mail, and if it's the day before the appellant's brief is mailed, then they just mail it to a different address. So what?

CHAIRMAN SOULES: Rusty's concern is that's not soon enough for the client, but that's between the lawyer and the client. That's not really something that the rule may need to address. I don't know. I'm

just --

MR. ORSINGER: It's not anything the court of appeals concerns itself with. We don't send briefs out to appellees and say, "Hey, your briefing deadline is expired. Why didn't you file an appellee's brief?" If an appellee's brief isn't filed when a case is submitted, it's submitted on the appellant's brief. Truth is the court of appeals is never going to take any action based on knowing whether the appellee has a lawyer or doesn't have a lawyer. They are waiting for people to file stuff, and then they read what's filed.

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: Okay. Then right now (a) and (b), the first sentence, and (c) -- (a) and (b) and (d) are all approved as written on this sheet. Now we are talking about -- and the first sentence of (c) is okay with the change from "may" to "shall." Now we are talking about do we use any of the old (c) in there, and I think what we are saying is that the notice of non-appearance can be sent any time, and it contains 1, 2, and 3, and the

lawyer is supposed to serve the other parties and his client when he notices the court.

Now, the only thing that doesn't fix is Sarah's concern that that's a suggestion that the court is sanctioning an improper withdrawal, and that's a good reason for defeating the whole thing, but leaving that aside for the moment, would what I just suggested fix the problem? Rusty.

MR. MCMAINS: Well --

CHAIRMAN SOULES: This is one last pass at this.

MR. MCMAINS: I know. Well, the problem, again, is because of the interrelationship the way these rules are written. It's not just where the courts send it. It's where the lawyers send it.

CHAIRMAN SOULES: Well, that's why I said they need to notify the lawyers, too. That's not in here now.

MR. MCMAINS: But I'm just saying but (b) is an attempt to say you send it to the attorneys in charge. (C) is what if there is no designated attorney in charge. Then the reason for the last sentence is to

basically make the wrap, isn't it, that unless something is done by that lawyer, and everybody is going to assume that the attorney in charge is the trial lawyer and that they are sending it to the right place until they get notification that they need to send it someplace else.

MR. YELENOSKY: That's right.

MR. MCMAINS: And so that's the reason why I think the attorney in charge language is all balled up in there because (b) does say you do send it. That's where the court clerk and the lawyers send things, is to the attorney in charge, and then we have a provision when you don't have one explicitly then we create one, so that we don't have a gap. So that everybody knows where to send something unless the conditions change, and then the question comes again the conditions change unilaterally, which is the principal objection, I think, to the (c) part, which is where we were, but I don't think that you by just adopting (a) and (b) and then taking out anything that deems anybody an attorney in charge, then (b) doesn't tell you where to

send it.

MR. YELENOSKY: Well, we can -- I have a suggestion on that.

MR. MCMAINS: You see?

CHAIRMAN SOULES: What's that now?

MR. MCMAINS: (B) doesn't tell you what to do if you don't have anything that deems somebody to be an attorney in charge.

CHAIRMAN SOULES: Yes, it does.

PROFESSOR DORSANEO: It says you send it to them.

CHAIRMAN SOULES: It says that you send it to the lawyer in charge in the trial court.

HONORABLE SARAH DUNCAN: Just the notice of the filing.

MR. ORSINGER: Yeah. We need to broaden that up to include briefs, too.

CHAIRMAN SOULES: It's got to include everything.

MR. ORSINGER: Yeah. Right now it's just the notice of appeal.

CHAIRMAN SOULES: It's got to include what the parties do and what the court

does, and you have got to get notice to the other parties. So it's just like notifying somebody when there is a change of counsel.

MR. YELENOSKY: Right.

CHAIRMAN SOULES: Basically you are putting a party pro se.

MR. ORSINGER: How about just saying, "All notices required by these rules will be sent to" --

CHAIRMAN SOULES: That's right. That's got to be fixed, and that's easy. That's not the real issue.

MR. YELENOSKY: And you can give the alternative, which is unless the trial court attorney provides the party's mailing address or try to make it value neutral that the trial court attorney can direct the clerk to --

CHAIRMAN SOULES: Let's don't get into that. That's easy to fix that everybody -- whoever this mailbox is everybody --

MR. YELENOSKY: Ought to know that.

CHAIRMAN SOULES: -- knows it,

and everybody sends their stuff to this mailbox. That's easy to fix. We are still back to the philosophical issues that need resolution about whether to do this at all.

PROFESSOR DORSANEO: I hate to say this, but I am getting so disenchanted with what this person is -- this attorney in charge in the trial court might or might not do after listening to everybody today if I am the party I think I want to get notice, too.

HONORABLE PAUL HEATH TILL: Amen.

PROFESSOR DORSANEO: And I am almost ready to surrender on the concept of just treating the lawyer in the trial court as if she is still running this show.

MR. ORSINGER: There was going to be some opposition to that because I think that this will support a claim that you owe a duty when you otherwise wouldn't, and there are going to be some defense lawyers that agree with me, and there is going to be a lot of trial lawyers that agree with me, and we are picking a fight we don't need to fight because what we really want is we want a

mailbox, but what we are doing is we are making this statement about what we think the duties are.

HONORABLE C. A. GUITTARD: Well, why don't we just say it's a mailbox, but it doesn't affect the duties otherwise?

MR. ORSINGER: Then if you have to have permission of the court of appeals to change the mailing address then you have implicitly said that the court of appeals has control over your relationship with your client.

CHAIRMAN SOULES: Sarah.

HONORABLE SARAH DUNCAN: I am sort of with Bill, although I don't reach the same conclusion. Based on what I have heard today and what we have all said, I am exactly at the point that we shouldn't table this. If everybody is handling this so differently then I think we are doing a real disservice to the universe of clients out there that the Supreme Court, Court of Criminal Appeals, doesn't figure out what these responsibilities are. If there is no continuing responsibility then the rule needs to reflect that. If there are

some circumstances in which there may be continuing responsibility, the rule needs to provide for it, but whichever way it is -- and as Anne said maybe we do need to get somebody to research this, but whichever way it is we shouldn't imply that it's not.

CHAIRMAN SOULES: Well, by tabling it I don't mean to table it for good. I mean just for this meeting. There is no question we can come to consensus, but that's going to take some compromise because there is some strong feelings, and the compromise shouldn't come from giving up something that we think is important. I don't think we ought to compromise just to get this done because we have talked too much about the issues. If there is a way to get our minds together on this in some short order, we ought to do it. If it's not, then we need to finish the Supreme Court report because it's going to go to the court next week, and put this on the side and tell the court this is coming later, but we have got to get our report to the Supreme Court.

And incidentally, how many of you will be

here tomorrow? Okay. That's most everybody that's still here. So that's good. So we have got a mission at this meeting to get our appellate rules report to the Supreme Court. We can set this aside as a piece of that, but we cannot set aside the rest of these items that are in here and get the report to the Supreme Court. So what I'd like to try to get a sense of is if we continue to push on Rule 7 are we in a position where people can compromise, legitimately compromise, and get this to closure, or is that going to take some more study, thought, work, that we don't have time to do at this meeting? Bill.

PROFESSOR DORSANEO: I am going to just say it again, that having the attorney in charge in the trial court treated, for whatever consequences that has, as an attorney on appeal in order to facilitate the notice providing function of the clerk of the court of appeals has turned out to be a bad idea. All right. We know that much, that it has lots of problems.

I went back and looked at Rule 4, and there are problems there in terms of talking

about somebody represented by counsel that create the same ambiguities, and I think a sensible fix would be to just if there is no attorney in charge to send it to the party. Now, if you wanted to send it to the party and also to the attorney who was the attorney in charge in the trial court to protect that attorney, that wouldn't bother me. Would it bother the clerk of the court of appeals?

MR. ORSINGER: Does that mean two briefs for every appellee?

PROFESSOR DORSANEO: No. I just think this first notice.

MR. ORSINGER: Okay. Just the clerk's notices.

PROFESSOR DORSANEO: And I also wonder a little bit about designation. I mean, I guess a party could designate himself as the attorney in charge even though he is not an attorney, I guess, or the person in charge, something like that, and that's not altogether clear in the first paragraph either. But that sentence that's bad in the draft which I had just as soon like to pitch is, "The attorney who was in charge for any

party other than the appellant in the trial court shall be deemed the attorney in charge for that party on appeal." If we pitched that, just took that out, then when you went back to Rule 4 it would say, "Service on a party represented by counsel shall be mailed to that party's attorney in charge," which at least suggests that if there isn't any such person then it's service on the party.

And if I am the party I think I am wanting to get notice. Say, well, I won't know what to do with it. Well, maybe that's true, but I certainly won't even get it if my attorney in charge in the trial court throws it away, which he might.

HONORABLE C. A. GUITTARD: And you sue him.

PROFESSOR DORSANEO: Well, I don't want that. I don't want the remedy to sue some lawyer who probably doesn't have insurance.

CHAIRMAN SOULES: So this is -- what does a clerk do with the next notice that they are supposed to send out after the notice of appeal?

PROFESSOR DORSANEO: I heard one judge here say that the most important thing that the clerk has to do is to figure out how to get notice to the right person, and I think making that too easy was a mistake when it's not easy. We might as well say send them all to Orsinger.

MR. ORSINGER: Luke, this doesn't talk about subsequent notices. It just talks about the notice of appeal.

CHAIRMAN SOULES: Yeah. This doesn't really fix the problem we are talking about, and that's ongoing communication during appeal. That's what we have been talking about so much. It doesn't tell the parties who to communicate with when there is not an attorney in charge.

PROFESSOR DORSANEO: Well, they would know it's the other party, wouldn't they?

HONORABLE C. A. GUITTARD: Well, under (a) that would cover other notices served and so forth because it determines who the attorney in charge is. That would include attorney in charge for the purpose of

receiving copies of briefs or whatever.

CHAIRMAN SOULES: That's right. The attorney in charge, if you have got someone who has made an appearance, you know who that is; but if you haven't, you don't know who that is. They don't have any way to serve somebody who doesn't have an attorney.

HONORABLE C. A. GUITTARD: I don't see any reason to make it any different between the clerk sending a copy of the notice of appeal or anything else that should be served or sent to the party.

CHAIRMAN SOULES: All right. You are talking about sending them directly to the party?

HONORABLE C. A. GUITTARD: Not if he has an attorney.

CHAIRMAN SOULES: Attorney in the trial court or attorney on appeal?

HONORABLE C. A. GUITTARD: Well, attorney that's either designated on appeal or that the appellate court could look to as being a presumptive or deemed attorney on appeal if nobody else is named.

CHAIRMAN SOULES: I thought I

just heard Bill say that the default would be to send it to the party and not to the lawyer.

HONORABLE C. A. GUITTARD: Well, that's what he said.

CHAIRMAN SOULES: There is a problem with that because some things are going on on appeal, and I have got to send -- Orsinger is the trial lawyer, and he's still got things going on in the trial, and he represents a party, and I represent the other party, and we are adverse. Now, I am on appeal, and I have got to send stuff to his client.

HONORABLE C. A. GUITTARD: No. No.

CHAIRMAN SOULES: But in the appellate practice, but I have got to send stuff to him in the trial practice, and when I send stuff to the party in the appellate practice I am probably in violation of the DRs. So it's got to be the party because there is overlapping activity in the appellate court and the trial court. Am I right?

HONORABLE C. A. GUITTARD: Very rarely.

MR. ORSINGER: There isn't anybody I have heard that --

CHAIRMAN SOULES: Notice of appeal, notice of limitation of appeal.

MR. ORSINGER: There isn't anybody here that I have heard today that objects to sending notices to the trial lawyer in the absence of any other lawyer on appeal. Where we have a difference is when somebody wants to change that from the trial lawyer to the client. Then we have this huge fight about whether the lawyer can do that unilaterally or whether he has to have the permission of the court to do that.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: That's really what the big debate is.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: And it seems to me that the rest of this we could very easily write, and then we could either take a vote on that other part, or we could do two alternative versions of it, and let the

Supreme Court decide because in the last analysis they will decide whether the duty exists or doesn't exist.

CHAIRMAN SOULES: Does everybody agree with Richard's statement that the real issue is whether the lawyer, the trial lawyer, should have an easy out -- I will call it that for shorthand. I don't mean to be implicating or implying anything there. Off (b).

HONORABLE C. A. GUITTARD: Yeah.

MR. ORSINGER: Versus requiring the court's permission.

CHAIRMAN SOULES: Excuse me. Versus requiring the court's permission.

HONORABLE C. A. GUITTARD: That's (b).

PROFESSOR DORSANEO: I think there is another issue, and I really do think it's in there, and that's the issue of whether the notice sent to this person who is not thinking that he is responsible and who is not actually acting as counsel is binding in some sense on the client who didn't get notice, and

it might be. You know, the cases that I have had where I have sent notices to attorneys who don't want to fess up to being attorneys are cases where they don't want notice, where the client doesn't want notice.

MR. ORSINGER: Bill, if we put it in our rule that notice to the trial attorney is okay, we are saying that the client is held to notice given to the trial attorney.

PROFESSOR DORSANEO: And you have convinced me that that will be a mistake sometimes here today.

CHAIRMAN SOULES: Okay. But that's going to satisfy due process.

PROFESSOR DORSANEO: Yeah. I'm also convinced of that, and that makes it an even bigger mistake.

CHAIRMAN SOULES: All right. How many feel that a lawyer -- and I am not going to try to define what the circumstances are. They might be narrow. They might be large, but should have some way to notify the appellate court that they are not representing the client on appeal and to send papers to the

client, and that's all they have to do? How many feel that? Seven -- eight.

All right. How many feel otherwise? They should have to go through, I guess, a motion to withdraw. That's the only alternative.

MR. ORSINGER: That's the only alternative.

CHAIRMAN SOULES: Three. So that's eight to three.

PROFESSOR DORSANEO: Same vote as before.

CHAIRMAN SOULES: All right. Then we are going to have an easy out. Okay. Now then, what?

MR. ORSINGER: To me it's implicit in easy out that there is no drop-dead deadline.

PROFESSOR DORSANEO: Yeah.

MR. ORSINGER: Perhaps that's a different vote, but it would seem to me if it's an easy out you don't drop dead at the end of 15 or 30 days since all we are doing is talking about a mailing address anyway.

CHAIRMAN SOULES: Okay.

Drop-dead deadline or not? Are we ready to discuss that?

JUSTICE CORNELIUS: Take the deadline out, and then I want to renew my suggestion that we put language in there that this is merely a mailbox rule for purposes of notice for the benefit of the appellate court and does not affect the attorney-client relationship.

CHAIRMAN SOULES: All right. Deadline, in or out? Is it going to be a finite -- maybe we already voted on that. I can't remember we have taken so many.

MR. MCMAINS: We actually did, and we voted that there should be a finite period.

HONORABLE PAUL HEATH TILL: We even voted on the 15 days.

MR. MCMAINS: And we even voted on 15 days.

CHAIRMAN SOULES: Well, let's look at it again because we have done a lot of talking since then. How many feel that there should be a finite time for this lawyer to send his notice to notify the client and don't

say anything else to him? How many think there should be a finite deadline? Five.

How many feel otherwise? Four. Everybody vote.

PROFESSOR DORSANEO: I voted -- it's four and a half, really.

CHAIRMAN SOULES: Everybody vote. Everybody vote on this. Take a position because we need a position on it, and it seems to be pretty important.

Okay. How many feel that there should be a finite deadline for the lawyer to do it? Six.

Those who feel otherwise show by hands. Everybody vote. Seven. Okay.

MR. ORSINGER: Luke, what's wrong with us drafting it two ways and let the Supreme Court decide because we are talking here about legal duties?

MR. YELENOSKY: Yeah. Yeah. Right.

MR. ORSINGER: And since they are the final arbiter of that absent a statute why don't we draft -- this is a pretty even split. Let's draft it the two ways and then

let the court vote or whatever.

CHAIRMAN SOULES: What's the consequence of missing the deadline?

HONORABLE C. A. GUITTARD: You have to file a motion to withdraw, or you're still in.

CHAIRMAN SOULES: Okay. If you are going to write it that way, there has to be some -- what difference does it make if you have a finite deadline, and it doesn't mean anything? Nothing happens.

MR. ORSINGER: I am not in favor of a deadline. I voted against it, but what I am saying is it was a close vote. I can see appellate lawyers mostly on the other side and one appellate judge on the other side. I can see an appellate judge on the side I am on. Maybe we ought to draft it two ways.

CHAIRMAN SOULES: Well, we have got to have some guidance on the ones that draft a finite deadline, the six. Do they put a consequence in, or do they not put a consequence in?

MR. ORSINGER: Can those of us

who voted against the deadline vote in that, too?

CHAIRMAN SOULES: New issue. All right. If there is a finite deadline for those who -- somebody is going to draft that, I guess, if we use Richard's suggestion. Is there a consequence for missing the deadline such that you thereafter have to file a motion to withdraw? Okay. How many feel that the consequences of missing a deadline is they have to file a motion to withdraw? Nine.

Those who feel that there should be no consequence, nothing in the rule suggesting any consequences. Three.

Okay. If there is a deadline, the consequence will be to move to a motion to withdraw, which is discretionary, of course, with the court.

MR. ORSINGER: And that means the court is going to be looking at affidavits and copies of employment agreements and resolving those disputes in the chambers. That's going to be interesting.

PROFESSOR DORSANEO: Well, if I were deciding, I might let somebody withdraw

who was no longer going to be effective counsel.

CHAIRMAN SOULES: Well, we don't need to -- we are past that. Okay. So we are going to draft it one way that there is no deadline and that we are going to put Judge Cornelius' language in. Richard, why don't you draft it this way since this is your favorite position, that this mailbox arrangement does not affect the attorney-client relationship or the duties of the lawyer on appeal, I guess?

HONORABLE C. A. GUITTARD: Why don't we put that limiting language in it whether there is a deadline or not?

CHAIRMAN SOULES: Well, that's just what I was going to ask. Should that go in whether there is a deadline or not?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Because if the lawyer has to withdraw, how can it not affect the duties on the appeal? To me that's non sequitur.

PROFESSOR DORSANEO: That would go in your paragraph (c) probably.

MR. ORSINGER: That's why I am fighting the motion to withdraw because it's inherent that you are an attorney even after --

JUSTICE CORNELIUS: Maybe "affect" is not the right word. Maybe a better word would be "govern" or "control." In other words, this rule is not intended to govern the relationship between an attorney and a client. It's just for notice purposes only.

MR. YELENOSKY: Well, but you have already voted that if you miss the deadline then you have to file a motion to withdraw, which as Richard suggests implies at least, you know, that you are in it in some fashion and have some responsibility.

CHAIRMAN SOULES: And that's why I don't think that sentence particularly applies if you have got to go to a motion to withdraw, but if we want to put it in both, that's okay with me.

HONORABLE SARAH DUNCAN: Are you going to put it on the notice of non-appearance that's made to the client?

CHAIRMAN SOULES: Okay. Let me get a show of hands on Judge Cornelius' suggestion. Should it go in both versions or only the one that has no time limit? How many in favor of both versions? Nine.

And how many in favor of just the version that goes to the withdrawal practice? Okay. Everybody agrees it goes in both.

Sarah's question is should that same statement or something similar be required on the notice of non-representation? Okay. How many feel that something to that effect should be in the notice of non-representation?

MR. MCMAINS: What? What is it?

CHAIRMAN SOULES: A statement that the -- I don't know. Sarah articulate it. When the lawyer sends in the non-representation the lawyer represents to the court, and I guess by a copy to the client as well, that this notice does not affect the attorney-client relationship.

MR. YELENOSKY: So in other words, that I think I don't represent you, but I may be wrong, basically is essentially what

you are saying.

HONORABLE SARAH DUNCAN: We require notice, but you can challenge your bill. We require notice, but you can file grievances, and the reason I thought we were requiring all of these notices and protecting the clients is because we are the ones that know the law, not them. So to put in the Rules of Appellate Procedure that none of this affects the responsibility that the lawyer has to the client, so what? The client is going to think that it does.

MR. YELENOSKY: Uh-huh. I mean, I don't disagree with you except on --

HONORABLE SARAH DUNCAN: I know. I know we agree.

CHAIRMAN SOULES: On the other side is if you have got a contractual relationship that says you don't -- that you have a way out, why do you have to tell your client that they can contest it when they really can't? I don't know.

MR. ORSINGER: If you look in the trial rules on Rule 10 on withdrawal of attorney you are required to recite that your

client approves, and if there is not another attorney coming in, you have to recite that you have delivered a copy of the motion, the party has been notified in writing of his right to object, whether the party consents, and the last known address.

So the withdrawal at the trial level when you are getting out and no new lawyer is coming in, you have to represent to the court as a lawyer that your client has been informed of their right to object to the motion. So that concept of giving the lawyer notice that they have some rights vis-a-vis their lawyer withdrawing is present in the trial court. Now, we may not have an existing obligation that we are trying to get out of here, and maybe it could be handled differently, but at least that's an example.

CHAIRMAN SOULES: So are you suggesting that language to that effect be put in the notice of -- it ought to be in the withdrawal, too. Both. It certainly needs to be in the withdrawal.

MR. ORSINGER: I agree it needs to be in the withdrawal, and my reticence

about putting it in this mailing thing is that in my view it presupposes that you have a duty to the client that you may be breaching, and while that's true, I think it's also as likely as not that you are not breaching that duty, and so I have very mixed feelings about telling the clients that they can object to it.

CHAIRMAN SOULES: In the trial court suppose you're firing your client because they are not paying you, and you have got it in your contract that you can do that. So it's all legit, and you come into the court, and you are withdrawing, and if your client comes in to object, then the trial court is going to decide whether or not the client is in breach of the attorney-client fee arrangement.

MR. ORSINGER: That's right.

CHAIRMAN SOULES: And if so, you're out.

MR. ORSINGER: And the lawyer is in that position because they have affirmatively made an appearance on behalf of the client in that court proceeding.

CHAIRMAN SOULES: Right.

MR. ORSINGER: The problem we are having here is not when someone has affirmatively made an appearance in the court of appeals. It's when they have affirmatively made an appearance in the trial court and now the case is moving off to another court.

CHAIRMAN SOULES: Do we notify them that they have a right to object to the notice of non-representation?

HONORABLE SARAH DUNCAN: They don't have a right to object. We haven't given them anywhere in this rule a right to object. The attorney can decide unilaterally.

CHAIRMAN SOULES: No. That's what we are talking about. Do we put it in now?

HONORABLE SARAH DUNCAN: You are talking about putting in more than just as a part of the notice of non-appearance? You are talking about providing for an objection procedure?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Well, Rule 10 in the trial rules doesn't specifically say that

the clients have a right to object.

CHAIRMAN SOULES: I know.

MR. ORSINGER: But it implies that they do.

CHAIRMAN SOULES: Yes.

MR. ORSINGER: And that's because the court may not grant the relief over their opposition because the court controls whether the attorney of record withdraws or not, and that's perfectly appropriate when the attorney has made an appearance of record. Where we get the debate going is if the lawyer has never made an appearance and has no obligation to make an appearance. Then we are telling the client, "You can object to their withdrawing," and then the court of appeals is going to be looking at the employment agreement, and they are going to be reading affidavits from both sides and deciding whether to let the lawyer out or not.

HONORABLE SARAH DUNCAN: But I thought that was the whole point. I thought the point of a notice of non-representation was that the court has no authority over it

and really neither does the client. The attorney is unilaterally deciding that they no longer represent this person, at least for purposes of notice in the appellate court. So why would we ever put in a notice of non-representation that the client can object? Who are they going to object to if the court has no control over this procedure?

CHAIRMAN SOULES: It's fine with me if it's not in there. It seems to me like the notice of non-appearance raises the interest of both the lawyer and the client because the notice of non-appearance may be basis. There may be an ongoing duty, may or may not be, and that there could be a reason for notifying the client that they have the right to object to the notice of non-appearance. If so, then that would lay the decision at the court of appeals. It's different than withdrawal because you are not there yet.

JUSTICE CORNELIUS: Yeah. I think we ought to give them the right to object to it. That would protect their interests, and I don't think it would put a

real big burden on the appellate courts. I doubt if you would get many contests.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Well, I'm sure this is not going to solve all of the problems because you can always hypothesize that the client will skip town or whatever, but if you simply require as part of the notice of non-representation that it be signed by the party, or you know, officer of the party or whatever, then really that's essentially like a consentual motion, and I recognize that, you know, there may be circumstances where you don't -- where long after the thing is going up you may not know about it, but then you just file a motion to -- but then you realize that you have to go to the motion to withdraw if you can't satisfy the requirements.

It seems to me the purpose of what we had this for was so the court didn't have to treat everything as a contested motion and weigh the particulars. It was just done.

CHAIRMAN SOULES: Your suggestion is that notice of non-appearance has to bear the client's signature?

MR. MCMAINS: Yeah.

JUSTICE CORNELIUS: That's a good idea. That takes care of it.

MR. MCMAINS: And that should solve all of those other problems except for -- I mean, I know there will be people who will say, well, you can duress the client into signing it or whatever, but you are always going to have that argument anyway, but I think that would satisfy all of the problems.

MR. YELENOSKY: Not mine.

MR. MCMAINS: And eliminate it being a contested motion, and then if he won't sign it, then you just go to withdrawal.

CHAIRMAN SOULES: Steve.

MR. YELENOSKY: Let me tell you where I am coming from on this since -- having been in Legal Services for nearly ten years and now with another federally funded organization, with limited resources you're picking who you represent, and for various reasons, even if you are technically the appellee and you have won, there may be reason why you don't want to go on to the appellate court that may have to do with conservation of

your scarce federal funds, which are becoming scarcer.

It may have to do with the change in the case to where it's decided on a point of law that doesn't have a widespread impact, but yet to go through the appellate courts would be significant, a variety of things like that. And if we make clear up front that we are not committing to an appeal, but nonetheless the client is going to have an opportunity to contest our notice of non-appearance or even we are required to file a notice of non-appearance, we are free.

They are always going to contest it, and there is probably not another attorney out there to substitute in, particularly if it's not a fee-generating case. We are in trouble both in having to file a notice of non-appearance that they can contest, and we are particularly in trouble in having to get their signature, and again, another subset of that problem is there are occasions where we are representing people who have mental disabilities, and there is no guardian, or a situation like that that, you know, we have to

be clear up front that we are not going to represent on appeal and not be put in the situation of having to argue to the appellate court that we should be let out of the appeal.

CHAIRMAN SOULES: Okay. So notice of right to object or no on -- now we are talking about the one that has no consequence, I guess, or if you get it done during the deadline. Okay.

JUSTICE CORNELIUS: Or making the party sign it. Which one of those?

CHAIRMAN SOULES: Well, signing or notice either one. Steve is saying neither because he can't get it done. It won't work, and he makes a pretty convincing argument that it won't work for him.

MR. ORSINGER: Well, then objection to a notice of appeal and securing a ruling from the court of appeals is nothing but a motion to withdraw in disguise.

MR. YELENOSKY: Yes. Yes.

CHAIRMAN SOULES: Notice of non-appearance.

MR. ORSINGER: Or I'm sorry. What did I say? Notice of non-appearance

subject to an objection from a client that requires an approval from the court of appeals is a motion to withdraw.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. How many feel there should be either a concurring signature of the client or a notice that they have a right to object in a notice of non-appearance, timely filed, whenever that is? Nine.

Okay. Those who feel otherwise, no notice, no joining? Five. Okay. So we have notice in both places. Okay.

MR. MCMAINS: It doesn't say which one.

CHAIRMAN SOULES: Oh, okay.

MR. MCMAINS: My view is I agree with Richard that giving notice that they can object to a notice of non-appearance is the same basically as a motion to withdraw, and that's why I say that I think merely requiring concurrence of signature, that's something that's automatic that the clerk can see and do and then change what the clerk's

doing based on the appearance. If he can't get the signature then they do the motion to withdraw, and any way that goes is to protect the client, but it still serves the administrating function of being expeditious. That's kind of what I voted for in this vote.

CHAIRMAN SOULES: Sarah.

I'm glad you asked the question.

HONORABLE SARAH DUNCAN: It may have the same effect, and it's that effect that cures my objection to it, but it doesn't have the presumption that initially caused all of this discussion.

CHAIRMAN SOULES: One problem that we sort of assume in here is when we talk about the last known address if we say the last known address, that at least implies that we may not be able to find the client to get them to join.

MR. MCMAINS: And I think that it makes sense. I mean, I don't personally have that much of a problem with saying you have to go to the motion to withdraw if you can't satisfy the requirements in the other. I mean, if you, for instance, know that they

are not at that address, and you can't make contact with them and whatever, I think it would be a much safer practice to go to the motion to withdraw.

CHAIRMAN SOULES: Well, is there going to be an inclination on the appellate court that if you can't find your client, don't know where they are, can't get the adjoiner, to cause the trial lawyer to stay in the case?

MR. MCMAINS: I mean, again, if the trial lawyer doesn't really have any obligation to be there, all he is going to do is be receiving notices and transmitting it to the last known address, and he is not going to do anything anyway.

PROFESSOR DORSANEO: All of this applies to criminal cases, correct?

MR. MCMAINS: That's not going to change anything of what we are currently doing.

MR. ORSINGER: In criminal cases when you -- appointed criminal cases, I think if you are appointed in the trial court you are appointed to ride it out all the way.

CHAIRMAN SOULES: Not in the federal system.

MR. ORSINGER: No. But in the state system.

HONORABLE SARAH DUNCAN: No. There was just a case the other day. The Court of Criminal Appeals has a case on that.

JUSTICE CORNELIUS: Well, in criminal cases you have to give notice to the defendant, you know, on the motion to withdraw anyway, and we have had some in our court where they could not find their client and where the client would refuse to accept notices and so on and so forth, and I believe in those situations after proof of that fact we have allowed a withdrawal.

CHAIRMAN SOULES: Which in effect terminated the appeal.

JUSTICE CORNELIUS: Right.

MR. ORSINGER: By the way, how did they happen to be before your court? Were they before your court by default because they were the trial lawyer, or had they taken some action other than the motion to withdraw?

CHAIRMAN SOULES: How did the

appeal get perfected?

MR. ORSINGER: You give notice of appeal right when they print out sentence. Orally, isn't that right? It's an oral notice of appeal?

JUSTICE CORNELIUS: Yeah. I think the attorney perfected the appeal in those cases, and then something happened later on that caused him to move to withdraw because he was no longer able to find his client.

MR. ORSINGER: We had some discussion about the criminal at the subcommittee level, and I can't remember who it was that commented, but the impression I had was that when you are appointed to represent somebody in a criminal prosecution that it is usually understood that you also are appointed to handle the appeal. I used to do some criminal practice 15 years ago, and it took a separate order, but I always got appointed on appeal after the trial court, but then there was some times when I got appointed on appeal when I hadn't done the trial. So that means that the trial lawyer didn't handle the appeal. I'm confused. I don't know.

CHAIRMAN SOULES: Well, I guess where I am headed is it seems to me like you almost have to have an either-or, either adjoiner or a notice sent to the last known address.

JUSTICE CORNELIUS: Yeah.

CHAIRMAN SOULES: Notice of right to object sent to the last known address.

MR. ORSINGER: Does it require permission? If there is no adjoiner you then must -- even if it's within 15 days, you must move for the court to order permission to --

CHAIRMAN SOULES: What I am saying is you would just say notice of right to object has been sent to Joe Smith at last known -- to Joe Smith, appellee, at last known address.

MR. ORSINGER: Well, under the proposal like Rusty had proposed where the client cosigns it, if the client won't cosign it, and you indicate that you have mailed notice of the right to object to them, and the client does not object, is it automatically valid; or does it require an order of the

court of appeals for it to be valid?

CHAIRMAN SOULES: What I am suggesting is no objection, and you are out.

MR. ORSINGER: By operation of law after 15 days?

CHAIRMAN SOULES: We haven't covered that yet.

MR. ORSINGER: Okay.

HONORABLE SARAH DUNCAN: How do we rule on the notice? How does the court rule on the notice?

MR. ORSINGER: You can rule on an objection, but if there is no objection --

JUSTICE CORNELIUS: I would think that if he cannot get the consent of his client, that he ought to be required to move to withdraw, that the appellate court consider all of the circumstances then and make an appropriate order.

HONORABLE SARAH DUNCAN: Then we are back to the same conception that got everybody fired up to begin with that there is something to withdraw from, something from which to withdraw.

CHAIRMAN SOULES: Right. We

are down to decision time on that, too. So okay. How many feel that the notice of non-appearance, notice of non-representation, should be limited in use to those circumstances where the client signs the notice?

HONORABLE SARAH DUNCAN: Would it bother a whole loft of people a whole lot if we called this non-appearance?

JUSTICE CORNELIUS: Yeah. Non-appearance.

CHAIRMAN SOULES: But you are appearing for that purpose. Really you are not representing the client. You are appearing, but I mean, I don't -- I mean, that was suggested. It doesn't matter to me. That's the thought that went through my mind.

MR. YELENOSKY: Can I ask a question, Luke, on this?

CHAIRMAN SOULES: All right. Let's get this to closure unless you have got something on the signed -- how many feel that the notice, whatever it's called, non-appearance, non-representation, should be limited to a notice that bears the client's

signature? Those in favor show by hands. Six in favor.

Those opposed? Four.

HONORABLE SARAH DUNCAN: I'm sorry. I didn't understand this vote. We are voting the notice is only valid if it contains the client's signature?

CHAIRMAN SOULES: That's right.

JUSTICE CORNELIUS: For the automatic non-representation it has to have the client's signature.

HONORABLE SARAH DUNCAN: Oh, okay. Can we start over?

CHAIRMAN SOULES: Those in favor show by hands.

HONORABLE PAUL HEATH TILL: This is an automatic out, right?

CHAIRMAN SOULES: Eight. Okay.

Those opposed. Eight to four. Okay. So that would be the limitation.

Okay. Anything else on this rule? We are going to have two versions that we are going to vote up or down.

HONORABLE SARAH DUNCAN: Very patient chair.

MR. ORSINGER: I think we need to address the question that you mentioned earlier on a withdrawal of an attorney of record. Do they need to say that they have told their client -- if they are not substituting a new lawyer, do they need to recite that they have told their client of the right to object and then the client has a right to object, or do we just forget that?

CHAIRMAN SOULES: Well, we know that -- yeah. We have got under those circumstances -- the hypothesis is that there is an attorney-client relationship and that the lawyer has appeared in the appellate court for the party.

MR. ORSINGER: Right. No new lawyer coming in.

CHAIRMAN SOULES: And the question is should we basically put all the same notices in that kind of withdrawal that we have in the trial court in the same basic circumstances?

HONORABLE SARAH DUNCAN: Absolutely.

CHAIRMAN SOULES: Those in

favor show by hands.

Those opposed? There is no opposition. So that carries.

PROFESSOR DORSANEO: I have one thing I would like to say at the end of this. Sitting and thinking about this due process question, about whether notice to trial counsel would be considered due process or otherwise appropriate notice to the former client, I am not so sure what the answer to that question is, but I would like to see a third alternative proposed to the court that the notice be sent to the party to give them the choice of doing that. Now, if I am the only one who thinks it's an appropriate thing, I would suppose that would not be a sensible thing to do.

CHAIRMAN SOULES: Notice of non-representation would be sent to the party?

PROFESSOR DORSANEO: No. I am talking about the notice of --

MR. YELENOSKY: Of appeal.

PROFESSOR DORSANEO: The notice to start this out.

HONORABLE SARAH DUNCAN: The

notice of appeal.

MR. YELENOSKY: Would go to both the attorney and the client?

MR. ORSINGER: Yeah. But you don't have the address of the client. Under the docketing statement you have the address of the attorneys of record, and if there is no attorney of record, and they are pro se, you have their private address, but right now the record doesn't tell the clerk what any of the clients' addresses are.

PROFESSOR DORSANEO: The docketing statement doesn't tell them that if they are not represented by counsel?

MR. ORSINGER: Yeah. If they are not represented you have to give them the mailing address of the unrepresented client, but if they have a trial lawyer then all you have got on the docketing statement is the trial lawyer's address, and so if you are going to mail a duplicate statement to the client, who is going to give the client's address?

CHAIRMAN SOULES: Okay. Think about that, Bill. If you think it's a big

problem, we will try to work on it.

PROFESSOR DORSANEO: All right.

CHAIRMAN SOULES: What's next? We have got another 20 minutes here to work.

HONORABLE C. A. GUITTARD: Rule 18.

PROFESSOR DORSANEO: Well, it's actually Rule 9. I think this has already been done, but just for the --

CHAIRMAN SOULES: Oh, just so we button up the record here, we are going to talk about this Rule 7 at the next meeting, but we are going to go ahead and send the entire appellate rules report to the Supreme Court without a Rule 7 with the understanding that that be forthcoming, if that's all right with your Honor.

JUSTICE HECHT: Uh-huh.

CHAIRMAN SOULES: Okay. Good enough.

PROFESSOR DORSANEO: I think this Item (5) in the additional changes memo with respect to page 16 of the March 13, 1995, appellate rules report is accurate and that that paragraph (b)(3), formerly (c)(3),

concerning costs needs to be deleted from the March 13 appellate rules report.

CHAIRMAN SOULES: At what page?

PROFESSOR DORSANEO: Page 16.

CHAIRMAN SOULES: Page 16. Paragraph (b)(3) of Rule 9 should be deleted in accordance with the --

HONORABLE C. A. GUITTARD: I'm not sure why we are deleting it, but that's what they voted.

PROFESSOR DORSANEO: That's just a correction of the appellate rules report itself to conform with the prior vote.

CHAIRMAN SOULES: So you are talking about right here on page 16 where it says "three costs"?

PROFESSOR DORSANEO: Uh-huh.

HONORABLE C. A. GUITTARD: Just strike that.

CHAIRMAN SOULES: Delete. Okay. That's done.

PROFESSOR DORSANEO: And I defer to Judge Guittard on Rule 18, duties of clerk of appellate court, which appears in the appellate rules report dated March 13, 1995,

at page -- beginning at page 33.

HONORABLE C. A. GUITTARD: I think most of this is codification or clarification of existing law except the proposed Rule 6, which says that, "After final disposition of an appeal, original proceeding, application for writ of error, or petition for discretionary review, the appellate court may allow filed items to be withdrawn from the clerk's office on written agreement of the parties or on motions showing reasonable grounds. The order permitting withdrawal shall include such directions and conditions as may be required to insure preservation and return of the items withdrawn." That's to replace a previous requirement or prohibition against removing any papers from the clerk's office after disposition.

Now, also I call your attention to subdivision (e), which is mainly just a re-enactment or relocation of Rule 8 with respect to the clerk's duty to account for money. Now, Lee Parsley drafted this. Is Lee still here? Lee, do you have any other comments on that?

I move the adoption of Rule 18 as drafted here.

CHAIRMAN SOULES: Okay. So you want to substitute Rule 18 as typed on the handout that goes from "Rule 18, Duties of the Clerk of Appellate Court," the rest of that page, all the next page, all of the next page, and down to Item (7)?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: You want to substitute that for pages 33 and 34 except for the notes and comments on 34?

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: Okay. So we will -- okay. Is there any opposition to that? Has everybody had a chance to see all of this, digest it, understand it? Okay. So any opposition to substituting new Rule 18 in the handout for Rule 18 on page 33 and 34? No opposition. That will be done.

So let me see. This may let me get my bookkeeping done. 18 from handout. And before we leave tomorrow I would like to have the revisions to the notes and comments on

page 34 if any changes need to be made there, and you can do that by interlineation and giving me a new page 34, which I will just slip into the book for Holly to work from. Okay. Next?

HONORABLE C. A. GUITTARD: The next is in Rule 51(b).

PROFESSOR DORSANEO: What about 22(b)(3), Judge? 22(b)(3) on page 40.

HONORABLE C. A. GUITTARD: Yeah. 22(3)(b), oh, that's the question that judge -- that's the point that Chip had a question about. The former --

CHAIRMAN SOULES: Where is this in the March 13 papers?

PROFESSOR DORSANEO: Page 40 of the appellate rules report of March 13, 1995, paragraph (b)(3).

CHAIRMAN SOULES: (B)(3). Okay.

HONORABLE C. A. GUITTARD: Which had this provided "documents, papers, or other items have been filed with the trial court or in the appellate court in camera and for the purpose of obtaining a ruling on the

discoverability of the documents, papers, or other items."

There are two problems about that, and the first is it's not clear whether that term "in camera" applies to documents filed in the trial court, which is the main point there, and second, should it be limited to the documents filed in camera for the purpose of obtaining a ruling on the discoverability of the documents, or should it simply be in camera under any circumstances? Should it simply read, as in this handout, "documents, papers, or other items filed in camera," period.

CHAIRMAN SOULES: Okay. Those who -- Chip.

MR. BABCOCK: Yeah. The problem with this as I see it, Judge, is its interplay with Rule 76(a). It seems to me that this opens up a very large exception such that anybody could escape a 76(a) procedure by filing something with the appellate court in camera. For example, if I had a brief that for whatever reason I wanted to file and keep the public from being able to see, if you had

this exception, all I'd have to do is file it with the clerk in camera, and that under this rule exempts it from Rule 22(c), which says except for the things exempted here Rule 76(a) applies.

MR. ORSINGER: If you said properly filed in camera.

MR. BABCOCK: Huh?

MR. ORSINGER: Did you say "properly filed"?

MR. BABCOCK: No. See, 76(a), you don't need (3) at all because 76(a) has already got a procedure where the court may receive matters in camera. Not limited to discovery but just for any reason. So you don't need this subdivision (3) in order to preserve your right for in camera inspection. So that if somebody wants to come to the court of appeals with a court record, and they say, "We want to seal this, and we want to submit something to you in camera to justify that sealing or maybe to show that the document itself ought to be sealed," they ought to do it under this proposed Rule 22(c) which then kicks in 76(a).

If it's something that's a big emergency, they can get a temporary sealing order under 76(a). If it's something that they just want to submit in camera, they can do that under 76(a), but you are going to create a lot of mischief with this subdivision (c) -- I mean, subdivision (3) the way you propose it, and frankly, I don't think it's -- I think it's redundant of 76(a) in any event. I think it ought to be out of there altogether.

MR. ORSINGER: That's on the assumption that 76(a) applies to courts of appeals. Is that a safe assumption?

MR. BABCOCK: Well, under 22(c) you explicitly say it does.

HONORABLE C. A. GUITTARD: Well, let me ask you this. I see the problem about just permitting anybody to label their brief in camera and then exempting it from public view, but -- and there should be some qualification there, of course, but there are other reasons for filing something in camera other than for the purpose of obtaining a ruling on the discoverability. For instance, if they are trade secrets or something like

that.

MR. BABCOCK: Sure.

HONORABLE C. A. GUITTARD: Now, and the next question is, is there any occasion for filing a document in camera in the appellate court that hasn't been filed in camera in the trial court?

PROFESSOR DORSANEO: Or filed at all in the trial court.

HONORABLE C. A. GUITTARD: Filed at all in the trial court.

MR. BABCOCK: There may or may not be. I can't imagine the circumstance where you would do that, but maybe there are some, but the 22(c) says that if you want to -- proposed 22(c) says if you want to do that, if you want to file something under seal, then you have got to comply with 76(a).

HONORABLE C. A. GUITTARD: Well, should this subdivision (3) simply say, "documents or other items filed with the trial court in camera"? It can't be filed in camera unless the trial court permits it to be filed in camera according to Rule 76(a); is that right?

MR. BABCOCK: Well, but your subdivision (2) right above that already covers that, it seems to me, where it says "Documents, papers, or items that the trial court has ordered sealed or concerning which the trial court has otherwise restricted access." So if it has been filed in camera in the trial court and the trial court has restricted access in one way or the other, then that's covered by your subdivision (2) here, and you don't need (3).

HONORABLE C. A. GUITTARD: Then your point is we just don't need (3) at all.

MR. BABCOCK: That's right.

HONORABLE C. A. GUITTARD: There is no occasion to file anything else in camera besides what's mentioned in subdivision (2); is that right?

MR. BABCOCK: That's correct.

HONORABLE C. A. GUITTARD: Well, okay. If that's it, well, this will just be something --

JUSTICE CORNELIUS: I don't think that's true in all cases. We have had matters filed in camera in our court that were

not filed in the trial court.

CHAIRMAN SOULES: For example, in original proceedings.

JUSTICE CORNELIUS: Original proceedings.

HONORABLE C. A. GUITTARD: Well, how would you limit that to avoid Chip's problem?

CHAIRMAN SOULES: I don't think you can. I mean, the court of appeals is not going to hold a hearing open to the public on a motion to seal records every time.

PROFESSOR DORSANEO: No. But (c) does take care of that.

CHAIRMAN SOULES: It takes care of that.

PROFESSOR DORSANEO: "Appellate court may refer any motion to seal to the trial court." I guess this is almost going completely in reverse to what I had been thinking when I drafted this. I agree with Chip. It's now not necessary to talk about things filed in camera in the trial court, but it may be necessary to talk about things filed in camera in the appellate court, if you can

do that.

MR. BABCOCK: Right. Which you take care of, it seems to me, under (c).

PROFESSOR DORSANEO: Well, I don't read (c) necessarily as providing that much of a requirement of filing it in camera in the trial court before it's filed in camera in the appellate court in order to get it determined to be in camera in the appellate court because you have to use 76(a), and that requires it in the trial court and --

MR. BABCOCK: Well, but you incorporate 76(a), and 76(a) permits two ways you can present matters to the court and not have anybody see it. One by just -- it says you can send it to them in camera. The other one is a temporary sealing order, which in camera is not appropriate. So by incorporating 76(a) you take care of that problem.

PROFESSOR DORSANEO: But where do I get the temporary sealing order?

MR. BABCOCK: Out of 76(a).

PROFESSOR DORSANEO: But I'd have to move in the appellate court for a

temporary sealing order, and that would be the motion that's referred to the trial court?

MR. BABCOCK: Or the appellate court can hear it itself, I guess, under this proposed (c).

CHAIRMAN SOULES: Okay. 22(b) does not seal records.

MR. BABCOCK: That's right.

CHAIRMAN SOULES: It only creates a presumption.

MR. BABCOCK: Right.

CHAIRMAN SOULES: 22(b)(3) would permit a party to file something in camera and by that alone create a presumption that it should be sealed, but that's a rebuttable presumption.

MR. BABCOCK: Now, with this rule, you have to read that in conjunction with (c) because it says that if (b) -- if the record is in the category that is delineated in this laundry list here then they are presumed to be open -- court records that are presumed to be open under (b), which this wouldn't be because you have excepted it, may be sealed only as provided in Rule 76(a). So

now you are permitting a sealing merely by the lawyer coming in and saying, "I'm filing this in camera." So you don't have any of the protections of 76(a).

PROFESSOR ALBRIGHT: Can I add something?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: In 76(a) you do have a possibility of a lawyer coming in and saying, "I'm filing this in camera," but it's limited to documents filed with the court in camera solely for the purpose of obtaining a ruling on the discoverability of such documents. If you take (3) out completely then you are saying as a lawyer you cannot file anything in camera with the appellate court so the appellate court can determine --

MR. BABCOCK: No.

PROFESSOR ALBRIGHT: -- the discoverability.

MR. BABCOCK: No. Because you also -- excuse me. Go ahead.

PROFESSOR ALBRIGHT: It just

seems to be consistent with 76(a) you have got to allow lawyers to file something in camera because Rule 76(a) does, and it may be that you shouldn't leave it open like this new part (3) that just says "filing it in camera." It should be as the previous version of (b)(3) is, which limits it to for the purpose of obtaining a ruling. I don't know what instances things are filed in camera with the court of appeals. Maybe that would help us.

MR. BABCOCK: Two answers to that. I think under 76(a)(4) it says the court may inspect records in camera when necessary. So that's one authority that the court has. And then under 76(a)(5) there is a procedure for temporary sealing orders when there is an emergency whereby somebody has to come in and file something but makes a certain representation to the court that it's immediate. I have got to do it right now, and so it seems to me that takes care of both of those situations.

PROFESSOR ALBRIGHT: What about 76(a)(2)(a)(1)?

MR. BABCOCK: Okay. Well,

that's what you read, which was limiting it to discovery, but I'm talking about (4), where it says, "The court may inspect records in camera when necessary." So the court under 76(a) has the authority not limited to --

PROFESSOR ALBRIGHT: Okay.

MR. BABCOCK: -- discovery to inspect records in camera if it needs to, and it also has the authority under 76(a)(5) to issue a temporary sealing order if there is an emergency.

PROFESSOR ALBRIGHT: So you go to the appellate court and say, "I need to file something with you, but I don't want to because it would make it a public record, and I need an emergency sealing order."

MR. BABCOCK: Right.

PROFESSOR ALBRIGHT: "If you let me, I will tender these documents to you in camera so you can determine whether I have a sealing order or not."

MR. BABCOCK: Right. Right. Exactly. And the point is that 76(a) takes care of all of these things.

PROFESSOR ALBRIGHT: Is there

ever a situation where you would be filing with the court of appeals documents in camera for the first time to determine their discoverability? I can't imagine that you would. Is there?

JUSTICE CORNELIUS: Yes. We have.

MR. BABCOCK: I would think it would be rare, but there would be circumstances.

JUSTICE CORNELIUS: Well, it is rare, but you know, sometimes in the trial court they won't even produce them for the trial court to view in camera, and they come up to us on an original proceeding saying the trial court should have looked at them in camera, and we are filing them in camera with you so you can look at them to tell us if he should have.

PROFESSOR ALBRIGHT: So maybe it wouldn't hurt to have 22(b)(3) as an original order.

JUSTICE CORNELIUS: I don't see how it hurts.

MR. BABCOCK: It hurts if you

do it as amended.

PROFESSOR ALBRIGHT: Right. Yeah. I understand that.

MR. BABCOCK: Because that opens up a big gap. As originally was it's probably not a problem, although it is duplicative of the procedures you already have under 76(a). And these laundry lists exempts 76(a). So if that's what you are about, if that's what you are trying to do, then for that category of documents in that rare instance where they are trying to file with the court of appeals to determine -- to obtain a ruling on discoverability, then in that instance you are going to be outside the procedures of 76(a) because of the way (c) is worded.

PROFESSOR ALBRIGHT: But you are outside of 76(a) in the trial court in the that situation. So why shouldn't you be outside 76(a) in the appellate court as well?

MR. BABCOCK: Well, because it's redundant, but yeah. That's probably okay.

CHAIRMAN SOULES: So what?

Leave (3) the way it is on page 40?

MR. BABCOCK: And maybe add the word "solely" to make it track with 76(a), but other than that...

CHAIRMAN SOULES: And we have got to put a "that," don't we, before "have been"?

HONORABLE C. A. GUITTARD: Yes. Right.

PROFESSOR ALBRIGHT: So I think what you would want to do is say, "documents, papers, or other items filed."

CHAIRMAN SOULES: That have been filed or filed?

HONORABLE C. A. GUITTARD: Just documents filed. Why not? Strike out "have been."

PROFESSOR ALBRIGHT: "Filed with the appellate court in camera."

CHAIRMAN SOULES: "Documents, papers, or other items filed with the trial court or in an appellate court in camera."

HONORABLE C. A. GUITTARD: In that case you don't --

CHAIRMAN SOULES: "For the

purpose of obtaining a ruling on the discoverability of the documents, papers, or other items."

PROFESSOR ALBRIGHT: Okay. If you have filed documents in camera with the trial court to determine discoverability then you have a mandamus in the court of appeals. They are still in camera.

CHAIRMAN SOULES: That's right.

PROFESSOR ALBRIGHT: They are still outside of 76(a).

CHAIRMAN SOULES: That needs to be contained.

PROFESSOR ALBRIGHT: It seems like it should say if it's been filed with the trial court in camera it's still outside 76(a). If it's filed for the first time in the appellate court, it's still out 76(a).

MR. BABCOCK: Well, just because you have a discovery dispute does not mean it's outside of 76(a).

PROFESSOR ALBRIGHT: No. But if you filed it in camera for the sole reason of determining discoverability.

MR. BABCOCK: Right.

PROFESSOR ALBRIGHT: I claim this is privileged. I am tendering it to the trial court in camera.

MR. BABCOCK: Right. Okay. I'm with you.

PROFESSOR ALBRIGHT: Trial court says, "No, it's not privileged." I file a mandamus. I still want to protect those documents. I do not want them to be considered court records --

MR. BABCOCK: Okay.

PROFESSOR ALBRIGHT: -- when it goes up to the court of appeals either. So it seems like to me that (3) as written is appropriate. You can add "solely" for the purpose to make it consistent with 76(a).

JUSTICE CORNELIUS: I don't know why you want to limit it to documents involved in discovery proceedings. I can't think of any other reason why anybody would file some in camera in the appellate court, but there may be, and I don't see any reason to limit (3) there to those that are filed solely for that purpose.

MR. BABCOCK: Well, you are not

limited because you still have the 22(c), which is going to cover all the other circumstances.

JUSTICE CORNELIUS: Which is the sealing. What is that, the sealing rule?

MR. BABCOCK: Yes, sir.

PROFESSOR ALBRIGHT: But that means you file a motion.

JUSTICE CORNELIUS: But you have to go through the --

MR. BABCOCK: That's right.

JUSTICE CORNELIUS: And that's the whole order for sealing.

MR. BABCOCK: Right. And that's the whole purpose because you don't want to create this big exception where people can just unilaterally come in and seal court records.

PROFESSOR DORSANEO: Right. I'm convinced that that makes since, the way that you have brought it to us.

HONORABLE C. A. GUITTARD: What about other cases where there are trade secrets or something besides cases involving discoverability?

JUSTICE CORNELIUS: Well, we have had some like that, but in those cases they have all always been sealed in the trial court or filed in camera in the trial court.

PROFESSOR DORSANEO: That was in here in the last draft the last meeting and it kind of fell out, and now it would be dealt with under the general provisions of 76(a).

MR. BABCOCK: Which specifically mentions trade secrets.

CHAIRMAN SOULES: Is there anything in 76(a) that applies to family law?

MR. ORSINGER: No. I am not worried about this at all because none of this makes any difference because if it's under the family code you don't have the public notice requirements, and you don't have a presumption of openness.

CHAIRMAN SOULES: Well, but if you are trying to file something in a family law case that is not for discovery you don't get the benefit of 22(c) because it doesn't apply to you.

MR. BABCOCK: But, Luke, you have also got a subsection (4) here that

exempts family code stuff.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: This is assuming that if the original proceeding relates to a family code proceeding in the trial court I am assuming that this --

CHAIRMAN SOULES: Yeah. That takes care of it. Okay. Let me read (3) now. It will say, "Documents, papers, or other items..." Strike "have been." Pick up "filed with the trial court or in an appellate court in camera..." Strike "and."

"For the purposes" --

MR. BABCOCK: "Solely."

PROFESSOR ALBRIGHT: "Solely."

CHAIRMAN SOULES: "Solely for the purposes of obtaining a ruling on the discoverability of documents, papers, or other items." Okay. Any opposition to that now as written?

HONORABLE C. A. GUITTARD: I would raise this question.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Does the in camera refer both to filing in the

appellate court and in the trial court?

CHAIRMAN SOULES: It says "or." With the trial or in an appellate court.

HONORABLE C. A. GUITTARD: Or in the appellate court in camera.

PROFESSOR DORSANEO: Yeah. Put "in camera" there.

MR. ORSINGER: Why don't you put "in camera" before "the trial court"?

CHAIRMAN SOULES: Filed with the trial court in camera or --

HONORABLE C. A. GUITTARD: Or in the appellate court in camera.

MR. ORSINGER: Well, couldn't you say "filed in camera with the trial court or the appellate court"?

CHAIRMAN SOULES: No.

MR. ORSINGER: Okay. Can't do that.

CHAIRMAN SOULES: Two in cameras here --

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: -- are felt not to be redundant. Okay. We will use it

twice.

JUSTICE CORNELIUS: Or you could say it "in camera with either the trial or the appellate court," or you can say it twice.

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

MR. ORSINGER: Luke, I would like to get a confirmation on the record that if you have an original proceeding relating to a trial court proceeding that's in the family code that this 22(b)(4) applies because there is no such thing as a mandamus under the family code, but if there is a mandamus or a habeas or whatever it is that relates to a family court proceeding then this exception applies; is that right? Is that what these words mean?

CHAIRMAN SOULES: "Documents, papers, and other items filed in an action."

MR. ORSINGER: Because the action in the court of appeals is obviously a separate lawsuit from the action in the trial court, and there is no provision for original proceedings under the family code in appellate

courts. We could say, "relating to documents, papers, or items filed in the appellate court relating to an action originally arising under the family code."

HONORABLE SARAH DUNCAN: Relating to?

MR. ORSINGER: Yeah. Relating to in the sense that I am seeking to -- I am seeking some kind of original -- some kind of relief by original proceeding, and I am filing copies of pleadings and a lot of other stuff that comes out of this family court proceeding. Well, now, that was not subject to Rule 76(a) where they were filed in the trial court, but when I bring copies up to the court of appeals now all of the sudden I am not under the family code anymore.

HONORABLE SARAH DUNCAN: Right. But my point is that "relating to" I think is too broad.

MR. ORSINGER: Okay.

HONORABLE SARAH DUNCAN: Your original proceeding arises out of your action in the trial court that's a family code action, and I think that's why it uses the

language it does.

MR. BABCOCK: I think your original interpretation is correct, but wouldn't -- in your original proceeding wouldn't it arise under the family code in the sense that you are authorized to institute this original proceeding by the family code?

MR. ORSINGER: No. You are not. You are authorized to originate the original proceeding by the Civil Practice and Remedies Code and the Rules of Appellate Procedure.

CHAIRMAN SOULES: What about "filed in an appellate court for review of an action originally arising in the family code"?

HONORABLE SARAH DUNCAN: "Review" doesn't get the original proceedings.

CHAIRMAN SOULES: It doesn't?

HONORABLE SARAH DUNCAN: Not technically.

MR. ORSINGER: Could you say "in connection with in an original proceeding not" --

HONORABLE SARAH DUNCAN: What's wrong with the way it is now?

MR. ORSINGER: Because these papers are not filed -- when they are filed in the court of appeals they are not filed in an action originating under the family code.

HONORABLE SARAH DUNCAN: That's right, but they are contained within a transcript or statement of facts that's filed in the appellate court, and that's --

MR. ORSINGER: Well, they are certainly not contained in a transcript because there isn't one. What I had was certified copies of what I filed in my family law proceeding, and I am filing them now in an original proceeding in the appellate court.

HONORABLE SARAH DUNCAN: This needs to say "record."

MR. BABCOCK: Mr. Chairman, how about if you added the words after "family code" -- Richard, how about this? After "family code" saying "including an original action to review the decision of a court in the family code."

CHAIRMAN SOULES: One more try. What if we say, "Documents, papers, or items filed in an action originally arising in the

trial court under the family code."

MR. ORSINGER: So that means any new stuff like affidavits and whatnot are not covered? They have to be filed in the trial court first?

CHAIRMAN SOULES: No. It's arising in the trial court under an action.

MR. ORSINGER: If they are filed for the first time in the court of appeals that language wouldn't help me, would it?

CHAIRMAN SOULES: I mean, that's what I am trying to get at. I don't know whether it helps you or not.

MR. ORSINGER: Okay. Say it again.

CHAIRMAN SOULES: "Documents, papers, or items filed in an action originally arising in the trial court." Of course, if it originally arises in the trial court --

MR. ORSINGER: That would work if I was bringing you certified copies of something filed in the trial court, but if I had an affidavit or something that was filed for the first time, your language wouldn't

help me as to that.

HONORABLE C. A. GUITTARD: "Arising in the trial court or with reference to a proceeding in the trial court."

MR. BABCOCK: Yeah.

MR. ORSINGER: I'm happy with that. I think that would clearly cover it.

CHAIRMAN SOULES: What are the words again?

HONORABLE C. A. GUITTARD: "Arising in the trial court or with reference to a proceeding in the trial court" or "relating to a proceeding."

"Concerning a proceeding."

CHAIRMAN SOULES: Say it again, please. I lost you.

HONORABLE C. A. GUITTARD: Well, let's do it this way.

CHAIRMAN SOULES: "Arising in the trial court or" --

HONORABLE C. A. GUITTARD: "Relating to a proceeding in the trial court under the family code."

CHAIRMAN SOULES: Okay. Well, that takes us to adjournment today, and how do

we look for getting through with this tomorrow? These next, what, eight? Start with No. 8 and go through 20.

HONORABLE C. A. GUITTARD: Eight, I think, is routine. Nine is also routine. Ten, I think, is routine. You get down to 11 you are talking about administrative orders. That's new, but I am not sure it would take a great deal of discussion.

Then we have the rule concerning -- 13 is related to 12. In other words, it's related to administrative appeal. Item 14 is routine. Item 15 is, I would think, routine. 16 is routine. 17 is routine. 18 is probably routine, but I am not sure. 19, I think, is routine. 20 about ultimate disposition of papers is new, but it probably won't cause a great deal of discussion. Do you agree with those sentiments, Bill?

PROFESSOR DORSANEO: Well, with some trepidation, yes.

HONORABLE C. A. GUITTARD: Okay. With trepidation.

CHAIRMAN SOULES: Okay. Once

again, I do have a room at the Wyndham if anybody needs it. Otherwise, I am going to cancel it, or I can change it to your name. I know there was some trouble getting rooms here. We are in this same room. You can leave your papers. We will be here, back here in the morning, at 8:00 o'clock, and we will quit at noon.

MR. ORSINGER: What's our agenda for tomorrow?

CHAIRMAN SOULES: We are going to finish the appellate rules and then start with Rule 1 in the big agenda and go as far as as we can with those that are here to report.

PROFESSOR DORSANEO: And Rule 7?

CHAIRMAN SOULES: I don't know. It depends on where we are with Rule 7. Okay. We are adjourned unless somebody has got other business.

(Proceedings adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 17, 1995, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,287.00.

CHARGED TO: Soules & Wallace.

Given under my hand and seal of office on this the 28th day of March, 1995.

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