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HEARING OF THE SUPREME COURT  
ADVISORY COMMITTEE

MARCH 18, 1995

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Taken before William F. Wolfe,  
Certified Shorthand Reporter and Notary Public  
in Travis County for the State of Texas, on  
the 18th day of March, A.D. 1995, between the  
hours of 8:00 o'clock a.m. and 12:15 o'clock  
p.m., at the Texas Law Center, 1414 Colorado,  
Room 104, Austin, Texas 78701.

ORIGINAL

MARCH 18, 1995

MEMBERS PRESENT:

Luther H. Soules III  
Prof. Alexandra Albright  
Pamela Stanton Baron  
Honorable Scott A. Brister  
Prof. Elaine A. Carlson  
Prof. William V. Dorsaneo III  
Honorable Sarah B. Duncan  
Michael T. Gallagher  
Honorable Clarence A. Guittard  
Joseph Latting  
John Marks Jr.  
Honorable F. Scott McCown  
Russell H. McMains  
Anne McNamara  
Harriett Miers  
Richard R. Orsinger  
David L. Perry  
Stephen Yelenosky

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht  
Hon William Cornelius  
David B. Jackson  
Hon. Paul Heath Till  
Hon. Bonnie Wolbrueck

Also present:

Lee Parsley  
Holly Duderstadt

MEMBERS ABSENT:

Alejandro Acosta, Jr.  
Charles L. Babcock  
David J. Beck  
Honorable Anne T. Cochran  
Anne L. Gardner  
Michael A. Hatchell  
Charles F. Herring, Jr.  
Donald M. Hunt  
Tommy Jacks  
Franklin Jones Jr.  
David E. Keltner  
Thomas A. Leatherbury  
Gilbert I. Low  
Robert E. Meadows  
Honorable David Peeples  
Anthony J. Sadberry  
Stephen D. Susman  
Paula Sweeney

EX OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton  
Doyle Curry  
Paul N. Gold  
Honorable Doris Lange  
Kenneth Law  
Thomas C. Riney

SUPREME COURT ADVISORY COMMITTEE  
MARCH 18, 1995

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1                   CHAIRMAN SOULES: Okay. We're  
2 back in session here on March 18th at 8:00  
3 o'clock to take up the appellate rules. We've  
4 been having some discussion about the concerns  
5 of some appellate lawyers in the change of the  
6 presumption of the Englander case that  
7 appellate lawyers are going to have to  
8 designate the whole record in order for them  
9 to do what they need to do on appeal,  
10 particularly if they were involved in the  
11 trial, just so they will have all the  
12 information that they may need for appeal.

13                   Now the incentives to -- or the penalties  
14 of designating too much may be a bigger factor  
15 than they were before the reversal of the  
16 Englander case by these rules, if they pass  
17 the Supreme Court.

18                   And we've been discussing that, and I  
19 think Bill Dorsaneo has a thought about it.  
20 Bill, what are your thoughts on this?

21                   PROFESSOR DORSANEO: Richard  
22 Orsinger, help me on this a little bit, if you  
23 can. The way that the scheme is contemplated  
24 to work now is that the appellee who receives  
25 a designation of a partial record can

1 designate the remainder of the record in order  
2 to avoid any difficulties of leaving anything  
3 out. But that involves some potential amount  
4 of risk, because if too much is designated,  
5 the appellee would be required to pay the cost  
6 of that part that shouldn't have been  
7 designated by the appellee.

8 MR. ORSINGER: That's correct.  
9 Under TRAP 53 it could happen two ways. The  
10 trial court can assess the cost of unnecessary  
11 portions of the statement of facts, and the  
12 court of appeals can assess the portions of  
13 the unnecessary -- unnecessary portions of  
14 statement of facts against the party  
15 requesting it, whether it's the appellant or  
16 the appellee. I don't think that's a change  
17 from prior law.

18 What is a change from prior law, as Luke  
19 pointed out, is that under prior law you could  
20 always cover yourself by attacking the  
21 sufficiency of the evidence, which then would  
22 justify the entire record. But since we have  
23 now limited the sufficiency review to just  
24 what record was brought forward by the  
25 parties, then there may be no error that

1 requires the entire record.

2 And maybe what we ought to do, rather  
3 than saying "unnecessary," because hindsight  
4 is 20/20 as to what's necessary and  
5 unnecessary, maybe we ought to use some kind  
6 of reasonableness standard; and that  
7 reasonableness would include a bona fide  
8 concern that there might be an error anywhere  
9 in the record and that someone obtains the  
10 record to look for it.

11 However, why should the appellant pay for  
12 the appellee to search the record for error if  
13 there is no error in there? I mean, why isn't  
14 that fair to say that the appellee should  
15 stand the risk that after their review of the  
16 record there is no error in that part of the  
17 record.

18 CHAIRMAN SOULES: Judge Duncan.

19 HONORABLE SARAH DUNCAN: I've  
20 been against this since the beginning, as the  
21 Committee knows, and this brings up part of  
22 the reason. You do have appellate lawyers who  
23 do sit in at trial, and if there is a partial  
24 designation by the appellant, how does that  
25 person really even know what parts to

1 designate, much less whether they're excessive  
2 or even reasonable?

3 I just -- to me, the Supreme Court got it  
4 right. If it's an error that requires as a  
5 standard of review the review of the entire  
6 record, then that's what the appellant should  
7 be charged with bringing up. And he shouldn't  
8 be able to change effectively the standard of  
9 review by designating a partial record.

10 MR. JACKSON: Luke, no one said  
11 anything about the no-evidence rule, but if  
12 you make a no-evidence claim, don't you have  
13 to do the entire statement of facts anyway?

14 HONORABLE SARAH DUNCAN: That's  
15 precisely what one of the complaints is that  
16 this would change or affect.

17 HONORABLE C. A. GUITTARD: The  
18 proposal is that the court presumes that what  
19 the -- since both parties have an opportunity  
20 to designate whatever they need, that they're  
21 going to designate whatever is pertinent with  
22 respect to the no-evidence review. And the  
23 appellate court can presume that there's  
24 nothing that would be pertinent to the  
25 no-evidence review that hasn't been

1 designated. That's the theory here.

2 Now, there's, of course, two sides of  
3 it. But the general overall objective is to  
4 reduce costs so that you can have a shorter  
5 record.

6 PROFESSOR DORSANEO: It seems  
7 to me that the appellee's lawyer is saying  
8 that "I do not want to pay for a part of the  
9 record that really shouldn't have been  
10 transcribed and included in the statement of  
11 facts because it really wasn't pertinent to  
12 anything, but I don't know enough about this  
13 case yet to do less than request all of the  
14 record."

15 Now, if that's so, that seems to me to be  
16 a matter between the appellee's lawyer and the  
17 client, with the problem of economics being  
18 their problem. It shouldn't be the case that  
19 the appellee should have to pay for an  
20 unnecessary part. It shouldn't be the case  
21 that the court should have to fund that or  
22 wade through it. That's a choice made by the  
23 appellee to request the entire record in order  
24 to protect the appellee. And I don't see how  
25 it's fair to have the appellant have to pay



1 that without regard to the need for it.

2 Now, maybe what Richard is saying, maybe  
3 some other word than "unnecessary" would be a  
4 better word, although I think "unnecessary" is  
5 a pretty good word.

6 CHAIRMAN SOULES: Judge Duncan.

7 HONORABLE SARAH DUNCAN: I just  
8 think we all need to be very clear that we are  
9 changing the rule that historically has put  
10 the burden on the appellant to bring forward a  
11 record showing reversible error, and by doing  
12 that we are effectively changing the standard  
13 of review.

14 CHAIRMAN SOULES: Judge  
15 Guittard, and then David Jackson.

16 HONORABLE C. A. GUITTARD: We  
17 sort of tried to make it clear. I think if  
18 anybody reads it now, they can't escape the  
19 effect of it. If there's anything else that  
20 we can put in to make it clearer, let's do it.

21 CHAIRMAN SOULES: Well, I just  
22 hope that the courts of appeals will be more  
23 inclined to grant penalties for frivolous  
24 appeals if the appellants bring up a short  
25 record on factual and legal sufficiency and

1 the appellant -- and the appellee then shows  
2 the court that there is legally and factually  
3 sufficient evidence, because that basically  
4 means that the appellant has tried to pull the  
5 wool over the court's eyes by bringing up a  
6 short record, saying, "This is all the  
7 evidence that there is."

8 And then the appellee comes in and says,  
9 "No, there's not. Look at all of this  
10 evidence."

11 I think the courts of appeals ought to  
12 hammer the appellants who do that.

13 MR. ORSINGER: I don't think  
14 there's any provision in here for that.

15 CHAIRMAN SOULES: Well, there  
16 is a frivolous appeal.

17 MR. ORSINGER: Well, it's not a  
18 frivolous appeal necessarily, because there --  
19 it may be arguable that the error that -- that  
20 the record they did bring forward does support  
21 that a mistake was made. But then when you  
22 look at the rest of it, maybe you decide that  
23 it's harmless. I'm not sure that the rule  
24 that we have for sanctions for frivolous  
25 appeal would apply to someone who in bad faith

1 under-designates the statement of facts. And  
2 the worst punishment that they could get under  
3 this rule is that they have to pay for the  
4 whole statement of facts anyway, so it's  
5 almost like, you know, there's no punishment  
6 if you do it and you get caught.

7 CHAIRMAN SOULES: How does the  
8 appellee show harmless error without  
9 showing -- without bringing up the record?

10 MR. ORSINGER: Well, I mean, a  
11 perfect example would be if something is  
12 admitted over objection in the version that's  
13 brought up, and then it's re-offered later on  
14 and comes in without objection. The second  
15 admission without objection probably renders  
16 the first ruling harmless error. The  
17 appellant doesn't bring that up, so the  
18 appellee does, and says, "Look here, they  
19 might have a good argument under the record  
20 they brought up, except it came in later on  
21 without objection," so that wipes their point  
22 out.

23 I mean, is there a sanction there? The  
24 only sanction I can see is that the cost of  
25 that additional record stays with the

1 appellant instead of being shifted to the  
2 appellee, but I think that's the extent of the  
3 punishment.

4 CHAIRMAN SOULES: There is no  
5 risk to the appellant to bring up a record  
6 that supports their points of error only, when  
7 the rest of the record defeats their points of  
8 error. There is no penalty for them doing  
9 that.

10 MR. ORSINGER: I don't think  
11 there is.

12 CHAIRMAN SOULES: That's right.

13 HONORABLE SARAH DUNCAN: I  
14 think there is no penalty because they would  
15 end up paying for that anyway, and so they  
16 have everything to gain by under-designating  
17 to show reversible error when an entire record  
18 would show no reversible error. That's why  
19 I've been against this since day one.

20 MR. ORSINGER: If I may, I  
21 think the use of the word "unnecessary" maybe  
22 is too difficult for the appellees, because  
23 you only know after the fact whether the part  
24 you brought up was necessary or not after the  
25 court of appeals rules. And if they rely on

1 the part of the statement of facts you brought  
2 up, it was necessary; if they don't, it was  
3 unnecessary.

4 On the other hand, if you were to use a  
5 word like "unreasonable," that would mean  
6 someone where they couldn't tell which way the  
7 court of appeals might go, or they were the  
8 lawyer only for appeal and weren't there on  
9 the trial court; that it was reasonable for  
10 them to request more of the record, even if it  
11 turns out that there was nothing in there that  
12 impacts the decision made by the court of  
13 appeals.

14 And that might make it less likely that  
15 the appellee will be stuck with a designation  
16 that is a reasonable one but it turns out not  
17 to be necessary.

18 CHAIRMAN SOULES: Well, here is  
19 the concept I'm thinking of: If the appellee  
20 designates a portion of the record that could  
21 not reasonably be anticipated to have a  
22 bearing on the appeal, could not reasonably be  
23 anticipated to have a bearing on the appeal,  
24 then you can charge it to them. Of course,  
25 that completely pulls the plug, because

1 there's no part of the record that the  
2 appellee could not reasonably anticipate could  
3 have a bearing. Maybe you could leave out  
4 voir dire; maybe --

5 HONORABLE C. A. GUITTARD:  
6 Maybe leave out damages, if there's no point  
7 concerning the damages, and only liability.

8 CHAIRMAN SOULES: Something  
9 like that.

10 HONORABLE C. A. GUITTARD:  
11 That's the concepts here, that the appellant  
12 designates only liability points and leaves  
13 out all the medical testimony. And the  
14 question is, the defendant comes in and -- the  
15 appellee comes in and designates all the  
16 record, all the medical testimony, which has  
17 been excluded from the issues on appeal by the  
18 appellant's designation of points.

19 CHAIRMAN SOULES: Richard  
20 Orsinger.

21 MR. ORSINGER: Of course, if  
22 you make this too easy for the appellee to  
23 have the appellant include the entire cost,  
24 we're going to defeat the whole purpose,  
25 because the appellees will do it every time

1 and the appellants will have to pay for it  
2 every time.

3 CHAIRMAN SOULES: They will  
4 anyway. I don't know if the appellants are  
5 going to pay for it, but the appellees are  
6 going to designate virtually everything every  
7 time.

8 HONORABLE C. A. GUITTARD: Who  
9 should pay for it? Who is going to pay for  
10 it?

11 MR. ORSINGER: Which abuse is  
12 greater? Is the abuse greater that the  
13 appellants will under-designate, or is the  
14 abuse greater that the appellees will  
15 over-designate?

16 CHAIRMAN SOULES: I think it's  
17 the first.

18 MR. ORSINGER: I'm not sure. I  
19 think most appellees, if they knew that they  
20 could ask for the cost of the appeal, would  
21 immediately designate the entire record to  
22 make it as painful and expensive as possible  
23 to appeal the case.

24 CHAIRMAN SOULES: David  
25 Jackson.

1 MR. JACKSON: We need to come  
2 up with some sort of subjective guidelines for  
3 designating the record, because we've already  
4 had a situation where a court reporter  
5 appeared before the grievance committee  
6 because the pro se plaintiff came and said, "I  
7 want you to transcribe all the parts where  
8 so-and-so said such-and-such." And she found  
9 two places, but apparently she never found the  
10 third place that this guy contends happened.  
11 And she wound up before the grievance  
12 committee for not finding all the places that  
13 this conversation took place in the record.

14 And you could wind up with a situation  
15 where you would have an appellee telling the  
16 court reporter, "Give me all the parts that  
17 help my part of the case," and the other side  
18 coming back and saying to the court reporter,  
19 "Well, give me all the parts that help my  
20 side," and you wind up with a court reporter  
21 practicing law, or trying to, and then  
22 appearing before the grievance committee if he  
23 didn't do it right.

24 PROFESSOR DORSANEO: Well, the  
25 main reason the entire record is necessary is



1 because of the presumptions right now.

2 CHAIRMAN SOULES: Well, there  
3 are three things: Legal sufficiency, factual  
4 sufficiency and harmless error.

5 HONORABLE SARAH DUNCAN: And  
6 charge error.

7 CHAIRMAN SOULES: And charge  
8 error.

9 PROFESSOR DORSANEO: But to say  
10 that the entire record is everything that  
11 happened in the trial court, that's just a  
12 choice. The record is what you have on  
13 appeal. What happened in the trial court is  
14 what happened in the trial court. And those  
15 are two different things.

16 And in my experience, maybe because of  
17 doing mostly business litigation cases,  
18 virtually all of the record of what happened  
19 in the trial court that is complete in the  
20 court of appeals has nothing to do with the  
21 appeal. It's only a very small part of the  
22 case that has real pertinence to all of these  
23 issues that you're talking about, just a  
24 couple of pages.

25 CHAIRMAN SOULES: Sarah Duncan.

1                   HONORABLE SARAH DUNCAN: I've  
2                   now seen exactly the opposite where a  
3                   complaint is brought up, the appellee makes  
4                   the argument that something else is not in the  
5                   record before the court, and the appellant  
6                   argues that if he wants it in there, he needs  
7                   to supplement. And I think that we're going  
8                   to be getting a lot of those.

9                   PROFESSOR DORSANEO: So what's  
10                  wrong with that? Supplement it and get it in  
11                  there, instead of saying we have to have it  
12                  all based on the theory that something might  
13                  be left out.

14                  HONORABLE SARAH DUNCAN: No.  
15                  This complaint could only have occurred on a  
16                  day that was not included in the statement of  
17                  facts before the court. And the appellant  
18                  was, under the current rules, trying to shift  
19                  the burden of bringing up the record. And all  
20                  I'm saying is, we will institutionalize that.

21                  CHAIRMAN SOULES: Well, we've  
22                  talked about this. Let's see if -- I had  
23                  promised some appellate lawyers that we would  
24                  revisit this because they thought that maybe  
25                  it hadn't gotten enough attention.

1           Is there any -- we've got the rule as  
2           it's presently proposed on -- what page is the  
3           material on?

4                       MR. ORSINGER:  It's on Page 84,  
5           Rule 53.

6                       CHAIRMAN SOULES:  Page 84,  
7           Rule 53, TRAP Rule 53.

8                       MR. ORSINGER:  It's going to be  
9           in subsection (d) and again in (e).

10                      CHAIRMAN SOULES:  Okay.  (d)  
11           and (e).  I just want to get a show of hands  
12           as to whether or not anybody thinks we should  
13           change what's been proposed in Rule 53(d) and  
14           (e).  Okay.  Those who feel we should make a  
15           change in light of our conversation today show  
16           by hands.

17                      HONORABLE SCOTT BRISTER:  Just  
18           a second, Luke, let me make sure.  The  
19           question we're asking here is whether we  
20           should change the presumption from the  
21           presumption that there's something out there  
22           that's not in front of us that's going to  
23           dispose of this appeal to a presumption that  
24           everything that's on my table is all I'm going  
25           to consider and I'm going to decide the appeal

1 based on that?

2 CHAIRMAN SOULES: No. And I  
3 appreciate you raising that, Judge Brister.  
4 I'm not suggesting that we change the reversal  
5 of the presumption, only that the -- either we  
6 delete the incentive or the penalty that  
7 charges that to the appellant for designating  
8 too much, one; or that the test be changed to  
9 not charge that to the appellee -- and these  
10 are just words -- unless the portion that the  
11 appellee designates could not reasonably be  
12 anticipated to have a bearing on the appeal, a  
13 more subjective standard.

14 Let's just get a show of hands from those  
15 who are inclined to make any change at all and  
16 those who are inclined to leave it alone.

17 HONORABLE C. A. GUITTARD: So  
18 we're talking about changes in the draft that  
19 we have before us, not changes in the current  
20 law?

21 CHAIRMAN SOULES: That's right.  
22 Changes in this draft.

23 MR. LATTING: How do I vote for  
24 what you just said? Do I vote for or against  
25 what we're getting ready to vote on?

1 MR. ORSINGER: Vote against it.

2 CHAIRMAN SOULES: Let me put it  
3 this way. How many -- the vote to -- okay.  
4 Pam.

5 MS. BARON: I think what would  
6 really help to do for most people here is to  
7 say what the current law is and what the  
8 change is.

9 CHAIRMAN SOULES: We've been  
10 doing that up here for 30 minutes.

11 MS. BARON: I know. But I  
12 don't think everybody is following.

13 CHAIRMAN SOULES: Well, they  
14 should have been. We've got other things to  
15 do. We've been working on this since  
16 8:00 o'clock.

17 MS. BARON: Well, I'll just say  
18 that I don't think it's going to be a  
19 particularly well-informed vote.

20 CHAIRMAN SOULES: All right.  
21 How many feel that Rule 53 as written on  
22 Pages 84 and 85 should go to the Court as is?  
23 Show by hands. Six.

24 How many feel that it should be changed?  
25 Seven. How?

1 MR. YELENOSKY: I want to  
2 abstain on that, and I apologize for being  
3 late, but I really don't want to vote on  
4 something that I --

5 CHAIRMAN SOULES: Okay. By a  
6 vote of seven to six with one abstention, it  
7 should be changed. Who has a recommendation  
8 to change it?

9 JUSTICE CORNELIUS: Let's  
10 change it the way you suggested it.

11 MR. MARKS: Make that two  
12 abstentions. I didn't raise my hand either.  
13 John Marks.

14 CHAIRMAN SOULES: Okay. And  
15 where is the "necessary" language?

16 PROFESSOR DORSANEO: Right  
17 there in the first sentence.

18 MR. ORSINGER: No. It's right  
19 in the middle of Page 84. It starts on the  
20 left-hand side, "portion designated was  
21 unnecessary." Do you see that?

22 CHAIRMAN SOULES: "Could not  
23 reasonably have been anticipated to have a  
24 bearing on the appeal." Okay. If we delete  
25 the words "was unnecessary" virtually right

1           there in the middle of the page -- if you're  
2           looking at the underlined portions, it's the  
3           fourth underlined line, the words "was  
4           unnecessary." Delete those words and insert  
5           "could not reasonably have been anticipated  
6           to have a bearing on the appeal."

7           Okay. With that change, those in favor  
8           show by hands.

9                           HONORABLE SARAH DUNCAN: Wait,  
10           just a second.

11                          MR. ORSINGER: You may want to  
12           do this now or later, but you have to change  
13           (e) also.

14                          CHAIRMAN SOULES: And change  
15           (e) to correspond as well.

16                          MR. ORSINGER: It's going to  
17           take a new title, isn't it?

18                          CHAIRMAN SOULES: Right. But  
19           we can do that.

20                          MR. ORSINGER: Okay.

21                          CHAIRMAN SOULES: Okay. Judge  
22           Duncan, are you with us now, or do you still  
23           need --

24                          HONORABLE SARAH DUNCAN: Yes.

25                          CHAIRMAN SOULES: Okay. Those

1 in favor show by hands. Nine. Those  
2 opposed. Five. Nine to five that carries.

3 Okay. I think we ought to go first to  
4 Pam's work so that we can try to get that out  
5 of way and go on, if the subcommittee agrees.  
6 That's probably going to take more time than  
7 anything else.

8 HONORABLE C. A. GUITTARD:  
9 What's that?

10 CHAIRMAN SOULES: The  
11 administrative appeal.

12 HONORABLE C. A. GUITTARD: Did  
13 Pam do that?

14 MR. ORSINGER: No, sir. That  
15 came to us from the AG's office.

16 HONORABLE C. A. GUITTARD:  
17 Yes. Well, we'll take that first, if you  
18 like.

19 CHAIRMAN SOULES: Okay. Let's  
20 take that first. That's Item 11, isn't it?

21 HONORABLE C. A. GUITTARD: It's  
22 not a part of the Cumulative Report. It's a  
23 new proposal. And the reason that it hasn't  
24 been considered before is because the attorney  
25 general -- let's see, we got the request from



1 the attorney general only late last fall, and  
2 so it's taken some time to do the drafting and  
3 consider it in the committee, the  
4 subcommittee.

5 The point is to provide a procedure for  
6 cases which, according to a relatively new  
7 statute, permit direct appeals from state  
8 administrative agencies to the court of  
9 appeals without any review by the district  
10 court, as has been the law previously. In  
11 other words, there are two methods of doing  
12 that.

13 The first is that if there's no case  
14 filed in the district court, the party  
15 objecting to the agency's order can file, as  
16 the statute says, a petition for review in the  
17 court of appeals.

18 The statute also provides that if a case  
19 for review of an administrative decision has  
20 been filed and is pending in a district court,  
21 then any party can file a notice of removal of  
22 that case to the court of appeals before the  
23 trial in the district court. And so this  
24 proposed rule is to implement that statute.

25 Steve, do you have a question?

1 MR. YELENOSKY: Yeah. Did you  
2 say what type of cases are those that --

3 HONORABLE C. A. GUITTARD:  
4 Well, I'm not sure just what kind of cases  
5 they are. Pam, will you enlighten us on  
6 that?

7 MS. BARON: Well, they're  
8 appeals from the Motor Vehicle Commission, and  
9 they license a number of different things.  
10 But I would guess it would be licensing type  
11 decisions.

12 HONORABLE C. A. GUITTARD: Do  
13 all of those appeals go to the Third Court in  
14 Austin?

15 MS. BARON: Right.

16 HONORABLE C. A. GUITTARD:  
17 According to the statute?

18 MS. BARON: Right.

19 PROFESSOR DORSANEO: Which will  
20 not make rules to deal with them.

21 HONORABLE C. A. GUITTARD:  
22 Sarah.

23 HONORABLE SARAH DUNCAN: That's  
24 my question. Why are we putting this in the  
25 Rules of Appellate Procedure when it's an

1 Austin Court of Appeals problem?

2 HONORABLE C. A. GUITTARD:

3 Well, this is the reason: I've been dealing  
4 with one of the assistants there, Beth  
5 Sterling, and it was my thought that if this  
6 is purely a matter of the Austin Court, why  
7 not just have a little rule here that says,  
8 "Such appeals shall be governed by the rules  
9 promulgated by the Austin Court and approved  
10 by the Supreme Court."

11 Well, the answer to that is the Austin  
12 court doesn't make rules. They won't make any  
13 rules, so we've got to do it.

14 HONORABLE SARAH DUNCAN: Well,  
15 we've proposed like an order on transcripts,  
16 an order on the form of the statement of  
17 facts. Let's propose a Supreme Court order  
18 governing these. But to me it makes no sense  
19 to put it in the TRAP Rules.

20 HONORABLE C. A. GUITTARD:

21 Well, I didn't think so either. I'm just  
22 trying to -- Pam.

23 MS. BARON: I think there are  
24 some reasons to have it in the TRAP Rules. It  
25 is a statute. It's not just Austin lawyers

1 who are practicing before the Motor Vehicle  
2 Commission. There is a problem with  
3 administrative appeals right now, that it is  
4 kind of a hidden rule. You have to know how  
5 the Austin Court works. You have to know the  
6 local rules of the Travis County District  
7 Courts. This is a statewide practice, but  
8 it's all done here locally really by a very  
9 small group of people who know what's going  
10 on.

11 I think this gives a fair chance to other  
12 lawyers to know how to do this, and I think  
13 it's good to have it here. The Third Court is  
14 reluctant to make rules, and I think it's good  
15 that everybody knows what the rules are.

16 CHAIRMAN SOULES: Richard  
17 Orsinger.

18 MR. ORSINGER: Pam, can I ask  
19 you, I thought from our conversation with this  
20 woman from the AG that there were at least a  
21 slender number of administrative appeals that  
22 could go to another court of appeals besides  
23 Austin. Is that wrong?

24 MS. BARON: No. There are a  
25 few. I think there are some agency statutes,

1 and I can't tell you what they are, that do  
2 provide for judicial review locally.

3 MR. ORSINGER: Now, let's  
4 assume that that's true. If we just had a  
5 local rule in Austin, then there would be no  
6 requirement that the other courts of appeals  
7 abide by that, true?

8 MS. BARON: Right. But that  
9 would not affect the Motor Vehicle Commission,  
10 all of which do have to come to Austin.

11 MR. ORSINGER: But these rules,  
12 do they apply to only the Motor Vehicle  
13 appeals?

14 MS. BARON: I think they apply  
15 only to direct appeals to courts of appeals.  
16 And as far as I know, this is the only current  
17 statute that provides that. That doesn't mean  
18 there won't be others.

19 HONORABLE C. A. GUITTARD: As  
20 the attorney general tells us, it's only this  
21 one statute that provides for direct review  
22 without intervening the trial in the district  
23 court, and that all of those go to the Austin  
24 Court, so it would seem reasonable to have the  
25 Austin Court do it. But there are reasons to

1 also put it in the TRAP Rules so that  
2 everybody knows about it.

3 CHAIRMAN SOULES: Steve  
4 Yelenosky.

5 MR. YELENOSKY: I was just  
6 going to say I had never even heard of this.

7 HONORABLE C. A. GUITTARD: I  
8 hadn't either.

9 MR. YELENOSKY: And I've done a  
10 fair amount or am aware of a fair amount of  
11 administrative hearings because of, you know,  
12 Legal Services. And either you appeal to the  
13 trial court or you don't have any avenue of  
14 appeal, period, like in food stamps.

15 CHAIRMAN SOULES: Joe Latting.

16 MR. LATTING: Why don't we pass  
17 a draft here and show it to the Austin Court  
18 and tell them if they don't like it, give us  
19 their comments. And if they don't give us any  
20 comments, let's pass it and be done with it.

21 HONORABLE C. A. GUITTARD:  
22 Well, we have done that in effect. We have  
23 checked it with the court of -- with the  
24 attorney general. We have Ken Law from the  
25 Austin Court, and it's been submitted to him,

1 and he made his comments on it. And so I  
2 don't know that there's anything more to be  
3 gained by presenting it to the court.

4 CHAIRMAN SOULES: Well, if it's  
5 acceptable to those who are going to be using  
6 it, why not do it and give notice of it in the  
7 TRAP Rules. If it only applies in this case,  
8 in the Motor Vehicle appeals to Austin now,  
9 who knows what the -- the legislature is  
10 meeting across the street, so we don't know  
11 what's next.

12 HONORABLE C. A. GUITTARD:  
13 That's right. There are several problems in  
14 the draft. One is that it doesn't provide a  
15 time for filing of a petition, and I think  
16 perhaps there ought to be some -- Pam, you  
17 have studied this, have you not?

18 MS. BARON: I'm sorry? I've  
19 read it. I'm certainly not near as familiar  
20 with it as Beth is.

21 HONORABLE C. A. GUITTARD:  
22 Well, one problem that I've just noticed in  
23 going over it is that it doesn't -- well,  
24 first of all, let me say, let me explain that  
25 the draft provides that the statutory petition

1 for review shall be considered the  
2 equivalent -- shall be deemed a notice of  
3 appeal for purposes of the TRAP Rules. Then  
4 it also provides that the notice in a case  
5 which has been filed in the district court and  
6 removed from the district court before trial,  
7 that the notice of removal to the court of  
8 appeals shall be considered a notice of appeal  
9 for the purpose of the TRAP Rules.

10 Now, I guess you could construe the rule  
11 as meaning that it has to be done within 30 --  
12 that the full petition for review, where it  
13 hasn't been filed in district court, has to be  
14 done within 30 days from the final agency  
15 order. However, perhaps it's necessary to  
16 spell that out in this draft, and I think it  
17 probably should be. Is there any comment on  
18 that?

19 CHAIRMAN SOULES: Judge Duncan.

20 HONORABLE SARAH DUNCAN: Well,  
21 I have recently become aware -- maybe I'm not  
22 sure how aware I am, but there appears to be  
23 in the whole administrative code rules for --  
24 for instance, mailbox rules and filing rules  
25 that are completely at odds with the Rules of



1 Civil Procedure and the Rules of Appellate  
2 Procedure. You can't merge them. You can't  
3 make them harmonized. And if we're going to  
4 have rules in the TRAP Rules governing this  
5 particular type of administrative appeal, then  
6 it would seem to me that we should include the  
7 rest of the administrative appeals, too. I  
8 mean, there should be some continuity between  
9 how you do this kind of an appeal and that  
10 kind of an appeal.

11 I mean, once we do this, are the TRAP  
12 Rules relating to filing and service  
13 applicable to motions for rehearing and when  
14 they have to be filed and served and how? I  
15 think we're getting in over our heads.

16 CHAIRMAN SOULES: Joe Latting.

17 MR. LATTING: I was going to  
18 suggest that it seems to me that this is an  
19 issue for the appellate rules subcommittee,  
20 because whatever they want to do with it is  
21 okay with me. It sounds as though the Austin  
22 Court doesn't care too much about it, and  
23 we're not ready to pass a judgment on this,  
24 because we've -- I mean, Judge Guittard is  
25 just looking over this now. It seems to me

1 the subcommittee ought to tell us what needs  
2 to be done, and let's turn our attention  
3 elsewhere.

4 CHAIRMAN SOULES: All right.  
5 Tell us what should be done.

6 HONORABLE C. A. GUITTARD: My  
7 best recommendation is to add a provision here  
8 for a time for filing the petition for  
9 review. Make it 30 days after the final  
10 order. Otherwise, you could adopt the draft  
11 as it stands.

12 CHAIRMAN SOULES: Where would  
13 that be placed?

14 JUSTICE CORNELIUS: So this is  
15 the recommendation of the appellate  
16 subcommittee?

17 CHAIRMAN SOULES: Where should  
18 that be placed, the 30-day time line?

19 HONORABLE C. A. GUITTARD: It  
20 should be under (c).

21 CHAIRMAN SOULES: Under (c) at  
22 what place?

23 HONORABLE SARAH DUNCAN: Do we  
24 know that this does not conflict with the  
25 statute or the administrative code?

1 HONORABLE C. A. GUITTARD:

2 Well, I've looked at the statute and --

3 CHAIRMAN SOULES: One thing at  
4 a time. Let's put that 30-day fuse in here,  
5 and then we'll talk about that.

6 HONORABLE C. A. GUITTARD: A  
7 suit for judicial review of a state agency  
8 decision initiated in the court of appeals  
9 pursuant to Article 4413 and so forth, or any  
10 similar statute, is perfected when the party  
11 challenging the agency files a petition for  
12 judicial review with the court of appeals, and  
13 then add there, "within 30 days of the final  
14 order of the agency."

15 CHAIRMAN SOULES: Okay. Should  
16 we change "when" to "if"? If the party  
17 challenging files within 30 days?

18 HONORABLE C. A. GUITTARD: All  
19 right. Say that.

20 CHAIRMAN SOULES: Within 30  
21 days of what?

22 HONORABLE C. A. GUITTARD: The  
23 final order of the agency.

24 HONORABLE SARAH DUNCAN: But  
25 that's contrary to administrative law, which I

1 vaguely remember from law school, which is  
2 that the timing of the petition in district  
3 court, I think, goes from the date of -- never  
4 mind. I don't know.

5 HONORABLE C. A. GUITTARD: Now,  
6 there are two aspects of this, and Sarah  
7 raises the point, and I think it's good.  
8 There are two aspects of this. One is the  
9 appeals from the agency to the district court,  
10 which is the usual route. There ought to be  
11 in the Rules of Civil Procedure a rule that  
12 deals with that kind of situation. And we  
13 have discussed that in our subcommittee and  
14 have not gotten to the point of preparing a  
15 draft of a rule that would cover that sort of  
16 situation. And that ought to be taken up in  
17 connection with the civil rules, with the  
18 trial rules. And this deals only with direct  
19 appeals to the court of appeals and cases  
20 where the district court cases are removed to  
21 the court of appeals without trial.

22 CHAIRMAN SOULES: Joe Latting.

23 MR. LATTING: I might comment  
24 that Travis County has local rules covering  
25 what you just mentioned. And if your

1 subcommittee is going to look at putting those  
2 in the Rules of Civil Procedure, you might  
3 want to take a look at the Travis County local  
4 rules on appeals from administrative agencies.

5 CHAIRMAN SOULES: They're  
6 pretty detailed too.

7 HONORABLE C. A. GUITTARD: I  
8 think that's correct. I would agree with  
9 that. The question before us now is, should  
10 we not act on this phase of it pending the  
11 consideration of the other as well?

12 CHAIRMAN SOULES: Okay. As I  
13 understand the subcommittee report, the motion  
14 is that with the changes we made in (c), that  
15 this -- that we add this Rule 54 to the TRAP  
16 Rules, correct?

17 HONORABLE C. A. GUITTARD: Yes.

18 CHAIRMAN SOULES: Okay. Any  
19 discussion on that? Alex Albright.

20 PROFESSOR ALBRIGHT: One  
21 question: What if we didn't do anything?  
22 Wouldn't the Austin Court have to deal with it  
23 in some manner?

24 HONORABLE C. A. GUITTARD: They  
25 would, and they do. But nobody would know

1 what they're doing except those who are on the  
2 inside.

3 CHAIRMAN SOULES: Judge Duncan.

4 HONORABLE SARAH DUNCAN: We  
5 already have a rule that once an appeal is  
6 perfected, the court of appeals is required to  
7 send a copy of its local rules to the counsel  
8 for the litigants and the party that they  
9 represent.

10 HONORABLE C. A. GUITTARD: I  
11 guess so.

12 CHAIRMAN SOULES: Richard  
13 Orsinger.

14 MR. ORSINGER: I don't think we  
15 can expect the Austin Court to act on this.  
16 They have over 50 rules that you're supposed  
17 to follow when you file an appeal in the  
18 Austin Court of Appeals. But it's my  
19 understanding that they were prepared by the  
20 clerk's office in order to keep people from  
21 calling them all the time; and that for  
22 reasons that are not available to the public,  
23 the Austin Court refuses to adopt a formal set  
24 of rules that's approved by the Supreme  
25 Court. So we have a plethora of --

1 MR. YELENOSKY: Let's organize  
2 a phone bank and force them to.

3 MR. ORSINGER: I think it's an  
4 internal thing for the court of appeals, and I  
5 don't think, based on the current practice,  
6 that we should rely on them to do something as  
7 complicated as adopt this.

8 PROFESSOR DORSANEO: Well, this  
9 also integrates a practice that's unclear into  
10 our new method of handling appeals generally.  
11 This is an advance in that respect as well.

12 We have met with the attorney general's  
13 office and looked at the local rules that are  
14 pertinent and the statutes and worked with the  
15 attorney general people to try to come up with  
16 something that would solve the problem that  
17 admittedly is a problem because neither the  
18 legislature nor the Austin Court has done this  
19 for public availability and information. And  
20 that's why we are proposing it for inclusion  
21 now, to satisfy those felt needs in a way that  
22 wasn't a Committee invasion but in a way that  
23 involves the Committee's working with the  
24 informed people in the attorney general's  
25 office to develop something that will work.

1                   HONORABLE C. A. GUITTARD: We  
2 started from a draft by the attorney general's  
3 staff, and then we have been working back and  
4 forth. They drafted, we drafted, they  
5 drafted, and it went back and forth until we  
6 finally got to this.

7                   Now, there are several other points here  
8 that I think you ought to be aware of.  
9 Number one is, besides the time for filing it,  
10 the second point was about the filing of the  
11 record.

12                   The statute provides that the agency  
13 shall file the record. Now, the agency record  
14 is not like a record in any other kind of  
15 case. It's a series of boxes of papers which  
16 are not easily handled, so that's a problem.

17                   But the question is, unlike other appeals  
18 where, under our present scheme on the  
19 proposal, the clerk files the record, files  
20 the transcript, and the court reporter files  
21 the statement of facts, and the appellant's  
22 counsel is supposed to know where to look if  
23 they don't do their job, in these cases it's  
24 the agency that files the record. And that  
25 seems to be contrary to our usual procedure or



1 usual concept, because although the appellant  
2 makes his appeal, then the opposing party, the  
3 agency, has to file the record. So there is a  
4 provision in this rule that the agency shall  
5 file the record within 30 days of the time of  
6 filing the petition for review or notice of  
7 removal.

8 And since we have abolished the time for  
9 filing a record, since we've repealed Rule 54,  
10 we have abolished the strict requirement, time  
11 requirements for filing the record in other  
12 cases, then how does that scheme fit in with  
13 this?

14 Well, one of our drafts left it out with  
15 the idea that we treat that the same way as  
16 other appeals and let the appellate court  
17 clerk be responsible for seeing that the  
18 record got up there. But that didn't seem  
19 to -- the attorney general wasn't satisfied  
20 with that.

21 And they've got this provision in here  
22 for 30 days after. I don't know just what  
23 happens if the record isn't filed within  
24 30 days. Surely the appellate court won't say  
25 that the appeal isn't good if the agency, the

1           appellee, hasn't filed the record, so I don't  
2           guess that would be a problem. And I don't  
3           know what would happen, but I guess that if  
4           the record was filed late, it would still  
5           be -- the appellant would still have the right  
6           to go forward with the appeal. Isn't that  
7           right?

8                           MR. LATTING: What about  
9           inserting a statement in this rule to instruct  
10          the appellate court to direct the agency to  
11          file the record; and if it's not filed in a  
12          timely fashion, to attend to it. Let's just  
13          say that.

14                           HONORABLE C. A. GUITTARD: I  
15          would suppose that our Rule 56 would then  
16          apply and that would be the effect of it.

17                           MR. LATTING: Well, if it's an  
18          ambiguity, then I would suggest that you clear  
19          it up in the rule. And you and Bill and the  
20          other people on the committee would need to  
21          guide us on that.

22                           CHAIRMAN SOULES: Well, Judge  
23          Guittard thinks that Rule 56 would fix it, so  
24          we don't need to say anything here. Okay?

25                           Steve Yelenosky.

1 MR. YELENOSKY: But perhaps you  
2 do need to do a cross-reference. Looking at  
3 Rule 56, Duties of the Appellate Clerk, I  
4 mean, is it clear? Do we need to make some  
5 reference that Rule 56 would apply? Because  
6 by its own terms, Rule 56 doesn't refer to any  
7 agency.

8 HONORABLE C. A. GUITTARD:  
9 Perhaps we ought to check that. I would  
10 suggest that we sort of look this over and  
11 decide whether we approve it in principle with  
12 what suggestions we have and then go back and  
13 put the finishing touches on it in light of  
14 the discussion that we have had here.

15 CHAIRMAN SOULES: Is there a  
16 way to get it finished so that we can put it  
17 in what goes to the Supreme Court? Would it  
18 take long to do that?

19 HONORABLE C. A. GUITTARD: Oh,  
20 I suppose not.

21 CHAIRMAN SOULES: What do we  
22 need to do then? If 56 doesn't take care of  
23 the problem, what do we need to do to fix it?

24 PROFESSOR DORSANEO: Well, one  
25 thing we could do, on Page 97 in Rule 56 in

1 paragraph (c), which talks about no record  
2 filed, is to say, "On expiration of 90 days,  
3 or 30 days in the case of an accelerated  
4 appeal, or" and then whatever this is called.

5 HONORABLE C. A. GUITTARD: Or  
6 30 days in the case of a --

7 CHAIRMAN SOULES: -- of a  
8 Rule 54 appeal.

9 MR. YELENOSKY: Right.  
10 Although that then throws this esoteric rule  
11 into the meat of Rule 56.

12 CHAIRMAN SOULES: Okay.

13 HONORABLE C. A. GUITTARD: On  
14 expiration of 90 days, or 30 days in the case  
15 of an accelerated appeal, or an appeal from a  
16 state administrative agency under Rule 54.

17 CHAIRMAN SOULES: Or just a  
18 Rule 54 appeal.

19 HONORABLE C. A. GUITTARD:  
20 Okay.

21 PROFESSOR DORSANEO: Well, I  
22 would rather have Judge Guittard's words, and  
23 I'm thinking more as a teacher now, because  
24 I'll have to go back and remind myself what a  
25 Rule 54 appeal is every time I teach it.

1 CHAIRMAN SOULES: Okay. Say it  
2 again. Give me your words again, Judge  
3 Guittard.

4 HONORABLE C. A. GUITTARD:  
5 Beginning with subdivision (c), after the  
6 words "accelerated appeal," insert "or an  
7 appeal from a state administrative agency  
8 under Rule 54." So it's "or an appeal from an  
9 order of a state agency under Rule 54."

10 MR. YELENOSKY: But if people  
11 don't carefully read 54, they may think that  
12 that applies to any administrative case that's  
13 come up through the trial court and is on its  
14 way to the appellate court.

15 HONORABLE C. A. GUITTARD:  
16 Well, not if it's under Rule 54.

17 PROFESSOR DORSANEO: You mean  
18 if they don't read it at all?

19 MR. YELENOSKY: Yes.

20 HONORABLE C. A. GUITTARD:  
21 "After the date the judgment is signed  
22 without a proper transcript." Well,  
23 "judgment" might not fit quite so well  
24 there. That should be "after the judgment or  
25 order is signed."

1 MS. BARON: No, because it's  
2 dated from the petition. The filing of the  
3 petition triggers your 30 days.

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

6 CHAIRMAN SOULES: This is going  
7 to take another sentence.

8 HONORABLE C. A. GUITTARD:  
9 Well, I think instead of fiddling with  
10 Rule 56(c), we're going to have to write  
11 something into 54 to take care of this.

12 CHAIRMAN SOULES: Okay.

13 HONORABLE C. A. GUITTARD: I  
14 think we can do it, but I don't think we can  
15 do it here this morning.

16 CHAIRMAN SOULES: All right.  
17 Just as a logistical issue, is there any real  
18 strong sentiment to just leaving that out and  
19 letting it -- just seeing how it works so that  
20 we can get this on to the Supreme Court?

21 HONORABLE C. A. GUITTARD: We  
22 can leave that part of it out, sure.

23 CHAIRMAN SOULES: Okay. So now  
24 the Committee's recommendation is that we make  
25 the changes in (c) and otherwise insert new

1 Rule 54 on Page 90 of the materials as the  
2 Committee has it drafted. Okay?

3 MR. YELENOSKY: What is the  
4 title of this new rule?

5 HONORABLE C. A. GUITTARD: The  
6 title is Appeals from Administrative Decisions  
7 of State Agencies Without Intervening Review  
8 by District Courts.

9 CHAIRMAN SOULES: How about  
10 "Direct Appeals"?

11 HONORABLE C. A. GUITTARD:  
12 Yeah. Direct Appeals from Administrative  
13 Agencies Without Intervening Review by  
14 District Courts.

15 MR. LATTING: Well, if it says  
16 "direct appeals," do we have to say "without  
17 intervening review"? I mean, isn't that what  
18 a direct appeal is?

19 MR. YELENOSKY: How about  
20 "Direct Appeals from Administrative  
21 Decisions"?

22 HONORABLE C. A. GUITTARD:  
23 Well, it's a little complicated because of  
24 this removal thing.

25 MR. LATTING: How about just

1 "Direct Appeals"?

2 HONORABLE C. A. GUITTARD:

3 Well, let me see what title I put on it.

4 CHAIRMAN SOULES: How about

5 Steve's words, "Direct Appeals from

6 Administrative Decisions."

7 HONORABLE SARAH DUNCAN:

8 Certain administrative decisions.

9 CHAIRMAN SOULES: Pardon? The  
10 word "decisions" is in the body of the rule.

11 MR. LATTING: Well, it's both,  
12 isn't it? Isn't it direct and removed  
13 appeals?

14 MR. YELENOSKY: That's true.  
15 It is.

16 MR. LATTING: How about direct  
17 and removed?

18 HONORABLE SARAH DUNCAN: And  
19 it's only certain appeals.

20 CHAIRMAN SOULES: What was  
21 that, Judge?

22 HONORABLE SARAH DUNCAN: It's  
23 my understanding that --

24 MR. YELENOSKY: Esoteric,  
25 direct and removed.



1 CHAIRMAN SOULES: Direct and  
2 removed appeals from administrative decisions?

3 HONORABLE SARAH DUNCAN: No, I  
4 don't think so. From what I understand --

5 CHAIRMAN SOULES: Okay. Judge  
6 Duncan.

7 HONORABLE SARAH DUNCAN: I  
8 don't know the substance of all of this, but  
9 from what I understand from what Pam said  
10 earlier, this is only a very limited number of  
11 administrative appeals covered by this  
12 statute. All other administrative appeals are  
13 not covered by the TRAP Rules and are  
14 unaffected by this rule.

15 MR. YELENOSKY: But none of  
16 those are direct or removed appeals.

17 HONORABLE C. A. GUITTARD:  
18 Well, here is the title that the attorney  
19 general put on it: Direct and Removed Appeals  
20 from Administrative Orders.

21 MR. LATTING: Wonderful.

22 MR. YELENOSKY: Right.

23 CHAIRMAN SOULES: Okay. Those  
24 in favor show by hands. 16. Those opposed.  
25 One. It carries.

1 PROFESSOR DORSANEO: One?

2 MR. ORSINGER: Sarah. Sarah  
3 voted against it. She thinks it violates the  
4 statute.

5 HONORABLE SARAH DUNCAN: No. I  
6 just don't think that --

7 MR. YELENOSKY: She just  
8 doesn't think there should be a rule.

9 CHAIRMAN SOULES: Okay. This  
10 is Rule 54. Okay.

11 What's next, Judge Guittard? Let's go  
12 back, I guess, and just pick up in sequence.  
13 We had finished --

14 HONORABLE C. A. GUITTARD: We  
15 had finished seven. We're down to eight,  
16 right?

17 CHAIRMAN SOULES: We didn't  
18 finish seven, but we've -- let's forget that  
19 for now. Let's get on with it. Five was  
20 done. Six was done. Seven was --

21 PROFESSOR DORSANEO: Seven was  
22 done.

23 CHAIRMAN SOULES: Seven was  
24 done. And so we're to Item 8.

25 HONORABLE C. A. GUITTARD: And

1 eight has not been done yet. Now, eight is  
2 simple. It merely adds to paragraph (a) of  
3 Rule 51 concerning the transcript two  
4 additional items which have to be put in the  
5 transcript. One is the request for a  
6 statement of facts under Rule 53(a). That  
7 statement of facts ought to be inserted in the  
8 transcript -- that request. And any statement  
9 of points under Rule 53(d) should also be put  
10 in the transcript. So I move that that  
11 proposal be added to 51(a).

12 CHAIRMAN SOULES: Okay. On  
13 what page of the materials is this?

14 HONORABLE C. A. GUITTARD: It's  
15 on Page 74.

16 CHAIRMAN SOULES: So it's just  
17 this highlighted portion that is added and  
18 then there is no other change?

19 HONORABLE C. A. GUITTARD: No  
20 other change.

21 CHAIRMAN SOULES: Okay. So  
22 after "showing any credits for payments made,"  
23 then we have an insert.

24 HONORABLE C. A. GUITTARD: Yes.

25 CHAIRMAN SOULES: Insert this

1 from Item 8.

2 Okay. Any objection to that.

3 MR. JACKSON: No. Just a quick  
4 clarification.

5 CHAIRMAN SOULES: Okay. David  
6 Jackson has a clarification.

7 MR. JACKSON: Does this  
8 presuppose that every request for a statement  
9 of facts is written?

10 HONORABLE C. A. GUITTARD:

11 Well, I think that's --

12 PROFESSOR DORSANEO: They're  
13 supposed to be written and they're supposed to  
14 be filed with the court clerk as well as being  
15 sent to you. So yes, there should be one.

16 MR. JACKSON: With the court  
17 clerk. Okay. Bonnie and I talked about this  
18 a little yesterday. Sometimes the court clerk  
19 doesn't get it, so the court reporter has to  
20 turn it over to them as part of the statement  
21 of facts.

22 PROFESSOR DORSANEO: Well, it's  
23 nice of you to do that.

24 CHAIRMAN SOULES: Okay. We  
25 haven't voted on that. Is there any

1 opposition to this change in Rule 51(a)?  
2 There's no opposition, so that will go.

3 No. 9.

4 HONORABLE C. A. GUITTARD: In  
5 No. 9 apparently we had deleted a little too  
6 much.

7 CHAIRMAN SOULES: We're at page  
8 what of the materials?

9 HONORABLE C. A. GUITTARD: On  
10 Page 75.

11 CHAIRMAN SOULES: Page 75.

12 HONORABLE C. A. GUITTARD: On  
13 Page 75 it shows a deletion beginning with  
14 "Failure to timely make the designation  
15 provided for in this paragraph shall not be  
16 grounds for refusing to file a transcript or  
17 supplemental transcript tendered within the  
18 time provided by Rule 54(a); however, if the  
19 designation specifying such matter is not  
20 timely filed, the failure of the clerk to  
21 include designated matter will not be grounds  
22 for complaint on appeal."

23 We deleted that on the theory that since  
24 we've repealed Rule 54 that doesn't make any  
25 sense. However, upon further examination we

1 concluded that part of it, and only part of  
2 it, should be deleted. And that part is the  
3 words that now appear deleted there "tendered  
4 within the time provided by Rule 54(a)."

5 So of that sentence which was previously  
6 deleted, only that phrase -- we propose that  
7 only that phrase should be deleted so that the  
8 sentence should be restored to this instead:  
9 "Failure to timely make the designation  
10 provided in this paragraph shall not be  
11 grounds for refusing to file a transcript or  
12 supplemental transcript. However, if the  
13 designation specified is not timely filed, the  
14 failure of the clerk to include the designated  
15 matter will not be grounds for complaint on  
16 appeal."

17 CHAIRMAN SOULES: Any  
18 opposition to that? Being no opposition,  
19 that's done. So we're going to restore the  
20 sentence.

21 HONORABLE C. A. GUITTARD:  
22 Except for the words "tendered within the time  
23 provided by Rule 54(a)."

24 CHAIRMAN SOULES: Except for  
25 "tendered within the time provided by

1 Rule 54(a)."

2 Okay. Item No. 10.

3 PROFESSOR DORSANEO: That  
4 sentence originated with the Chair, I think.

5 CHAIRMAN SOULES: Years ago.  
6 That's ancient history.

7 HONORABLE C. A. GUITTARD: Now  
8 we're down to Rule 53(m)(2) on Page 87. This  
9 is --

10 CHAIRMAN SOULES: What page is  
11 this on now, Judge?

12 HONORABLE C. A. GUITTARD: On  
13 Page 87. The proposal is that the first  
14 sentence of subdivision (2) there will read as  
15 follows: "The trial court shall upon request  
16 by the court reporter or recorder deliver all  
17 original exhibits to the reporter or recorder  
18 for use in preparing the statement of facts.  
19 The court reporter or recorder shall return  
20 the original exhibits to the clerk after the  
21 reporter or recorder has copied the exhibits  
22 for inclusion in the statement of facts." And  
23 then the rest of the paragraph would be the  
24 same. So that's just a clarification there,  
25 which is of mostly administrative

1           significance.

2                           CHAIRMAN SOULES:   Any  
3           opposition to that?  So we would take out the  
4           first sentence of Paragraph 2 and then --  
5           let's see, looking on Page 87, tell me what  
6           comes out that this replaces.

7                           HONORABLE C. A. GUITTARD:  
8           Well, it's indicated by strike-outs in this  
9           proposal here, and it goes down through --

10                          CHAIRMAN SOULES:  Actually, the  
11           entire first sentence is changed --

12                          HONORABLE C. A. GUITTARD:  No.  
13           Down there in about the fifth line, it says,  
14           "for inclusion in the statement of facts or  
15           omitted from the statement of facts."  Well,  
16           we have stricken out "or omitted from the  
17           statement of facts."  And the proposal here  
18           would replace all of that sentence down to the  
19           comma after the words "or omitted from the  
20           statement of facts."

21                          CHAIRMAN SOULES:  Except that  
22           there's a period here in this case in Rule 87.

23                          HONORABLE C. A. GUITTARD:  
24           Well, I guess it is a period instead of a  
25           comma.



1                   CHAIRMAN SOULES:   Okay.   So  
2                   we're going to substitute 10 --

3                   HONORABLE C. A. GUITTARD:   For  
4                   the first sentence.

5                   CHAIRMAN SOULES:   -- for the  
6                   first two sentences actually.

7                   HONORABLE C. A. GUITTARD:  
8                   Yeah.

9                   CHAIRMAN SOULES:   Okay.   So we  
10                  insert this on Page 87.

11                  We've got a court of appeals decision of  
12                  some interest on this.   It says, "Our record  
13                  does not contain a statement of facts from the  
14                  hearing on Nancy's motion for new trial  
15                  wherein Nancy testified and did not deny that  
16                  she had been warned about the risk of relying  
17                  on tapes.   Neither Nancy's trial counsel nor  
18                  the master were called to testify as to what  
19                  warnings, if any, were given about tapes'  
20                  quality.   In fact, no mention of the inability  
21                  to obtain a complete record was made until  
22                  after all testimony was concluded and Nancy's  
23                  attorney tendered the tapes to the court.

24                  "In light of the master's warnings, not  
25                  to mention common understanding about the

1 fallibility of tape recording, we cannot say  
2 Nancy diligently sought to protect the record  
3 in this case."

4 So this court of appeals has held that  
5 since a party didn't object to a tape  
6 recording at a master hearing and so that she  
7 couldn't get a good record of the master  
8 hearing, she waived the right -- she could not  
9 complain on appeal for not being able to get a  
10 record and was denied a new trial, even though  
11 she couldn't get a record because the tape was  
12 bad. This is Henning vs. Henning, 889  
13 Southwest 2nd.

14 HONORABLE SCOTT BRISTER: That  
15 was not Supreme Court approved recording.  
16 That was a tape recorder sitting on the desk  
17 just like our court reporter has here. Sure,  
18 I mean, if you want to go in and have a  
19 hearing and slap a tape recorder on the desk,  
20 punch the button and have no one monitoring  
21 it, you're likely to get -- but we pay-- let  
22 me just point out that's not electronic  
23 recording where you've got somebody paid a  
24 salary sitting there listening to it making  
25 sure you're recording every word that is

1           said.

2                   I don't see what application that has to  
3 courts of record. That's not a court of  
4 record. That's a master slapped a tape  
5 recorder on the table and pushed the record  
6 button. That's not a court of record.

7                   CHAIRMAN SOULES: Well, it  
8 becomes a court of record whenever the trial  
9 judge reviews it and approves it and you can't  
10 show the trial judge was wrong because there  
11 was no underlying record.

12                   MR. ORSINGER: Well, wait a  
13 minute. Master's appeals, I think, are  
14 de novo, aren't they?

15                   CHAIRMAN SOULES: It's on the  
16 record according to this case.

17                   MR. ORSINGER: Well, it must be  
18 a kind of appeal that I'm not familiar with,  
19 because the ones I'm familiar with are de novo  
20 with the trial court.

21                   CHAIRMAN SOULES: Just as long  
22 as we know that there was this denial on the  
23 basis of --

24                   MR. ORSINGER: I'm not sure  
25 what kind of case that is. If it's a divorce

1 case, it's my opinion, and correct me if  
2 anybody in here thinks I'm wrong, that all  
3 appeals from the master to the district court  
4 are de novo. And then if you waive the  
5 appeal, which is a trick that a lot of  
6 counties use, they won't even send you to the  
7 master unless both sides agree to waive appeal  
8 to the district court. And then you go ahead  
9 and appeal to the court of appeals based on  
10 the record you made before the master, but you  
11 have to consciously waive your right to a  
12 de novo review in the district court.

13 CHAIRMAN SOULES: Well, that  
14 may have been done.

15 MR. ORSINGER: And so I think  
16 what this says basically is that if you're  
17 going to waive your right to appeal to the  
18 district court so that the master's ruling  
19 then will be appealed on the master's record,  
20 then you better be sure you're getting a  
21 statement of facts.

22 CHAIRMAN SOULES: Judge Duncan.

23 HONORABLE SARAH DUNCAN: One  
24 warning: Don't just make sure you've got one;  
25 make sure that it's preserved rather than

1 erased.

2 MR. ORSINGER: Can I ask Judge  
3 Brister a question?

4 CHAIRMAN SOULES: Sure.

5 MR. ORSINGER: To my knowledge  
6 there are no -- you're the only judge in  
7 Harris County that has this procedure. And I  
8 don't think anybody in Austin or Fort Worth is  
9 doing it where they have family law courts.  
10 We have one of them doing it in Bexar County,  
11 and they have general jurisdiction including  
12 family law.

13 What is your view of a court that does  
14 have family law jurisdiction that does have a  
15 master that uses a tape recorder to make a  
16 statement of facts? Should that record be  
17 under the control of our rule, or is it only  
18 the district court's record that should be  
19 under the control of our rule?

20 HONORABLE SCOTT BRISTER: I  
21 don't know enough about how masters operate,  
22 never having had one or been involved with  
23 one.

24 MR. ORSINGER: Well, perhaps we  
25 ought to ask ourselves that question. It may

1           only apply in one court, whoever's court this  
2           was. But that's possibly a valid question,  
3           because even though there is a right to a  
4           de novo review, you'll find customarily that  
5           that right is waived in advance, in which  
6           event we may be having an electronic statement  
7           of facts that doesn't fit our rule.

8                           CHAIRMAN SOULES: Well, there  
9           may have been a waiver there. I don't  
10          remember what the rest of the decision was. I  
11          just read it in -- I guess it's in the most  
12          recent --

13                           HONORABLE SCOTT BRISTER: I can  
14          ask around about that and see what the  
15          practice in our family courts is, whether  
16          that's a problem and whether our rules need to  
17          fit together with them.

18                           But I'm sure, you know, that masters  
19          certainly don't usually have court reporters  
20          sitting in there. Maybe they do. I don't  
21          know. Let me call around.

22                           MR. JACKSON: We get hired to  
23          take masters hearings. If it's an important  
24          enough issue that the lawyers feel they need a  
25          court reporter, they'll hire a court

1 reporter.

2 HONORABLE SCOTT BRISTER: I'll  
3 talk with some of the judges that both have  
4 and don't have electronic recording and find  
5 out what the masters do in those cases.

6 What's the style of that case again?

7 CHAIRMAN SOULES: It's Henning  
8 vs. Henning. What is it, Richard?

9 MR. ORSINGER: 889. And the  
10 internal page is 614. I don't know what the  
11 beginning page is.

12 CHAIRMAN SOULES: Okay. So  
13 that takes care of Item 11.

14 MR. YELENOSKY: Luke, can I  
15 just ask a question?

16 CHAIRMAN SOULES: Steve  
17 Yelenosky.

18 MR. YELENOSKY: I just wanted  
19 to confirm my assumption that this case  
20 wouldn't have any bearing on tape recorded  
21 administrative hearings that are routinely  
22 tape recorded and nobody ever brings a court  
23 reporter in. And suppose there was a problem  
24 with the tape. My understanding would be that  
25 this case wouldn't have a bearing on that

1 because you really don't have a choice there  
2 if the tape is bad.

3 CHAIRMAN SOULES: I have no  
4 idea how far it's going to go. This is the  
5 first one I've ever seen that way, but it's a  
6 new case.

7 MR. YELENOSKY: Well, I don't  
8 know if that relates to what we're doing now,  
9 but obviously I would have a concern there.

10 CHAIRMAN SOULES: Okay. Now  
11 we're over to Item 12.

12 HONORABLE C. A. GUITTARD:  
13 Yes. This is simply an addition to  
14 subdivision (a) of Rule 55, which concerns an  
15 amendment of the record. Rule 55(a) as now --

16 CHAIRMAN SOULES: What page is  
17 this on, Judge?

18 HONORABLE C. A. GUITTARD: It's  
19 on Page 92. It provides, and this would not  
20 be changed, that "If anything material is  
21 omitted from the transcript, the trial court,  
22 the appellate court, or any party may by  
23 letter direct the clerk of the trial court to  
24 prepare, certify, and file in the appellate  
25 court a supplemental transcript containing the



1           omitted matters."

2           And this proposal would add to that the  
3           shaded material here: "If the missing  
4           material cannot be found in the clerk's  
5           office, the parties may, by written  
6           stipulation, deliver a copy of the omitted  
7           material to the clerk to include in a  
8           supplemental transcript. If the parties  
9           cannot agree on the accuracy of the copy, upon  
10          motion of either party or of the appellate  
11          court, the trial court shall, after notice to  
12          all parties and hearing, consider what  
13          constitutes an accurate copy of the missing  
14          material and order it to be included in a  
15          supplemental transcript."

16                   CHAIRMAN SOULES: Has everybody  
17                   had a chance to look at that?

18                   HONORABLE C. A. GUITTARD: Does  
19                   anybody object to that?

20                   CHAIRMAN SOULES: Is there any  
21                   objection to this? No objection. It will be  
22                   done.

23                   Next is 13. 55(c) is on what page,  
24                   Judge?

25                   HONORABLE C. A. GUITTARD: On

1 the same page, Page 92. And this has to do  
2 with (b).

3 CHAIRMAN SOULES: (c).

4 HONORABLE C. A. GUITTARD: Yes,  
5 (c).

6 CHAIRMAN SOULES: Okay. It  
7 starts at the bottom of Page 92?

8 HONORABLE C. A. GUITTARD:  
9 Right.

10 PROFESSOR DORSANEO: I hate to  
11 have a question on this. But on the one we  
12 just did, 12, should that really begin "If the  
13 missing material cannot be found in the  
14 clerk's office"?

15 HONORABLE C. A. GUITTARD:  
16 Well, I wondered about that too. Can you  
17 suggest a better term?

18 PROFESSOR DORSANEO: I'm  
19 troubled by the geography of it. I would  
20 doubt that the missing material has found its  
21 way into the clerk's office unless we're  
22 talking about something the clerk lost,  
23 something that was filed and no longer can be  
24 found in the clerk's office. I mean, what  
25 clerk are we talking about? The trial court

1 clerk?

2 HONORABLE C. A. GUITTARD: Yes.

3 JUSTICE CORNELIUS: Why don't  
4 you strike "in the clerk's office" and just  
5 say if it cannot be found?

6 MR. ORSINGER: Well, that means  
7 they have a duty to search the courthouse.  
8 Should they?

9 PROFESSOR DORSANEO: I guess  
10 the clerk is supposed to have this stuff.

11 PROFESSOR ALBRIGHT: It has to  
12 be filed. It has to be filed to be considered  
13 part of the transcript, right?

14 MR. JACKSON: But they could  
15 have loaned it to the court reporter.

16 CHAIRMAN SOULES: Okay. What's  
17 your comment, Alex?

18 PROFESSOR ALBRIGHT: I think  
19 Bill was indicating that this may be stuff  
20 that wasn't filed. I think this is stuff that  
21 had to have been filed to be part of the  
22 record. It's just that the clerk, after  
23 having it filed and putting it in the folder  
24 for the particular case -- somehow it got  
25 lost, whether it was when it was sent to the

1 court reporter or loaned to a lawyer or  
2 whatever. It's just not there.

3 CHAIRMAN SOULES: Anyone else?

4 PROFESSOR DORSANEO: I think  
5 I'll take back what I said then.

6 CHAIRMAN SOULES: No problem?  
7 Leave it like it is? Okay. The vote stands  
8 unless somebody wants it changed. It stands.

9 Okay. No. 13.

10 HONORABLE C. A. GUITTARD: Go  
11 to paragraph (c) at the bottom of Page 92. It  
12 seems that this has to do with inaccuracies in  
13 the statement of facts. As drawn, the rule  
14 would apply only after filing with the  
15 appellate court, but the proposal would permit  
16 corrections even before filing with the  
17 appellate court.

18 And the rule as corrected would read,  
19 "Any inaccuracies in the statement of facts  
20 may be corrected by agreement of the parties  
21 without recertification by the court  
22 reporter. If any dispute arises as to whether  
23 the statement of facts accurately discloses  
24 what occurred in the trial court, the trial  
25 judge shall, after notice to the parties and

1 hearing, settle the dispute and make the  
2 statement of facts conform to what occurred in  
3 the trial court. If the disputed" -- and  
4 there's a "d" here that ought not -- that's  
5 out of place. "If the dispute arises after  
6 filing in the appellate court, the appellate  
7 court shall submit the matter to the trial  
8 court for a decision."

9 CHAIRMAN SOULES: So that would  
10 be a complete replacement for the (c) that we  
11 have?

12 HONORABLE C. A. GUITTARD: Yes.

13 CHAIRMAN SOULES: As modified  
14 in the handout?

15 HONORABLE C. A. GUITTARD:

16 That's right.

17 CHAIRMAN SOULES: Okay. Any  
18 comment? Any opposition to this change?  
19 There being no opposition, it will be done.

20 HONORABLE C. A. GUITTARD: The  
21 next part has to do with the records in  
22 administrative appeals, which have special  
23 problems, as indicated.

24 It would read this way: This paragraph  
25 only applies to cases involving judicial

1 review of state agency decisions in contested  
2 cases pursuant to Government Code 2001.175 as  
3 amended. At any stage of the proceeding, the  
4 parties may, by agreement, make corrections to  
5 the agency record filed pursuant to Government  
6 Code Section 2001 and so forth, as amended, or  
7 pursuant to Rule 54, to ensure that the agency  
8 record accurately reflects the contested case  
9 proceedings before the state agency. No  
10 recertification by the court reporter shall be  
11 required. If the parties fail to agree to any  
12 requested correction to the agency record,  
13 upon motion of any party or the appellate  
14 court, the appellate court shall send the  
15 question to the trial court, which shall,  
16 after notice and hearing, determine what  
17 constitutes an accurate copy of the agency  
18 record and order the agency to deliver it to  
19 the clerk where the case is pending.

20 In other words, this may be something  
21 that hasn't been at all filed in the trial  
22 court. It might be a direct appeal from the  
23 agency. And this would provide a mechanism  
24 for the appellate court to direct a trial  
25 court, in the place where the agency says, to

1 make that factual decision as to what is a  
2 proper record in the agency appeal.

3 CHAIRMAN SOULES: Why wouldn't  
4 that go to the hearing examiner?

5 HONORABLE C. A. GUITTARD:  
6 Well, I guess --

7 CHAIRMAN SOULES: How is the  
8 trial court going to resolve that?

9 HONORABLE C. A. GUITTARD:  
10 Well, the motion is filed and the parties  
11 appear and present their evidence and the  
12 trial court decides it.

13 PROFESSOR DORSANEO: Is this  
14 the attorney general's proposal on how to deal  
15 with this?

16 HONORABLE C. A. GUITTARD: This  
17 is the attorney general's proposal.

18 CHAIRMAN SOULES: That doesn't  
19 seem to me to be fair to a trial court to have  
20 to resolve a dispute about what occurred  
21 before a hearing examiner.

22 PROFESSOR DORSANEO: That's  
23 part of the price of living in Austin.

24 MR. ORSINGER: A small price to  
25 pay.

1                   CHAIRMAN SOULES: Okay. If  
2 nobody else is concerned about that, I'm not  
3 going to be.

4                   MR. PERRY: Doesn't that go  
5 back to the agency? Isn't the agency  
6 responsible for the record?

7                   CHAIRMAN SOULES: That's what  
8 I'm saying. That's my feeling about it. It  
9 seems to me it would be an imposition on the  
10 trial court system to have them straighten out  
11 what happened in an agency proceeding.

12                  MR. PERRY: Well, it also seems  
13 like you would have all kinds of questions  
14 about how you would open the file in the trial  
15 court. I mean, you don't just walk in one day  
16 and say, "Hey, judge, we're here."

17                  CHAIRMAN SOULES: It's a new  
18 lawsuit. Okay. Well, let's just, I guess,  
19 vote that up or down. Should it go to the  
20 trial court or go to the agency? That's  
21 what's on the table for discussion.

22                  Richard Orsinger.

23                  MR. ORSINGER: Does this rule  
24 apply to those appeals that go directly from  
25 the administrative agency to the court of



1 appeals and don't pass through the trial  
2 court?

3 HONORABLE C. A. GUITTARD: Yes.

4 PROFESSOR DORSANEO: As well as  
5 the ones that go -- I mean, you can't tell  
6 under this statue which way it's going to  
7 happen.

8 MR. ORSINGER: Well, that  
9 raises a different issue, which is that if we  
10 are remanding it to the trial court to clarify  
11 a record that never even went into the trial  
12 court, then that's even doubly ridiculous.

13 In other words, if we had a direct appeal  
14 from an administrative agency to the court of  
15 appeals, and then we're remanding it to the  
16 trial court where the case was never  
17 previously pending, I guess, to conduct a  
18 factual inquiry now, and then...

19 CHAIRMAN SOULES: Then what?

20 MR. ORSINGER: And then, I  
21 guess, render some kind of findings based on a  
22 reevaluation of the administrative agency's  
23 hearing?

24 CHAIRMAN SOULES: Any other  
25 discussion? Bill.

1                                    PROFESSOR DORSANEO:  My  
2                                    recollection, and I wish we had the attorney  
3                                    general's people here, is that this was  
4                                    directed primarily at a situation where there  
5                                    is a record made in the trial court but nobody  
6                                    looks in the boxes.  I mean, they just kind of  
7                                    admit the boxes.  You know, "I offer Boxes 1  
8                                    through 15, Bankers Boxes 1 through 15," and  
9                                    they're admitted.  And when they ultimately  
10                                   get to the court of appeals, somebody notices  
11                                   that something is not in one of the boxes and  
12                                   they have to go back and correct the record.  
13                                   And they want to be able to do that without a  
14                                   lot of hassle.  Okay?

15                                                      And I think this also probably applies to  
16                                   cases that don't get removed from the trial  
17                                   court, but I don't know if that makes a  
18                                   difference, given what the trial court does to  
19                                   begin with, which is just kind of to pass  
20                                   these boxes along.

21                                                      And this worked from their standpoint,  
22                                   and that's why it's fine with me, because I  
23                                   don't really much care about it, if they  
24                                   don't.

25                                                      CHAIRMAN SOULES:  Any other

1 comment on this? Okay. Those in favor of  
2 inserting paragraph (d) at the end of Rule 55  
3 show by hands. 12. Those opposed. One  
4 opposed. 12 to one it carries. So that will  
5 go in as 55(d).

6 Okay. Item 14 has to do with what page  
7 in our materials, Judge?

8 HONORABLE C. A. GUITTARD:  
9 "Prior of the call of the case" didn't seem  
10 to be --

11 CHAIRMAN SOULES: Page 120, is  
12 that correct? Yeah.

13 HONORABLE C. A. GUITTARD: That  
14 seemed to be an obsolete phrase. And so the  
15 rule would be changed to read "before the date  
16 set for submission."

17 CHAIRMAN SOULES: Okay. If  
18 you're on Page 120 and you're looking at what  
19 was (m) and is now (l), six lines down, the  
20 words "prior to the call of the case" have  
21 been stricken. And we want to make an insert  
22 there now of some new words?

23 HONORABLE C. A. GUITTARD:  
24 Right.

25 CHAIRMAN SOULES: And those new

1 words are?

2 HONORABLE C. A. GUITTARD:

3 "Before the date set for submission."

4 CHAIRMAN SOULES: Any objection  
5 to that?

6 MR. ORSINGER: I'd like to  
7 inquire.

8 CHAIRMAN SOULES: Go ahead.

9 MR. ORSINGER: If the appellant  
10 does not file a brief, will the appellate  
11 court eventually set it for submission, even  
12 though there's no brief on file from anybody,  
13 or will they prepare a motion to dismiss or  
14 issue a show cause order why it shouldn't be  
15 dismissed?

16 JUSTICE CORNELIUS: That was  
17 the point I was going to make. I think in a  
18 situation like this, probably the appellate  
19 court will not set it for submission or will  
20 just dismiss it for want of prosecution.

21 HONORABLE C. A. GUITTARD: If  
22 the appellant doesn't file a brief, it's  
23 dismissed for lack of prosecution. If the  
24 appellee doesn't file a brief, then you submit  
25 it on the appellant's brief.

1 JUSTICE CORNELIUS: But this  
2 says where the appellant has failed to file a  
3 brief --

4 MR. ORSINGER: But the point  
5 I'm making is --

6 CHAIRMAN SOULES: Let Judge  
7 Cornelius develop his thought and put it on  
8 the record, please.

9 JUSTICE CORNELIUS: This  
10 provision is for when the appellant fails to  
11 file a brief. And in that case I don't  
12 believe the appellate court to going to set it  
13 for submission in the traditional sense of the  
14 term.

15 MR. ORSINGER: And if I may,  
16 that means that the appellee will never  
17 know -- the deadline for the appellee filing  
18 will never occur because there will never be a  
19 submission date. There will be just a notice  
20 of intent to dismiss or a show cause order or  
21 whatever.

22 JUSTICE CORNELIUS: Right.  
23 When that happens in our court, we just  
24 dismiss it for want of prosecution, and  
25 there's no notice to the appellee.

1                   CHAIRMAN SOULES: All right.  
2           What if we use these words: "Before the date  
3           set for submission or dismissal of the cause"?

4                   MR. ORSINGER: It's a dumb  
5           appellee that files a brief if the case is  
6           about to be dismissed.

7                   CHAIRMAN SOULES: Well, I'm  
8           just trying to see what the issue is.

9                   HONORABLE C. A. GUITTARD:  
10          Well, if there's a cross-appeal and the  
11          appellant has failed to file a brief, then the  
12          appellee or cross-appellee may, before the  
13          date set for submission, file his brief.

14                   MR. ORSINGER: But there may  
15          never be a date set for submission if the  
16          appellant doesn't file a brief.

17                   HONORABLE C. A. GUITTARD:  
18          Well, if there's a cross-appeal there would  
19          be.

20                   MR. ORSINGER: You won't even  
21          know there's a cross-appeal. You won't know  
22          whether there's a cross-appeal until a brief  
23          is filed saying so, because the appellee is  
24          not required to perfect an appeal.

25                   CHAIRMAN SOULES: Okay. Judge

1 Duncan.

2 HONORABLE SARAH DUNCAN: But if  
3 the appellant never files a brief, why would  
4 the cross-appellant ever file a brief raising  
5 a cross-appeal?

6 HONORABLE C. A. GUITTARD: If  
7 he wants --

8 CHAIRMAN SOULES: Judge  
9 Guittard.

10 HONORABLE C. A. GUITTARD: If  
11 he wants affirmative relief from the trial  
12 court's judgment, he would.

13 CHAIRMAN SOULES: Well,  
14 shouldn't that be required to be done before  
15 the case is either set for submission or  
16 dismissed?

17 MR. ORSINGER: Why don't we  
18 just add the two timetables together? Since  
19 you've got 30 days plus 25 days, why don't we  
20 just say by the 55th day? Same deadline as if  
21 there was a brief filed by the appellant.

22 CHAIRMAN SOULES: Judge  
23 Cornelius.

24 JUSTICE CORNELIUS: I was going  
25 to suggest that we say that he may file his

1 brief within 25 days after the date that  
2 appellant's brief was due, because you're not  
3 going to have an official submission of a case  
4 in this situation. Just put a time limit on  
5 it, which you say would be 55 days.

6 MR. ORSINGER: 30 plus 25.

7 CHAIRMAN SOULES: All right.

8 How do we write that?

9 MR. ORSINGER: Just like he  
10 said, within 25 days after the appellant's  
11 brief was due.

12 CHAIRMAN SOULES: Okay. After  
13 the word "may" and in the place of the  
14 stricken words "prior to the call of the  
15 case," we will insert "within 25 days"?

16 JUSTICE CORNELIUS: Right.  
17 From the date that the appellant's brief was  
18 due.

19 CHAIRMAN SOULES: 25 days after  
20 what?

21 JUSTICE CORNELIUS: After the  
22 date the appellant's brief was due.

23 PROFESSOR DORSANEO: That's  
24 good.

25 MR. ORSINGER: Is that "is" or



1 "was"?

2 JUSTICE CORNELIUS: Was. Was  
3 due.

4 MR. ORSINGER: Was due.

5 CHAIRMAN SOULES: Okay. Any  
6 opposition to that? Being no opposition,  
7 that's done.

8 Okay. That takes care of 14. Now to  
9 15. That deals with what pages in the  
10 materials?

11 HONORABLE C. A. GUITTARD:  
12 That's on Page 130 about unpublished  
13 opinions. Previously this rule -- this  
14 proposal was adopted to avoid the problem of  
15 what was an unpublished opinion. We simply  
16 said, "An opinion designated not for  
17 publication shall not be cited as authority."  
18 But some courts, instead of saying "not for  
19 publication," say, "do not publish," which is  
20 the same thing, so we put both of those in  
21 there, and that's the effect of this proposal.

22 CHAIRMAN SOULES: Okay. Sarah  
23 Duncan.

24 HONORABLE SARAH DUNCAN: I'd  
25 like to propose an alternative, and that is

1 that we delete subdivision (i).

2 HONORABLE C. A. GUITTARD: And  
3 that raises the main question as to whether or  
4 not there should be any not published, right?

5 HONORABLE SARAH DUNCAN: No. I  
6 don't have a problem with opinions that are  
7 designated as not to be published within  
8 Southwest 2nd.

9 PROFESSOR DORSANEO: Could we  
10 come back to that?

11 CHAIRMAN SOULES: Bill wants to  
12 know if we can come back to that, and I don't  
13 know when, so -- I mean, we've really done  
14 this many times.

15 HONORABLE C. A. GUITTARD: Yes.  
16 We've been over that.

17 CHAIRMAN SOULES: But I don't  
18 want to frustrate anybody trying to get this  
19 changed, so go ahead.

20 You disagree that we've been over this  
21 before. How so, Judge Duncan?

22 HONORABLE SARAH DUNCAN: I  
23 believe it's come up before. But I don't  
24 believe that this Committee, or for that  
25 matter really the appellate committee at least

1 in my time here, has really discussed  
2 unpublished opinions and what should be done  
3 with them.

4 I personally believe that there is a  
5 growing problem and that there are a lot of  
6 lawyers legitimately very upset with what's  
7 being done with unpublished opinions. And I  
8 think we -- I don't think we've actually  
9 debated and voted on whether to change or  
10 alter this procedure. We just all recognize  
11 that it's extremely controversial, and so we  
12 say, you know, we've been down this road  
13 before; let's not go again.

14 CHAIRMAN SOULES: Okay. Any  
15 other comment? Richard.

16 MR. ORSINGER: I have real  
17 mixed feelings about this, because Westlaw and  
18 other places do have unpublished opinions, so  
19 people are aware of them. And you have to  
20 insinuate they exist by saying things like "An  
21 unpublished opinion on this subject exists in  
22 this court," but you can't say what it is, or  
23 some people do say what it is and whatever.

24 On the other hand, you don't want to  
25 disadvantage the people that don't have access

1 to Westlaw, which costs a lot of money,  
2 because they're not even going to get a copy  
3 of it.

4 Let me point out that over time this rule  
5 is going to lose its justification, because as  
6 we move to CD-ROM cases, which there are now  
7 three people that put cases on CD-ROM,  
8 Butterworth, West and Q-Case, the incremental  
9 cost of adding all of our opinions is nil.  
10 And you pay like 85 or \$90 a month, and you  
11 get your disks every month and you don't have  
12 to even have books on the shelf any more or  
13 anything else.

14 Our whole purpose of reducing the volume  
15 of papers in our libraries is going to  
16 disappear as time goes on. And if we don't  
17 kill this rule now, I think we ought to  
18 understand that we may want to revisit it,  
19 because I believe the original driving force  
20 was to keep lawyers from having to pay law  
21 book publishers for publishing opinions.

22 CHAIRMAN SOULES: Well, that  
23 was the expressed reason.

24 MR. ORSINGER: What was the  
25 other unstated reason?

1                                   CHAIRMAN SOULES: Judge  
2           Brister, and then we'll come around the table

3                                   HONORABLE SCOTT BRISTER: You  
4           guys may get CD-ROM in the near future, but  
5           I'm not going to get CD-ROMs for decades. And  
6           I don't want people citing unpublished  
7           opinions that I don't have and expecting me to  
8           look this stuff up. I've got a wall of  
9           books. It may be more expensive than CD-ROM,  
10          but do you know how it got there? That's an  
11          expenditure we've done for 50 years, and we  
12          can keep doing it forever no matter how much  
13          it costs.

14                                 CD-ROM is different, new. It will raise  
15          taxes. We're not going to get it. So I'm  
16          going to keep getting my books for the next  
17          20 years. If I want to look up what's cited  
18          to me, get me my books, because that's all I  
19          or anybody else in Harris County is going to  
20          have.

21                                 And second of all, when I get reversed,  
22          or affirmed occasionally, on do-not-publish  
23          opinions, they're always less than three pages  
24          and they do not explain why they're doing what  
25          they're doing, and that's why they don't

1 publish them.

2 And those -- I think it would be a bad  
3 idea to throw opinions that are less carefully  
4 considered into the law when the judges  
5 involved know that. And sometimes they  
6 designate them not for publication for just  
7 that reason. So I say leave it just like  
8 this.

9 The only suggestion I have is that rather  
10 than putting these terms in quotes, if the  
11 concern is that, you know, because there may  
12 be a hundred ways courts of appeals can decide  
13 not to publish something, just make it a  
14 generic, not a quotation, not quoted exact  
15 language. Just put "opinions that are not  
16 designated for publication shall not be cited  
17 as authority," rather than trying to guess the  
18 specific terms that may be used by courts of  
19 appeals.

20 CHAIRMAN SOULES: Alex.

21 PROFESSOR ALBRIGHT: I agree  
22 with Judge Brister in the second part of his  
23 discussion. I think if we make the courts of  
24 appeals publish every opinion, we're going to  
25 be inundated with opinions that don't mean

1 anything, that don't say anything, and they  
2 weren't intended to mean or say anything  
3 except just to tell the parties and the court  
4 that they're being reversed.

5 There may be a problem that some opinions  
6 are being designated not for publication when  
7 they should be published.

8 MR. ORSINGER: That's the  
9 problem.

10 PROFESSOR ALBRIGHT: But that  
11 is not a problem that is solved by simply  
12 deleting Rule 90(i).

13 Maybe what we should do instead is have a  
14 mechanism whereby the decision to not publish  
15 is reviewed and then someone makes a decision  
16 that this opinion should be published. But I  
17 think there are lots of opinions that should  
18 not be published, and I think that we're all  
19 inundated with too much information anyway.  
20 If there's a way to get things we don't need  
21 to deal with out of the system, I think it's  
22 good.

23 CHAIRMAN SOULES: Sarah Duncan.

24 HONORABLE SARAH DUNCAN: My  
25 proposal, in all seriousness, is not to just

1 delete subdivision (i). My proposal would be  
2 that all opinions be available on Westlaw  
3 regardless of whether they're designated  
4 available for publication in Southwest 2nd or  
5 not, and that is as done in the Fifth Circuit.  
6 If it is an opinion that is not published in  
7 the bound Reporter, if you wish to cite it,  
8 you must give the court to whom you are citing  
9 it a copy of it.

10 We have the interesting situation right  
11 now that while unpublished opinions are not  
12 citable as authority in a Texas state court,  
13 they are freely citable in the Fifth Circuit  
14 and in all of the federal courts.

15 And yes, there are a lot of cases that  
16 should not be published. They don't comply  
17 with the standards of Rule 90. But there are  
18 a lot of cases that should be published that  
19 aren't. And until we remove this obstacle to  
20 citation, there's going to be an incentive not  
21 to publish certain types of decisions.

22 CHAIRMAN SOULES: Harriet  
23 Miers, you had your hand up.

24 MS. MIERS: I agree with Sarah,  
25 Judge Duncan, except with the requirement that



1 you have to provide it not only to the court  
2 but all the parties involved. If there's an  
3 access issue, that's resolvable by making  
4 available to everyone in the matter what  
5 you've been able to locate.

6 And if it is substantively significant in  
7 the lawyer's view what the court said, I don't  
8 understand why it's not available for  
9 citation.

10 CHAIRMAN SOULES: Richard, you  
11 had your hand up.

12 MR. ORSINGER: I was going to  
13 say the same thing.

14 CHAIRMAN SOULES: Anything  
15 else? Steve.

16 MR. YELENOSKY: I guess I do  
17 disagree with Alex a little bit and do agree  
18 with Harriet on the point that if it really  
19 isn't intended to say anything and yet an  
20 attorney cites it and copies it to all the  
21 parties, opposing counsel should be able to  
22 demonstrate that it doesn't say anything, that  
23 it was not designated for publication and that  
24 that's an indication that it doesn't really  
25 mean to say anything, so that there is still a

1 disincentive to using not-designated-for-  
2 publication documents or opinions.

3 But in my practice I have noticed that  
4 there are times when things aren't published,  
5 and all I can figure is that it's sort of an  
6 esoteric area of the law for the appellate  
7 court. Often this is in the areas that I've  
8 dealt with, and they don't want it published,  
9 but it's real important for us to have it  
10 published.

11 In TEC cases, for example, there are only  
12 several dozen cases. It's not like they're  
13 inundated with cases. And you may get a case  
14 that the appellate court may not realize the  
15 significance of because so few people practice  
16 in that area. And there is a mechanism, I  
17 guess, already where you can file some kind of  
18 motion and ask that it be published, but, you  
19 know, it's totally discretionary.

20 CHAIRMAN SOULES: Okay.  
21 Anything else on this? Sarah Duncan.

22 HONORABLE SARAH DUNCAN: I  
23 would agree with what Harriet suggested. I  
24 mean, I always anticipated that you would have  
25 to provide it to opposing parties.

1           But as an example, Steve used the TEC  
2 cases, I was doing -- and I think this is sort  
3 of embarrassing to us as a profession, but I  
4 was doing research on proving legal  
5 malpractice with experts a few years ago. And  
6 naturally the Supreme Court cases are  
7 published, but it is embarrassing the number  
8 of legal malpractice cases in this state that  
9 are not reported. It is extremely difficult  
10 to research and get reported opinions.

11                           CHAIRMAN SOULES: Judge  
12 Brister.

13                           HONORABLE SCOTT BRISTER: I  
14 don't care if Westlaw prints these things and  
15 you all can them up. My concern is, when  
16 people give me an opinion that they want me to  
17 follow, they never attach the contrary  
18 opinions that suggest I should do something  
19 else. And I think the rules require that, but  
20 nobody ever does it.

21           When an attorney cites me a case and says  
22 this is controlling, if it's a case of any  
23 importance, I don't take that on face value  
24 because I know they're not telling me the  
25 whole story. I go to my Texas Digest or

1           Shepard's and look it up and see if there may  
2           be some other law that says something to the  
3           contrary I need to know about. I will be  
4           unable to do that on unpublished opinions.

5           I can use Westlaw if I personally pay for  
6           it, not the county commissioner, but Scott  
7           Brister. If I take my salary, I can go look  
8           up something on Westlaw. Otherwise, I cannot,  
9           because it is not in the budget.

10           And so I don't want people citing to me  
11           to follow unpublished opinions when I cannot  
12           play with a full deck. I don't know, unless  
13           it's published, whether there's a whole area  
14           of law and opinions that they're just choosing  
15           not to tell me about.

16                           CHAIRMAN SOULES: David Perry.

17                           MR. PERRY: I think the very  
18           concept of an unpublished opinion is extremely  
19           unfair, because you get into exactly the  
20           conflict that is pointed up by this discussion  
21           where Judge Brister on the one hand has  
22           absolutely good and valid reasons that also  
23           apply to a lot of lawyers why an unpublished  
24           opinion should not be authoritative.

25           On the other hand, it's nonsensical that

1 an opinion is going to be nonauthoritative.  
2 It would seem to me that if an opinion is  
3 going to be sufficiently -- of sufficiently  
4 little consequence that it should have no  
5 authority, then give the court the ability to  
6 publish an order without an opinion. But if  
7 they write an opinion, let's have it be  
8 published and have it be authoritative.

9 CHAIRMAN SOULES: That would be  
10 a big change in the court of appeals' standard  
11 of review. Richard Orsinger.

12 MR. ORSINGER: In response to  
13 the comment that David just made, you couldn't  
14 effectively present to the Supreme Court the  
15 error committed by the court of appeals or  
16 even the reasoning of the court of appeals  
17 without an opinion.

18 And having never been an appellate judge,  
19 I'm speaking as an advocate now, but one of  
20 the virtues of requiring an opinion in every  
21 case is that it forces the appellate judges to  
22 go through the reasoning process of finding  
23 applicable law and then reconciling that law  
24 to their outcome of the case. And I think  
25 that that's a form of discipline that we force

1           upon our appellate courts that time has proven  
2           is important to the system, so that people can  
3           understand that the judges are applying the  
4           law to their case and that it's rational and  
5           fair the way they're doing it.

6                     And then I'd like -- to Judge Brister's  
7           comment I'd like to say that I sympathize with  
8           the condition he's in. I wish that more  
9           district judges would do research on their  
10          own. Many district judges rely on the  
11          opposing party to call to their attention  
12          adverse case law. And perhaps Judge Brister  
13          may be in the condition to have to do that if  
14          someone is citing unpublished opinions or if  
15          there might be unpublished opinions that are  
16          adverse even to a published opinion that's  
17          submitted to the court.

18                    And then the last thing I'd like to say  
19          is that we have to reenvision our citation  
20          methods if we're going to permit the citation  
21          of unpublished opinions. And there are four  
22          or five states, either through their courts or  
23          through their legislatures, that have adopted  
24          a citation format that is not based on the  
25          official Reporter, which in Texas would be the

1 Southwest 2nd. And if we have some that are  
2 in Southwest 2nd and some that are not, we  
3 have to have a method of citing the ones that  
4 are not in Southwest 2nd.

5 And I would say, for example, that the  
6 cause numbers in the appellate courts would be  
7 a possible routine, because they start out by  
8 0493, hyphen, and then the case number, and  
9 then hyphen CV or CR, and then we could use  
10 that -- pardon me. Sarah says I'm behind the  
11 times. Okay.

12 HONORABLE SARAH DUNCAN: Well,  
13 I mean, it's in the blue book.

14 CHAIRMAN SOULES: Okay. Steve  
15 Yelenosky.

16 MR. YELENOSKY: Another  
17 response, I think, to what Judge Brister has  
18 said is that there are two alternatives then.  
19 And the alternative I think that Judge Brister  
20 is arguing is that you cannot then argue the  
21 unpublished law. And the problem with that is  
22 that I have a case right now in the Fifth  
23 Circuit where there is one case on it, and  
24 under state law, I guess, I couldn't argue  
25 it. And you can be sure, as Richard has said,

1 if there were any other cases on it, the other  
2 parties would find them. But I recite in the  
3 brief that this is the only case I'm aware of  
4 and I attach it.

5 Under your regime, I simply would not  
6 have any way of arguing that. And it seems to  
7 me that the fault ought to be that you can't  
8 argue it and the other side can try to ferret  
9 out opposing opinions or an opposite opinion,  
10 but that it isn't fair to simply exclude what  
11 may be the only case on point.

12 CHAIRMAN SOULES: Okay. Let me  
13 just -- I want to go around again. One of our  
14 esteemed members who is not here has spoken on  
15 this quite a bit and has said a couple of  
16 things.

17 Number one, the fact that the court of  
18 appeals' jurisdiction is mandatory. Parties  
19 invoke that jurisdiction and cause the court  
20 to have to act upon their case, unlike the  
21 Supreme Court, so they've got no choice but to  
22 take the case. And a lot of those cases are  
23 really not worthy of even having the court  
24 give the case its attention, but statutorily  
25 they must, so they decide them. And they do



1           them with these short opinions many times.

2           And then basically there are cases coming  
3 up where the established law has been applied  
4 by the trial court or not applied by the trial  
5 court, but there's nothing new. It's easy to  
6 decide. It's over. He's saying that many of  
7 them are cases where the trial court has  
8 properly applied the law and people are just  
9 still complaining, but they've got really  
10 nothing to complain about, so that apparently  
11 there are some of those cases.

12           Then the other piece of it is that  
13 sometimes the issues are novel. There really  
14 isn't much jurisprudence. And they don't  
15 publish their opinions because they're  
16 uncertain of their precedential value.  
17 They're deciding the case, which they must, as  
18 best they can. But they're admittedly  
19 uncertain about whether this opinion reflects  
20 the jurisprudence and they want the  
21 jurisprudence to develop more before they  
22 start publishing what they're saying about the  
23 jurisprudence.

24           Now, you all know who I'm talking about.  
25 He's just not here today, and I think he would

1 put those remarks on the record, and I  
2 don't -- a former court of appeals justice.

3 I don't know whether Judge Cornelius has  
4 anything to say about this. Because you've  
5 been at this longer than anybody here, if you  
6 have anything to add, why, we would be happy  
7 to hear from you.

8 JUSTICE CORNELIUS: Well, I  
9 realize that the lawyers think that appellate  
10 judges sometimes try to hide their opinions by  
11 not publishing them. I can say emphatically  
12 that my court does not do that. We try to  
13 make a genuine realistic appraisal on the  
14 issue of whether the opinion has any  
15 precedential value, and it's that basis on  
16 which we make our decision whether to publish  
17 it or not.

18 Additionally, I might point out that the  
19 Supreme Court has consistently put pressure on  
20 the courts of appeals to publish fewer and  
21 fewer opinions. They have not done so  
22 recently, and they may have done so only  
23 before Justice Hecht got on the court. I  
24 don't remember. But there was a time that we  
25 were criticized by the Supreme Court for

1 publishing too many opinions and were  
2 admonished to publish fewer and fewer.

3 I think that as long as you're going to  
4 have the power to order an opinion not  
5 published, you must have a rule that they  
6 cannot be cited as authority, because there  
7 are just too many problems that arise when you  
8 can't order them not published and yet allow  
9 somebody to cite them as authority, as Judge  
10 Brister has pointed out, so that's my feeling  
11 on it.

12 CHAIRMAN SOULES: Sarah Duncan.

13 HONORABLE SARAH DUNCAN: I  
14 think what I have been suggesting this morning  
15 is that if we take away the incentive for  
16 courts not to publish, we will start getting  
17 the cases that should be published designated  
18 for publication and those that should not be,  
19 not. And they will be available in Westlaw,  
20 and we won't have anything to worry about.

21 I think David Perry does have a point.  
22 In a certain number of cases, and I'm not sure  
23 exactly how it would be quantified, but I've  
24 noticed just in the last couple of months that  
25 a large portion of our unpublished opinions

1 are on motions to dismiss, either for want of  
2 jurisdiction or voluntary because of  
3 settlement or whatever.

4 Well, you could clear -- you could take  
5 our 80 percent statistic down real quick if we  
6 could dispose of those with an order and not  
7 have to write an opinion that's then  
8 unpublished.

9 For those of you that have wills that  
10 provide -- that have a provision regarding a  
11 support trust, you will find that there is one  
12 case in this state that interprets a provision  
13 that's used in over 10,000 wills in this  
14 state, and that opinion is unpublished. And  
15 it affects every single will in this state  
16 that has that provision in it.

17 I don't think this is a small problem. I  
18 really don't.

19 CHAIRMAN SOULES: David and  
20 then Bill and Judge Brister.

21 MR. PERRY: I think one of the  
22 practical problems that should be recognized  
23 is that the concept that you will in fact have  
24 an unpublished opinion is no longer true. It  
25 may have been true a number of years ago, but

1           today, even though it may not come out in a  
2           paper hardbound book, it is going to come out  
3           in all kinds of other mediums. And as a  
4           result, instead of having an opinion that is  
5           truly an unpublished opinion, what you have is  
6           an opinion that is published some places but  
7           not other places and that is designated as  
8           being unable to be cited authoritatively, even  
9           though it may be important. And I think we  
10          would be better off to have either no opinion  
11          at all or let it be cited as authority.

12                           CHAIRMAN SOULES: Okay. For  
13          those of us who read the green books, there's  
14          enough to read. I'll say that. And there's  
15          many of us who do.

16                           Judge Brister and then Bill, and then  
17          let's bring this to a close.

18                           HONORABLE SCOTT BRISTER:  
19          Briefly. An unpublished opinion, the  
20          advantage of having an opinion, even though  
21          it's unpublished, if it is a substantive area,  
22          you have nothing else to go on, the only  
23          advantage of having an opinion that you can  
24          reference is so that you can short-circuit  
25          your argument. "Judge, this is the law. Just

1           decide it that way."

2           If it's unpublished, you can take the  
3 arguments, you can take the cases that they  
4 cite and then put them into your case. If it  
5 makes sense, you just carry it over into your  
6 case. The only advantage of saying you can  
7 cite it is to try to skip over all the  
8 reasoning and just say, "It's been decided.  
9 Just decide it the same way as some other  
10 court of appeals did."

11           Well, that's not the way I decide. I  
12 don't think that's the way most district  
13 judges decide things: Well, just because some  
14 court of appeals said something 30 years ago,  
15 I'm going to do that.

16           Just lift the stuff out of the  
17 unpublished opinion that makes sense and copy  
18 it in. It's not that there's no value to it.  
19 However, publishing them all means more books  
20 that the county has to buy. If it's in the  
21 books, the poor folks can go to the law  
22 library and look it up for free. If it's on  
23 Westlaw, they may not.

24           And there's no reason in this day when  
25 we're trying to cut costs, equal access to

1 litigation, et cetera, that we should have a  
2 whole area of law which the rich lawyers and  
3 the rich people can use but the poor folks  
4 don't know anything about and can't counter.

5 And finally, my final point, this doesn't  
6 apply to you all's cases. You all know what  
7 the law is. When you go into court, you know  
8 what the law is and your opposing side knows  
9 what the law is. That is not true of at least  
10 50 percent of the litigants in front of me.  
11 As I've told you before, I'm informing people  
12 to this day that they have to designate  
13 experts 30 days before trial. I mean, these  
14 are people that have been in bankruptcy, real  
15 estate, or something else. They're walking  
16 into court and do not know.

17 And I really believe that most district  
18 judges want to follow their oath, do the law,  
19 and do not rely -- in many cases, you can look  
20 at these people, hear the first five minutes,  
21 and you know they have no idea, and you cannot  
22 rely on what they're telling you to do. You  
23 will actually have to look something up. And  
24 that's why we have books in our libraries, to  
25 do that.

1           And if I get an unpublished opinion from  
2 the guy with money and Westlaw and nothing  
3 from the other side, I'm going to be stuck.

4           CHAIRMAN SOULES: Bill, did you  
5 have something?

6           PROFESSOR DORSANEO: Yes. I  
7 think we have all been reading this "shall not  
8 be cited as authority" phrase to mean -- I  
9 think it's conventional to interpret it to  
10 mean that it shall not be mentioned or  
11 included in a brief or quoted.

12           And I think, Judge Brister, you just  
13 said, "Well, I don't want you to quote it, but  
14 you can paraphrase it."

15           HONORABLE SCOTT BRISTER: Copy  
16 it. Copy it if you want.

17           PROFESSOR DORSANEO: Or copy  
18 it. And I really wonder if we shouldn't let  
19 it be cited, but let's make a distinction  
20 between it from the standpoint of it being  
21 authoritative or as authoritative.

22           I wrote a brief the other day out of a  
23 case from the Southern District of New York  
24 published in some sort of a something cite  
25 that I can't tell what the cite is, it may be



1 some misspelling from Westlaw, and it's a  
2 perfectly useful case for the court that's to  
3 decide this question to read. Now, it's not  
4 authority on Texas law, Texas partnership law,  
5 being from the Southern District of New York  
6 interpreting whatever in the world it's  
7 interpreting anyway, I mean. But I ought to  
8 in writing this brief be able to mention it,  
9 and let the court make whatever use of it the  
10 court wants.

11 Maybe we read too much into this "cited  
12 as authority." If we think of all cases as  
13 authority, we would think of, I guess,  
14 occasionally secondary authority as  
15 authority. We call it authority and it's  
16 hardly authority. It's just argument and  
17 reasoning.

18 So I don't like not being able to cite  
19 something that is free, generally free, you  
20 know, or no less available than other things  
21 that are cited routinely, when it might  
22 provide some assistance to someone who has to  
23 decide a question; even though I would  
24 recognize that perhaps they might not have the  
25 complete picture and they might not agree with

1 it.

2 So I don't like interpreting this to mean  
3 shall not be cited at all or included in the  
4 briefing at the trial or appellate level. And  
5 I don't know exactly what kind of wording to  
6 use on that. Maybe the Fifth Circuit wording  
7 would take care of it. But that's my attitude  
8 about it, and I'm only an appellate lawyer.

9 CHAIRMAN SOULES: Okay. No  
10 repetition. Anything new on this? New.  
11 Sarah Duncan.

12 HONORABLE SARAH DUNCAN: Can I  
13 make a motion? Is that new enough?

14 CHAIRMAN SOULES: Well, sure.  
15 Go ahead.

16 HONORABLE SARAH DUNCAN: Well,  
17 Richard has something first.

18 MR. ORSINGER: I was going to  
19 follow Bill's suggestion by saying "should not  
20 be considered an authoritative statement of  
21 the law," and then that it has its  
22 informational value but it doesn't have  
23 precedential weight.

24 But as a practical matter, if it's your  
25 court of appeals that has handed that opinion

1 down, that means more than if it's somebody  
2 else's court of appeals. You should know that  
3 if you're a trial judge.

4 CHAIRMAN SOULES: Okay.  
5 Motion. Judge Duncan.

6 HONORABLE SARAH DUNCAN: I move  
7 that Rule 90(i) be amended to read:  
8 "Unpublished Opinions. Opinions designated  
9 not for publication may be cited as authority  
10 by counsel or by a court, and due weight may  
11 be accorded them."

12 MR. LATTING: Don't you want to  
13 include a requirement that they be provided  
14 to --

15 HONORABLE SARAH DUNCAN: So  
16 long as -- let me see, it's going to have to  
17 be rewritten. "So long as a copy of the  
18 opinion is provided to the court and all  
19 counsel."

20 HONORABLE C. A. GUITTARD:  
21 Mr. Chairman.

22 CHAIRMAN SOULES: Just a  
23 moment, please. Okay. Let's see, the motion  
24 is that Rule 90(i) be amended to read,  
25 "Unpublished Opinions. Opinions designated

1 'Do not publish' or 'Not for publication' may  
2 be cited" --

3 HONORABLE SARAH DUNCAN: No. I  
4 agree with Judge Brister. Take out all the  
5 quotations. "Opinions designated not for  
6 publication that are" --

7 CHAIRMAN SOULES: How about  
8 "Opinions not designated for publication" --

9 PROFESSOR DORSANEO: No. It's  
10 got to be the other way. It's got to be the  
11 ones that are designated not for publication,  
12 because the ones -- some are not designated at  
13 all, and people are not playing this game.

14 CHAIRMAN SOULES: Okay.  
15 Opinions designated not for publication,  
16 without the quotes, may be cited.

17 HONORABLE SARAH DUNCAN: May be  
18 cited as authority.

19 CHAIRMAN SOULES: By counsel or  
20 by a court, and due weight may be accorded, so  
21 long as a copy of the opinion is provided to  
22 the court and to all counsel.

23 Okay. Anything new on this now?

24 HONORABLE C. A. GUITTARD:  
25 Mr. Chairman.

1                   CHAIRMAN SOULES: Judge  
2                   Guittard.

3                   HONORABLE C. A. GUITTARD: I  
4                   think the issue here is whether or not these  
5                   unpublished opinions, whether citable or not,  
6                   should be considered as authoritative. I  
7                   would really prefer the rule as written, but  
8                   as a substitute for this proposal that says  
9                   they are authoritative, I would propose and  
10                  move as a substitute that the rule read,  
11                  "Opinions designated not for publication are  
12                  not authoritative and shall not be cited  
13                  without providing a copy to the court and  
14                  opposing counsel."

15                  CHAIRMAN SOULES: Is there a  
16                  second to the substitute motion?

17                  MR. ORSINGER: Can I ask a  
18                  question?

19                  MR. LATTING: Yes, I'll second  
20                  that.

21                  HONORABLE PAUL HEATH TILL:  
22                  Would you accept a friendly amendment saying  
23                  complete, a complete copy, because I'll tell  
24                  you, I have received some that are incomplete,  
25                  and they don't tell me that.

1 CHAIRMAN SOULES: Okay.

2 There's no problem with that.

3 HONORABLE SARAH DUNCAN: Can I  
4 ask a question?

5 CHAIRMAN SOULES: Okay. Sarah  
6 Duncan.

7 HONORABLE SARAH DUNCAN: When  
8 you're saying they're not authoritative, then  
9 they have no precedential value. They cannot  
10 be important to the jurisprudence of the state  
11 if they have no precedential value. Is that  
12 the intent of your substitution?

13 HONORABLE C. A. GUITTARD:  
14 Right.

15 CHAIRMAN SOULES: Okay.  
16 Restate the substitute motion and we'll vote  
17 on that, and then we'll vote on the main  
18 motion.

19 HONORABLE C. A. GUITTARD:  
20 "Opinions designated not for publication are  
21 not authoritative and shall not be cited  
22 without providing a complete copy to the court  
23 and opposing counsel."

24 CHAIRMAN SOULES: Okay. That's  
25 been moved and seconded. You've got something

1 new on this, David?

2 MR. PERRY: Yes, sir. I would  
3 propose that we say that unpublished opinions  
4 may be cited as persuasive.

5 PROFESSOR DORSANEO: Yes. Add  
6 that into this thing and it will work.

7 MR. PERRY: And take out the  
8 word "authority" entirely, and just say that  
9 they may be cited as persuasive.

10 CHAIRMAN SOULES: Alex  
11 Albright.

12 PROFESSOR ALBRIGHT: I don't  
13 understand what you mean by "as persuasive."  
14 But I think what Judge Guittard's amendment  
15 does is make these opinions like Bill  
16 Dorsaneo's New York supplement opinion or like  
17 a law review article that is interesting and  
18 maybe --

19 PROFESSOR DORSANEO: Or like a  
20 writ denied opinion from another court of  
21 appeals.

22 PROFESSOR ALBRIGHT: -- or  
23 maybe interesting and the court should know  
24 about it because it gives a way of thinking  
25 about the arguments, but the court does not

1 have to follow it, which I think is exactly  
2 what is meant by an unpublished opinion. And  
3 I would support Judge Guittard's amendment.

4 CHAIRMAN SOULES: Okay. Those  
5 in favor of Judge Guittard's substitute motion  
6 show by hands.

7 MR. YELENOSKY: I'm not sure  
8 what we're voting on.

9 CHAIRMAN SOULES: Well, we may  
10 have to rewrite it. But let me count the  
11 hands again. Nine. Nine. Those opposed.  
12 Six.

13 HONORABLE SCOTT BRISTER: How  
14 did Sarah and I end up on the same side?

15 HONORABLE SARAH DUNCAN: I  
16 don't know.

17 CHAIRMAN SOULES: Okay. Now,  
18 those in favor of the main motion. That  
19 carried by nine to six, but I still want to  
20 get a show of hands on the main motion.

21 MR. ORSINGER: Is that assuming  
22 that this one fails?

23 CHAIRMAN SOULES: Well, I don't  
24 know Roberts' Rules of Order well enough to  
25 tell you. I'm sometimes criticized because we



1 never get to something somebody else proposed.

2 HONORABLE SARAH DUNCAN: But  
3 that was fairly deliberate.

4 MR. ORSINGER: I support  
5 Justice Guittard's motion, but if that fails,  
6 then I support Sarah's. So can I vote on both  
7 of them?

8 MR. YELENOSKY: And there's  
9 also David's.

10 MR. ORSINGER: And I support  
11 that one too.

12 JUSTICE CORNELIUS: I thought  
13 Judge Guittard's motion was a substitute  
14 motion. And if so, if it's adopted, then it  
15 kicks the other one out. That's all there is  
16 to it.

17 HONORABLE SARAH DUNCAN: Can I  
18 make one comment on the record?

19 CHAIRMAN SOULES: All right.  
20 Yes. And Judge Guittard, will you write out  
21 your 90(i).

22 HONORABLE SARAH DUNCAN: My  
23 discussion with Judge Guittard before we took  
24 a vote on this amendment, part of my question  
25 was, is it the intent of this amendment that

1 these opinions subject to subdivision (i) will  
2 not be authoritative, will have no  
3 precedential value, and cannot, therefore, be  
4 important to the jurisprudence of the state.  
5 I'm not saying this on behalf of my court,  
6 which is, I think, getting ready to put our  
7 opinions on Westlaw. I'm saying this as a  
8 former appellate lawyer. The reason this game  
9 is played is to keep the opinion from being  
10 reviewed by the Supreme Court in part.

11 JUSTICE HECHT: It doesn't  
12 work.

13 HONORABLE SARAH DUNCAN: The  
14 amendment -- but that's not what's going on.

15 CHAIRMAN SOULES: Well, we're  
16 continuing to argue, and we've got a motion  
17 that's passed. And I want to read it again  
18 just to be sure that the Committee agrees that  
19 this is what we did. And then I want to get  
20 Judge Guittard's response to David's tendered  
21 amendment after we get that language.

22 Why don't we take about a 10-minute  
23 recess and give the court reporter a break.  
24 Be back at 20 after, according to my watch.

25 (At this time there was a

1 recess.)

2 CHAIRMAN SOULES: Okay. Let's  
3 come back to order. Everyone write this  
4 down: 90(i). Unpublished opinions.  
5 Unpublished opinions designated not for  
6 publication --

7 HONORABLE C. A. GUITTARD: No.  
8 Opinions designated not for publication.

9 CHAIRMAN SOULES: -- are not  
10 authoritative and shall not be cited without  
11 providing a complete copy to the court and  
12 opposing counsel.

13 MR. YELENOSKY: Parties.

14 PROFESSOR ALBRIGHT: Parties.  
15 Because parties equals counsel.

16 HONORABLE C. A. GUITTARD:  
17 Opposing parties. Okay. Opposing parties  
18 rather than opposing counsel.

19 MR. YELENOSKY: All parties.

20 CHAIRMAN SOULES: Okay. And  
21 all parties.

22 HONORABLE C. A. GUITTARD: All  
23 other parties?

24 CHAIRMAN SOULES: All other  
25 parties. Okay. This is the way it reads:

1 "90(i). Unpublished opinions. Opinions  
2 designated not for publication are not  
3 authoritative and shall not be cited without  
4 providing a complete copy to the court and all  
5 other parties."

6 Now, I'll take amendments with no debate,  
7 and we'll vote through the amendments. State  
8 the amendment and we'll vote without debate.

9 Okay. Going around the table. Bill.

10 PROFESSOR DORSANEO: I move to  
11 add the word "precedent" after the word  
12 "authoritative" and the words "as persuasive  
13 authority" after "cited," such that the text  
14 reads, "Unpublished opinions," or however you  
15 want to begin it, "designated not for  
16 publication are not authoritative precedent  
17 and shall not be cited as persuasive authority  
18 without providing a complete copy to the court  
19 and opposing counsel" -- or "parties."

20 HONORABLE C. A. GUITTARD: I  
21 would accept the amendment.

22 CHAIRMAN SOULES: Okay. The  
23 amendment has been accepted.

24 Okay. Are not authoritative what?

25 PROFESSOR DORSANEO: Precedent.

1 CHAIRMAN SOULES: And shall not  
2 be cited without providing what?

3 PROFESSOR DORSANEO: Shall not  
4 be cited as persuasive authority.

5 MR. MARKS: Why put "authority"  
6 in there?

7 HONORABLE C. A. GUITTARD: Why  
8 do you say "authority"?

9 PROFESSOR DORSANEO: Well, I  
10 say "authority" because we call everything  
11 authority whether it's authoritative or not.  
12 That's already been mentioned.

13 CHAIRMAN SOULES: Okay. Does  
14 anyone else have a specific amendment?  
15 Richard.

16 MR. ORSINGER: I would break  
17 that up into two sentences and put a period  
18 after "are not authoritative," period. "They  
19 shall not be cited." In other words, the  
20 "and" suggests to me that if you provide a  
21 copy, all of a sudden they may become  
22 authoritative.

23 PROFESSOR DORSANEO: I don't  
24 think so.

25 MR. ORSINGER: Well, maybe

1 not. But I'm in favor of putting a period  
2 after the first sentence and then starting a  
3 second sentence.

4 CHAIRMAN SOULES: You're in  
5 favor of putting a period after "authoritative  
6 precedent," period?

7 MR. ORSINGER: Period. "They  
8 shall not be" and then carry on with the same  
9 language.

10 CHAIRMAN SOULES: "They shall  
11 not be cited." Any opposition to that?  
12 "Precedent," period. "They" -- strike  
13 "and" -- "shall not be cited as persuasive  
14 authority," and so forth.

15 Okay. Any other amendments? Sarah, do  
16 you want to make an amendment?

17 HONORABLE SARAH DUNCAN: Oh,  
18 no.

19 CHAIRMAN SOULES: Okay.  
20 Harriet, offer an amendment.

21 MS. MIERS: I would just delete  
22 the word "authoritative." I don't understand  
23 the difference between "authoritative" and  
24 "precedent."

25 CHAIRMAN SOULES: Any objection

1 to that amendment?

2 HONORABLE C. A. GUITTARD: Yes,  
3 I would object to that.

4 CHAIRMAN SOULES: Okay. Is  
5 there a second to that amendment? No second.  
6 It fails.

7 Okay. Are we ready to vote? Okay. Here  
8 is what we're voting on to replace 90(i) on  
9 Page 130 of the materials: "90(i),  
10 Unpublished Opinions. Opinions designated not  
11 for publication are not authoritative  
12 precedent. They shall not be cited as  
13 persuasive authority without providing a  
14 complete copy to the court and all other  
15 parties."

16 MR. LATTING: No, that's not  
17 what Dorsaneo -- he said "and" --

18 CHAIRMAN SOULES: Then we took  
19 the "and" out.

20 PROFESSOR DORSANEO: I don't  
21 mind the "and" not being in there. But if the  
22 "and" is not in there, I would rather have  
23 the sentence read affirmatively rather than  
24 negatively; that they may be cited as  
25 persuasive authority if --

1 CHAIRMAN SOULES: Is that  
2 amendment accepted, that they may be cited?

3 PROFESSOR ALBRIGHT: No, no,  
4 no. That changes it, Bill.

5 CHAIRMAN SOULES: All right.

6 HONORABLE C. A. GUITTARD: They  
7 shall be cited as -- they may be cited as  
8 persuasive.

9 CHAIRMAN SOULES: You don't  
10 accept the "authority" part of the amendment?  
11 Okay. Any second to leaving "authority" in?  
12 That fails. Okay. Here it goes again, and  
13 I'll read it slow so you can fix your notes so  
14 that you can look at it.

15 "90(i), Unpublished Opinions. Opinions  
16 designated not for publication are not  
17 authoritative precedent. They may be cited as  
18 persuasive if a complete copy is provided to  
19 the court and all other parties."

20 Now, that's the proposed amendment.

21 MR. LATTING: Second.

22 CHAIRMAN SOULES: Sarah, do you  
23 have an amendment to offer?

24 HONORABLE SARAH DUNCAN: Yes.  
25 I would suggest that we place the burden for



1 providing the copy -- "They may be cited as  
2 persuasive if the citing party provides a  
3 complete copy to the court and all other  
4 parties."

5 CHAIRMAN SOULES: Any objection  
6 to that addition? All right.

7 MR. GALLAGHER: Why don't you  
8 just take out the whole thing?

9 CHAIRMAN SOULES: The motion  
10 has been made to take out the whole thing.  
11 Any second? No second. It fails.

12 There's a second. Those in favor show by  
13 hands.

14 JUSTICE CORNELIUS: Wait, take  
15 out what whole thing?

16 CHAIRMAN SOULES: Just take out  
17 90(i) altogether, I guess.

18 Those in favor? There are three.  
19 Opposed. That motion fails.

20 "90(i), Unpublished Opinions. Opinions  
21 designated not for publication are not  
22 authoritative precedent. They may be cited as  
23 persuasive if the citing party provides a  
24 complete copy to the court and all other  
25 parties."

1           Those in favor show by hands. 13. And  
2 those opposed. Three. 13 to three the motion  
3 carries, so this will be the new 90(i).

4                           HONORABLE PAUL HEATH TILL:  
5 Read it one more time, please, Luke.

6                           CHAIRMAN SOULES: "90(i),  
7 Unpublished Opinions. Opinions designated not  
8 for publication are not authoritative  
9 precedent. They may be cited as persuasive if  
10 the citing party provides a complete copy to  
11 the court and all other parties."

12                   Okay. Next is Item 16.

13                           HONORABLE C. A. GUITTARD: This  
14 is an amendment to Rule 130, paragraph (a).

15                           CHAIRMAN SOULES: And this is  
16 on Page 149 in your materials.

17                           HONORABLE C. A. GUITTARD:  
18 However, subdivision (a) doesn't appear there  
19 because it hasn't previously been amended.

20                   The rule as now in force reads, "Method  
21 of Review. The Supreme Court may review final  
22 judgments of the courts of appeals upon writ  
23 of error." And the amendment would simply say  
24 that "The Supreme Court may review the final  
25 judgments of a court of appeals by writ of

1 error if a timely motion for rehearing has  
2 been overruled."

3 Now, that doesn't change the goal, it  
4 just enlightens some misguided or ignorant  
5 lawyers that might think they can file an  
6 application for writ of error without  
7 presenting a motion for rehearing and having  
8 it overruled.

9 Ken Law says it's surprising how many  
10 lawyers don't understand that they can't file  
11 an application for writ of error without  
12 having a motion for rehearing filed and  
13 overruled.

14 CHAIRMAN SOULES: Any objection  
15 to inserting this into Page 149? Being no  
16 objection, it will be done.

17 Next is No. 16 and then No. 17.

18 HONORABLE C. A. GUITTARD: Next  
19 is No. 17 on Page 155. The rule reads that  
20 the Supreme Court -- let me get the page. The  
21 rule says "Expenses" in the middle of  
22 Page 155. "The party applying for the writ of  
23 error shall deposit with the clerk of the  
24 court of appeals a sum sufficient to pay the  
25 experssage or carriage of the record to and

1 from the Clerk of the Supreme Court."

2 JUSTICE CORNELIUS: I love that  
3 language. Let's keep it in there.

4 CHAIRMAN SOULES: That's kind  
5 of neat, isn't it?

6 JUSTICE CORNELIUS: Archaic.

7 HONORABLE C. A. GUITTARD: The  
8 issue is, shall we go with the archaic  
9 language?

10 MR. LATTING: Yeah. What the  
11 heck.

12 HONORABLE C. A. GUITTARD: Or  
13 shall we substitute "expense of mailing and  
14 shipping"?

15 CHAIRMAN SOULES: Any objection  
16 to No. 17? Being no objection, it will be  
17 done. It's amended.

18 HONORABLE C. A. GUITTARD: In  
19 Rule 182, which is on Page 162 --

20 CHAIRMAN SOULES: Just a  
21 minute, let me get my notes caught up here.  
22 "Expense of mailing or shipping."

23 HONORABLE C. A. GUITTARD: It's  
24 as stated in Item No. 17.

25 PROFESSOR DORSANEO: I think

1 the Court does do that, right? It has current  
2 Rule 182 as amended in 1990 rather than the  
3 one that was in our prior drafts, so that has  
4 already been done.

5 CHAIRMAN SOULES: Okay. I've  
6 got 132(b). So now we're at Rule 182, and  
7 it's on what page?

8 PROFESSOR DORSANEO: 162. As a  
9 result of this project spanning at least,  
10 what, Judge, three years or four years, maybe,  
11 the appellate rules combined committee  
12 meetings over a period of four years?

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

15 PROFESSOR DORSANEO: Okay. The  
16 draft of Rule 182 that was in our report was  
17 actually a draft that had been amended in  
18 1990, and we caught that in red-lining. So  
19 the change that you have on Page 162 of the  
20 March 13, 1995, Appellate Rules Report is  
21 faithful to the current rules. And the only  
22 change, which has already been voted on, is to  
23 provide damages for delay in original  
24 proceedings as well as when there's an  
25 application for writ of error.

1 MR. ORSINGER: So the reference  
2 in the supplementary report to 182 is not --  
3 that's not the page --

4 CHAIRMAN SOULES: It's on  
5 Page 162.

6 PROFESSOR DORSANEO: It's been  
7 previously included in previous versions.

8 CHAIRMAN SOULES: This is on  
9 Page 162. We're saying that in Rule 182,  
10 language previously included in the report  
11 limiting the Supreme Court to ten times cost  
12 as a sanction was deleted. It's not deleted  
13 on Page 162.

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

16 PROFESSOR DORSANEO: So this is  
17 informational.

18 CHAIRMAN SOULES: So it is the  
19 intent for the Supreme Court to continue to be  
20 limited to 10 --

21 PROFESSOR DORSANEO: No. For  
22 the Supreme Court -- it is the intent of the  
23 Supreme Court to have the rule that it wants  
24 to have.

25 CHAIRMAN SOULES: Okay.

1 MR. ORSINGER: We need to draw  
2 a line through our report then.

3 HONORABLE C. A. GUITTARD:  
4 That's right. In other words, the proposal  
5 is -- the existing rule has the language "not  
6 to exceed 10 percent of the amount of damages  
7 awarded." That has not changed in --

8 PROFESSOR DORSANEO: Well, it  
9 has.

10 HONORABLE C. A. GUITTARD: --  
11 the report on Page 162. But the proposal is  
12 to strike out that language, "not to exceed  
13 10 percent of the amount of the damages  
14 awarded," so that the Supreme Court will have  
15 the discretion to impose a different penalty.

16 Of course, if no damages are awarded,  
17 then there's no basis upon which to assess a  
18 penalty, so that if you delete that language,  
19 this will give the Supreme Court more  
20 discretion with regards to penalty.

21 MR. ORSINGER: Luke.

22 CHAIRMAN SOULES: Just a moment  
23 here. There's some confusion.

24 PROFESSOR DORSANEO: No. It  
25 didn't happen. It was supposed to be fixed,

1 and it's not fixed back on Page 162. I'll  
2 have to take back what I said.

3 MR. ORSINGER: The current rule  
4 says "an appropriate amount." What's wrong  
5 with the current rule language? What's wrong  
6 with (b) in our paperback books?

7 PROFESSOR DORSANEO: Nothing.  
8 We're trying to get it here on this page.

9 MR. ORSINGER: Well, why can't  
10 we just say that we're going to eliminate this  
11 entirely from our book, because we have no  
12 changes to the rule as --

13 PROFESSOR DORSANEO: But "or in  
14 an original proceeding" and "or relator" needs  
15 to be added.

16 MR. ORSINGER: Let's just --

17 CHAIRMAN SOULES: Hold on just  
18 a second. Holly and I are going to have to do  
19 this next week.

20 "Whenever the Supreme Court shall  
21 determine that an application for writ of  
22 error or an original proceeding has been taken  
23 for delay and without sufficient cause, then  
24 the court may award each prevailing respondent  
25 an appropriate amount." Strike "not to exceed



1 10 percent of the amount of." Insert "as  
2 damages." Strike "awarded to."

3 PROFESSOR DORSANEO: And just  
4 keep going.

5 CHAIRMAN SOULES: Strike  
6 "awarded to." Okay. "As damages against  
7 each petitioner or relator."

8 HONORABLE SARAH DUNCAN: Can I  
9 make a suggestion?

10 PROFESSOR DORSANEO:  
11 Appropriate amount as damages.

12 CHAIRMAN SOULES: "Appropriate  
13 amount as damages against each petitioner or  
14 relator."

15 Okay. I've got it, and it now tracks the  
16 present rule. And the only changes are  
17 underscored. Okay. We've got this, and the  
18 papers that go to the Supreme Court will be  
19 correct. Judge Duncan.

20 HONORABLE SARAH DUNCAN: I  
21 thought it initially paralleled the rule  
22 that --

23 PROFESSOR DORSANEO: It was  
24 changed in 1990.

25 CHAIRMAN SOULES: Okay. Now,

1 we've fixed Rule 182, which was incorrect in  
2 the materials on Page 162, and now we're down  
3 to 19.

4 HONORABLE C. A. GUITTARD:  
5 Well, this has to do with Rule 190.

6 CHAIRMAN SOULES: On page  
7 what?

8 HONORABLE C. A. GUITTARD:  
9 Well, let's see, it's on Page 166.

10 CHAIRMAN SOULES: Page 166 in  
11 the materials?

12 HONORABLE C. A. GUITTARD:  
13 Yes. But it has to do with subparagraphs, and  
14 it has not been -- they're not in our report.

15 Subdivision (b) of Rule 190 says the  
16 points relied on for the rehearing shall be  
17 distinctly specified in the motion. That's  
18 okay. We keep that in. But we strike the  
19 rest of that paragraph, which says, The motion  
20 shall state the name and address of the  
21 attorneys of record for the parties to the  
22 trial court's final judgment; and, if there's  
23 no attorney of record, the name and address of  
24 the parties to the trial court's final  
25 judgment.



1 HONORABLE C. A. GUITTARD: Yes,  
2 because it's required that the court -- that  
3 the motion be served, so that's sufficient  
4 notice.

5 Subdivision (d), then, would be amended  
6 by providing that the parties shall have five  
7 days after -- instead of "after notice in  
8 which to file an answer," say "after service  
9 of the motion in which to file an answer."

10 PROFESSOR DORSANEO: None of  
11 that's a big deal.

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

14 CHAIRMAN SOULES: Okay. I need  
15 to have somebody read (d) to me so I can --

16 HONORABLE C. A. GUITTARD: All  
17 right. "The parties shall have five days  
18 after service of the motion" -- strike  
19 "notice" -- "in which to file an answer to  
20 the motion."

21 CHAIRMAN SOULES: The party  
22 shall have five days after.

23 HONORABLE C. A. GUITTARD:  
24 Service of the motion.

25 CHAIRMAN SOULES: Of the

1 motion.

2 HONORABLE C. A. GUITTARD: In  
3 which to file an answer. I don't guess we  
4 need "to the motion." We'll strike that.

5 CHAIRMAN SOULES: Okay. "The  
6 parties shall have five days after" -- and we  
7 strike "notice" --

8 HONORABLE C. A. GUITTARD: --  
9 "after service of the motion."

10 PROFESSOR DORSANEO: Make it  
11 10 days.

12 HONORABLE C. A. GUITTARD:  
13 Well, that's another question.

14 CHAIRMAN SOULES: "Five days  
15 after service of the motion in which to file  
16 an answer."

17 HONORABLE C. A. GUITTARD:  
18 "Answer," period.

19 CHAIRMAN SOULES: And strike  
20 "to the motion."

21 HONORABLE C. A. GUITTARD:  
22 Right.

23 CHAIRMAN SOULES: And retain  
24 the rest of the rule?

25 HONORABLE C. A. GUITTARD:

1 Right.

2 CHAIRMAN SOULES: And that's  
3 (d), right?

4 HONORABLE C. A. GUITTARD:  
5 Yeah.

6 HONORABLE C. A. GUITTARD: Now,  
7 Professor Dorsaneo raises a question which has  
8 not previously been proposed as to whether we  
9 should increase the number of days from five  
10 to 10, which is --

11 PROFESSOR DORSANEO: The reason  
12 I do that is, because by taking out the things  
13 we're taking out, we're taking out some of the  
14 engineering and we actually make the five days  
15 shorter.

16 HONORABLE C. A. GUITTARD: I  
17 guess.

18 PROFESSOR DORSANEO: 10 days is  
19 the more normal time to do anything in  
20 response to a motion in a court of appeals  
21 anyway.

22 HONORABLE C. A. GUITTARD: I  
23 would agree.

24 CHAIRMAN SOULES: Any  
25 opposition to 10 days? No opposition. That

1 carries.

2 All right. Is there any opposition,  
3 then, to 19 and the expansion thereon related  
4 to (d)?

5 PROFESSOR DORSANEO: It's 190.

6 CHAIRMAN SOULES: Well, it's  
7 Item 19 on this -- well, to this amendment to  
8 Rule 190. Any opposition to that? Being  
9 none, that will be done then.

10 Okay. Item 20.

11 HONORABLE C. A. GUITTARD: 20  
12 would provide an order of the Supreme Court  
13 for an administrative basis as to what's to be  
14 done with old records. This would provide --  
15 this would implement the statute which  
16 provides that after the 10 years after the  
17 final disposition that the court may destroy  
18 those records or shall destroy those records  
19 which have no -- unless they have unique  
20 permanent value.

21 And this would provide the mechanism for  
22 implementing that statute, which would adopt  
23 the procedure that I think is followed in the  
24 Austin Court, perhaps others, that provides  
25 that the panel that decides an opinion shall,

1 when the record is disposed of initially after  
2 the case is over, file with the record a paper  
3 to say this document -- this record shall or  
4 shall not be permanently preserved. Then  
5 after 10 years, if it hasn't been so  
6 designated, the records may be destroyed.

7 The proposed rule would also provide that  
8 the court of appeals may revise that  
9 designation or change it at any time before  
10 the record is destroyed.

11 So the first subdivisions, (a) and (b),  
12 would simply have definitions there.  
13 Subdivision (b) would require in (1) that  
14 before any court records are destroyed, the  
15 court of appeals shall, in accordance with  
16 Government Code section 51.204 and the  
17 guideline provides by the State Archives,  
18 determine whether they should be permanently  
19 preserved.

20 No. 2 requires that determination to be  
21 made immediately after disposition of an  
22 appeal or other proceeding. The panel that --  
23 I prefer "which" to "that" -- Judge Cornelius.

24 JUSTICE CORNELIUS: I have a  
25 concern about subdivision (2).



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HONORABLE C. A. GUITTARD:

Okay.

JUSTICE CORNELIUS: I don't want the courts of appeals to be required to file in every case after they decide it a statement one way or another. I think that's just extra work that we don't need to do. And I would propose that subdivision (2) be changed to provide that if -- that the panel which decided the case -- take out that "immediately after final disposition." Just say the panel which decided the case shall determine whether the records shall be permanently preserved. If they are to be preserved, the panel shall file with the case record a statement to that effect.

HONORABLE C. A. GUITTARD:

That's all right with me.

JUSTICE CORNELIUS: That way you don't have to clutter up the "case filed with the statement" part, unless they are worthy of preservation.

HONORABLE C. A. GUITTARD: I

would suppose you would have a form. And as it is here, you would just check off -- check

1 "preserved" or "not preserved."

2 Now, I don't have any objection to --

3 JUSTICE CORNELIUS: But I would  
4 rather not have the panel be required to do  
5 anything unless they determine that the  
6 records ought to be preserved.

7 HONORABLE C. A. GUITTARD: The  
8 problem about that is to make sure that the  
9 panel's attention is focused on that problem,  
10 and not put the burden on the panel to take  
11 any -- to figure out what they ought to do at  
12 that point, but call their attention to the  
13 fact that they need to make a determination  
14 and not just let it go without determining it.

15 JUSTICE CORNELIUS: Well, No. 1  
16 says that they will make the determination  
17 before the records are destroyed.

18 HONORABLE C. A. GUITTARD: Yes.

19 JUSTICE CORNELIUS: And as a  
20 practical matter, that's how my court does  
21 it. We wait, and then we'll get an entire  
22 batch of records and then decide if they  
23 should be preserved.

24 PROFESSOR DORSANEO: What kind  
25 of review is done?

1 JUSTICE CORNELIUS: What kind  
2 of review? Just a personal one between myself  
3 and the clerk and the other judges, you know,  
4 if it's --

5 HONORABLE C. A. GUITTARD: The  
6 current judges, right? Not the ones that  
7 decided it?

8 JUSTICE CORNELIUS: Right. The  
9 current ones.

10 CHAIRMAN SOULES: And that's a  
11 problem, because this just says the panel has  
12 to decide it.

13 HONORABLE C. A. GUITTARD:  
14 Yeah. The thought there is that that panel,  
15 after being familiar with the record, knows  
16 better than anyone whether it has permanent  
17 value. So the purpose of the rule is to  
18 require that panel to make the initial  
19 determination subject to redetermination by  
20 the court at any time.

21 CHAIRMAN SOULES: Okay. That's  
22 three. I don't know. You've got to have the  
23 panel determination. Under three, you've got  
24 to have a panel determination before the court  
25 can make a determination. The government

1 code, does it limit the power to make this  
2 determination to the panel that decided the  
3 case?

4 HONORABLE C. A. GUITTARD: No.

5 CHAIRMAN SOULES: I don't think  
6 they ought to be, because it may or may not  
7 happen at the time. The panel may not even  
8 be -- you may not even be able to reconstitute  
9 the panel.

10 JUSTICE CORNELIUS: Well,  
11 that's why he put in there "immediately after  
12 the case is decided." But I hesitate to put  
13 another burden on the panel that in every case  
14 they not only have to have an opinion and  
15 they've got to have a judgment, they have to  
16 have a decision whether to publish or not, but  
17 they've also got to have an immediate decision  
18 as to whether or not the record ought to be  
19 preserved.

20 CHAIRMAN SOULES: And all I'm  
21 doing in responding to that is saying if it's  
22 not done immediately, which I understand your  
23 position, then it shouldn't be limited to the  
24 panel that made the decision, because you may  
25 not be able to reconstitute it.

1 Judge Duncan.

2 HONORABLE SARAH DUNCAN: Two  
3 points. One, I think if it's not done  
4 immediately by the panel, it effectively can't  
5 meaningfully be done by someone later on down  
6 the road.

7 And two, this is beside the point but I  
8 don't want us to lose it in the discussion, I  
9 don't think that (a)(2)'s definition of  
10 "Record on Appeal" is going to work, because  
11 it includes everything that's been filed in  
12 the trial court regardless of whether it's in  
13 the appellate court or not. And that's sort  
14 of an aside.

15 CHAIRMAN SOULES: Alex  
16 Albright.

17 PROFESSOR ALBRIGHT: Well, I  
18 have two points too. One quick point is you  
19 use the words "court records," which is also  
20 the words used in 76(a) and the appellate  
21 equivalent of 76(a). And I'm just wondering  
22 if it's confusing to use "court records" in  
23 two different ways. Maybe we should think up  
24 another word. I think you do have in (1),  
25 "records of a case." Maybe that should be

1 the word that's used.

2 Secondly, I think what Judge Cornelius is  
3 saying is just that there is a presumption  
4 that the panel has decided that the records  
5 should not be preserved unless there is a  
6 piece of paper that says it shall be  
7 preserved. So I think you do have a decision  
8 of the panel immediately, it's just that in  
9 most cases there will not be a piece of paper  
10 filed to reflect that decision unless they  
11 have decided to go counter to the  
12 presumption. I don't see that that's --

13 HONORABLE C. A. GUITTARD: You  
14 have a presumed opinion -- you have a presumed  
15 finding that it's not to be preserved.

16 JUSTICE CORNELIUS: Right.

17 HONORABLE C. A. GUITTARD: But  
18 the question is, is that realistic. Has the  
19 panel really taken any thought -- given any  
20 thought to that problem if they don't have to  
21 record a decision one way or another?

22 PROFESSOR ALBRIGHT: Well, is  
23 it significant?

24 CHAIRMAN SOULES: Richard  
25 Orsinger.

1 MR. ORSINGER: I agree with  
2 Justice Guittard. I'm afraid that it will be  
3 routine that nothing is put in the files just  
4 because it's a neglected issue that's not  
5 mentioned or brought up; and that we may be  
6 assuming someone is making a conscious  
7 decision, and then after a while we find out  
8 that no one is making a decision, conscious or  
9 unconscious.

10 PROFESSOR ALBRIGHT: But just  
11 by checking off a piece of paper, I doubt that  
12 there will be a conscious decision made on  
13 that. They will just check "not preserved"  
14 until somebody happens to brings up the point  
15 that this may be something that should be  
16 preserved, which I wouldn't think would happen  
17 very often.

18 CHAIRMAN SOULES: Let's hear  
19 from the court of appeals people on this too.  
20 Judge Duncan.

21 HONORABLE SARAH DUNCAN: It  
22 seems on me -- I mean, I don't know exactly  
23 how other courts' procedures are, but when we  
24 circulate opinions, there's a publish/do not  
25 publish slot, and you look at it, and you

1 think, oh, should it be or shouldn't it be,  
2 and you look at what the writing author has  
3 done.

4 And if you have another little box on  
5 there that says "preserve records/not preserve  
6 records," in nine out of 10 cases I'm sure  
7 that you would just go, "No, don't preserve  
8 this." But it causes you to advert to it,  
9 which I don't know about the other courts, but  
10 I don't think anybody has caused me to think  
11 about should the records in a particular case  
12 be preserved.

13 And I don't think it's terribly onerous a  
14 burden to put on the panel to make that  
15 determination one way or the other when the  
16 final opinion is issued. Maybe I'm off base.

17 HONORABLE C. A. GUITTARD:

18 You're right.

19 HONORABLE SARAH DUNCAN: Am I  
20 right? Judge Guittard says I'm right, so I  
21 must be this one time.

22 JUSTICE CORNELIUS: Well, I  
23 don't feel that strongly about the matter, so  
24 I'll just withdraw my suggestion.

25 CHAIRMAN SOULES: As a result



1 of this discussion, though, do there need to  
2 be any changes made in the way the order is  
3 constructed?

4 HONORABLE SARAH DUNCAN: I do  
5 think we need to change (a)(1).

6 CHAIRMAN SOULES: Change  
7 (a)(1). Change it to say what?

8 HONORABLE SARAH DUNCAN: Alex  
9 has brought up that "court records" is  
10 confusing because of 76(a). I think "record  
11 on appeal" is confusing because of TRAP 50(a),  
12 so what if we just said, "Records of a case  
13 are all documents filed, or presented for  
14 filing and received" -- no, that won't do  
15 it -- "in an appellate court."

16 But you still also want to include the  
17 motions folder, the folder containing the  
18 court's orders, the --

19 CHAIRMAN SOULES: Is it the  
20 file of the clerk of the court of appeals that  
21 we're going to get rid of, the whole thing?

22 MR. ORSINGER: Judgment and all  
23 opinions?

24 HONORABLE SARAH DUNCAN: No.  
25 Those are kept.

1 HONORABLE C. A. GUITTARD: No.  
2 Opinions are always kept. They are not to be  
3 destroyed. But it's the other papers in the  
4 case that would be destroyed.

5 MR. ORSINGER: Can I also  
6 inquire, are preliminary opinions always  
7 destroyed automatically and never become part  
8 of the file? In other words, they don't -- no  
9 one will ever see a preliminary draft of an  
10 opinion. Is that right?

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

13 CHAIRMAN SOULES: As far as I  
14 know.

15 HONORABLE SARAH DUNCAN: The  
16 briefing attorneys get copies of the briefs  
17 that are marked up, but do not --

18 CHAIRMAN SOULES: Okay. So  
19 what are we going to call these papers?

20 PROFESSOR ALBRIGHT: Records of  
21 the case.

22 CHAIRMAN SOULES: Well, we have  
23 "Order of the Supreme Court Regarding the  
24 Disposition of Papers in Civil Cases."

25 Why don't we call them "papers"? "Papers

1 defined."

2 MR. ORSINGER: How about "For  
3 purposes of this order, papers are:"

4 PROFESSOR DORSANEO: This  
5 definition is consistent with the one in  
6 TRAP 22 as proposed. It's completely  
7 consistent and identical to it.

8 CHAIRMAN SOULES: To what?

9 PROFESSOR DORSANEO:

10 (Indicating).

11 CHAIRMAN SOULES: But that  
12 doesn't necessarily mean that we want to  
13 destroy the same things, and this is for two  
14 different purposes.

15 Okay. Are we going to define this  
16 somehow so that we can get on with it, or  
17 leave it like it is? Help us.

18 HONORABLE C. A. GUITTARD: Lee,  
19 do you have a suggestion?

20 MR. PARSLEY: I don't have a  
21 suggestion. I just drafted this, and there is  
22 a reason for a distinction between "court  
23 records" and the "record on appeal," because  
24 the Supreme Court sends back to the courts of  
25 appeals the record in some instances and does

1 not send back the record in other instances,  
2 and that is the record as defined by the  
3 appellate rules; that is, the statement of  
4 facts and transcript. But it doesn't send  
5 back everything. It doesn't send back its  
6 entire file. It just sends back the record,  
7 so there has to be a distinction between those  
8 two.

9 Sarah has got a point that there may be a  
10 problem with the way the "record" is defined  
11 as everything in the trial court, and that may  
12 need fixing. But there's got to be those --  
13 because the Supreme Court doesn't send back  
14 the entire file. It just sends back the  
15 record sometimes, and so we've got to be able  
16 to recognize that distinction in the rule,  
17 which is why we had the definition section to  
18 begin with.

19 Now, what we call them doesn't really  
20 matter. We just have to distinguish between  
21 the record and everything that's in the file,  
22 which are two different things.

23 PROFESSOR ALBRIGHT: So why  
24 can't we just substitute every place "court  
25 records" is used or "records of a case" is

1 used and substitute the word "papers"?

2 MR. PARSLEY: Well, is a poster  
3 board "papers"?

4 PROFESSOR ALBRIGHT: Because  
5 that would be a --

6 HONORABLE C. A. GUITTARD: Or  
7 correspondence with the court or something  
8 like that, is that -- that's a paper. Is that  
9 going to be considered the record?

10 PROFESSOR ALBRIGHT: What if it  
11 says, "Papers are defined as all documents  
12 included in the transcript, or in the  
13 statement of facts, and any other papers or  
14 items made part of the record on appeal or  
15 otherwise filed, or presented for filing and  
16 received, in an appellate court."

17 So papers are defined to include items,  
18 which would be a poster board or a gun or  
19 whatever else, I suppose.

20 HONORABLE SARAH DUNCAN: But  
21 then we still have the "record on appeal"  
22 problem.

23 PROFESSOR ALBRIGHT: But then  
24 it would still say "'Papers' include the  
25 'record on appeal.'"

1           And then Part (2). "Record on appeal"  
2 defined. The "record on appeal" is defined by  
3 TRAP Rule 50(a).

4                   HONORABLE SARAH DUNCAN: But  
5 that's the problem. 50(a) we changed  
6 intentionally to mean everything filed in the  
7 trial court including the transcript on  
8 appeal.

9                   PROFESSOR ALBRIGHT: Well, then  
10 we just need to figure out a definition of  
11 "record on appeal" then. And if that is used  
12 inconsistently in 50(a), then maybe we need a  
13 different term.

14                   MR. ORSINGER: Why do we need  
15 "record on appeal" anyway? Doesn't "papers"  
16 cover the whole waterfront?

17                   MR. PARSLEY: Well, again, if  
18 you go to (c) in the order, Part (c)(1), (2),  
19 and (3), the Supreme Court does things with  
20 the record, what we always think of as the  
21 record, that it does not do with all the  
22 papers in the file. So you have to  
23 distinguish between the record, which  
24 sometimes they send back to the court of  
25 appeals and sometimes they don't, and all

1 papers on file, which they sometimes store all  
2 of and sometimes they don't.

3 CHAIRMAN SOULES: Okay. Is  
4 "the record" defined anywhere in this order?

5 MR. PARSLEY: Well, I only  
6 refer to "record on appeal." I don't ever  
7 refer to "the record." I refer to "the record  
8 on appeal," which is defined in (a)(2) as  
9 being the record on appeal from 50(a).

10 MR. ORSINGER: Why do we even  
11 need to discuss that? If we define "papers"  
12 to be things that are in the custody of the  
13 court of appeals, we don't care where they  
14 look or whether they came back. What we're  
15 destroying is papers in the court of appeals.  
16 And if they're in the Supreme Court or the  
17 trial court, they don't get destroyed.

18 MR. PARSLEY: Well, the answer  
19 to your question is, and maybe that points up  
20 your problem, is that part (c) talks about  
21 destruction of papers in the Supreme Court as  
22 well. This order does not just apply to the  
23 courts of appeals. The proposed order applies  
24 to the Supreme Court and the courts of  
25 appeals.

1                   CHAIRMAN SOULES: The words  
2 "the record" are used several times in (c).

3                   MR. ORSINGER: We don't need to  
4 use it, though, is my point, Luke. Why don't  
5 we just say "papers," and then we'll just say  
6 papers in the court of appeals can be  
7 destroyed under the following circumstances;  
8 papers in the Supreme Court can be destroyed  
9 under the following circumstances. And let's  
10 not worry about where they went or where they  
11 came from. If they're there, they get  
12 destroyed; and if they're not there, then we  
13 don't worry about them. Wouldn't that be a  
14 way to avoid the definitional problem?

15                   PROFESSOR ALBRIGHT: Lee, what  
16 is the "record on appeal" that you're talking  
17 about? The transcript and the statement of  
18 facts? Then why don't we just say "the  
19 transcript and the statement of facts"?

20                   MR. PARSLEY: I would say  
21 transcript and statement of facts as  
22 supplemented, because you can supplement  
23 those, and so maybe that clears it up some.

24                   MR. ORSINGER: Can I inquire,  
25 are the transcript and statement of facts



1 included in "papers" as we've defined it?

2 HONORABLE C. A. GUITTARD: Yes.

3 MR. ORSINGER: Then why do we  
4 even need to discuss it?

5 CHAIRMAN SOULES: Okay. Let's  
6 start with Part (1) and see how inclusive it  
7 is, and we're going to use the words "Papers  
8 defined."

9 HONORABLE C. A. GUITTARD:  
10 Statement of facts, briefs, motions?

11 CHAIRMAN SOULES: "Papers  
12 defined. 'Papers' are all documents" -- and  
13 I'm just trying to get this moving. I'm not  
14 trying to necessarily do this, if anybody has  
15 got an objection. "'Papers' are all documents  
16 included in the transcript or in the statement  
17 of facts and any other papers or items made  
18 part of the record on appeal."

19 HONORABLE SARAH DUNCAN: No.  
20 You can't use "record on appeal."

21 CHAIRMAN SOULES: Part of the  
22 what then?

23 HONORABLE SARAH DUNCAN:  
24 Appellate file. Case file.

25 CHAIRMAN SOULES: Of the

1           appellate case file?

2                           HONORABLE C. A. GUITTARD:  Just  
3           say "any other papers or items filed."

4                           CHAIRMAN SOULES:  Any other  
5           papers or items filed.

6                           MR. ORSINGER:  Filed or  
7           presented for filing.

8                           CHAIRMAN SOULES:  Filed or  
9           presented for filings in a court of appeals.  
10          Filed or presented for filing and received in  
11          an appellate court.

12                          So we strike "'court records' include  
13          the 'record on appeal.'"  Strike all of  
14          (2)?

15                          PROFESSOR ALBRIGHT:  I think  
16          that's up to Lee.  Lee, do we need to  
17          distinguish the record on appeal?

18                          MR. PARSLEY:  We've got to,  
19          because in part (c) they do some things with  
20          the record on appeal that they don't do with  
21          the other items that we defined as "papers."

22                          PROFESSOR ALBRIGHT:  So we  
23          could say "'Papers' include the 'record on  
24          appeal,'" and then "The 'record on appeal' is  
25          defined as the transcript and statement of

1 facts as supplemented."

2 CHAIRMAN SOULES: "Papers"  
3 include the "record on appeal"?

4 MR. ORSINGER: Well, you don't  
5 need to say that, because that follows from  
6 our definition of papers, because the record  
7 on appeal is filed in the court of appeals.

8 CHAIRMAN SOULES: Well, he's  
9 wanting to define -- okay. So we don't need  
10 that sentence, but we do need (2), which says  
11 "record on appeal" means transcript and  
12 statement of facts, because he uses that as  
13 defined -- the record on appeal is the  
14 transcript and statement of facts as  
15 supplemented. And all supplements.

16 Okay. So "papers" are defined in the  
17 first sentence under (1) to the period.  
18 Delete "'Court records' include the 'record  
19 on appeal.'" Then say "'Record on Appeal'  
20 defined. The 'record on appeal' is the  
21 transcript and statement of facts and all  
22 supplements." Does that do it?

23 PROFESSOR ALBRIGHT: It may  
24 actually sound better to use the term -- make  
25 it "court papers" instead of just "papers."

1 CHAIRMAN SOULES: Court  
2 papers. Okay. We'll change the title to  
3 "Court Papers."

4 Okay. Now, what do we need to do from  
5 there?

6 MR. ORSINGER: Change "court  
7 records" to "court papers."

8 CHAIRMAN SOULES: Well, we've  
9 got to go through all of this then.

10 HONORABLE C. A. GUITTARD: So  
11 where it says "records of the case" in  
12 item (2), it should be "court papers"?

13 MR. ORSINGER: Yes.

14 CHAIRMAN SOULES: No. That's  
15 the record on appeal, because that's used  
16 later as a term of art.

17 MR. ORSINGER: Not in  
18 subdivision (2). It's records of the case. I  
19 think they mean "court papers" there.

20 CHAIRMAN SOULES: Okay.

21 MR. ORSINGER: In (b)(1),  
22 change "court records" to "court papers."

23 CHAIRMAN SOULES: Court papers.  
24 Anything else on (1) other than "records" to  
25 "papers" in the second line? Nothing else?

1 Good. No. (2).

2 MR. ORSINGER: Okay. On the  
3 third line.

4 CHAIRMAN SOULES: The third  
5 line, "whether the court papers of the case."

6 MR. ORSINGER: Court papers.

7 HONORABLE C. A. GUITTARD: I  
8 suggest that in the second line strike "which"  
9 and insert "that."

10 "Immediately after the final disposition  
11 of an appeal or other proceeding, the panel  
12 that decided the case shall determine."

13 CHAIRMAN SOULES: "That."  
14 Okay. (3). Anything on (3)?

15 MR. ORSINGER: The second line.

16 CHAIRMAN SOULES: Court papers.

17 MR. ORSINGER: And then on the  
18 third line.

19 CHAIRMAN SOULES: Okay. (4).

20 MR. ORSINGER: Second line.

21 MR. YELENOSKY: And then on the  
22 fourth line, it says "papers or exhibits," and  
23 we've already defined "papers" to essentially  
24 include exhibits.

25 MR. ORSINGER: This is

1 different. Aren't we saying that exhibits  
2 will be sent out to the parties on request?  
3 It's handled a little bit differently, isn't  
4 it?

5 PROFESSOR ALBRIGHT: These are  
6 papers and exhibits outside of the defined  
7 term "court papers."

8 HONORABLE SARAH DUNCAN:  
9 Shouldn't it just be original exhibits? It  
10 shouldn't be original papers, because that  
11 would mean original motions and things likes  
12 original briefs.

13 PROFESSOR ALBRIGHT: It seems  
14 like it would only be exhibits.

15 MR. ORSINGER: And not just  
16 original exhibits, because we send copies up  
17 most of the time.

18 MR. PARSLEY: The point here is  
19 that Rules 51 and 53, if I'm correct, Judge  
20 Guittard, which we have already approved in  
21 this Committee, require the trial court to  
22 make an order for the preservation,  
23 safekeeping, and return of any original papers  
24 or original exhibits that are sent on to the  
25 court of appeals. The idea here is that since

1 the trial court has ordered that these things  
2 should be returned, or under our rules should  
3 have ordered that, that we have to provide  
4 that the appellate court will do that, will  
5 return to the trial court the original papers  
6 or exhibits.

7 CHAIRMAN SOULES: That's what  
8 this is designed to do under (4).

9 MR. PARSLEY: That's the  
10 point. It may not have done it right, but  
11 that's the point.

12 CHAIRMAN SOULES: So we just  
13 need to change it to "court papers" in the  
14 second line, and then that works. (4) works.

15 PROFESSOR ALBRIGHT: Should we  
16 refer to those rules in (4)?

17 MR. PARSLEY: It wouldn't hurt.

18 CHAIRMAN SOULES: Okay.

19 MR. YELENOSKY: You have a  
20 second reference to "record on appeal."

21 MR. ORSINGER: Yeah. Lee, I  
22 think we need to change that, because we talk  
23 about "included in the record on appeal," and  
24 remember, "the record" now includes what's in  
25 the trial court, so maybe we ought to say

1 "filed in the appellate court" or something  
2 like that.

3 CHAIRMAN SOULES: "Without  
4 regard to the determination of whether the  
5 records of a case should be permanently  
6 preserved, within thirty days after final  
7 disposition of an appeal, pursuant to" -- what  
8 rules, Lee?

9 MR. PARSLY: 51. The original  
10 papers are under 51.

11 HONORABLE SARAH DUNCAN: We've  
12 taken "papers" out on Page 86,  
13 subdivision (m).

14 CHAIRMAN SOULES: Excuse me,  
15 just a minute. Let me try to get this one  
16 point down.

17 MR. PARSELEY: Original papers  
18 are in 51(d).

19 CHAIRMAN SOULES: 51(d)?

20 MR. PARSELEY: Correct.

21 CHAIRMAN SOULES: So "Without  
22 regard to the determination of whether the  
23 records of a case should be permanently  
24 preserved, within thirty days after final  
25 disposition of an appeal, any original papers



1 or exhibits included in the record on  
2 appeal" -- I don't know if we're keeping  
3 that -- "shall be returned to the trial court  
4 pursuant to Rule 51(d)."

5 MR. PARSLEY: Original  
6 exhibits, I'm sorry, are under 53(m).

7 CHAIRMAN SOULES: 53(m). So  
8 pursuant to Rule 51(d) and 53(m).

9 Now, what else on (4)? Judge Duncan.

10 HONORABLE SARAH DUNCAN: That  
11 was it. We've changed "record on appeal" to  
12 "court papers."

13 CHAIRMAN SOULES: "Any original  
14 papers or exhibits." And we should probably  
15 strike "including the record on appeal"  
16 completely. "Any original papers or exhibits  
17 shall be returned pursuant to those rules."  
18 Doesn't that take care of it?

19 PROFESSOR ALBRIGHT: What if  
20 you said "exhibits sent to the appellate court  
21 under Rules 51(d) or 53(m)"?

22 HONORABLE SARAH DUNCAN: Well,  
23 actually why wouldn't we leave it "record on  
24 appeal," because that is only the transcript  
25 and the statement of facts, which includes the

1 exhibits. Well, we've redefined that. Never  
2 mind.

3 MR. ORSINGER: What's wrong  
4 with just leaving "included in the record on  
5 appeal" out altogether?

6 CHAIRMAN SOULES: Just strike  
7 it. Just strike it and put the rules in,  
8 because the rules -- it takes us back to the  
9 rule.

10 PROFESSOR ALBRIGHT: But it  
11 seems to me like it should refer to 51(d) and  
12 53(m), because that makes it clear that it's a  
13 special circumstance where the trial court has  
14 sent these to --

15 CHAIRMAN SOULES: Yeah. And I  
16 wrote that in.

17 PROFESSOR ALBRIGHT: Okay.

18 CHAIRMAN SOULES: Right after  
19 "trial court" in the next to the last line,  
20 "trial court, pursuant to 51(d) and 53(m).  
21 The appellate court may, but is not required  
22 to, copy those papers" and so forth.

23 Okay. Now (5). (5) is okay.

24 MR. ORSINGER: No. It's got  
25 "records" in there. "All other court

1 papers."

2 CHAIRMAN SOULES: "All other  
3 court papers."

4 (6).

5 HONORABLE C. A. GUITTARD: Now,  
6 there's a problem with (6). Let me just --  
7 this term, "permanent value" -- instead of  
8 "permanent value," that term came from an  
9 earlier draft where "permanent value" was  
10 used, but now the draft reads "records that  
11 should be permanently preserved."

12 So it will be necessary to change this to  
13 read, (1) destroy the papers which the court  
14 decides, finally decides should not be  
15 preserved; and (2), return the records of a  
16 case -- the papers in a case that the court  
17 finds should be permanently preserved over to  
18 the State Archives.

19 CHAIRMAN SOULES: Okay. (1)  
20 says, "Destroy the papers the court  
21 determines."

22 HONORABLE C. A. GUITTARD:  
23 Should not be permanently preserved, and turn  
24 over to the State Archives.

25 CHAIRMAN SOULES: Just a

1 minute, sorry. "Should not be permanently  
2 preserved." And then (2) is okay?

3 HONORABLE C. A. GUITTARD:  
4 Well, no. And (2), turn over to the State  
5 Archives the papers that the court finds  
6 should be permanently preserved.

7 CHAIRMAN SOULES: Turn over to  
8 the State Archives the what?

9 HONORABLE C. A. GUITTARD: The  
10 papers, the court papers that the court finds  
11 should be permanently preserved or has found  
12 should be permanently preserved.

13 CHAIRMAN SOULES: Okay. (c).

14 MR. ORSINGER: Before we go on,  
15 can I ask you one question?

16 CHAIRMAN SOULES: Yes, sir.

17 MR. ORSINGER: On  
18 subdivision (5), it is unclear to me what  
19 papers, if any, fit in subdivision (5) or why  
20 we even have a subdivision (5). We've talked  
21 about all other papers, so do we need "other  
22 than original papers and exhibits"? And if  
23 so, then --

24 HONORABLE C. A. GUITTARD:  
25 Other than as stated in (4)?

1 MR. ORSINGER: Yeah. If that's  
2 other than as stated in (4), we've got to fold  
3 that sentence into the end of (4), because  
4 "other" could mean other than (1), (2), (3),  
5 and (4). And I think (1) through (4) include  
6 everything.

7 CHAIRMAN SOULES: It doesn't  
8 include the decision.

9 MR. ORSINGER: Well, we've  
10 defined "court papers," and then we tell them  
11 to make an initial determination and then a  
12 subsequent determination, and then we say all  
13 other papers are to be held until they're to  
14 be destroyed.

15 CHAIRMAN SOULES: Until an  
16 ultimate disposition, and then that's defined.

17 MR. ORSINGER: See, the problem  
18 I have is "other than." Other than what? It  
19 seems to me that if "other than" means other  
20 than in (4), then why don't we put this  
21 sentence at the end of (4) and not make it a  
22 separate subdivision.

23 HONORABLE C. A. GUITTARD:  
24 What's the point there, Lee?

25 MR. PARSLEY: He's correct.

1 The "other" was referring back to (4), and  
2 perhaps we should change the caption of (4) to  
3 include (5) as a sentence in paragraph (4).

4 CHAIRMAN SOULES: So what do we  
5 change the caption in (4) to say?

6 HONORABLE C. A. GUITTARD:  
7 Well, "original papers and exhibits" is all  
8 right, isn't it, even though we've already had  
9 that?

10 CHAIRMAN SOULES: Do we need to  
11 change the caption, Lee?

12 MR. PARSLEY: Well, I think we  
13 do.

14 MR. PERRY: Maybe "Original  
15 papers and exhibits" ought to be No. (1),  
16 because everything else does not apply to  
17 that.

18 MR. YELENOSKY: That's right.

19 MR. ORSINGER: Yeah. That's an  
20 excellent point.

21 CHAIRMAN SOULES: Okay. So  
22 (4) becomes (1), and then (1) becomes (2),  
23 right, (2) becomes (3), (3) becomes (4)?

24 MR. ORSINGER: We don't need  
25 section (5) then. That sentence is completely

1 unnecessary if we put that first.

2 MR. PERRY: Well, (5) really  
3 defines everything that the remainder of it  
4 talks about.

5 MR. ORSINGER: We don't need  
6 to, though, because if it's not handled by  
7 (1), it's handled by (2).

8 MR. PARSLEY: No. (1) and (2)  
9 are intended only to tell the court to make  
10 the determination. What the determination is  
11 and when to make it is what (1), (2) and (3)  
12 are intended to do.

13 (5) was intended to say -- now that  
14 you've made the determination, (5) and (6)  
15 were intended to say now what disposition you  
16 make depending on that determination.

17 HONORABLE SARAH DUNCAN: Can I  
18 suggest that (5) might should be (2)?

19 HONORABLE C. A. GUITTARD: No.  
20 It seems to me that (1), (2), and 3 should  
21 stay as they are. And (4) and (5) should be  
22 put together.

23 CHAIRMAN SOULES: I think  
24 that's what Lee is saying. (1), (2), and (3)  
25 have to do with getting a decision made, and

1           then --

2                           HONORABLE C. A. GUITTARD:

3           That's right.

4                           CHAIRMAN SOULES:   Okay.   So the  
5           numbering will be as in original.

6                           Okay.   So this is (4).   And then if we  
7           just move the sentence that's in (5) to the  
8           end of (4), do we need to change any caption?

9                           HONORABLE SARAH DUNCAN:   Yes.

10                          CHAIRMAN SOULES:   Okay.   What  
11           should it say?

12                          HONORABLE SARAH DUNCAN:   Well,  
13           I think if you merge those two, I think you  
14           are losing the emphasis that is now being  
15           placed on treating original exhibits and  
16           papers differently from all other papers.

17                          CHAIRMAN SOULES:   What's the  
18           purpose of this, Lee?   How do we fix this so  
19           that it says what you envision it as saying?

20                          MR. PARSLEY:   Well, I think the  
21           easiest fix is to leave it as is, not combine  
22           (4) and (5), and say in (5) that "The  
23           appellate court shall keep and preserve all  
24           other papers, other than original papers and  
25           exhibits, until their ultimate disposition as



1 prescribed herein."

2 MR. YELENOSKY: So then why did  
3 we abandon moving that up to the front? Since  
4 you're saying we're not going to talk about  
5 this, you're sending it back, now let's talk  
6 about the stuff you have to make a  
7 determination about.

8 HONORABLE C. A. GUITTARD:

9 Well, the general rules, rules (1), (2) and  
10 (3), are general with respect to all papers,  
11 the briefs, the transcript, statement of  
12 facts, everything. (4) just concerns a  
13 special situation where there are original  
14 papers or original exhibits in the court of  
15 appeals. And that's a different disposition  
16 than the general disposition of the papers, so  
17 that should follow the others.

18 CHAIRMAN SOULES: Then we're  
19 saying the court shall keep and preserve all  
20 papers except duplicates and original papers  
21 or exhibits?

22 MR. ORSINGER: Why can't  
23 you just say, "Except as provided in  
24 subdivision (b)(4), the appellate court shall  
25 keep and preserve all other court papers,

1           except duplicates, until their ultimate  
2           disposition"?

3                           HONORABLE C. A. GUITTARD: Yes,  
4           that's fine. Except I don't think then you  
5           would need the word "other."

6                           MR. ORSINGER: Take "other"  
7           out. Yeah. "Except as in provided in  
8           subdivision (b)(4), the appellate court shall  
9           keep and preserve all court papers."

10                          HONORABLE C. A. GUITTARD:  
11           Yeah, except duplicates, until their ultimate  
12           disposition as prescribed herein.

13                          CHAIRMAN SOULES: Subject to  
14           paragraph (4)?

15                          MR. ORSINGER: No. Except  
16           as -- what have we got --

17                          CHAIRMAN SOULES: But we've got  
18           except, except, except.

19                          MR. ORSINGER: Okay. Whatever.

20                          CHAIRMAN SOULES: "Pursuant to  
21           paragraph (b)(4) above, the appellate court  
22           shall keep and preserve all other" --

23                          MR. ORSINGER: No. Kill  
24           "other."

25                          CHAIRMAN SOULES: -- "preserve

1 all court papers, except duplicates, until  
2 their ultimate disposition prescribed herein."

3 HONORABLE C. A. GUITTARD:

4 Right.

5 CHAIRMAN SOULES: And then  
6 we've got ultimate disposition, and we talked  
7 about that.

8 Now we've got the Supreme Court. "In the  
9 Supreme Court, the following disposition is  
10 made of court papers."

11 Reverse and remand. The Supreme Court  
12 returns the -- what? Returns what? Returns  
13 the record on appeal. We've defined that.  
14 (Continuing) -- to the court of appeals. The  
15 court of appeals shall then dispose of the,  
16 what, record on appeal? Of the court papers?

17 MR. YELENOSKY: Court papers.

18 CHAIRMAN SOULES: In accordance  
19 with paragraph (b). The Supreme Court keeps  
20 and preserves all other items which constitute  
21 what? How about "The Supreme Court keeps and  
22 preserves all other items except duplicates."  
23 Would that work, Lee?

24 PROFESSOR ALBRIGHT: Wait a  
25 minute. The Supreme Court keeps and preserves

1 court papers in its -- in that court.

2 CHAIRMAN SOULES: All other  
3 items. It's just everything that's left.

4 MR. PARSLEY: I think that's  
5 fine, Luke.

6 CHAIRMAN SOULES: "All other  
7 items except duplicates."

8 MR. PARSLEY: Until they are.

9 CHAIRMAN SOULES: "Until they  
10 are turned over to the State Archive."

11 MR. ORSINGER: That means  
12 everything that the Supreme Court keeps is  
13 permanently saved forever, no discretion?

14 MR. PARSLEY: That's how it  
15 works today.

16 CHAIRMAN SOULES: "Keeps and  
17 preserves all court papers of that case"?

18 MR. PARSLEY: All court papers  
19 of that case.

20 CHAIRMAN SOULES: "Until those  
21 court papers are turned over to the State  
22 Archive."

23 Okay. "In all other cases, the Supreme  
24 Court returns the record on appeal to the  
25 court of appeals, keeps and preserves all

1 other court papers of that case, except  
2 duplicates, until they are turned over to the  
3 State Archive."

4 Okay. Does that get there, Lee?

5 MR. PARSLEY: Yes.

6 CHAIRMAN SOULES: Okay. Any  
7 other comments on the Order of the Supreme  
8 Court Regarding Disposition of Court Papers in  
9 Civil Cases?

10 Okay. Any opposition to this being  
11 recommended to the Supreme Court? There's no  
12 opposition, so it will be recommended.

13 Where do we put it in our papers? In the  
14 back? It goes after -- it should be following  
15 181. Following 181.

16 MR. ORSINGER: Question.

17 CHAIRMAN SOULES: Question.

18 Okay.

19 MR. ORSINGER: This is just  
20 going to be a miscellaneous docket order, and  
21 it will not be in anybody's version of the  
22 rules of procedure. Is that what this means?

23 CHAIRMAN SOULES: I don't  
24 know. I'll have to ask Lee. Is this a  
25 miscellaneous docket order? Is that the idea

1 here, or will it be in the rules?

2 MR. PARSLEY: Judge Guittard  
3 and I talked about this. We decided to make  
4 it an order to begin with, because we felt it  
5 was purely administrative and it really didn't  
6 make any difference to practitioners. So  
7 unless somebody says it ought to be published,  
8 I can't see much of a reason to -- I'd make it  
9 miscellaneous.

10 MR. ORSINGER: So the Supreme  
11 Court will just mail it out to all the courts  
12 of appeals?

13 MR. PARSLEY: That's what I  
14 would assume. Judge Guittard, do you have any  
15 comment on that?

16 HONORABLE C. A. GUITTARD:  
17 Well, the other orders of the Supreme Court,  
18 the ones directing the record particularly,  
19 are included in the rule book. And I suppose  
20 that this might be included as well. I don't  
21 see any point in leaving it out. It's not  
22 very long.

23 CHAIRMAN SOULES: What do you  
24 recommend? What do we recommend? In the rule  
25 book or not in the rule book?

1 HONORABLE C. A. GUITTARD: I  
2 recommend putting it in.

3 CHAIRMAN SOULES: Okay. Does  
4 everybody agree with that? Bill.

5 PROFESSOR DORSANEO: I think  
6 all of the Supreme Court's orders ought to be  
7 put in an appendix in the rule book, period.

8 HONORABLE SARAH DUNCAN: For  
9 every one?

10 MR. ORSINGER: My goodness,  
11 they might hand down 100 orders a year or  
12 more. Everything related to the state bar is  
13 a miscellaneous docket order. Isn't that  
14 right? Referendums, approving appointments to  
15 this Committee, you name it.

16 CHAIRMAN SOULES: All right.  
17 Well, the Supreme Court can probably do what  
18 it wants to. We say we want this one in the  
19 rule book, right?

20 Okay. Now, turn to Page 69. We have  
21 changes on Page 69 because Bonnie read this  
22 and felt that she was not given enough  
23 direction or it wasn't clear enough for her to  
24 follow, and we have some changes. The changes  
25 are as follows. You can note them on your

1 copy, and then we'll talk about them.

2 In the second line, between "bond" and  
3 "deposit," put a (1). The same line, after  
4 the words "cash or," a (2). The next line,  
5 after "leave of court," insert the word  
6 "tender."

7 In the seventh line that begins "of  
8 America," delete the comma after "thereof."  
9 Delete "that is." Insert before the word  
10 "insured," insert the word "and."

11 In the next line that begins "of the  
12 United States of America or any agency  
13 thereof," a period after "thereof," and insert  
14 "the cash or negotiable instrument shall  
15 be." In the next line, after "surety bond,"  
16 insert "and." In the next line, after "would  
17 be," delete "a" and insert "the."

18 HONORABLE C. A. GUITTARD:

19 Where is that?

20 MR. ORSINGER: The second to  
21 the last line.

22 CHAIRMAN SOULES: And after  
23 "bond" put a period. Strike "for the  
24 protection of other parties." And the rest of  
25 it stays as is. Take a look at that.



1 HONORABLE SARAH DUNCAN: On the  
2 second line --

3 PROFESSOR DORSANEO: You don't  
4 want the cash conditioned in the same manner  
5 as would be a surety bond.

6 HONORABLE C. A. GUITTARD: I  
7 don't understand what we're doing here.

8 HONORABLE SARAH DUNCAN: I  
9 believe the (1) in the second line -- where  
10 did you put that?

11 CHAIRMAN SOULES: Okay. Let me  
12 do it again. In the second line, after the  
13 word "bond," (1). After the word "or" --

14 MR. ORSINGER: Okay. Let's  
15 stop here. That's in the wrong place. It  
16 ought to be "shall deposit (1) cash or, (2)  
17 with leave of the court, a negotiable  
18 obligation." You can deposit both cash or --

19 CHAIRMAN SOULES: Did you get  
20 the word "tender"?

21 MR. ORSINGER: No.

22 CHAIRMAN SOULES: Well, I gave  
23 it to you. Okay. Let's go through here  
24 again. Okay? On line 2 --

25 MR. PERRY: What page are you

1 guys on again?

2 CHAIRMAN SOULES: On Page 69.

3 Okay. Anybody that doesn't have Page 69 raise  
4 your hand. Okay. Everybody has got it.

5 Line 2, after the words "filing the  
6 bond," insert (1). After the words "cash or,"  
7 insert (2). In the next line after "leave of  
8 court," insert the word "tender."

9 In the seventh line that begins with the  
10 words "of America or any state thereof,"  
11 delete the comma after "thereof," and delete  
12 "that is," which are the words there  
13 following. Then insert before "insured" the  
14 word "and."

15 In the next line, it reads "of the United  
16 States of America or any agency thereof,"  
17 change the comma to a period. In the next  
18 line, this is a change from what I gave you,  
19 because cash doesn't need to be conditioned on  
20 anything, I don't think --

21 MR. PARSLEY: The condition is,  
22 if you lose, they get it. They ought to get  
23 the cash as well if you lose.

24 HONORABLE C. A. GUITTARD:  
25 Yeah. It's conditioned.

1 CHAIRMAN SOULES: Okay. You're  
2 right. The cash deposit actually, right? The  
3 cash deposit or negotiable instrument --

4 HONORABLE SARAH DUNCAN: No.  
5 No.

6 CHAIRMAN SOULES: -- shall  
7 be --

8 MR. ORSINGER: It's a  
9 negotiable obligation.

10 CHAIRMAN SOULES: Okay.  
11 (Continuing) -- negotiable obligation shall be  
12 in the amount fixed for the surety bond.  
13 After the comma, insert the word "and."

14 In the next line after the words "would  
15 be," strike "a" and insert "the." After  
16 "surety bond" put a period, and delete "for  
17 the protection of other parties."

18 Any opposition to that? Judge Duncan.

19 HONORABLE SARAH DUNCAN:  
20 Regarding the new subparagraph 2, if you have  
21 leave of court, you're entitled to file it,  
22 not just tender it. And that makes a big  
23 difference if you're trying to stop the  
24 execution process.

25 CHAIRMAN SOULES: Okay. Any

1 opposition to that? Bonnie, is that okay?

2 Does anyone see any problem with that?

3 MS. WOLBRUECK: That's fine.

4 PROFESSOR DORSANEO: Let's use  
5 the word "file."

6 HONORABLE C. A. GUITTARD: No.  
7 You want to deposit the obligation, the  
8 negotiable obligation, do you not, rather than  
9 file it? So instead of putting the "tender"  
10 there, say "deposit." "With leave of court  
11 deposit."

12 CHAIRMAN SOULES: Is that okay,  
13 Judge Duncan?

14 HONORABLE SARAH DUNCAN: Yes.

15 CHAIRMAN SOULES: Okay. So  
16 we're now going to change the word "tender" in  
17 the third line, instead of inserting "tender,"  
18 we're going to insert "deposit."

19 All right. Any other comments? Alex  
20 Albright.

21 PROFESSOR ALBRIGHT: Does  
22 "cash" only mean \$100 bills, or can it be a  
23 cashier's or certified check.

24 HONORABLE SARAH DUNCAN: That's  
25 a negotiable obligation.

1 PROFESSOR ALBRIGHT: Okay.

2 That's a negotiable obligation.

3 HONORABLE SARAH DUNCAN: Wait,  
4 I'm getting confused here. Well, it has to be  
5 accepted by the court.

6 MR. LATTING: Luke, let's talk  
7 about that, because there's a confusion here  
8 in Austin.

9 CHAIRMAN SOULES: Okay. Bill  
10 suggested we take out the word "deposit" in  
11 the fifth line because it's redundant of the  
12 one we put in in the third line. Judge  
13 Duncan.

14 HONORABLE SARAH DUNCAN: Why  
15 don't we -- we've got one class of things here  
16 that has to have leave of court, and it's a  
17 negotiable obligation of certain things. And  
18 so I would take out in the fifth line  
19 "deposit" up to "any."

20 CHAIRMAN SOULES: Okay. So it  
21 says "or of any bank or savings and loan."

22 HONORABLE SARAH DUNCAN: If  
23 you've only got two, then make it an "and,"  
24 but one or the other.

25 CHAIRMAN SOULES: "Or with

1 leave of court deposit a negotiable obligation  
2 with the government of the United States of  
3 America or any agency thereof, or of any bank  
4 or savings and loan association chartered by  
5 the government of the United States of America  
6 or any state thereof, and" -- what's wrong  
7 with "that is"?

8 HONORABLE SARAH DUNCAN:

9 Because the "that" doesn't refer back to the  
10 association.

11 CHAIRMAN SOULES: "And insured  
12 by the government of the United States of  
13 America or any agency thereof."

14 PROFESSOR DORSANEO: That's  
15 fine.

16 CHAIRMAN SOULES: Okay. Joe  
17 Latting.

18 MR. LATTING: I would like to  
19 see us write this rule where a cashier's check  
20 is specifically stated to be the equivalent of  
21 cash. The reason --

22 CHAIRMAN SOULES: It's just an  
23 obligational -- a negotiable --

24 MR. LATTING: Well, I would  
25 like to see it where you don't have to have

1 leave of court in order to deposit a cashier's  
2 check, because it's just a needless step.

3 And the clerks don't know how to handle  
4 this. Some clerks treat it one way and some  
5 treat it another.

6 PROFESSOR DORSANEO: Actually,  
7 the Uniform Commercial Code says that a check  
8 is cash.

9 MR. LATTING: Well, I know.  
10 But tell that to -- when you go to Burnet and  
11 tell them that "This is cash," they say, "No,  
12 it's not."

13 And it seems to me that it would  
14 streamline -- and no offense to Burnet, but it  
15 depends on what clerk's office you're in,  
16 whether it's cash or not.

17 CHAIRMAN SOULES: Okay. So  
18 what Joe wants to do is say after the word  
19 "cash" in the second line to say "or a  
20 cashier's check."

21 MR. LATTING: But I think we  
22 ought to make it from a national or a state  
23 bank. I guess there aren't any other kinds.  
24 But we ought to restrict it to that so it's  
25 not some private company's cashier's check.

1 HONORABLE C. A. GUITTARD:

2 Well, how do you deposit cash? Do you go down  
3 to the bank and get a little sack and put the  
4 money in the sack and bring it to the clerk?  
5 Or can't you just write the clerk a check, and  
6 if he cashes it, it's cash.

7 MR. LATTING: Well. I'm just  
8 saying that different clerks -- I can tell you  
9 from having to deal with these cases. They  
10 don't quite know what to do with it when you  
11 walk in. They say -- some clerks say you need  
12 leave of court and some say you don't in order  
13 to give them a cashier's check.

14 HONORABLE C. A. GUITTARD:

15 Well, we ought to write the rule so that you  
16 can tender to the clerk either cash or a  
17 personal check or any kind of a check which is  
18 effective only if it's cashed.

19 But it's different from a deposit, like  
20 you would put up a deposit of a negotiable  
21 instrument which the clerk keeps and doesn't  
22 cash.

23 CHAIRMAN SOULES: That doesn't  
24 take care of Sarah's problem. She wants an  
25 immediate supersedeas whenever that clerk



1 takes a cashier's check, not after the check  
2 has been negotiated, and we need that.

3 MR. LATTING: And a cashier's  
4 check from a state or national bank would do  
5 that. I mean, that's my suggestion.

6 CHAIRMAN SOULES: Again, what  
7 Joe wants to do, as I understand it, is after  
8 the word "cash" in the second line put "or  
9 cashier's check."

10 MR. LATTING: From a state or  
11 national bank.

12 MR. ORSINGER: Well, then  
13 you've got to worry about "insured." What if  
14 we added a sentence at the end saying that a  
15 cashier's check shall be the equivalent of  
16 cash, because then you've got to repeat all  
17 that verbage in there about insurance and  
18 everything, because a cashier's check from an  
19 uninsured institution will not be honored.  
20 I've seen it happen, if they go under. And  
21 maybe they're through going under, but they  
22 did.

23 PROFESSOR DORSANEO: Maybe we  
24 could look in the Uniform Commercial Code,  
25 Article 3 or 4, and see what they do. We

1 could borrow from that.

2 PROFESSOR ALBRIGHT: I had a  
3 criminal case in December that concerned the  
4 Uniform Commercial Code, and you don't want to  
5 get into that.

6 MR. LATTING: I don't care how  
7 we phrase it, Richard, but the point being  
8 that if it's a cashier's check from a state or  
9 national bank, that's going to take care of  
10 99 percent of the problem. And it's going to  
11 keep from having to going to a judge and  
12 getting leave of court if we can take a  
13 cashier's check to the clerk's office.

14 CHAIRMAN SOULES: Okay. Let's  
15 get on with it here. After "deposit cash"  
16 insert this: "or cashier's check or, (2) with  
17 leave of court, a negotiable obligation of the  
18 government of the United States of America or  
19 any agency thereof, or any bank or savings and  
20 loan chartered by the government of the United  
21 States of America or any state thereof, and  
22 insured by the government of the United States  
23 of America or any agency thereof."

24 Well, we're just going to have to repeat  
25 it. "Or cashier's check drawn on any bank or

1 savings and loan association chartered by the  
2 government of the United States of America or  
3 any state thereof, and insured by the  
4 government of the United States of America or  
5 any agency thereof." You have to say it  
6 twice. That's okay.

7 HONORABLE SARAH DUNCAN: And if  
8 you say it twice, go ahead and indent (1) and  
9 (2), instead of having them imbedded in the  
10 text.

11 CHAIRMAN SOULES: Okay. So  
12 after "the bond," we'll put a colon and a  
13 paragraph. And at the end of "thereof" the  
14 first time, we'll put a paragraph and do (2).

15 And then we'll have a paragraph that says  
16 the cash must be conditioned and so forth.

17 MR. ORSINGER: Can I ask a  
18 question?

19 CHAIRMAN SOULES: And then "any  
20 interest thereon."

21 Okay. Here is what we're going to have  
22 to do. We're going to have this "Wherever  
23 these rules provide for" part, and then we're  
24 going to have an indented (1) and an indented  
25 (2), and then back to the margin with the last

1 sentence. That takes care of it.

2 HONORABLE SARAH DUNCAN: The  
3 last two sentences.

4 CHAIRMAN SOULES: The last  
5 sentence.

6 HONORABLE SARAH DUNCAN: The  
7 last two sentences, Luke. If you don't take  
8 the cash deposit or negotiable obligation back  
9 to the margin, then it's going to be a part of  
10 subparagraph (2), and that's just not right.  
11 It applies to both of them.

12 CHAIRMAN SOULES: Okay. Well  
13 let's just take that last -- we'll just make a  
14 paragraph and have -- the last paragraph will  
15 not go back to the margin either way. It will  
16 start with The cash deposit or negotiable  
17 instrument -- negotiable obligation shall be  
18 in the amount fixed and conditioned, and any  
19 interest thereon shall constitute part of the  
20 deposit. So there will be another paragraph  
21 after (1) and (2), right?

22 HONORABLE SARAH DUNCAN: No. I  
23 think it needs to go back to the margin so  
24 that it applies to -- it's one rule. There's  
25 no paragraph. There are two prongs on what

1 you can deposit, but the last two sentences  
2 apply to everything in the paragraph.

3 CHAIRMAN SOULES: Okay. So  
4 it's just one paragraph all the way through,  
5 but it has two indented paragraphs in the  
6 middle?

7 HONORABLE SARAH DUNCAN:  
8 Right.

9 CHAIRMAN SOULES: Okay. Does  
10 that do it?

11 HONORABLE SARAH DUNCAN: But  
12 there's just one other thing.

13 CHAIRMAN SOULES: Okay.

14 HONORABLE SARAH DUNCAN: I  
15 don't think you can condition a negotiable  
16 obligation. I think you can condition the  
17 deposit of a negotiable obligation. So what I  
18 would suggest is just take out "cash or  
19 negotiable obligation" and just say "the  
20 deposit shall be in the amount fixed for the  
21 surety bond and conditioned in the same  
22 manner."

23 CHAIRMAN SOULES: Any objection  
24 to that?

25 PROFESSOR DORSANEO: No.

1                   CHAIRMAN SOULES: Okay. "The  
2 deposit shall be in the amount fixed" and so  
3 forth. Okay. Richard.

4                   MR. ORSINGER: I'm concerned  
5 that if we're going to treat cashier's checks  
6 the same as cash, then we should prescribe  
7 that the clerk cash the cashier's check right  
8 away. Because I can foresee that people will  
9 make the cashier's check payable to the  
10 appellee, and two years later, when it's  
11 presented for negotiation, it may not clear.  
12 So if it's going to be nondiscretionary,  
13 meaning no approval of the court, then I think  
14 we should ask the clerk to negotiate it,  
15 convert it into cash, and then handle it like  
16 cash.

17                   PROFESSOR DORSANEO: But that  
18 cashier's check at the top is meant to be  
19 cash.

20                   MR. ORSINGER: But I can tell  
21 you right now it's going to be written payable  
22 to the appellee.

23                   CHAIRMAN SOULES: Well, why  
24 don't we say "deposit cash or cashier's check  
25 payable to the clerk"?

1 MS. WOLBRUECK: And because I  
2 couldn't deposit it if it was made payable to  
3 the appellee.

4 MR. ORSINGER: That's right.  
5 Payable to the clerk.

6 CHAIRMAN SOULES: Payable to  
7 the clerk, drawn on any, and so forth.

8 MR. LATTING: How about let's  
9 say payable to the clerk or endorsed to the  
10 clerk by the payee, because sometimes you get  
11 a cashier's check payable to Joe Latting, pay  
12 to the order of Travis County District Clerk.

13 PROFESSOR DORSANEO: Well,  
14 that's Joe Latting's check then.

15 MR. LATTING: Well, okay. I'll  
16 give up on it. I don't think it's right yet,  
17 though.

18 PROFESSOR DORSANEO: If they  
19 won't take your check already, they shouldn't  
20 take that one.

21 CHAIRMAN SOULES: Okay. The  
22 clerk shall negotiate the check promptly.

23 MR. LATTING: I don't know if I  
24 agree with that. I mean, unless my  
25 endorsement is a forgery, my credit doesn't

1 have anything to do with the validity of the  
2 check.

3 CHAIRMAN SOULES: How do you  
4 want us to say this so that it directs you?  
5 Shall negotiate the check promptly into the  
6 clerk's account?

7 MS. WOLBRUECK: I don't have a  
8 problem with that.

9 CHAIRMAN SOULES: Where do you  
10 keep this? In the registry of the clerk?

11 MS. WOLBRUECK: Yes.

12 CHAIRMAN SOULES: Okay. The  
13 clerk shall negotiate the cashier's check  
14 promptly into the registry of the clerk?

15 MS. WOLBRUECK: Just say  
16 deposit it.

17 CHAIRMAN SOULES: You actually  
18 deposit it, don't you?

19 MR. ORSINGER: Well, every  
20 county does it differently. But in amounts  
21 that are over the FDIC insurance limit, I  
22 believe, the government code, correct me,  
23 anybody who has fought through this, requires  
24 that they be in a special trust arrangement  
25 with the depository bank that's backed up by



1 U.S. deposits.

2 MS. WOLBRUECK: That's taken  
3 care of in the Local Government Code,  
4 Chapter 117, the depository contract per a  
5 court order.

6 CHAIRMAN SOULES: Don't you  
7 negotiate the check into the clerk's account?

8 MS. WOLBRUECK: Yes, I do. And  
9 the amount should be covered under the  
10 depository contract.

11 MR. ORSINGER: But we don't  
12 have to say that here.

13 CHAIRMAN SOULES: Yes, we do.

14 MR. ORSINGER: We don't need to  
15 talk about all the local government codes.

16 CHAIRMAN SOULES: That's  
17 right. But we need to tell her what to do  
18 with it.

19 MR. LATTING: The clerk shall  
20 deposit the check promptly. That's all you  
21 need to say. We don't have to tell her what  
22 account to put it in and all that stuff.

23 CHAIRMAN SOULES: Deposited  
24 promptly into what?

25 PROFESSOR DORSANEO: As

1 provided by law.

2 PROFESSOR ALBRIGHT: That's  
3 right. Wherever they deposit it.

4 CHAIRMAN SOULES: Okay. That's  
5 all I'm trying to get at, is just so that we  
6 say that in a way the -- okay.

7 We can't hear anyone up here. I can't  
8 hear and the court reporter can't hear.

9 Okay. The clerk -- how do you want me to  
10 say this? What I've got written down here is  
11 that "The clerk shall deposit any cashier's  
12 check promptly."

13 MS. WOLBRUECK: That's  
14 sufficient.

15 CHAIRMAN SOULES: Now, Judge  
16 Till, you had your hand up.

17 HONORABLE PAUL HEATH TILL: You  
18 do have in there that the check is to be made  
19 out to the clerk of the court, don't you?

20 CHAIRMAN SOULES: Right.

21 HONORABLE PAUL HEATH TILL:  
22 Okay. That's fine.

23 CHAIRMAN SOULES: Okay. So it  
24 says "or cashier's check made payable to the  
25 clerk drawn on any banks," and so forth.

1           And then after we get down through what  
2 all the banks are and how they're insured, we  
3 have a new sentence. It says, "The clerk  
4 shall deposit any cashier's check promptly."

5           And then we go to (2), which talks about  
6 negotiable obligation.

7                   PROFESSOR DORSANEO: I've got  
8 one question that I hesitate to ask.

9                   CHAIRMAN SOULES: Go ahead.

10                   PROFESSOR DORSANEO: I don't do  
11 this any more, and I haven't done this for a  
12 while, but when I've done it, I used to do it  
13 with my own check. That doesn't happen now?

14                   MR. LATTING: You can do it in  
15 Travis County.

16                   MR. ORSINGER: It's not a  
17 negotiable obligation of the government or a  
18 bank.

19                   PROFESSOR DORSANEO: I know  
20 what we just did. But I used to be able to  
21 say that this is cash. And people used to not  
22 say, "That's not cash, that's a check."

23                   MR. LATTING: That's right.  
24 But it's never been a negotiable obligation of  
25 a bank; it's been your negotiable obligation.

1 And it's been in my -- I don't think it's  
2 clear that the clerk should not have accepted  
3 that as cash.

4 PROFESSOR DORSANEO: Well, I  
5 think you can find definitions of "cash" that  
6 include personal checks in the Uniform  
7 Commercial Code. And every time somebody  
8 said, "That's not cash, that's a check," I  
9 would show them that. And they would say,  
10 "Fine," because they didn't expect my check  
11 to bounce anyway and they took it.

12 CHAIRMAN SOULES: Okay.

13 PROFESSOR DORSANEO: And I  
14 don't want to have to make people do cashier's  
15 checks unnecessarily.

16 CHAIRMAN SOULES: All right.  
17 We're off the record.

18 (At this time there was a  
19 discussion off the record.)

20 CHAIRMAN SOULES: Back on the  
21 record.

22 MR. ORSINGER: This is probably  
23 not a problem, but is the FDIC an agency of  
24 the federal government not withstanding the  
25 fact that it's a corporation?

1 PROFESSOR DORSANEO: Sure.

2 MR. ORSINGER: It is? Okay.

3 CHAIRMAN SOULES: I don't know.

4 MR. ORSINGER: All right. Then  
5 I won't worry about that.

6 CHAIRMAN SOULES: Okay.

7 Anything else on this? Okay. Those in favor  
8 show by hands. Opposed. Okay. That's  
9 unanimous.

10 Except for Rule 7, which I don't want to  
11 revisit today, probably nobody does today --  
12 well, maybe some. We've got seven minutes.  
13 Can we use them?

14 Again, I want to thank Clarence Guittard  
15 and Bill Dorsaneo and all the members, Alex  
16 Albright, all the members of this committee  
17 that worked so hard on these appellate rules.

18 PROFESSOR DORSANEO: And  
19 special thanks to Lee Parsley as well.

20 CHAIRMAN SOULES: And to Lee  
21 and to Holly for getting this report  
22 together. It's come to closure before any of  
23 our other work, probably substantially before  
24 any of our other work. The charge rules are  
25 very close. And I do want to thank all of you

1 for what you have done and thank you on behalf  
2 of the Court and the Committee and the bar and  
3 the bench for doing all this work.

4 We will make the corrections as a result  
5 of this meeting and forward them to Justice  
6 Hecht for presentment to the Court. And I  
7 will provide everybody a copy of the final  
8 report so that at your leisure you can look  
9 back through here and see if you can pick up  
10 any errors that we have made in doing the  
11 report.

12 If you find an error, just copy it on  
13 your copy machine and interline it or write  
14 what you think is wrong and get it to me, and  
15 I will get it to the Court promptly.

16 Judge Brister.

17 HONORABLE SCOTT BRISTER: Where  
18 do we stand? And do we need to meet sometime  
19 for more than a day and a half on a weekend to  
20 finish? How many more years are we going to  
21 be doing this?

22 CHAIRMAN SOULES: Well, we've  
23 got meetings set all the way through November,  
24 so we've got May, July, September and  
25 November.

1 I think a lot depends on how far we get  
2 with discovery at the next meeting, if we get  
3 discovery pretty much to closure at the next  
4 meeting. And we should have a sanctions  
5 report at the next meeting based on what we  
6 think the discovery rules are going to look  
7 like, and we've got a pretty good picture of  
8 that.

9 Then -- and I expect to have the charge  
10 rules in a red-lined version ready to go to  
11 the Court after our next meeting. I think  
12 that will be very short, because they've  
13 already been approved, there's just some  
14 grammatical errors in the final report and  
15 some things like that that we just need to  
16 take a brief look at, I think.

17 So by the end of the next meeting, we  
18 should have the charge rules done, sanctions  
19 with major progress, discovery with major  
20 progress. That would mean that by the July  
21 meeting we would want those closed. All  
22 three. Well, the charge rules probably next  
23 time. Discovery and sanctions closed in  
24 July. That gives us September and November to  
25 to get the miscellaneous rules done that we've

1 got.

2 And any time we have a gap in our  
3 schedule, we'll get to work on those  
4 miscellaneous -- I'm calling them  
5 miscellaneous rules. They're very important  
6 because they're coming from everywhere. And  
7 they may in fact slide back and change some of  
8 the things we've done, because there are a lot  
9 of good ideas that have come from all over the  
10 state in those materials.

11 And then -- but I don't know if this is  
12 quickly enough for the Court, soon enough for  
13 the Court, but we can do it, I think, on our  
14 regular schedule as long as we make progress.

15 What do you think, Justice Hecht?

16 JUSTICE HECHT: I think we  
17 ought to stay on it for now. I expect the  
18 Court will be through with the TRAP Rules by  
19 the May meeting or at least by our summer  
20 break, so we'll be ready to look at something  
21 else by then.

22 MR. ORSINGER: Can I ask a  
23 question?

24 CHAIRMAN SOULES: Let me make  
25 this comment, and then to you, Richard.



1           The Court is going to look at these, and  
2 they may feel that some of the things we've  
3 done are not the way they want them, and that  
4 obviously is going to influence scheduling.  
5 Particularly if the discovery rules are  
6 conceptually different from the way the Court  
7 wants to go, then we're going to have a good  
8 deal more work to do, which is fine, of  
9 course. As I suggested, that wouldn't be any  
10 imposition, because it has to satisfy the  
11 Court.

12           But my understanding from Justice Hecht  
13 is that he anticipates that the Court is going  
14 to look at the rules and change them the way  
15 the Courts wants them and then get those back  
16 to us just to advise the Court if we see any  
17 serious problems with what the Court has done  
18 that they may not have seen. And obviously  
19 those things come up here just because there  
20 are more sets of eyes.

21           So we'll have brief sessions on the rules  
22 after the Court gets done, at least brief  
23 sessions, perhaps more extensive sessions on  
24 the rules after the Court gets done with  
25 them. Richard.

1 MR. ORSINGER: After the  
2 Supreme Court has done what it's going to do  
3 on the TRAPs, do they then go out for public  
4 comment in the Bar Journal before they're  
5 adopted?

6 JUSTICE HECHT: Oh, yeah. I  
7 mean, we'll put them out for comment and have  
8 a public hearing, if we do what we've done in  
9 the past, before they're adopted.

10 MR. ORSINGER: So it's unlikely  
11 that they would go into effect before maybe  
12 January 1 of '96?

13 JUSTICE HECHT: Right. That's  
14 likely.

15 CHAIRMAN SOULES: And, of  
16 course, the Court -- after that there's a very  
17 formal process that's required by statute that  
18 we publish them in the Texas Bar Journal so  
19 long before the effective date, but that's  
20 after they've been promulgated.

21 If you have this report from Alejandro  
22 Acosta that Alex passed out, either leave it  
23 here so Holly can pick it up or bring it back  
24 with you next time because we won't  
25 redistribute it. We'll pick up all the ones

1 that are left and we'll bring them back, but  
2 if you take them, you have a chance to look at  
3 them in the meantime. Justice Guittard.

4 HONORABLE C. A. GUITTARD:  
5 Mr. Chairman, there are a couple of matters  
6 with respect to the Rules of Civil Procedure,  
7 the trial rules, that may need some  
8 attention. One is that a number of the Rules  
9 of Civil Procedure have been proposed by the  
10 appellate subcommittee, some of which have  
11 been approved by this Committee, and so the  
12 question is, what's the status of that? Is  
13 that finally adopted?

14 There are other rules that we have  
15 proposed for the Rules of Civil Procedure,  
16 including the rules with respect to judgments  
17 and so forth, that have been published in our  
18 previous reports but that have not been  
19 finally adopted, such as Rule 300. That  
20 probably should be considered by the  
21 subcommittee that has responsibility for those  
22 rules.

23 The third question is the problem of  
24 coordinating the TRAP Rules and the Rules of  
25 Civil Procedure. Now, I've noticed here --

1 I've read this (indicating).

2 CHAIRMAN SOULES: Alejandro's  
3 report.

4 HONORABLE C. A. GUITTARD:  
5 Alejandro's report. I've noticed that they've  
6 gone a long way towards doing that. They've  
7 adopted some of the TRAP Rule provisions for  
8 the trial rules, and I think that's a big  
9 start in that direction.

10 As I wrote to you in that letter, it  
11 seems logical to have a section of rules, of  
12 general rules, that apply to both trial and  
13 appellate courts. And some of the Rules of  
14 Civil Procedure, for instance, Rule 1 and 2  
15 about construction of the rules and so forth,  
16 are really intended to apply both to appellate  
17 and trial procedure and should be included in  
18 general rules.

19 Likewise, rules that are common, such as  
20 perhaps rules as to service, time and so  
21 forth, that are common to appellate and trial  
22 rules, should be included in the general rules  
23 rather than in the separate -- repeated in the  
24 separate TRAP and trial rules.

25 So it would seem to me feasible to have a

1 joint committee for the trial rules and the  
2 appellate rules to work on rules that apply to  
3 both trial and appellate courts. And I would  
4 just inquire how we're to organize that and go  
5 forward with that?

6 HONORABLE SARAH DUNCAN: Can I  
7 ask a question real quick?

8 CHAIRMAN SOULES: Judge Duncan.

9 HONORABLE SARAH DUNCAN: I  
10 assumed that what I received in the mail was  
11 what the appellate rules report has always  
12 looked like before. But now I realize, and I  
13 guess this is what you're saying, that the  
14 Rules of Civil Procedure that the Appellate  
15 Rules Committee proposed amendments to and  
16 have been approved by this Committee are no  
17 longer included in the appellate rules  
18 report.

19 CHAIRMAN SOULES: That's right.

20 HONORABLE SARAH DUNCAN: And so  
21 I guess what you're saying -- whose decision  
22 was that?

23 CHAIRMAN SOULES: Mine.

24 HONORABLE C. A. GUITTARD: But  
25 we are to -- but what are we to do with

1 those?

2 CHAIRMAN SOULES: Okay. You  
3 asked me several questions, and I'll try to  
4 remember them as we proceed.

5 Okay. First, any subcommittee that  
6 believes that because of its work in its area  
7 there needs to be a change made in an area of  
8 responsibility of a different subcommittee,  
9 they need to write me and tell me what you  
10 recommend done. Now, for those that have  
11 already been passed, I need you to say, "These  
12 have been passed by the Committee."

13 And I will then direct that information  
14 to the chair of the subcommittee that has  
15 authority over those rules, because as we go  
16 through these sections of the rules, we're  
17 going to have to see -- we're going to be  
18 addressing other concerns that have come from  
19 the public. And they may relate to the same  
20 rules that we've already passed, but we passed  
21 them without regard to the fact that we have a  
22 public inquiry that needs to be addressed. So  
23 we've got to overlay those.

24 I hope that all of the appellate input  
25 that we've got from the public from every

1 source has been addressed in these appellate  
2 rules that are going to the Supreme Court. I  
3 don't know that, but your committee has had  
4 them, so I guess they've been addressed.  
5 Eventually we'll probably go through those  
6 individually just to check them off and be  
7 sure that we have.

8 But anyway, the subcommittees that have  
9 authority over certain portions of the Rules  
10 of Civil Procedure are going to have that  
11 authority, with your suggestions, as to what  
12 they need to be doing.

13 HONORABLE C. A. GUITTARD: Does  
14 that include the rules that -- the trial rules  
15 that have already been adopted by this  
16 Committee?

17 CHAIRMAN SOULES: It does.

18 HONORABLE SARAH DUNCAN: So we  
19 are going to revote on matters that the  
20 Committee as a whole has already voted on  
21 after the subcommittee is given an opportunity  
22 to redraft them. Is that right?

23 CHAIRMAN SOULES: Well, I don't  
24 assume that the subcommittee will redraft  
25 anything that we have already passed. But

1           it's going to come up in their report. It may  
2           be -- I would assume that those pieces of  
3           their report will be very quick. But they  
4           need to see how it fits in their scheme and in  
5           their area as well as the appellate rules.

6                     We have to make the Rules of Civil  
7           Procedure work, too, sequentially, and since  
8           we haven't even looked at those rules yet, we  
9           can't send to the Supreme Court changes in the  
10          Rules of Civil Procedure until we look at them  
11          comprehensively.

12                    MR. LATTING: Luke.

13                    CHAIRMAN SOULES: Joe Latting.

14                    MR. LATTING: The sanctions  
15          committee is planning to meet twice before the  
16          next meeting of this Committee. And we're  
17          going to come forth with two different  
18          versions of the suggested sanctions rules  
19          based on this division of the house we had  
20          before. So if anybody has any comments or  
21          ideas about how sanctions ought to be  
22          structured in view of where we're headed with  
23          discovery, let us know. And if you want to  
24          come to the meetings, let me know so that we  
25          can have your input. We'll be getting



1 together at the end of this month and again in  
2 April.

3 CHAIRMAN SOULES: Now, did I  
4 respond to the issues that you raised, Judge  
5 Guittard, or are there some that I didn't get  
6 to? I know I tried to talk about how we're  
7 going to -- the logistics of the rest of the  
8 process.

9 HONORABLE C. A. GUITTARD:  
10 Perhaps a little more definition with respect  
11 to this coordination of the appellate and the  
12 trial rules and the general rules that apply  
13 to both.

14 CHAIRMAN SOULES: Okay. What I  
15 would like to do is have the appellate rules  
16 subcommittee select among themselves  
17 representatives from each of the other Rules  
18 of Civil Procedure subcommittees where you  
19 think you need to have input.

20 HONORABLE C. A. GUITTARD:  
21 Okay.

22 CHAIRMAN SOULES: Get among  
23 yourselves, and have the findings of fact and  
24 conclusions of law area, or whatever that  
25 scope of the rules is, have a delegate, and

1 tell me who you want, and I'll put that person  
2 on that subcommittee. So there's a blending  
3 there now of the Appellate Rules Committee  
4 into the Rules of Civil Procedure Committee so  
5 that your work product is not lost, and that  
6 committee's representative is there to convey  
7 it fully to that committee.

8 It was never any intent to have the  
9 Appellate Rules Committee usurp any piece of  
10 anybody else's authority. It was only to have  
11 input into the other subcommittees where you  
12 feel it's necessary in support of the  
13 appellate rules or for any other rules.

14 HONORABLE C. A. GUITTARD: What  
15 I would like to do is to have a draft of these  
16 general rules, these common rules, and direct  
17 Lee to make such a draft, and for us then to  
18 present it to the subcommittee that has the  
19 responsibility for those rules. Do you  
20 understand what I mean?

21 CHAIRMAN SOULES: Right.  
22 Okay. That's about as good as can do now.  
23 We're just going to have to have a liasion at  
24 some point to handle it.

25 (HEARING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF  
SUPREME COURT ADVISORY COMMITTEE  
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I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 18, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \_\_\_\_\_.  
CHARGED TO: \_\_\_\_\_.

Given under my hand and seal of office on this the 31st day of March, 1995.

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