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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE  
MAY 20, 1994  
(AFTERNOON SESSION)

\* \* \* \* \*

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

ORIGINAL

MAY 20, 1994 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS:

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

OTHERS PRESENT:

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

MEMBERS ABSENT:

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

Paul N. Gold  
Honorable Paul Heath Till

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

Professor Elaine Carlson  
Honorable Sam Houston Clinton  
Honorable William J. Cornelius  
Professor William V. Dorsaneo  
Sarah B. Duncan  
Anne Gardner  
Paul N. Gold  
Honorable Clarence Guittard  
Honorable Nathan L. Hecht  
Donald M. Hunt  
David B. Jackson  
Honorable Scott McCown  
Russell McMains  
Robert Meadows  
Richard Orsinger  
Paula Sweeney  
Bonnie Wolbrueck

SUPREME COURT ADVISORY COMMITTEE

MAY 20, 1994 (AFTERNOON SESSION)

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## 1 AFTERNOON SESSION

2 (Reconvened at 1:00 p.m.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Joe Latting.

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

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

11 CHAIRMAN SOULES: Judge  
12 Brister.

13 HONORABLE SCOTT BRISTER: I'm  
14 not sure it will be more onerous. My problem  
15 with this whole thing is the law of unintended  
16 consequences. You tell -- it's like what we  
17 were talking about. If you say you can't file  
18 a motion for less than a thousand dollars in  
19 attorneys' fees, then you're meaning to leave  
20 the small stuff out. What you will do  
21 unintentionally is tell everybody that they  
22 need to file a motion for at least a thousand  
23 dollars in attorneys' fees and the cost to  
24 have a motion to compel will immediately go to  
25 \$1,000 as a floor.

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

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

25           But then I will have to hear that. We

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

7 For instance, No. 2 requires that if  
8 you've done something not in good faith, that  
9 can't be remedied. My example that we started  
10 off with some months ago was where shortly  
11 before trial the corporate defendant finds  
12 100,000 documents that they had not previously  
13 found. There is no evidence that they were  
14 lying before. They really just had a bunch of  
15 documents and they just found them and it's  
16 going to cost \$100,000 to redo all the  
17 depositions, but it was not in bad faith.  
18 This person comes in and says, "You can do  
19 nothing about that. You must retake all those  
20 depositions at your cost because this rule  
21 says that conduct is not sanctionable because  
22 it was not in bad faith."

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

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

12 CHAIRMAN SOULES: Any other  
13 discussion?

14 Buddy, congratulations.

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

22 CHAIRMAN SOULES: Good look.

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

1 CHAIRMAN SOULES: John Marks.

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

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

16 MR. MARKS: Like conduct?

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

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

1 but he's right.

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

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

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

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

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

8 CHAIRMAN SOULES: Richard  
9 Orsinger.

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

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

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

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

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

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

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

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

20 MR. ORSINGER: He did?

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

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

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

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

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

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

22 MR. LATTING: It was.

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

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

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

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

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

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

25 CHAIRMAN SOULES: And we voted

1 to approve that?

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

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

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

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

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

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

24 CHAIRMAN SOULES: Okay. Alex  
25 Albright.

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

7                   CHAIRMAN SOULES: Okay. Is  
8 that the consensus?

9                   MR. HERRING: I second it.

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

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

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

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

1           been revised to some extent.

2                   I propose to go through here --

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

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

8                           MS. DUNCAN:  The sans serif  
9           type.

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

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

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

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

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

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

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

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

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

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

1 CHAIRMAN SOULES: What is your  
2 recommendation?

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

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

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

13 HONORABLE C. A. GUITTARD: I so  
14 move.

15 CHAIRMAN SOULES: Okay.  
16 Second?

17 PROFESSOR DORSANEO: I second  
18 it.

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

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

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

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

5 Discussion? Richard Orsinger.

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

17 Does anyone remember that?

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

20 CHAIRMAN SOULES: Steve  
21 Yelenosky.

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

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

8 CHAIRMAN SOULES: Any others?  
9 Rusty.

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

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

6 CHAIRMAN SOULES: Anyone else?  
7 Joe Latting.

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

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

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

5 CHAIRMAN SOULES: Alex  
6 Albright.

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

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

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

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

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

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

3 PROFESSOR ALBRIGHT: Well, we  
4 just have a provision that says if it's  
5 15 days later -- I guess you have to get a  
6 motion to extend the time.

7 CHAIRMAN SOULES: That's a  
8 different issue.

9 PROFESSOR ALBRIGHT: I guess we  
10 presume that the mail is going to get there in  
11 15 days, but that's --

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

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

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

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

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

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

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

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

20                           PROFESSOR ALBRIGHT: What's  
21          Alternative No. 1?

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

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

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

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

15           Okay. Judge, what's next?

16                           HONORABLE C. A. GUITTARD:

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

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

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

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

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

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

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

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

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

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

16 HONORABLE C. A. GUITTARD:  
17 Right.

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

1 then, if it was actually timely filed or not.

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

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

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

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

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

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

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

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

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

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

1 then the attorney is put back under other  
2 proof.

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

7 CHAIRMAN SOULES: Doris Lange.

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

11 MS. WOLBRUECK: Certified mail.

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

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

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

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

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

1 there's a challenge that it was not filed?

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

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

20 CHAIRMAN SOULES: Or the  
21 appellate brief.

22 PROFESSOR ALBRIGHT: Right.

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

25 HONORABLE C. A. GUITTARD:

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

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

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

9 MS. DUNCAN: We discussed this  
10 in --

11 CHAIRMAN SOULES: Okay. Sarah  
12 Duncan.

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

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

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

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

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

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

9 CHAIRMAN SOULES: Let Sarah  
10 finish, please.

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

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

