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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 18, 1994

(AFTERNOON SESSION)

VOLUME II

* * * * *

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

ORIGINAL

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

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NOVEMBER 18, 1994 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS PRESENT:

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

Also present:

Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt
Denise Smith

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS ABSENT:

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

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

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

12 MR. SADBERRY: Good reason.

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

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

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

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

18 MS. DUNCAN: And release the
19 funds.

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

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

1 as there is no supersedeas?

2 MS. DUNCAN: Or alternate
3 security.

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

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

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

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

19 HONORABLE SAM HOUSTON CLINTON:
20 Page 14.

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

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

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

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

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

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

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

1 without anybody requesting.

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

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

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

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

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

4 HONORABLE C. A. GUITTARD:

5 Judge, what about the changes in the times?

6 HONORABLE SAM HOUSTON CLINTON:

7 In the times?

8 HONORABLE C. A. GUITTARD:

9 Yeah. Do you have any comment on that?

10 HONORABLE SAM HOUSTON CLINTON:

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

17 HONORABLE C. A. GUITTARD:

18 Well --

19 HONORABLE SAM HOUSTON CLINTON:

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

1 anyway. He wants to go up there and get it
2 heard, and in habeas about the same thing is
3 true, but the bail is more immediate.
4 Everyday is causing that person some grief.
5 So while there is some justification to hurry
6 it up, I mean, there is some reason to hurry
7 it up, the truth of the matter is that in most
8 experiences he's already heard. I don't know
9 whether it's all worth the candle to tell you
10 the truth, but I wasn't in on the original
11 thinking about that, I guess, and if everybody
12 wants to do it, and they support it, I don't
13 know.

14 HONORABLE C. A. GUITTARD:

15 Well, I'm content just to withdraw that
16 proposal unless somebody has some thinking
17 that has some merit.

18 CHAIRMAN SOULES: As far as
19 changing the timing, Judge Guittard, or --

20 JUSTICE CORNELIUS: The time
21 change.

22 HONORABLE C. A. GUITTARD:

23 Well, we can withdraw the whole amendment
24 here.

25 HONORABLE SAM HOUSTON CLINTON:

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

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

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

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

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

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

25 HONORABLE SAM HOUSTON CLINTON:

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

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

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

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

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

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

14 HONORABLE SAM HOUSTON CLINTON:
15 44.

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

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

21 HONORABLE C. A. GUITTARD:
22 Right.

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

25 HONORABLE C. A. GUITTARD:

1 Right.

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

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

16 HONORABLE SAM HOUSTON CLINTON:
17 Oh, yeah.

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

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

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

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

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

7 HONORABLE C. A. GUITTARD:
8 Yeah.

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

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

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

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

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

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

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

1 acknowledgements?

2 HONORABLE SAM HOUSTON CLINTON:

3 Oh, absolutely.

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

7 HONORABLE SAM HOUSTON CLINTON:

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

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

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

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

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

3 HONORABLE SAM HOUSTON CLINTON:

4 That I will ask him.

5 CHAIRMAN SOULES: Probably so.

6 I'd guess they do.

7 HONORABLE C. A. GUITTARD: And

8 if you find out that --

9 HONORABLE SAM HOUSTON CLINTON:

10 Well, certainly if we don't hear from them in
11 a reasonable period of time I'm sure that he
12 or she would make some effort to find out.

13 HONORABLE C. A. GUITTARD: And

14 if you find out it hasn't been done what does
15 the court do?

16 HONORABLE SAM HOUSTON CLINTON:

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

19 HONORABLE C. A. GUITTARD: In

20 other words, I'm exploring the question, what
21 function does this report have besides just
22 satisfying the curiosity of the clerk of the
23 Court of Criminal Appeals? Is there something
24 that --

25 HONORABLE SAM HOUSTON CLINTON:

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

4 JUSTICE CORNELIUS: Your work
5 is done anyway.

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

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

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

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

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

1 enforced?

2 HONORABLE SAM HOUSTON CLINTON:

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

5 HONORABLE C. A. GUITTARD:

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

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

14 HONORABLE C. A. GUITTARD:

15 Right.

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

20 HONORABLE C. A. GUITTARD:

21 Yeah.

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

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

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

9 JUSTICE CORNELIUS: That's
10 right.

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

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

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

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

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

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

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

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

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

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

9 HONORABLE C. A. GUITTARD:

10 Okay.

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

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

17 HONORABLE C. A. GUITTARD:

18 Yeah.

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

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

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

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

8 HONORABLE C. A. GUITTARD: One.

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

11 HONORABLE C. A. GUITTARD:

12 Okay.

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

16 MS. DUNCAN: Electronic
17 recording.

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

21 CHAIRMAN SOULES: Yes, sir.

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

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

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

24 CHAIRMAN SOULES: Where is
25 that, judge?

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

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

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

12 HONORABLE SCOTT BRISTER: Rule
13 264b.

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

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

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

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

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

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

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

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

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

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

11 MR. GALLAGHER: Okay.

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

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

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

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

13 CHAIRMAN SOULES: No. 6?

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

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

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

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

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

15 MR. GALLAGHER: Yes.

16 CHAIRMAN SOULES: Okay. Go
17 ahead.

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

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

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

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

3 HONORABLE C. A. GUITTARD:

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

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

13 HONORABLE SCOTT BRISTER: Sure.

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

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

23 HONORABLE SCOTT BRISTER: I'm
24 sorry.

25 HONORABLE C. A. GUITTARD: Take

