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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

MARCH 17, 1995

(AFTERNOON SESSION)

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

ORIGINAL

MARCH 17, 1995

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS PRESENT:

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

Also present:

Lee Parsley
Holly Duderstadt

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS ABSENT:

Doyle Curry
Paul N. Gold
Honorable Doris Lange
Thomas Riney

SUPREME COURT ADVISORY COMMITTEE
MARCH 17, 1995
AFTERNOON SESSION

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1 CHAIRMAN SOULES: All right.
2 We will go to work, and we will go to work on
3 the appellate rules now. We were at -- let's
4 see. If I have kept inventory here, we have
5 covered number -- okay.

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

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

11 HONORABLE SARAH DUNCAN: Did we
12 do one?

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

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

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

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

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

13 MS. SWEENEY: So moved.

14 CHAIRMAN SOULES: Been moved.
15 Second?

16 MS. BARON: Second.

17 CHAIRMAN SOULES: Discussion?
18 Sarah Duncan.

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

21 HONORABLE C. A. GUITTARD:
22 Right.

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

1 going to be duplex and --

2 HONORABLE C. A. GUITTARD:

3 Well, send them back.

4 HONORABLE SARAH DUNCAN: Right.

5 As long as that proviso is in there.

6 CHAIRMAN SOULES: Okay. Where

7 do you want to put that?

8 HONORABLE C. A. GUITTARD: In

9 rule --

10 PROFESSOR DORSANEO: It would

11 be in 4(d).

12 CHAIRMAN SOULES: On page 7?

13 PROFESSOR DORSANEO: On page 7.

14 Somewhere on page 7.

15 CHAIRMAN SOULES: Let's see,

16 "and shall use only one side of each sheet."

17 HONORABLE C. A. GUITTARD:

18 Strike that.

19 CHAIRMAN SOULES: Strike that.

20 HONORABLE C. A. GUITTARD: And

21 say it may be on one -- both sides of the

22 sheet provided -- I don't like "provided."

23 "Both sides of the paper if it's bound so

24 it's to lie flat when open and the printing

25 does not show through the paper."

1 JUSTICE CORNELIUS: Did the
2 appellate rules subcommittee approve this?

3 HONORABLE C. A. GUITTARD: I
4 think so.

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

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

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

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

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

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

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

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

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

17 CHAIRMAN SOULES: Anyone else
18 have any comment about this?

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

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

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

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

7 MR. BABCOCK: Snuck it by you.

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

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

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

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

25 HONORABLE C. A. GUITTARD: They

1 don't have to.

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

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

6 MR. ORSINGER: Uh-huh.

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

9 HONORABLE C. A. GUITTARD:
10 David?

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

13 CHAIRMAN SOULES: Where does
14 that go?

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

17 CHAIRMAN SOULES: What page?

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

21 PROFESSOR DORSANEO: 177 is
22 where it begins.

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

25 JUSTICE CORNELIUS: If you

1 could.

2 CHAIRMAN SOULES: Rule 1.

3 PROFESSOR DORSANEEO: It's on
4 page 176 in paragraph (c).

5 CHAIRMAN SOULES: 176,
6 paragraph (c).

7 PROFESSOR DORSANEEO: For the
8 statement of facts. For the transcript we
9 have to back up.

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

15 PROFESSOR DORSANEEO: No. One
16 side. It's in (c).

17 CHAIRMAN SOULES: "And
18 printed" --

19 PROFESSOR DORSANEEO: On one
20 side only.

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

25 MR. PARSLEY: I think it would

1 be on page 171, Luke.

2 PROFESSOR DORSANEO: Right.

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

5 CHAIRMAN SOULES: 171?

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

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

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

15 HONORABLE C. A. GUITTARD:

16 Both.

17 MR. ORSINGER: Can I comment on
18 the transcript?

19 HONORABLE C. A. GUITTARD:

20 Okay.

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

1 way and then turn it back the other.

2 JUSTICE CORNELIUS: Exactly.

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

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

10 MR. ORSINGER: 8 1/2 by 14.

11 HONORABLE C. A. GUITTARD:

12 That's the only reason for binding it at the
13 top.

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

17 HON. C. A. GUITTARD: Right.

18 MR. ORSINGER: By rule.

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

22 PROFESSOR DORSANEO: Where is
23 Judge Clinton?

24 HONORABLE F. SCOTT MCCOWN: No.

25 MR. JACKSON: Here is the

1 reason.

2 HONORABLE F. SCOTT MCCOWN: You
3 can't require transcripts to be bound on the
4 left-hand side because the rule that requires
5 8 1/2 paper is relatively new, and in many,
6 many cases, particularly family law cases, you
7 are going to have papers that are the old
8 legal size, and that's going to be true for
9 years to come.

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

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

17 HONORABLE SARAH DUNCAN: And
18 8 1/2 by 11.

19 CHAIRMAN SOULES: Pardon?

20 HONORABLE DUNCAN: On 8 1/2 by
21 11.

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

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

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

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

9 MR. ORSINGER: Optional.

10 HONORABLE C. A. GUITTARD:
11 Optional.

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

14 HONORABLE F. SCOTT MCCOWN: Let
15 me just --

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

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

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

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

19 JUSTICE CORNELIUS: But it's
20 not being followed.

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

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

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

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

16 MR. JACKSON: We bind them at
17 the top.

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

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

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

25 CHAIRMAN SOULES: Well, this is

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

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

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

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

10 JUSTICE CORNELIUS: I see.
11 Already adopted.

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

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

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

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

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

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

17 CHAIRMAN SOULES: I mean, a
18 600-dollar copier will reduce today, but that
19 may not make any difference anyway. Richard
20 Orsinger and then Sarah.

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

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

18 CHAIRMAN SOULES: Okay. Sarah.

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

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

5 I think most copiers today have reduction
6 on them. You know, if they have got a supply
7 of old covers, they can cut them off, but this
8 is the only thing left in the practice that's
9 8 1/2 by 14. You have to configure your file
10 cabinets for 8 1/2 by 14, not 8 1/2 by 11.
11 You have to buy a larger size Read-well. I
12 mean, it just goes throughout the process. We
13 are conforming everything in the process
14 around these few 8 1/2 by 14 pages, and that
15 makes no sense to me.

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

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

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

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

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

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

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

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

23 CHAIRMAN SOULES: That's right.

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

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

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

8 CHAIRMAN SOULES: Any further
9 discussion? Those in favor show by hands.
10 12.

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

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

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

23 CHAIRMAN SOULES: Okay.

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

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

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

10 CHAIRMAN SOULES: We already
11 did that.

12 HONORABLE C. A. GUITTARD: All
13 right.

14 CHAIRMAN SOULES: I put that in
15 already.

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

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

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

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

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

1 be typed or printed on..." Strike "one side
2 only of" and pick up "opaque and unglazed
3 white paper not less than 13 pound weight,
4 8 1/2 by 11 inches in size and may be printed
5 on both sides of the paper if bound so as to
6 lie flat when open and the print on one side
7 will not show through the other side." Just
8 what we wrote out for the other one.

9 HONORABLE C. A. GUITTARD:

10 Yeah.

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

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

17 PROFESSOR DORSANEO: Seven.

18 CHAIRMAN SOULES: And did we do
19 four?

20 PROFESSOR DORSANEO: No.

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

1 the materials?

2 PROFESSOR DORSANEO: 14.

3 CHAIRMAN SOULES: Page 14.

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

8 HONORABLE C. A. GUITTARD:

9 Extra page.

10 PROFESSOR DORSANEO: Extra
11 pages.

12 HONORABLE C. A. GUITTARD:

13 Single page.

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

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

3 HONORABLE C. A. GUITTARD:

4 Well, I would say that instead of saying that
5 the attorney in charge of the trial court is
6 deemed to be the attorney in charge on appeal,
7 the rule would say, "The attorney in charge
8 for a party in a proceeding in an appellate
9 court, other than an appellant, is the
10 attorney whose signature first appears on the
11 first document filed on behalf of that party
12 in the appellate court. Any party may
13 designate an attorney in charge or a different
14 attorney in charge by filing a notice stating
15 the name, mailing address, telephone number,
16 telecopier number, and State Bar of Texas
17 identification number of the attorney being
18 designated as the attorney in charge. The
19 attorney in charge may also designate one
20 other attorney for that party to receive
21 notices and a copy."

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

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

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

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

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

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

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

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

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

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

22 MR. YELENOSKY: Right.

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

1 represent at the trial.

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

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

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

7 MR. YELENOSKY: That's clear.

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

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

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

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

10 MR. YELENOSKY: Right.

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

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

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

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

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

3 PROFESSOR DORSANEO:

4 Mr. Chairman?

5 CHAIRMAN SOULES: Yes, sir.

6 Bill Dorsaneo.

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

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

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

1 court."

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

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

13 JUSTICE CORNELIUS: For the
14 purpose of receiving notices.

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

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

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

22 JUSTICE CORNELIUS:
23 Non-representation.

24 CHAIRMAN SOULES: Sarah Duncan.

25 HONORABLE SARAH DUNCAN: I

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

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

18 CHAIRMAN SOULES: Scott McCown.

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

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

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

23 CHAIRMAN SOULES: Steve

24 Yelenosky.

25 MR. YELENOSKY: Well, I am not

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

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

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

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

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

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

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

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

24 MR. ORSINGER: That's right.

25 CHAIRMAN SOULES: You are just

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

6 HONORABLE SARAH DUNCAN: You're
7 stuck.

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

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

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

3 HONORABLE F. SCOTT MCCOWN:

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

14 CHAIRMAN SOULES: I do.

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

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

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

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

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

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

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

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

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

21 MR. ORSINGER: No. No.

22 HONORABLE F. SCOTT MCCOWN: No.

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

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

3 HONORABLE F. SCOTT MCCOWN:

4 What about in enforcement actions?

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

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

13 CHAIRMAN SOULES: I do.

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

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

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

