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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

MARCH 18, 1995

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

ORIGINAL

MARCH 18, 1995

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS PRESENT:

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

Also present:

Lee Parsley
Holly Duderstadt

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS ABSENT:

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

SUPREME COURT ADVISORY COMMITTEE
MARCH 18, 1995

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

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

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

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

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

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

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

1 requires the entire record.

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

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

18 CHAIRMAN SOULES: Judge Duncan.

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

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

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

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

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

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

1 designated. That's the theory here.

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

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

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

1 that without regard to the need for it.

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

6 CHAIRMAN SOULES: Judge Duncan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: That's right.

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

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

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

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

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

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

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

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

8 CHAIRMAN SOULES: Something
9 like that.

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

19 CHAIRMAN SOULES: Richard
20 Orsinger.

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

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

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

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

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

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

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

24 CHAIRMAN SOULES: David
25 Jackson.

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

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

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

1 because of the presumptions right now.

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

5 HONORABLE SARAH DUNCAN: And
6 charge error.

7 CHAIRMAN SOULES: And charge
8 error.

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

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

25 CHAIRMAN SOULES: Sarah Duncan.

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

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

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

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

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

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

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

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

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

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

1 based on that?

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

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

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

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

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

1 MR. ORSINGER: Vote against it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. ORSINGER: Okay.

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

24 HONORABLE SARAH DUNCAN: Yes.

25 CHAIRMAN SOULES: Okay. Those

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

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

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

10 CHAIRMAN SOULES: The
11 administrative appeal.

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

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

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

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

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

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

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

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

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

25 Steve, do you have a question?

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

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

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

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

15 MS. BARON: Right.

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

18 MS. BARON: Right.

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

21 HONORABLE C. A. GUITTARD:
22 Sarah.

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

1 Austin Court of Appeals problem?

2 HONORABLE C. A. GUITTARD:

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

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

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

20 HONORABLE C. A. GUITTARD:

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

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

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

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

16 CHAIRMAN SOULES: Richard
17 Orsinger.

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

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

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

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

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

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

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

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

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

3 CHAIRMAN SOULES: Steve
4 Yelenosky.

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

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

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

15 CHAIRMAN SOULES: Joe Latting.

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

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

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

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

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

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

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

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

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

19 CHAIRMAN SOULES: Judge Duncan.

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

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

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

16 CHAIRMAN SOULES: Joe Latting.

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

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

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

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

12 CHAIRMAN SOULES: Where would
13 that be placed?

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

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

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

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

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

1 HONORABLE C. A. GUITTARD:

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

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

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

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

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

20 CHAIRMAN SOULES: Within 30
21 days of what?

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

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

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

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

22 CHAIRMAN SOULES: Joe Latting.

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

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

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

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

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

17 HONORABLE C. A. GUITTARD: Yes.

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

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

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

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

3 CHAIRMAN SOULES: Judge Duncan.

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

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

12 CHAIRMAN SOULES: Richard
13 Orsinger.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Steve Yelenosky.

