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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.

COPY

MARCH 18, 1995

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS PRESENT:

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

Also present:

Lee Parsley
Holly Duderstadt

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS ABSENT:

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

SUPREME COURT ADVISORY COMMITTEE
MARCH 18, 1995

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

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

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

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

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

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

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

1 requires the entire record.

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

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

18 CHAIRMAN SOULES: Judge Duncan.

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

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

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

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

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

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

1 designated. That's the theory here.

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

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

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

1 that without regard to the need for it.

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

6 CHAIRMAN SOULES: Judge Duncan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: That's right.

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

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

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

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

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

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

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

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

8 CHAIRMAN SOULES: Something
9 like that.

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

19 CHAIRMAN SOULES: Richard
20 Orsinger.

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

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

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

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

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

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

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

24 CHAIRMAN SOULES: David
25 Jackson.

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

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

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

1 because of the presumptions right now.

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

5 HONORABLE SARAH DUNCAN: And
6 charge error.

7 CHAIRMAN SOULES: And charge
8 error.

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

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

25 CHAIRMAN SOULES: Sarah Duncan.

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

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

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

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

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

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

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

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

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

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

1 based on that?

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

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

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

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

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

1 MR. ORSINGER: Vote against it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. ORSINGER: Okay.

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

24 HONORABLE SARAH DUNCAN: Yes.

25 CHAIRMAN SOULES: Okay. Those

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

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

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

10 CHAIRMAN SOULES: The
11 administrative appeal.

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

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

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

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

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

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

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

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

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

25 Steve, do you have a question?

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

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

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

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

15 MS. BARON: Right.

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

18 MS. BARON: Right.

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

21 HONORABLE C. A. GUITTARD:
22 Sarah.

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

1 Austin Court of Appeals problem?

2 HONORABLE C. A. GUITTARD:

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

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

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

20 HONORABLE C. A. GUITTARD:

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

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

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

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

16 CHAIRMAN SOULES: Richard
17 Orsinger.

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

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

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

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

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

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

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

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

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

3 CHAIRMAN SOULES: Steve
4 Yelenosky.

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

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

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

15 CHAIRMAN SOULES: Joe Latting.

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

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

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

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

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

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

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

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

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

19 CHAIRMAN SOULES: Judge Duncan.

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

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

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

16 CHAIRMAN SOULES: Joe Latting.

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

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

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

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

12 CHAIRMAN SOULES: Where would
13 that be placed?

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

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

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

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

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

1 HONORABLE C. A. GUITTARD:

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

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

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

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

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

20 CHAIRMAN SOULES: Within 30
21 days of what?

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

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

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

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

22 CHAIRMAN SOULES: Joe Latting.

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

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

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

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

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

17 HONORABLE C. A. GUITTARD: Yes.

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

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

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

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

3 CHAIRMAN SOULES: Judge Duncan.

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

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

12 CHAIRMAN SOULES: Richard
13 Orsinger.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Steve Yelenosky.

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

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

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

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: Okay.

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

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

19 HONORABLE C. A. GUITTARD:
20 Okay.

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

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

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

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

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

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

19 MR. YELENOSKY: Yes.

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

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

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

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

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

12 CHAIRMAN SOULES: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. LATTING: How about just

1 "Direct Appeals"?

2 HONORABLE C. A. GUITTARD:

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

4 CHAIRMAN SOULES: How about
5 Steve's words, "Direct Appeals from
6 Administrative Decisions."

7 HONORABLE SARAH DUNCAN:
8 Certain administrative decisions.

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

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

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

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

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

20 CHAIRMAN SOULES: What was
21 that, Judge?

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

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

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

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

5 CHAIRMAN SOULES: Okay. Judge
6 Duncan.

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

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

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

21 MR. LATTING: Wonderful.

22 MR. YELENOSKY: Right.

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

1 PROFESSOR DORSANEO: One?

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

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

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

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

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

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

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

21 PROFESSOR DORSANEO: Seven was
22 done.

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

25 HONORABLE C. A. GUITTARD: And

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

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

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

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

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

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

24 HONORABLE C. A. GUITTARD: Yes.

25 CHAIRMAN SOULES: Insert this

1 from Item 8.

2 Okay. Any objection to that.

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

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

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

10 HONORABLE C. A. GUITTARD:

11 Well, I think that's --

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

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

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

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

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

3 No. 9.

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

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

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

11 CHAIRMAN SOULES: Page 75.

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

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

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

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

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

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

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

1 Rule 54(a)."

2 Okay. Item No. 10.

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

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

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

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

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

1 significance.

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

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

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

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

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

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

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

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

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

7 HONORABLE C. A. GUITTARD:
8 Yeah.

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

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

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

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

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

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

1 said.

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

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

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

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

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

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

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

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

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

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

22 CHAIRMAN SOULES: Judge Duncan.

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

1 erased.

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

4 CHAIRMAN SOULES: Sure.

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

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

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

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

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

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

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

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

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

1 reporter.

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

6 What's the style of that case again?

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

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

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

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

16 CHAIRMAN SOULES: Steve
17 Yelenosky.

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

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

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

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

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

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

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

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

1 omitted matters."

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

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

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

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

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

25 HONORABLE C. A. GUITTARD: On

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

3 CHAIRMAN SOULES: (c).

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

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

8 HONORABLE C. A. GUITTARD:
9 Right.

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

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

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

1 clerk?

2 HONORABLE C. A. GUITTARD: Yes.

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

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

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

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

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

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

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

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

3 CHAIRMAN SOULES: Anyone else?

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

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

9 Okay. No. 13.

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

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

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

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

12 HONORABLE C. A. GUITTARD: Yes.

13 CHAIRMAN SOULES: As modified
14 in the handout?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 Richard Orsinger.

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

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

3 HONORABLE C. A. GUITTARD: Yes.

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

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

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

19 CHAIRMAN SOULES: Then what?

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

24 CHAIRMAN SOULES: Any other
25 discussion? Bill.

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

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

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

25 CHAIRMAN SOULES: Any other

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

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

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

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

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

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

23 HONORABLE C. A. GUITTARD:
24 Right.

25 CHAIRMAN SOULES: And those new

1 words are?

2 HONORABLE C. A. GUITTARD:

3 "Before the date set for submission."

4 CHAIRMAN SOULES: Any objection
5 to that?

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

8 CHAIRMAN SOULES: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 CHAIRMAN SOULES: Okay. Judge

1 Duncan.

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

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

8 CHAIRMAN SOULES: Judge
9 Guittard.

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

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

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

22 CHAIRMAN SOULES: Judge
23 Cornelius.

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

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

6 MR. ORSINGER: 30 plus 25.

7 CHAIRMAN SOULES: All right.
8 How do we write that?

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

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

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

19 CHAIRMAN SOULES: 25 days after
20 what?

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

23 PROFESSOR DORSANEO: That's
24 good.

25 MR. ORSINGER: Is that "is" or

1 "was"?

2 JUSTICE CORNELIUS: Was. Was
3 due.

4 MR. ORSINGER: Was due.

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

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

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

22 CHAIRMAN SOULES: Okay. Sarah
23 Duncan.

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

1 that we delete subdivision (i).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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CHAIRMAN SOULES: Judge

Brister, and then we'll come around the table

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

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

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

1 publish them.

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

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

20 CHAIRMAN SOULES: Alex.

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

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

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

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

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

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

23 CHAIRMAN SOULES: Sarah Duncan.

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

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

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

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

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

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

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

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

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

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

14 CHAIRMAN SOULES: Anything
15 else? Steve.

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

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

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

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

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

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

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

11 CHAIRMAN SOULES: Judge
12 Brister.

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

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

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

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

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

16 CHAIRMAN SOULES: David Perry.

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

25 On the other hand, it's nonsensical that

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

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

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

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

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

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

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

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

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

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

14 CHAIRMAN SOULES: Okay. Steve
15 Yelenosky.

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

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

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

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

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

1 them with these short opinions many times.

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

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

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: Sarah Duncan.

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

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

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

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

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

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

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

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

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

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

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

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

1 decide it that way."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Okay. Anything new on this now?

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

1 CHAIRMAN SOULES: Judge
2 Guittard.

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

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

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

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

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

1 CHAIRMAN SOULES: Okay.

2 There's no problem with that.

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

5 CHAIRMAN SOULES: Okay. Sarah
6 Duncan.

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

13 HONORABLE C. A. GUITTARD:
14 Right.

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

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

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

1 new on this, David?

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

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

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

10 CHAIRMAN SOULES: Alex
11 Albright.

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

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

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

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

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

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

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

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

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

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

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

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

1 never get to something somebody else proposed.

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

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

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

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

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

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

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

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

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

11 JUSTICE HECHT: It doesn't
12 work.

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

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

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

25 (At this time there was a

1 recess.)

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

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

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

13 MR. YELENOSKY: Parties.

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

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

19 MR. YELENOSKY: All parties.

20 CHAIRMAN SOULES: Okay. And
21 all parties.

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

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

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

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

9 Okay. Going around the table. Bill.

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

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

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

24 Okay. Are not authoritative what?

25 PROFESSOR DORSANEO: Precedent.

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

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

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

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

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

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

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

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

25 MR. ORSINGER: Well, maybe

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

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

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

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

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

17 HONORABLE SARAH DUNCAN: Oh,
18 no.

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

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

25 CHAIRMAN SOULES: Any objection

1 to that amendment?

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

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

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

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

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

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

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

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

5 CHAIRMAN SOULES: All right.

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

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

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

20 Now, that's the proposed amendment.

21 MR. LATTING: Second.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Okay. Next is Item 16.

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

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

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

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

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

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

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

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

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

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

1 from the Clerk of the Supreme Court."

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

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

6 JUSTICE CORNELIUS: Archaic.

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

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

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

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

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

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

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

25 PROFESSOR DORSANEO: I think

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

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

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

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

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

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

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

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

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

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

16 PROFESSOR DORSANEO: So this is
17 informational.

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

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

25 CHAIRMAN SOULES: Okay.

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

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

8 PROFESSOR DORSANEO: Well, it
9 has.

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

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

21 MR. ORSINGER: Luke.

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

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

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

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

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

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

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

16 MR. ORSINGER: Let's just --

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

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

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

3 PROFESSOR DORSANEO: And just
4 keep going.

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

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

10 PROFESSOR DORSANEO:
11 Appropriate amount as damages.

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

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

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

23 PROFESSOR DORSANEO: It was
24 changed in 1990.

25 CHAIRMAN SOULES: Okay. Now,

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

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

6 CHAIRMAN SOULES: On page
7 what?

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

10 CHAIRMAN SOULES: Page 166 in
11 the materials?

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

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

1 The reason for striking that is that
2 that's already required in the briefs, so
3 there's no use to require that to be put in
4 again in the motion for rehearing.

5 The party filing such motion shall serve
6 on each party to the trial court's final
7 judgment or the attorney of record a true copy
8 of the motion. Well, of course, that's also
9 superfluous because service is elsewhere
10 provided.

11 Now, the next subdivision, "Notice of
12 Motion. Upon filing a motion" --

13 CHAIRMAN SOULES: Hold on.
14 Now, what you're saying is that in Rule 190(b)
15 we're going to retain the first sentence only
16 of the present rule?

17 HONORABLE C. A. GUITTARD: And
18 strike the rest.

19 CHAIRMAN SOULES: And delete
20 the remainder?

21 HONORABLE C. A. GUITTARD:
22 Okay. And in subdivision (c), let's see, all
23 of paragraph (c) would be deleted.

24 CHAIRMAN SOULES: (c) is
25 deleted?

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

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

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

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

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

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

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

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

25 CHAIRMAN SOULES: Of the

1 motion.

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

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

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

10 PROFESSOR DORSANEO: Make it
11 10 days.

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

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

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

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

21 HONORABLE C. A. GUITTARD:
22 Right.

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

25 HONORABLE C. A. GUITTARD:

1 Right.

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

4 HONORABLE C. A. GUITTARD:
5 Yeah.

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

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

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

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

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

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

1 carries.

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

5 PROFESSOR DORSANEO: It's 190.

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

10 Okay. Item 20.

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

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

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

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

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

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

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

1 HONORABLE C. A. GUITTARD:

2 Okay.

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

17 HONORABLE C. A. GUITTARD:

18 That's all right with me.

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

23 HONORABLE C. A. GUITTARD: I
24 would suppose you would have a form. And as
25 it is here, you would just check off -- check

1 "preserved" or "not preserved."

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

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

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

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

18 HONORABLE C. A. GUITTARD: Yes.

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

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

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

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

8 JUSTICE CORNELIUS: Right. The
9 current ones.

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

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

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

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

4 HONORABLE C. A. GUITTARD: No.

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

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

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

1 Judge Duncan.

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

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

15 CHAIRMAN SOULES: Alex
16 Albright.

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

1 the word that's used.

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

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

16 JUSTICE CORNELIUS: Right.

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

22 PROFESSOR ALBRIGHT: Well, is
23 it significant?

24 CHAIRMAN SOULES: Richard
25 Orsinger.

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

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

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

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

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

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

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

17 HONORABLE C. A. GUITTARD:
18 You're right.

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

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

25 CHAIRMAN SOULES: As a result

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

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

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

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

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

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

22 MR. ORSINGER: Judgment and all
23 opinions?

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

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

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

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

13 CHAIRMAN SOULES: As far as I
14 know.

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

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

20 PROFESSOR ALBRIGHT: Records of
21 the case.

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

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

1 defined."

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

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

8 CHAIRMAN SOULES: To what?

9 PROFESSOR DORSANEO:
10 (Indicating).

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

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

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

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

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

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

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

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

1 used and substitute the word "papers"?

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

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

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

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

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

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

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

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

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

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

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

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

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

3 CHAIRMAN SOULES: Okay. Is
4 "the record" defined anywhere in this order?

5 MR. PARSLEY: Well, I only
6 refer to "record on appeal." I don't ever
7 refer to "the record." I refer to "the record
8 on appeal," which is defined in (a)(2) as
9 being the record on appeal from 50(a).

10 MR. ORSINGER: Why do we even
11 need to discuss that? If we define "papers"
12 to be things that are in the custody of the
13 court of appeals, we don't care where they
14 look or whether they came back. What we're
15 destroying is papers in the court of appeals.
16 And if they're in the Supreme Court or the
17 trial court, they don't get destroyed.

18 MR. PARSLEY: Well, the answer
19 to your question is, and maybe that points up
20 your problem, is that part (c) talks about
21 destruction of papers in the Supreme Court as
22 well. This order does not just apply to the
23 courts of appeals. The proposed order applies
24 to the Supreme Court and the courts of
25 appeals.

1 CHAIRMAN SOULES: The words
2 "the record" are used several times in (c).

3 MR. ORSINGER: We don't need to
4 use it, though, is my point, Luke. Why don't
5 we just say "papers," and then we'll just say
6 papers in the court of appeals can be
7 destroyed under the following circumstances;
8 papers in the Supreme Court can be destroyed
9 under the following circumstances. And let's
10 not worry about where they went or where they
11 came from. If they're there, they get
12 destroyed; and if they're not there, then we
13 don't worry about them. Wouldn't that be a
14 way to avoid the definitional problem?

15 PROFESSOR ALBRIGHT: Lee, what
16 is the "record on appeal" that you're talking
17 about? The transcript and the statement of
18 facts? Then why don't we just say "the
19 transcript and the statement of facts"?

20 MR. PARSLEY: I would say
21 transcript and statement of facts as
22 supplemented, because you can supplement
23 those, and so maybe that clears it up some.

24 MR. ORSINGER: Can I inquire,
25 are the transcript and statement of facts

1 included in "papers" as we've defined it?

2 HONORABLE C. A. GUITTARD: Yes.

3 MR. ORSINGER: Then why do we
4 even need to discuss it?

5 CHAIRMAN SOULES: Okay. Let's
6 start with Part (1) and see how inclusive it
7 is, and we're going to use the words "Papers
8 defined."

9 HONORABLE C. A. GUITTARD:
10 Statement of facts, briefs, motions?

11 CHAIRMAN SOULES: "Papers
12 defined. 'Papers' are all documents" -- and
13 I'm just trying to get this moving. I'm not
14 trying to necessarily do this, if anybody has
15 got an objection. "'Papers' are all documents
16 included in the transcript or in the statement
17 of facts and any other papers or items made
18 part of the record on appeal."

19 HONORABLE SARAH DUNCAN: No.
20 You can't use "record on appeal."

21 CHAIRMAN SOULES: Part of the
22 what then?

23 HONORABLE SARAH DUNCAN:
24 Appellate file. Case file.

25 CHAIRMAN SOULES: Of the

1 appellate case file?

2 HONORABLE C. A. GUITTARD: Just
3 say "any other papers or items filed."

4 CHAIRMAN SOULES: Any other
5 papers or items filed.

6 MR. ORSINGER: Filed or
7 presented for filing.

8 CHAIRMAN SOULES: Filed or
9 presented for filings in a court of appeals.
10 Filed or presented for filing and received in
11 an appellate court.

12 So we strike "'court records' include
13 the 'record on appeal.'" Strike all of
14 (2)?

15 PROFESSOR ALBRIGHT: I think
16 that's up to Lee. Lee, do we need to
17 distinguish the record on appeal?

18 MR. PARSLEY: We've got to,
19 because in part (c) they do some things with
20 the record on appeal that they don't do with
21 the other items that we defined as "papers."

22 PROFESSOR ALBRIGHT: So we
23 could say "'Papers' include the 'record on
24 appeal,'" and then "The 'record on appeal' is
25 defined as the transcript and statement of

1 facts as supplemented."

2 CHAIRMAN SOULES: "Papers"
3 include the "record on appeal"?

4 MR. ORSINGER: Well, you don't
5 need to say that, because that follows from
6 our definition of papers, because the record
7 on appeal is filed in the court of appeals.

8 CHAIRMAN SOULES: Well, he's
9 wanting to define -- okay. So we don't need
10 that sentence, but we do need (2), which says
11 "record on appeal" means transcript and
12 statement of facts, because he uses that as
13 defined -- the record on appeal is the
14 transcript and statement of facts as
15 supplemented. And all supplements.

16 Okay. So "papers" are defined in the
17 first sentence under (1) to the period.
18 Delete "'Court records' include the 'record
19 on appeal.'" Then say "'Record on Appeal'
20 defined. The 'record on appeal' is the
21 transcript and statement of facts and all
22 supplements." Does that do it?

23 PROFESSOR ALBRIGHT: It may
24 actually sound better to use the term -- make
25 it "court papers" instead of just "papers."

1 CHAIRMAN SOULES: Court
2 papers. Okay. We'll change the title to
3 "Court Papers."

4 Okay. Now, what do we need to do from
5 there?

6 MR. ORSINGER: Change "court
7 records" to "court papers."

8 CHAIRMAN SOULES: Well, we've
9 got to go through all of this then.

10 HONORABLE C. A. GUITTARD: So
11 where it says "records of the case" in
12 item (2), it should be "court papers"?

13 MR. ORSINGER: Yes.

14 CHAIRMAN SOULES: No. That's
15 the record on appeal, because that's used
16 later as a term of art.

17 MR. ORSINGER: Not in
18 subdivision (2). It's records of the case. I
19 think they mean "court papers" there.

20 CHAIRMAN SOULES: Okay.

21 MR. ORSINGER: In (b)(1),
22 change "court records" to "court papers."

23 CHAIRMAN SOULES: Court papers.
24 Anything else on (1) other than "records" to
25 "papers" in the second line? Nothing else?

1 Good. No. (2).

2 MR. ORSINGER: Okay. On the
3 third line.

4 CHAIRMAN SOULES: The third
5 line, "whether the court papers of the case."

6 MR. ORSINGER: Court papers.

7 HONORABLE C. A. GUITTARD: I
8 suggest that in the second line strike "which"
9 and insert "that."

10 "Immediately after the final disposition
11 of an appeal or other proceeding, the panel
12 that decided the case shall determine."

13 CHAIRMAN SOULES: "That."
14 Okay. (3). Anything on (3)?

15 MR. ORSINGER: The second line.

16 CHAIRMAN SOULES: Court papers.

17 MR. ORSINGER: And then on the
18 third line.

19 CHAIRMAN SOULES: Okay. (4).

20 MR. ORSINGER: Second line.

21 MR. YELENOSKY: And then on the
22 fourth line, it says "papers or exhibits," and
23 we've already defined "papers" to essentially
24 include exhibits.

25 MR. ORSINGER: This is

1 different. Aren't we saying that exhibits
2 will be sent out to the parties on request?
3 It's handled a little bit differently, isn't
4 it?

5 PROFESSOR ALBRIGHT: These are
6 papers and exhibits outside of the defined
7 term "court papers."

8 HONORABLE SARAH DUNCAN:
9 Shouldn't it just be original exhibits? It
10 shouldn't be original papers, because that
11 would mean original motions and things likes
12 original briefs.

13 PROFESSOR ALBRIGHT: It seems
14 like it would only be exhibits.

15 MR. ORSINGER: And not just
16 original exhibits, because we send copies up
17 most of the time.

18 MR. PARSLEY: The point here is
19 that Rules 51 and 53, if I'm correct, Judge
20 Guittard, which we have already approved in
21 this Committee, require the trial court to
22 make an order for the preservation,
23 safekeeping, and return of any original papers
24 or original exhibits that are sent on to the
25 court of appeals. The idea here is that since

1 the trial court has ordered that these things
2 should be returned, or under our rules should
3 have ordered that, that we have to provide
4 that the appellate court will do that, will
5 return to the trial court the original papers
6 or exhibits.

7 CHAIRMAN SOULES: That's what
8 this is designed to do under (4).

9 MR. PARSLEY: That's the
10 point. It may not have done it right, but
11 that's the point.

12 CHAIRMAN SOULES: So we just
13 need to change it to "court papers" in the
14 second line, and then that works. (4) works.

15 PROFESSOR ALBRIGHT: Should we
16 refer to those rules in (4)?

17 MR. PARSLEY: It wouldn't hurt.

18 CHAIRMAN SOULES: Okay.

19 MR. YELENOSKY: You have a
20 second reference to "record on appeal."

21 MR. ORSINGER: Yeah. Lee, I
22 think we need to change that, because we talk
23 about "included in the record on appeal," and
24 remember, "the record" now includes what's in
25 the trial court, so maybe we ought to say

1 "filed in the appellate court" or something
2 like that.

3 CHAIRMAN SOULES: "Without
4 regard to the determination of whether the
5 records of a case should be permanently
6 preserved, within thirty days after final
7 disposition of an appeal, pursuant to" -- what
8 rules, Lee?

9 MR. PARSLY: 51. The original
10 papers are under 51.

11 HONORABLE SARAH DUNCAN: We've
12 taken "papers" out on Page 86,
13 subdivision (m).

14 CHAIRMAN SOULES: Excuse me,
15 just a minute. Let me try to get this one
16 point down.

17 MR. PARSLY: Original papers
18 are in 51(d).

19 CHAIRMAN SOULES: 51(d)?

20 MR. PARSLY: Correct.

21 CHAIRMAN SOULES: So "Without
22 regard to the determination of whether the
23 records of a case should be permanently
24 preserved, within thirty days after final
25 disposition of an appeal, any original papers

1 or exhibits included in the record on
2 appeal" -- I don't know if we're keeping
3 that -- "shall be returned to the trial court
4 pursuant to Rule 51(d)."

5 MR. PARSLEY: Original
6 exhibits, I'm sorry, are under 53(m).

7 CHAIRMAN SOULES: 53(m). So
8 pursuant to Rule 51(d) and 53(m).

9 Now, what else on (4)? Judge Duncan.

10 HONORABLE SARAH DUNCAN: That
11 was it. We've changed "record on appeal" to
12 "court papers."

13 CHAIRMAN SOULES: "Any original
14 papers or exhibits." And we should probably
15 strike "including the record on appeal"
16 completely. "Any original papers or exhibits
17 shall be returned pursuant to those rules."
18 Doesn't that take care of it?

19 PROFESSOR ALBRIGHT: What if
20 you said "exhibits sent to the appellate court
21 under Rules 51(d) or 53(m)"?

22 HONORABLE SARAH DUNCAN: Well,
23 actually why wouldn't we leave it "record on
24 appeal," because that is only the transcript
25 and the statement of facts, which includes the

1 exhibits. Well, we've redefined that. Never
2 mind.

3 MR. ORSINGER: What's wrong
4 with just leaving "included in the record on
5 appeal" out altogether?

6 CHAIRMAN SOULES: Just strike
7 it. Just strike it and put the rules in,
8 because the rules -- it takes us back to the
9 rule.

10 PROFESSOR ALBRIGHT: But it
11 seems to me like it should refer to 51(d) and
12 53(m), because that makes it clear that it's a
13 special circumstance where the trial court has
14 sent these to --

15 CHAIRMAN SOULES: Yeah. And I
16 wrote that in.

17 PROFESSOR ALBRIGHT: Okay.

18 CHAIRMAN SOULES: Right after
19 "trial court" in the next to the last line,
20 "trial court, pursuant to 51(d) and 53(m).
21 The appellate court may, but is not required
22 to, copy those papers" and so forth.

23 Okay. Now (5). (5) is okay.

24 MR. ORSINGER: No. It's got
25 "records" in there. "All other court

1 papers."

2 CHAIRMAN SOULES: "All other
3 court papers."

4 (6).

5 HONORABLE C. A. GUITTARD: Now,
6 there's a problem with (6). Let me just --
7 this term, "permanent value" -- instead of
8 "permanent value," that term came from an
9 earlier draft where "permanent value" was
10 used, but now the draft reads "records that
11 should be permanently preserved."

12 So it will be necessary to change this to
13 read, (1) destroy the papers which the court
14 decides, finally decides should not be
15 preserved; and (2), return the records of a
16 case -- the papers in a case that the court
17 finds should be permanently preserved over to
18 the State Archives.

19 CHAIRMAN SOULES: Okay. (1)
20 says, "Destroy the papers the court
21 determines."

22 HONORABLE C. A. GUITTARD:
23 Should not be permanently preserved, and turn
24 over to the State Archives.

25 CHAIRMAN SOULES: Just a

1 minute, sorry. "Should not be permanently
2 preserved." And then (2) is okay?

3 HONORABLE C. A. GUITTARD:
4 Well, no. And (2), turn over to the State
5 Archives the papers that the court finds
6 should be permanently preserved.

7 CHAIRMAN SOULES: Turn over to
8 the State Archives the what?

9 HONORABLE C. A. GUITTARD: The
10 papers, the court papers that the court finds
11 should be permanently preserved or has found
12 should be permanently preserved.

13 CHAIRMAN SOULES: Okay. (c).

14 MR. ORSINGER: Before we go on,
15 can I ask you one question?

16 CHAIRMAN SOULES: Yes, sir.

17 MR. ORSINGER: On
18 subdivision (5), it is unclear to me what
19 papers, if any, fit in subdivision (5) or why
20 we even have a subdivision (5). We've talked
21 about all other papers, so do we need "other
22 than original papers and exhibits"? And if
23 so, then --

24 HONORABLE C. A. GUITTARD:
25 Other than as stated in (4)?

1 MR. ORSINGER: Yeah. If that's
2 other than as stated in (4), we've got to fold
3 that sentence into the end of (4), because
4 "other" could mean other than (1), (2), (3),
5 and (4). And I think (1) through (4) include
6 everything.

7 CHAIRMAN SOULES: It doesn't
8 include the decision.

9 MR. ORSINGER: Well, we've
10 defined "court papers," and then we tell them
11 to make an initial determination and then a
12 subsequent determination, and then we say all
13 other papers are to be held until they're to
14 be destroyed.

15 CHAIRMAN SOULES: Until an
16 ultimate disposition, and then that's defined.

17 MR. ORSINGER: See, the problem
18 I have is "other than." Other than what? It
19 seems to me that if "other than" means other
20 than in (4), then why don't we put this
21 sentence at the end of (4) and not make it a
22 separate subdivision.

23 HONORABLE C. A. GUITTARD:
24 What's the point there, Lee?

25 MR. PARSLEY: He's correct.

1 The "other" was referring back to (4), and
2 perhaps we should change the caption of (4) to
3 include (5) as a sentence in paragraph (4).

4 CHAIRMAN SOULES: So what do we
5 change the caption in (4) to say?

6 HONORABLE C. A. GUITTARD:
7 Well, "original papers and exhibits" is all
8 right, isn't it, even though we've already had
9 that?

10 CHAIRMAN SOULES: Do we need to
11 change the caption, Lee?

12 MR. PARSLEY: Well, I think we
13 do.

14 MR. PERRY: Maybe "Original
15 papers and exhibits" ought to be No. (1),
16 because everything else does not apply to
17 that.

18 MR. YELENOSKY: That's right.

19 MR. ORSINGER: Yeah. That's an
20 excellent point.

21 CHAIRMAN SOULES: Okay. So
22 (4) becomes (1), and then (1) becomes (2),
23 right, (2) becomes (3), (3) becomes (4)?

24 MR. ORSINGER: We don't need
25 section (5) then. That sentence is completely

1 unnecessary if we put that first.

2 MR. PERRY: Well, (5) really
3 defines everything that the remainder of it
4 talks about.

5 MR. ORSINGER: We don't need
6 to, though, because if it's not handled by
7 (1), it's handled by (2).

8 MR. PARSLEY: No. (1) and (2)
9 are intended only to tell the court to make
10 the determination. What the determination is
11 and when to make it is what (1), (2) and (3)
12 are intended to do.

13 (5) was intended to say -- now that
14 you've made the determination, (5) and (6)
15 were intended to say now what disposition you
16 make depending on that determination.

17 HONORABLE SARAH DUNCAN: Can I
18 suggest that (5) might should be (2)?

19 HONORABLE C. A. GUITTARD: No.
20 It seems to me that (1), (2), and 3 should
21 stay as they are. And (4) and (5) should be
22 put together.

23 CHAIRMAN SOULES: I think
24 that's what Lee is saying. (1), (2), and (3)
25 have to do with getting a decision made, and

1 then --

2 HONORABLE C. A. GUITTARD:

3 That's right.

4 CHAIRMAN SOULES: Okay. So the
5 numbering will be as in original.

6 Okay. So this is (4). And then if we
7 just move the sentence that's in (5) to the
8 end of (4), do we need to change any caption?

9 HONORABLE SARAH DUNCAN: Yes.

10 CHAIRMAN SOULES: Okay. What
11 should it say?

12 HONORABLE SARAH DUNCAN: Well,
13 I think if you merge those two, I think you
14 are losing the emphasis that is now being
15 placed on treating original exhibits and
16 papers differently from all other papers.

17 CHAIRMAN SOULES: What's the
18 purpose of this, Lee? How do we fix this so
19 that it says what you envision it as saying?

20 MR. PARSLEY: Well, I think the
21 easiest fix is to leave it as is, not combine
22 (4) and (5), and say in (5) that "The
23 appellate court shall keep and preserve all
24 other papers, other than original papers and
25 exhibits, until their ultimate disposition as

1 prescribed herein."

2 MR. YELENOSKY: So then why did
3 we abandon moving that up to the front? Since
4 you're saying we're not going to talk about
5 this, you're sending it back, now let's talk
6 about the stuff you have to make a
7 determination about.

8 HONORABLE C. A. GUITTARD:
9 Well, the general rules, rules (1), (2) and
10 (3), are general with respect to all papers,
11 the briefs, the transcript, statement of
12 facts, everything. (4) just concerns a
13 special situation where there are original
14 papers or original exhibits in the court of
15 appeals. And that's a different disposition
16 than the general disposition of the papers, so
17 that should follow the others.

18 CHAIRMAN SOULES: Then we're
19 saying the court shall keep and preserve all
20 papers except duplicates and original papers
21 or exhibits?

22 MR. ORSINGER: Why can't
23 you just say, "Except as provided in
24 subdivision (b)(4), the appellate court shall
25 keep and preserve all other court papers,

1 except duplicates, until their ultimate
2 disposition"?

3 HONORABLE C. A. GUITTARD: Yes,
4 that's fine. Except I don't think then you
5 would need the word "other."

6 MR. ORSINGER: Take "other"
7 out. Yeah. "Except as in provided in
8 subdivision (b)(4), the appellate court shall
9 keep and preserve all court papers."

10 HONORABLE C. A. GUITTARD:
11 Yeah, except duplicates, until their ultimate
12 disposition as prescribed herein.

13 CHAIRMAN SOULES: Subject to
14 paragraph (4)?

15 MR. ORSINGER: No. Except
16 as -- what have we got --

17 CHAIRMAN SOULES: But we've got
18 except, except, except.

19 MR. ORSINGER: Okay. Whatever.

20 CHAIRMAN SOULES: "Pursuant to
21 paragraph (b)(4) above, the appellate court
22 shall keep and preserve all other" --

23 MR. ORSINGER: No. Kill
24 "other."

25 CHAIRMAN SOULES: -- "preserve

1 all court papers, except duplicates, until
2 their ultimate disposition prescribed herein."

3 HONORABLE C. A. GUITTARD:

4 Right.

5 CHAIRMAN SOULES: And then
6 we've got ultimate disposition, and we talked
7 about that.

8 Now we've got the Supreme Court. "In the
9 Supreme Court, the following disposition is
10 made of court papers."

11 Reverse and remand. The Supreme Court
12 returns the -- what? Returns what? Returns
13 the record on appeal. We've defined that.
14 (Continuing) -- to the court of appeals. The
15 court of appeals shall then dispose of the,
16 what, record on appeal? Of the court papers?

17 MR. YELENOSKY: Court papers.

18 CHAIRMAN SOULES: In accordance
19 with paragraph (b). The Supreme Court keeps
20 and preserves all other items which constitute
21 what? How about "The Supreme Court keeps and
22 preserves all other items except duplicates."
23 Would that work, Lee?

24 PROFESSOR ALBRIGHT: Wait a
25 minute. The Supreme Court keeps and preserves

1 court papers in its -- in that court.

2 CHAIRMAN SOULES: All other
3 items. It's just everything that's left.

4 MR. PARSLEY: I think that's
5 fine, Luke.

6 CHAIRMAN SOULES: "All other
7 items except duplicates."

8 MR. PARSLEY: Until they are.

9 CHAIRMAN SOULES: "Until they
10 are turned over to the State Archive."

11 MR. ORSINGER: That means
12 everything that the Supreme Court keeps is
13 permanently saved forever, no discretion?

14 MR. PARSLEY: That's how it
15 works today.

16 CHAIRMAN SOULES: "Keeps and
17 preserves all court papers of that case"?

18 MR. PARSLEY: All court papers
19 of that case.

20 CHAIRMAN SOULES: "Until those
21 court papers are turned over to the State
22 Archive."

23 Okay. "In all other cases, the Supreme
24 Court returns the record on appeal to the
25 court of appeals, keeps and preserves all

1 other court papers of that case, except
2 duplicates, until they are turned over to the
3 State Archive."

4 Okay. Does that get there, Lee?

5 MR. PARSLEY: Yes.

6 CHAIRMAN SOULES: Okay. Any
7 other comments on the Order of the Supreme
8 Court Regarding Disposition of Court Papers in
9 Civil Cases?

10 Okay. Any opposition to this being
11 recommended to the Supreme Court? There's no
12 opposition, so it will be recommended.

13 Where do we put it in our papers? In the
14 back? It goes after -- it should be following
15 181. Following 181.

16 MR. ORSINGER: Question.

17 CHAIRMAN SOULES: Question.

18 Okay.

19 MR. ORSINGER: This is just
20 going to be a miscellaneous docket order, and
21 it will not be in anybody's version of the
22 rules of procedure. Is that what this means?

23 CHAIRMAN SOULES: I don't
24 know. I'll have to ask Lee. Is this a
25 miscellaneous docket order? Is that the idea

1 here, or will it be in the rules?

2 MR. PARSLEY: Judge Guittard
3 and I talked about this. We decided to make
4 it an order to begin with, because we felt it
5 was purely administrative and it really didn't
6 make any difference to practitioners. So
7 unless somebody says it ought to be published,
8 I can't see much of a reason to -- I'd make it
9 miscellaneous.

10 MR. ORSINGER: So the Supreme
11 Court will just mail it out to all the courts
12 of appeals?

13 MR. PARSLEY: That's what I
14 would assume. Judge Guittard, do you have any
15 comment on that?

16 HONORABLE C. A. GUITTARD:
17 Well, the other orders of the Supreme Court,
18 the ones directing the record particularly,
19 are included in the rule book. And I suppose
20 that this might be included as well. I don't
21 see any point in leaving it out. It's not
22 very long.

23 CHAIRMAN SOULES: What do you
24 recommend? What do we recommend? In the rule
25 book or not in the rule book?

1 HONORABLE C. A. GUITTARD: I
2 recommend putting it in.

3 CHAIRMAN SOULES: Okay. Does
4 everybody agree with that? Bill.

5 PROFESSOR DORSANEO: I think
6 all of the Supreme Court's orders ought to be
7 put in an appendix in the rule book, period.

8 HONORABLE SARAH DUNCAN: For
9 every one?

10 MR. ORSINGER: My goodness,
11 they might hand down 100 orders a year or
12 more. Everything related to the state bar is
13 a miscellaneous docket order. Isn't that
14 right? Referendums, approving appointments to
15 this Committee, you name it.

16 CHAIRMAN SOULES: All right.
17 Well, the Supreme Court can probably do what
18 it wants to. We say we want this one in the
19 rule book, right?

20 Okay. Now, turn to Page 69. We have
21 changes on Page 69 because Bonnie read this
22 and felt that she was not given enough
23 direction or it wasn't clear enough for her to
24 follow, and we have some changes. The changes
25 are as follows. You can note them on your

1 copy, and then we'll talk about them.

2 In the second line, between "bond" and
3 "deposit," put a (1). The same line, after
4 the words "cash or," a (2). The next line,
5 after "leave of court," insert the word
6 "tender."

7 In the seventh line that begins "of
8 America," delete the comma after "thereof."
9 Delete "that is." Insert before the word
10 "insured," insert the word "and."

11 In the next line that begins "of the
12 United States of America or any agency
13 thereof," a period after "thereof," and insert
14 "the cash or negotiable instrument shall
15 be." In the next line, after "surety bond,"
16 insert "and." In the next line, after "would
17 be," delete "a" and insert "the."

18 HONORABLE C. A. GUITTARD:

19 Where is that?

20 MR. ORSINGER: The second to
21 the last line.

22 CHAIRMAN SOULES: And after
23 "bond" put a period. Strike "for the
24 protection of other parties." And the rest of
25 it stays as is. Take a look at that.

1 HONORABLE SARAH DUNCAN: On the
2 second line --

3 PROFESSOR DORSANEO: You don't
4 want the cash conditioned in the same manner
5 as would be a surety bond.

6 HONORABLE C. A. GUITTARD: I
7 don't understand what we're doing here.

8 HONORABLE SARAH DUNCAN: I
9 believe the (1) in the second line -- where
10 did you put that?

11 CHAIRMAN SOULES: Okay. Let me
12 do it again. In the second line, after the
13 word "bond," (1). After the word "or" --

14 MR. ORSINGER: Okay. Let's
15 stop here. That's in the wrong place. It
16 ought to be "shall deposit (1) cash or, (2)
17 with leave of the court, a negotiable
18 obligation." You can deposit both cash or --

19 CHAIRMAN SOULES: Did you get
20 the word "tender"?

21 MR. ORSINGER: No.

22 CHAIRMAN SOULES: Well, I gave
23 it to you. Okay. Let's go through here
24 again. Okay? On line 2 --

25 MR. PERRY: What page are you

1 guys on again?

2 CHAIRMAN SOULES: On Page 69.
3 Okay. Anybody that doesn't have Page 69 raise
4 your hand. Okay. Everybody has got it.

5 Line 2, after the words "filing the
6 bond," insert (1). After the words "cash or,"
7 insert (2). In the next line after "leave of
8 court," insert the word "tender."

9 In the seventh line that begins with the
10 words "of America or any state thereof,"
11 delete the comma after "thereof," and delete
12 "that is," which are the words there
13 following. Then insert before "insured" the
14 word "and."

15 In the next line, it reads "of the United
16 States of America or any agency thereof,"
17 change the comma to a period. In the next
18 line, this is a change from what I gave you,
19 because cash doesn't need to be conditioned on
20 anything, I don't think --

21 MR. PARSLEY: The condition is,
22 if you lose, they get it. They ought to get
23 the cash as well if you lose.

24 HONORABLE C. A. GUITTARD:
25 Yeah. It's conditioned.

1 CHAIRMAN SOULES: Okay. You're
2 right. The cash deposit actually, right? The
3 cash deposit or negotiable instrument --

4 HONORABLE SARAH DUNCAN: No.
5 No.

6 CHAIRMAN SOULES: -- shall
7 be --

8 MR. ORSINGER: It's a
9 negotiable obligation.

10 CHAIRMAN SOULES: Okay.
11 (Continuing) -- negotiable obligation shall be
12 in the amount fixed for the surety bond.
13 After the comma, insert the word "and."

14 In the next line after the words "would
15 be," strike "a" and insert "the." After
16 "surety bond" put a period, and delete "for
17 the protection of other parties."

18 Any opposition to that? Judge Duncan.

19 HONORABLE SARAH DUNCAN:
20 Regarding the new subparagraph 2, if you have
21 leave of court, you're entitled to file it,
22 not just tender it. And that makes a big
23 difference if you're trying to stop the
24 execution process.

25 CHAIRMAN SOULES: Okay. Any

1 opposition to that? Bonnie, is that okay?
2 Does anyone see any problem with that?

3 MS. WOLBRUECK: That's fine.

4 PROFESSOR DORSANEO: Let's use
5 the word "file."

6 HONORABLE C. A. GUITTARD: No.
7 You want to deposit the obligation, the
8 negotiable obligation, do you not, rather than
9 file it? So instead of putting the "tender"
10 there, say "deposit." "With leave of court
11 deposit."

12 CHAIRMAN SOULES: Is that okay,
13 Judge Duncan?

14 HONORABLE SARAH DUNCAN: Yes.

15 CHAIRMAN SOULES: Okay. So
16 we're now going to change the word "tender" in
17 the third line, instead of inserting "tender,"
18 we're going to insert "deposit."

19 All right. Any other comments? Alex
20 Albright.

21 PROFESSOR ALBRIGHT: Does
22 "cash" only mean \$100 bills, or can it be a
23 cashier's or certified check.

24 HONORABLE SARAH DUNCAN: That's
25 a negotiable obligation.

1 PROFESSOR ALBRIGHT: Okay.

2 That's a negotiable obligation.

3 HONORABLE SARAH DUNCAN: Wait,
4 I'm getting confused here. Well, it has to be
5 accepted by the court.

6 MR. LATTING: Luke, let's talk
7 about that, because there's a confusion here
8 in Austin.

9 CHAIRMAN SOULES: Okay. Bill
10 suggested we take out the word "deposit" in
11 the fifth line because it's redundant of the
12 one we put in in the third line. Judge
13 Duncan.

14 HONORABLE SARAH DUNCAN: Why
15 don't we -- we've got one class of things here
16 that has to have leave of court, and it's a
17 negotiable obligation of certain things. And
18 so I would take out in the fifth line
19 "deposit" up to "any."

20 CHAIRMAN SOULES: Okay. So it
21 says "or of any bank or savings and loan."

22 HONORABLE SARAH DUNCAN: If
23 you've only got two, then make it an "and,"
24 but one or the other.

25 CHAIRMAN SOULES: "Or with

1 leave of court deposit a negotiable obligation
2 with the government of the United States of
3 America or any agency thereof, or of any bank
4 or savings and loan association chartered by
5 the government of the United States of America
6 or any state thereof, and" -- what's wrong
7 with "that is"?

8 HONORABLE SARAH DUNCAN:
9 Because the "that" doesn't refer back to the
10 association.

11 CHAIRMAN SOULES: "And insured
12 by the government of the United States of
13 America or any agency thereof."

14 PROFESSOR DORSANEO: That's
15 fine.

16 CHAIRMAN SOULES: Okay. Joe
17 Latting.

18 MR. LATTING: I would like to
19 see us write this rule where a cashier's check
20 is specifically stated to be the equivalent of
21 cash. The reason --

22 CHAIRMAN SOULES: It's just an
23 obligational -- a negotiable --

24 MR. LATTING: Well, I would
25 like to see it where you don't have to have

1 leave of court in order to deposit a cashier's
2 check, because it's just a needless step.

3 And the clerks don't know how to handle
4 this. Some clerks treat it one way and some
5 treat it another.

6 PROFESSOR DORSANEO: Actually,
7 the Uniform Commercial Code says that a check
8 is cash.

9 MR. LATTING: Well, I know.
10 But tell that to -- when you go to Burnet and
11 tell them that "This is cash," they say, "No,
12 it's not."

13 And it seems to me that it would
14 streamline -- and no offense to Burnet, but it
15 depends on what clerk's office you're in,
16 whether it's cash or not.

17 CHAIRMAN SOULES: Okay. So
18 what Joe wants to do is say after the word
19 "cash" in the second line to say "or a
20 cashier's check."

21 MR. LATTING: But I think we
22 ought to make it from a national or a state
23 bank. I guess there aren't any other kinds.
24 But we ought to restrict it to that so it's
25 not some private company's cashier's check.

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HONORABLE C. A. GUITTARD:

Well, how do you deposit cash? Do you go down to the bank and get a little sack and put the money in the sack and bring it to the clerk? Or can't you just write the clerk a check, and if he cashes it, it's cash.

MR. LATTING: Well. I'm just saying that different clerks -- I can tell you from having to deal with these cases. They don't quite know what to do with it when you walk in. They say -- some clerks say you need leave of court and some say you don't in order to give them a cashier's check.

HONORABLE C. A. GUITTARD:

Well, we ought to write the rule so that you can tender to the clerk either cash or a personal check or any kind of a check which is effective only if it's cashed.

But it's different from a deposit, like you would put up a deposit of a negotiable instrument which the clerk keeps and doesn't cash.

CHAIRMAN SOULES: That doesn't take care of Sarah's problem. She wants an immediate supersedeas whenever that clerk

1 takes a cashier's check, not after the check
2 has been negotiated, and we need that.

3 MR. LATTING: And a cashier's
4 check from a state or national bank would do
5 that. I mean, that's my suggestion.

6 CHAIRMAN SOULES: Again, what
7 Joe wants to do, as I understand it, is after
8 the word "cash" in the second line put "or
9 cashier's check."

10 MR. LATTING: From a state or
11 national bank.

12 MR. ORSINGER: Well, then
13 you've got to worry about "insured." What if
14 we added a sentence at the end saying that a
15 cashier's check shall be the equivalent of
16 cash, because then you've got to repeat all
17 that verbage in there about insurance and
18 everything, because a cashier's check from an
19 uninsured institution will not be honored.
20 I've seen it happen, if they go under. And
21 maybe they're through going under, but they
22 did.

23 PROFESSOR DORSANEO: Maybe we
24 could look in the Uniform Commercial Code,
25 Article 3 or 4, and see what they do. We

1 could borrow from that.

2 PROFESSOR ALBRIGHT: I had a
3 criminal case in December that concerned the
4 Uniform Commercial Code, and you don't want to
5 get into that.

6 MR. LATTING: I don't care how
7 we phrase it, Richard, but the point being
8 that if it's a cashier's check from a state or
9 national bank, that's going to take care of
10 99 percent of the problem. And it's going to
11 keep from having to going to a judge and
12 getting leave of court if we can take a
13 cashier's check to the clerk's office.

14 CHAIRMAN SOULES: Okay. Let's
15 get on with it here. After "deposit cash"
16 insert this: "or cashier's check or, (2) with
17 leave of court, a negotiable obligation of the
18 government of the United States of America or
19 any agency thereof, or any bank or savings and
20 loan chartered by the government of the United
21 States of America or any state thereof, and
22 insured by the government of the United States
23 of America or any agency thereof."

24 Well, we're just going to have to repeat
25 it. "Or cashier's check drawn on any bank or

1 savings and loan association chartered by the
2 government of the United States of America or
3 any state thereof, and insured by the
4 government of the United States of America or
5 any agency thereof." You have to say it
6 twice. That's okay.

7 HONORABLE SARAH DUNCAN: And if
8 you say it twice, go ahead and indent (1) and
9 (2), instead of having them imbedded in the
10 text.

11 CHAIRMAN SOULES: Okay. So
12 after "the bond," we'll put a colon and a
13 paragraph. And at the end of "thereof" the
14 first time, we'll put a paragraph and do (2).

15 And then we'll have a paragraph that says
16 the cash must be conditioned and so forth.

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

19 CHAIRMAN SOULES: And then "any
20 interest thereon."

21 Okay. Here is what we're going to have
22 to do. We're going to have this "Wherever
23 these rules provide for" part, and then we're
24 going to have an indented (1) and an indented
25 (2), and then back to the margin with the last

1 sentence. That takes care of it.

2 HONORABLE SARAH DUNCAN: The
3 last two sentences.

4 CHAIRMAN SOULES: The last
5 sentence.

6 HONORABLE SARAH DUNCAN: The
7 last two sentences, Luke. If you don't take
8 the cash deposit or negotiable obligation back
9 to the margin, then it's going to be a part of
10 subparagraph (2), and that's just not right.
11 It applies to both of them.

12 CHAIRMAN SOULES: Okay. Well
13 let's just take that last -- we'll just make a
14 paragraph and have -- the last paragraph will
15 not go back to the margin either way. It will
16 start with The cash deposit or negotiable
17 instrument -- negotiable obligation shall be
18 in the amount fixed and conditioned, and any
19 interest thereon shall constitute part of the
20 deposit. So there will be another paragraph
21 after (1) and (2), right?

22 HONORABLE SARAH DUNCAN: No. I
23 think it needs to go back to the margin so
24 that it applies to -- it's one rule. There's
25 no paragraph. There are two prongs on what

1 you can deposit, but the last two sentences
2 apply to everything in the paragraph.

3 CHAIRMAN SOULES: Okay. So
4 it's just one paragraph all the way through,
5 but it has two indented paragraphs in the
6 middle?

7 HONORABLE SARAH DUNCAN:
8 Right.

9 CHAIRMAN SOULES: Okay. Does
10 that do it?

11 HONORABLE SARAH DUNCAN: But
12 there's just one other thing.

13 CHAIRMAN SOULES: Okay.

14 HONORABLE SARAH DUNCAN: I
15 don't think you can condition a negotiable
16 obligation. I think you can condition the
17 deposit of a negotiable obligation. So what I
18 would suggest is just take out "cash or
19 negotiable obligation" and just say "the
20 deposit shall be in the amount fixed for the
21 surety bond and conditioned in the same
22 manner."

23 CHAIRMAN SOULES: Any objection
24 to that?

25 PROFESSOR DORSANEO: No.

1 CHAIRMAN SOULES: Okay. "The
2 deposit shall be in the amount fixed" and so
3 forth. Okay. Richard.

4 MR. ORSINGER: I'm concerned
5 that if we're going to treat cashier's checks
6 the same as cash, then we should prescribe
7 that the clerk cash the cashier's check right
8 away. Because I can foresee that people will
9 make the cashier's check payable to the
10 appellee, and two years later, when it's
11 presented for negotiation, it may not clear.
12 So if it's going to be nondiscretionary,
13 meaning no approval of the court, then I think
14 we should ask the clerk to negotiate it,
15 convert it into cash, and then handle it like
16 cash.

17 PROFESSOR DORSANEO: But that
18 cashier's check at the top is meant to be
19 cash.

20 MR. ORSINGER: But I can tell
21 you right now it's going to be written payable
22 to the appellee.

23 CHAIRMAN SOULES: Well, why
24 don't we say "deposit cash or cashier's check
25 payable to the clerk"?

1 MS. WOLBRUECK: And because I
2 couldn't deposit it if it was made payable to
3 the appellee.

4 MR. ORSINGER: That's right.
5 Payable to the clerk.

6 CHAIRMAN SOULES: Payable to
7 the clerk, drawn on any, and so forth.

8 MR. LATTING: How about let's
9 say payable to the clerk or endorsed to the
10 clerk by the payee, because sometimes you get
11 a cashier's check payable to Joe Latting, pay
12 to the order of Travis County District Clerk.

13 PROFESSOR DORSANEO: Well,
14 that's Joe Latting's check then.

15 MR. LATTING: Well, okay. I'll
16 give up on it. I don't think it's right yet,
17 though.

18 PROFESSOR DORSANEO: If they
19 won't take your check already, they shouldn't
20 take that one.

21 CHAIRMAN SOULES: Okay. The
22 clerk shall negotiate the check promptly.

23 MR. LATTING: I don't know if I
24 agree with that. I mean, unless my
25 endorsement is a forgery, my credit doesn't

1 have anything to do with the validity of the
2 check.

3 CHAIRMAN SOULES: How do you
4 want us to say this so that it directs you?
5 Shall negotiate the check promptly into the
6 clerk's account?

7 MS. WOLBRUECK: I don't have a
8 problem with that.

9 CHAIRMAN SOULES: Where do you
10 keep this? In the registry of the clerk?

11 MS. WOLBRUECK: Yes.

12 CHAIRMAN SOULES: Okay. The
13 clerk shall negotiate the cashier's check
14 promptly into the registry of the clerk?

15 MS. WOLBRUECK: Just say
16 deposit it.

17 CHAIRMAN SOULES: You actually
18 deposit it, don't you?

19 MR. ORSINGER: Well, every
20 county does it differently. But in amounts
21 that are over the FDIC insurance limit, I
22 believe, the government code, correct me,
23 anybody who has fought through this, requires
24 that they be in a special trust arrangement
25 with the depository bank that's backed up by

1 U.S. deposits.

2 MS. WOLBRUECK: That's taken
3 care of in the Local Government Code,
4 Chapter 117, the depository contract per a
5 court order.

6 CHAIRMAN SOULES: Don't you
7 negotiate the check into the clerk's account?

8 MS. WOLBRUECK: Yes, I do. And
9 the amount should be covered under the
10 depository contract.

11 MR. ORSINGER: But we don't
12 have to say that here.

13 CHAIRMAN SOULES: Yes, we do.

14 MR. ORSINGER: We don't need to
15 talk about all the local government codes.

16 CHAIRMAN SOULES: That's
17 right. But we need to tell her what to do
18 with it.

19 MR. LATTING: The clerk shall
20 deposit the check promptly. That's all you
21 need to say. We don't have to tell her what
22 account to put it in and all that stuff.

23 CHAIRMAN SOULES: Deposited
24 promptly into what?

25 PROFESSOR DORSANEO: As

1 provided by law.

2 PROFESSOR ALBRIGHT: That's
3 right. Wherever they deposit it.

4 CHAIRMAN SOULES: Okay. That's
5 all I'm trying to get at, is just so that we
6 say that in a way the -- okay.

7 We can't hear anyone up here. I can't
8 hear and the court reporter can't hear.

9 Okay. The clerk -- how do you want me to
10 say this? What I've got written down here is
11 that "The clerk shall deposit any cashier's
12 check promptly."

13 MS. WOLBRUECK: That's
14 sufficient.

15 CHAIRMAN SOULES: Now, Judge
16 Till, you had your hand up.

17 HONORABLE PAUL HEATH TILL: You
18 do have in there that the check is to be made
19 out to the clerk of the court, don't you?

20 CHAIRMAN SOULES: Right.

21 HONORABLE PAUL HEATH TILL:
22 Okay. That's fine.

23 CHAIRMAN SOULES: Okay. So it
24 says "or cashier's check made payable to the
25 clerk drawn on any banks," and so forth.

1 And then after we get down through what
2 all the banks are and how they're insured, we
3 have a new sentence. It says, "The clerk
4 shall deposit any cashier's check promptly."

5 And then we go to (2), which talks about
6 negotiable obligation.

7 PROFESSOR DORSANEO: I've got
8 one question that I hesitate to ask.

9 CHAIRMAN SOULES: Go ahead.

10 PROFESSOR DORSANEO: I don't do
11 this any more, and I haven't done this for a
12 while, but when I've done it, I used to do it
13 with my own check. That doesn't happen now?

14 MR. LATTING: You can do it in
15 Travis County.

16 MR. ORSINGER: It's not a
17 negotiable obligation of the government or a
18 bank.

19 PROFESSOR DORSANEO: I know
20 what we just did. But I used to be able to
21 say that this is cash. And people used to not
22 say, "That's not cash, that's a check."

23 MR. LATTING: That's right.
24 But it's never been a negotiable obligation of
25 a bank; it's been your negotiable obligation.

1 And it's been in my -- I don't think it's
2 clear that the clerk should not have accepted
3 that as cash.

4 PROFESSOR DORSANEO: Well, I
5 think you can find definitions of "cash" that
6 include personal checks in the Uniform
7 Commercial Code. And every time somebody
8 said, "That's not cash, that's a check," I
9 would show them that. And they would say,
10 "Fine," because they didn't expect my check
11 to bounce anyway and they took it.

12 CHAIRMAN SOULES: Okay.

13 PROFESSOR DORSANEO: And I
14 don't want to have to make people do cashier's
15 checks unnecessarily.

16 CHAIRMAN SOULES: All right.
17 We're off the record.

18 (At this time there was a
19 discussion off the record.)

20 CHAIRMAN SOULES: Back on the
21 record.

22 MR. ORSINGER: This is probably
23 not a problem, but is the FDIC an agency of
24 the federal government notwithstanding the
25 fact that it's a corporation?

1 PROFESSOR DORSANEO: Sure.

2 MR. ORSINGER: It is? Okay.

3 CHAIRMAN SOULES: I don't know.

4 MR. ORSINGER: All right. Then
5 I won't worry about that.

6 CHAIRMAN SOULES: Okay.

7 Anything else on this? Okay. Those in favor
8 show by hands. Opposed. Okay. That's
9 unanimous.

10 Except for Rule 7, which I don't want to
11 revisit today, probably nobody does today --
12 well, maybe some. We've got seven minutes.
13 Can we use them?

14 Again, I want to thank Clarence Guittard
15 and Bill Dorsaneo and all the members, Alex
16 Albright, all the members of this committee
17 that worked so hard on these appellate rules.

18 PROFESSOR DORSANEO: And
19 special thanks to Lee Parsley as well.

20 CHAIRMAN SOULES: And to Lee
21 and to Holly for getting this report
22 together. It's come to closure before any of
23 our other work, probably substantially before
24 any of our other work. The charge rules are
25 very close. And I do want to thank all of you

1 for what you have done and thank you on behalf
2 of the Court and the Committee and the bar and
3 the bench for doing all this work.

4 We will make the corrections as a result
5 of this meeting and forward them to Justice
6 Hecht for presentment to the Court. And I
7 will provide everybody a copy of the final
8 report so that at your leisure you can look
9 back through here and see if you can pick up
10 any errors that we have made in doing the
11 report.

12 If you find an error, just copy it on
13 your copy machine and interline it or write
14 what you think is wrong and get it to me, and
15 I will get it to the Court promptly.

16 Judge Brister.

17 HONORABLE SCOTT BRISTER: Where
18 do we stand? And do we need to meet sometime
19 for more than a day and a half on a weekend to
20 finish? How many more years are we going to
21 be doing this?

22 CHAIRMAN SOULES: Well, we've
23 got meetings set all the way through November,
24 so we've got May, July, September and
25 November.

1 I think a lot depends on how far we get
2 with discovery at the next meeting, if we get
3 discovery pretty much to closure at the next
4 meeting. And we should have a sanctions
5 report at the next meeting based on what we
6 think the discovery rules are going to look
7 like, and we've got a pretty good picture of
8 that.

9 Then -- and I expect to have the charge
10 rules in a red-lined version ready to go to
11 the Court after our next meeting. I think
12 that will be very short, because they've
13 already been approved, there's just some
14 grammatical errors in the final report and
15 some things like that that we just need to
16 take a brief look at, I think.

17 So by the end of the next meeting, we
18 should have the charge rules done, sanctions
19 with major progress, discovery with major
20 progress. That would mean that by the July
21 meeting we would want those closed. All
22 three. Well, the charge rules probably next
23 time. Discovery and sanctions closed in
24 July. That gives us September and November to
25 to get the miscellaneous rules done that we've

1 got.

2 And any time we have a gap in our
3 schedule, we'll get to work on those
4 miscellaneous -- I'm calling them
5 miscellaneous rules. They're very important
6 because they're coming from everywhere. And
7 they may in fact slide back and change some of
8 the things we've done, because there are a lot
9 of good ideas that have come from all over the
10 state in those materials.

11 And then -- but I don't know if this is
12 quickly enough for the Court, soon enough for
13 the Court, but we can do it, I think, on our
14 regular schedule as long as we make progress.

15 What do you think, Justice Hecht?

16 JUSTICE HECHT: I think we
17 ought to stay on it for now. I expect the
18 Court will be through with the TRAP Rules by
19 the May meeting or at least by our summer
20 break, so we'll be ready to look at something
21 else by then.

22 MR. ORSINGER: Can I ask a
23 question?

24 CHAIRMAN SOULES: Let me make
25 this comment, and then to you, Richard.

1 The Court is going to look at these, and
2 they may feel that some of the things we've
3 done are not the way they want them, and that
4 obviously is going to influence scheduling.
5 Particularly if the discovery rules are
6 conceptually different from the way the Court
7 wants to go, then we're going to have a good
8 deal more work to do, which is fine, of
9 course. As I suggested, that wouldn't be any
10 imposition, because it has to satisfy the
11 Court.

12 But my understanding from Justice Hecht
13 is that he anticipates that the Court is going
14 to look at the rules and change them the way
15 the Courts wants them and then get those back
16 to us just to advise the Court if we see any
17 serious problems with what the Court has done
18 that they may not have seen. And obviously
19 those things come up here just because there
20 are more sets of eyes.

21 So we'll have brief sessions on the rules
22 after the Court gets done, at least brief
23 sessions, perhaps more extensive sessions on
24 the rules after the Court gets done with
25 them. Richard.

1 MR. ORSINGER: After the
2 Supreme Court has done what it's going to do
3 on the TRAPs, do they then go out for public
4 comment in the Bar Journal before they're
5 adopted?

6 JUSTICE HECHT: Oh, yeah. I
7 mean, we'll put them out for comment and have
8 a public hearing, if we do what we've done in
9 the past, before they're adopted.

10 MR. ORSINGER: So it's unlikely
11 that they would go into effect before maybe
12 January 1 of '96?

13 JUSTICE HECHT: Right. That's
14 likely.

15 CHAIRMAN SOULES: And, of
16 course, the Court -- after that there's a very
17 formal process that's required by statute that
18 we publish them in the Texas Bar Journal so
19 long before the effective date, but that's
20 after they've been promulgated.

21 If you have this report from Alejandro
22 Acosta that Alex passed out, either leave it
23 here so Holly can pick it up or bring it back
24 with you next time because we won't
25 redistribute it. We'll pick up all the ones

1 that are left and we'll bring them back, but
2 if you take them, you have a chance to look at
3 them in the meantime. Justice Guittard.

4 HONORABLE C. A. GUITTARD:
5 Mr. Chairman, there are a couple of matters
6 with respect to the Rules of Civil Procedure,
7 the trial rules, that may need some
8 attention. One is that a number of the Rules
9 of Civil Procedure have been proposed by the
10 appellate subcommittee, some of which have
11 been approved by this Committee, and so the
12 question is, what's the status of that? Is
13 that finally adopted?

14 There are other rules that we have
15 proposed for the Rules of Civil Procedure,
16 including the rules with respect to judgments
17 and so forth, that have been published in our
18 previous reports but that have not been
19 finally adopted, such as Rule 300. That
20 probably should be considered by the
21 subcommittee that has responsibility for those
22 rules.

23 The third question is the problem of
24 coordinating the TRAP Rules and the Rules of
25 Civil Procedure. Now, I've noticed here --

1 I've read this (indicating).

2 CHAIRMAN SOULES: Alejandro's
3 report.

4 HONORABLE C. A. GUITTARD:
5 Alejandro's report. I've noticed that they've
6 gone a long way towards doing that. They've
7 adopted some of the TRAP Rule provisions for
8 the trial rules, and I think that's a big
9 start in that direction.

10 As I wrote to you in that letter, it
11 seems logical to have a section of rules, of
12 general rules, that apply to both trial and
13 appellate courts. And some of the Rules of
14 Civil Procedure, for instance, Rule 1 and 2
15 about construction of the rules and so forth,
16 are really intended to apply both to appellate
17 and trial procedure and should be included in
18 general rules.

19 Likewise, rules that are common, such as
20 perhaps rules as to service, time and so
21 forth, that are common to appellate and trial
22 rules, should be included in the general rules
23 rather than in the separate -- repeated in the
24 separate TRAP and trial rules.

25 So it would seem to me feasible to have a

1 joint committee for the trial rules and the
2 appellate rules to work on rules that apply to
3 both trial and appellate courts. And I would
4 just inquire how we're to organize that and go
5 forward with that?

6 HONORABLE SARAH DUNCAN: Can I
7 ask a question real quick?

8 CHAIRMAN SOULES: Judge Duncan.

9 HONORABLE SARAH DUNCAN: I
10 assumed that what I received in the mail was
11 what the appellate rules report has always
12 looked like before. But now I realize, and I
13 guess this is what you're saying, that the
14 Rules of Civil Procedure that the Appellate
15 Rules Committee proposed amendments to and
16 have been approved by this Committee are no
17 longer included in the appellate rules
18 report.

19 CHAIRMAN SOULES: That's right.

20 HONORABLE SARAH DUNCAN: And so
21 I guess what you're saying -- whose decision
22 was that?

23 CHAIRMAN SOULES: Mine.

24 HONORABLE C. A. GUITTARD: But
25 we are to -- but what are we to do with

1 those?

2 CHAIRMAN SOULES: Okay. You
3 asked me several questions, and I'll try to
4 remember them as we proceed.

5 Okay. First, any subcommittee that
6 believes that because of its work in its area
7 there needs to be a change made in an area of
8 responsibility of a different subcommittee,
9 they need to write me and tell me what you
10 recommend done. Now, for those that have
11 already been passed, I need you to say, "These
12 have been passed by the Committee."

13 And I will then direct that information
14 to the chair of the subcommittee that has
15 authority over those rules, because as we go
16 through these sections of the rules, we're
17 going to have to see -- we're going to be
18 addressing other concerns that have come from
19 the public. And they may relate to the same
20 rules that we've already passed, but we passed
21 them without regard to the fact that we have a
22 public inquiry that needs to be addressed. So
23 we've got to overlay those.

24 I hope that all of the appellate input
25 that we've got from the public from every

1 source has been addressed in these appellate
2 rules that are going to the Supreme Court. I
3 don't know that, but your committee has had
4 them, so I guess they've been addressed.
5 Eventually we'll probably go through those
6 individually just to check them off and be
7 sure that we have.

8 But anyway, the subcommittees that have
9 authority over certain portions of the Rules
10 of Civil Procedure are going to have that
11 authority, with your suggestions, as to what
12 they need to be doing.

13 HONORABLE C. A. GUITTARD: Does
14 that include the rules that -- the trial rules
15 that have already been adopted by this
16 Committee?

17 CHAIRMAN SOULES: It does.

18 HONORABLE SARAH DUNCAN: So we
19 are going to revote on matters that the
20 Committee as a whole has already voted on
21 after the subcommittee is given an opportunity
22 to redraft them. Is that right?

23 CHAIRMAN SOULES: Well, I don't
24 assume that the subcommittee will redraft
25 anything that we have already passed. But

1 it's going to come up in their report. It may
2 be -- I would assume that those pieces of
3 their report will be very quick. But they
4 need to see how it fits in their scheme and in
5 their area as well as the appellate rules.

6 We have to make the Rules of Civil
7 Procedure work, too, sequentially, and since
8 we haven't even looked at those rules yet, we
9 can't send to the Supreme Court changes in the
10 Rules of Civil Procedure until we look at them
11 comprehensively.

12 MR. LATTING: Luke.

13 CHAIRMAN SOULES: Joe Latting.

14 MR. LATTING: The sanctions
15 committee is planning to meet twice before the
16 next meeting of this Committee. And we're
17 going to come forth with two different
18 versions of the suggested sanctions rules
19 based on this division of the house we had
20 before. So if anybody has any comments or
21 ideas about how sanctions ought to be
22 structured in view of where we're headed with
23 discovery, let us know. And if you want to
24 come to the meetings, let me know so that we
25 can have your input. We'll be getting

1 together at the end of this month and again in
2 April.

3 CHAIRMAN SOULES: Now, did I
4 respond to the issues that you raised, Judge
5 Guittard, or are there some that I didn't get
6 to? I know I tried to talk about how we're
7 going to -- the logistics of the rest of the
8 process.

9 HONORABLE C. A. GUITTARD:
10 Perhaps a little more definition with respect
11 to this coordination of the appellate and the
12 trial rules and the general rules that apply
13 to both.

14 CHAIRMAN SOULES: Okay. What I
15 would like to do is have the appellate rules
16 subcommittee select among themselves
17 representatives from each of the other Rules
18 of Civil Procedure subcommittees where you
19 think you need to have input.

20 HONORABLE C. A. GUITTARD:
21 Okay.

22 CHAIRMAN SOULES: Get among
23 yourselves, and have the findings of fact and
24 conclusions of law area, or whatever that
25 scope of the rules is, have a delegate, and

1 tell me who you want, and I'll put that person
2 on that subcommittee. So there's a blending
3 there now of the Appellate Rules Committee
4 into the Rules of Civil Procedure Committee so
5 that your work product is not lost, and that
6 committee's representative is there to convey
7 it fully to that committee.

8 It was never any intent to have the
9 Appellate Rules Committee usurp any piece of
10 anybody else's authority. It was only to have
11 input into the other subcommittees where you
12 feel it's necessary in support of the
13 appellate rules or for any other rules.

14 HONORABLE C. A. GUITTARD: What
15 I would like to do is to have a draft of these
16 general rules, these common rules, and direct
17 Lee to make such a draft, and for us then to
18 present it to the subcommittee that has the
19 responsibility for those rules. Do you
20 understand what I mean?

21 CHAIRMAN SOULES: Right.
22 Okay. That's about as good as can do now.
23 We're just going to have to have a liasion at
24 some point to handle it.

25 (HEARING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 18, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$1,107⁰⁰.
CHARGED TO: Soules + Wallace.

Given under my hand and seal of office on this the 31st day of March, 1995.

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