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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 18, 1994

AFTERNOON SESSION

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Taken before D'Lois Lea Nesbitt, Certified Shorthand Reporter in Travis County for the State of Texas, on the 18th day of March, A.D., 1994, between the hours of 1:30 o'clock p.m. and 5:40 o'clock p.m., at the Texas Law Center, 1414 Colorado, Austin, Texas 78701.

MARCH 18, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta, Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela S. Baron
Honorable Scott A. Brister
Professor Elaine Carlson
Professor William V. Dorsaneo
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Joseph Latting
Gilbert I. Low
John Marks
Russell H. McMains
Harriet E. Miers
Richard R. Orsinger
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Honorable Ann T. Cochran
Michael T. Gallagher
Anne Gardner
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable F. Scott McCown
Robert E. Meadows
Honorable David Peeples
David L. Perry

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Honorable Paul Heath Till
Bonnie Wolbrueck
Paul N. Gold
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Carl Hamilton

SUPREME COURT ADVISORY COMMITTEE

MARCH 18, 1994, Afternoon Session

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CHAIRMAN SOULES: Both Ms. Lange and Ms. Wolbrueck, the clerks that we have here, are pretty -- they have given some thought to this transcript thing and whether or not it's better to just leave it the way it is and make copies and send the copies. In other words, no change in the present practice as far as the transcript is concerned. Bonnie, why don't you give us your view?

MS. WOLBRUECK: Sure.

CHAIRMAN SOULES: Doris spoke about it a moment ago.

MS. WOLBRUECK: Originally when I heard this I thought this was an excellent idea until I really gave some thought to it; and several reasons. If we send up the original documents, No. 1, if the original judgment has gone up to the appellate court there has been no supersedeas bond filed. The trial court clerk still has the responsibility of issuing executions. We will not have that judgment on file in our office in order to issue an execution on that.

HONORABLE C. A. GUITTARD:

Don't you have it in your minutes?

MS. WOLBRUECK: We could. It depends upon -- yeah. They would probably be kept in the minutes, but even at that the other problem with that being -- is certifying to it. We can certify out of the minutes, but I would think that having the originals would still benefit the trial court clerk and the like. I realize what you are saying, Judge. I had forgotten about the minutes of the Court.

Family matters could evolve the same way. Many times we have many people doing research on files. We may have a divorce decree that what is in -- what is going up on appeal is possibly property, and child support matters continue, visitation matters continue. People want to view those files for those matters. We have a lot of title company people and research people into our offices all the time that want to see what has happened in certain documents within the file.

The other thing that I realized in looking at this initially, thinking that sending up the original papers would be a good

idea, is that actually the time and effort in doing a transcript is not in running the copies through the copy machine. It's actually pulling out whatever documents need to go into the transcript, putting those into transcript form and indexing them. Running them through the copying machine is actually the least of the effort involved in preparing a transcript, and I am concerned that possibly it may evolve into extra work on both clerks, the appellate clerks and the trial clerks, in that whenever they return those originals to us we have to put them back into the file into proper order and the like for continuation of the file.

Those are just some of the concerns and the thoughts that I had in regards to the possible originals. Like I said, initially I thought that it may be a good idea until I really put some thought to it as far as the clerk is concerned.

MR. HERRING: How is it done now in the Federal system? Don't they send almost everything?

MS. DUNCAN: It goes up on the

original papers, and the entire file goes.

MR. HERRING: What if you kept the judgment decree in the family case? Are there a lot of other documents that people come in to search?

MS. WOLBRUECK: You know, I can't even -- occasionally there are. It depends on what has happened, and the problem is that, you know, I can think in a real simplistic matter of just talking about a judgment, but many times there are other orders and the like that have been entered that somebody may want and, you know, other orders that don't pertain to what has gone up on appeal.

HONORABLE SCOTT A. BRISTER: A lot of times when they are split mandamuses I keep going on this while a mandamus goes up, interlocutory appeals of government official summary judgments, or media defendant summary judgments on first amendment. We have got a growing number of interlocutory appeals. Who gets the file if I don't have the file or copies of the file?

MS. DUNCAN: On an original

proceeding you are not going to go up on a transcript from the clerk's office anyway generally. You are either going to go up on certified copies that were later put together or on sworn copies, copies that have been sworn to by an attorney. In Federal Court, I mean, it seems to me if the burden if you want to get a writ of execution on a judgment and no supersedeas bond is on file it seems to me that the burden should be on the applying party to get the certified copy from the Court of Appeals and take it to the trial court or the clerk to have whatever process or have whatever dispute resolved that they want to get resolved. I mean, that seems to me to be fairly simple.

HONORABLE SCOTT A. BRISTER: Is the reason for this just cost-saving? We are spending too much making copies?

MS. DUNCAN: Legibility.

MS. WOLBRUECK: I would suggest in the Rule possibly to make sure that -- and possibly in the order on the form of the transcript or something to make sure that the copies are legible.

MS. DUNCAN: It's said that for years, and it hasn't helped.

MS. WOLBRUECK: Yeah. It needs to be -- well, sometime the originals aren't either. That's the problem.

MS. LANGE: I was going to say sometimes the originals we can't read.

MS. DUNCAN: Well, and sometimes they are just difficult to copy.

MS. LANGE: Especially on field notes. The attorneys keep making copies, and we get almost daily instruments that we put a clerk's note on it's not legible when it came to us.

CHAIRMAN SOULES: Of course, the clerks charge the appellant for the transcript, right, and they pay for it? So to that extent you get some of your cost back directly from the party you are performing services for.

MR. ORSINGER: Well, what would you charge for it? You used to charge a dollar a page to copy it or whatever the charge was, but if you are not copying anything now, you still would charge a dollar

a page to bind it?

MS. WOLBRUECK: No. But I'm sure --

CHAIRMAN SOULES: But the point is they are getting some of their --

MS. WOLBRUECK: Yeah. I'm sure that there will be some fee because actually the labor cost is not in the actual copying. It's in preparing the transcript, pulling the documents out, doing the index, and putting it -- bounding it and the like. That's where the labor cost actually is.

CHAIRMAN SOULES: But you are recovering some of that now at least by getting fees for the copies.

MS. WOLBRUECK: That's right.

CHAIRMAN SOULES: There is some revenue in the clerk's office coming from this to help offset the cost of their work in support of an appellant's appeal.

MS. WOLBRUECK: And I feel that there would probably be somewhere a cost for preparation of a transcript or something, if there was not a copying cost.

CHAIRMAN SOULES: Okay.

HONORABLE SCOTT A. BRISTER: And so on post-judgment --

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: Post-judgment motions where the file has gone up then you would get a copy and send a copy back down?

MS. DUNCAN: You just attach --

MR. ORSINGER: Would you need anything more than the judgment ever?

HONORABLE SCOTT A. BRISTER: Well, I am trying to think. I don't know.

MS. DUNCAN: Well, let's say you --

HONORABLE SCOTT A. BRISTER: All I know is there are a lot of times after the appeal has started when I am still in there messing with the file.

MS. WOLBRUECK: And that seems to happen a great deal, I mean, actually. I realize that also, and I can't think of a particular incident. But what would you do on temporary orders or summary judgment or something? There seems to be a great deal

that continues in the trial.

MR. ORSINGER: Actually the trial court's preliminary power goes until the 105th day, and if you have a transcript going up sooner than that it's not due until the 120th day if there is a motion for new trial made. You just have to request it back.

MR. LOWE: What's broke about what we have? Wasn't it that we just thought we could simplify it like the Federal people do and just send the original record? That was the reason, but there are probably not many Federal divorces, so they have a little different type practice. So wasn't that the main reason we wanted to do it?

CHAIRMAN SOULES: I think so.

MR. LOWE: And she has already stated reasons why it wouldn't work, so why isn't it working -- why don't we leave it like it is?

CHAIRMAN SOULES: Okay. Motion to leave it like it is. Those in favor show hands.

HONORABLE SAM HOUSTON CLINTON: You are talking now about the transcript?

CHAIRMAN SOULES: Yes, sir.

Those opposed? Okay. We will leave that like it is. That's unanimous in favor of leaving it like it is. Next?

PROFESSOR DORSANEO: Please turn to page 40.

HONORABLE C. A. GUITTARD: In the ancient English practice you had law of equity. You had the review of trial court judgment, and common law you had a writ of error in equity after you had appeal. That archaic distinction still persists to some extent in our present Rule 45 which has to do with appeal by writ of error, which is now limited to the parties that did not participate in the appeal. The problem with it is that the courts keep saying that a writ of error is limited to error apparent on the face of the record. Now, what in thunder is the face of the record?

Some courts say, well, you can consider the statements of facts. Well, then if you consider the statement of facts, well, how is that different from any other appeal? In a different context in McKenna against Edgar the

Supreme Court held that the jurisdiction of the non-resident defendant must appear from the face of the record, and that does not include oral testimony, the statement of facts. So it seems very odd the face of the record means something in one context and something different in another.

So the proposal is that if there is no real difference in the review and in order to avoid confusion and in order to simplify the process that we simply provide that as we do here in proposed Rule 41(a)(3) on the top of page 40 that "A party to the final judgment who did not participate in person or by attorney in the actual trial of the case shall file a notice of appeal within six months after the judgment is signed, whether or not a motion for new trial is" -- or "a motion to modify, correct, or reform the judgment is made." In other words, just give them the same kind of six months appeal as he would have by a writ of error. "Such a notice shall contain a certificate by the attorney that the appellant did not participate in person or by attorney in the actual trial of the case." So

that would considerably simplify our practice in those cases. So, Mr. Chairman, I move that that be adopted.

MR. LOWE: I would second that.

CHAIRMAN SOULES: Motion has been made and seconded. Is this just a writ of error by a different name?

MR. LOWE: Yeah.

HONORABLE C. A. GUITTARD: Well, except that it doesn't come within those decisions which talk about the face of the record, which I think originally meant in a common law review that the judgment ruled and the old clerk wrote out as distinguished from the testimony, but now since the confusion comes in when the Supreme Court has said and other courts have said you do consider the oral testimony. So although they say it's the face of the record, it's not the face of the record in that sense.

MR. ORSINGER: Luke, I'm sorry. From a procedural standpoint -- I'm sorry.

CHAIRMAN SOULES: Rusty, you have had your hand up, then I will get to Richard.

MR. MCMAINS: Well, one of the questions I have, if you basically are, quote, abolishing the writ of error practice and substituting a notice of appeal where are the -- where do you have any rights to attack that you haven't preserved? I mean, if you weren't at the trial you obviously didn't make an objection and you obviously most likely did not file a motion for new trial. You didn't do any of these other things by definition. So if you haven't done any of those things, you haven't presented any complaints for review.

The writ of error practice by and large, you know, historically was the reason I always viewed the term "on the face of the record" as being a good thing rather than a bad thing in your view; that is, it allowed you to attack, for instance, defects in service, et cetera, which is what it is primarily designed to do, but there weren't any preservation requirements. If you convert this to an ordinary appeal, how do you immunize it from the preservation requirements that are throughout the rest of our Rules?

HONORABLE C. A. GUITTARD: Well, isn't it immunized now since the courts have said the standards of review are the same? At least that's confusing. Whether or not you have different preservation requirements with respect to a party that didn't participate in the appeal -- in the trial is a question we need to talk about. If we think that the party that didn't participate ought to have different preservation rights or different standard review or ought not to be subject to the same preservation requirements as one that did, then we ought to say that expressly and not have some confusing other procedure called a writ of error that would allow you to get around the regular preservation rules. We ought to write that expressly.

PROFESSOR DORSANEO: We did make an attempt to revise Appellate Rule 52 partially in response to Justice Hecht's memos and what I will referral to as the Wilson vs. Dunn problem, which is the problem of the default judgment appellant seeking to challenge the default judgment on some basis

of the type you mentioned.

Frankly, that drafting may not be finished, but I agree with Judge Guittard that that's the proper place to deal with the issues that you raise such that regardless of whether it's an ordinary appeal or what previously had been referred to as a writ of error appeal, you either do or don't have to move for a new trial or otherwise preserve a complaint about service or evidence sufficiency or whatever.

HONORABLE C. A. GUITTARD: Now, most writ of error appeals are default judgment cases, and it has -- the face of the record thing has certain and some probability there because you don't have any -- you may not have a statement of facts. You are just looking at whether the service, the record of service, is complete and that sort of thing, but you could still do that with a six months appeal under our proposed Rule 41(a)(3). It would have the same effect in that respect.

MR. LOWE: Judge, there is no rule now, appellate rule, that speaks of writ of error anyway, is it?

HONORABLE C. A. GUITTARD: Oh, yeah. Rule 45.

PROFESSOR DORSANEO: 45.

MR. LOWE: 45 now is?

HONORABLE C. A. GUITTARD: Rule 45.

MR. LOWE: So in other words, all that would be changed would be the time limit, but other requirements of ordinary appeal wouldn't be changed, just as would be followed if you had participated, is what you are saying.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: Right.

HONORABLE C. A. GUITTARD: Rule 45 requires you to file a petition and then a bond.

MR. LOWE: Okay.

CHAIRMAN SOULES: Richard Orsinger.

PROFESSOR DORSANEO: It's kind of like a notice of appeal frankly.

MR. LOWE: Right.

MR. ORSINGER: Is there not

mention of the writ of error appeal in the Civil Practice and Remedies Code?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: I have looked at it briefly. We are going to have some dangling legislation I think.

HONORABLE C. A. GUITTARD: That's another point that I note here. If we repeal the writ of error practice then perhaps the Supreme Court ought to list that particular provision of the code as repealed.

PROFESSOR ALBRIGHT: I didn't understand --

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I did not understand Bill's answer to the question about the preservation of error problem, or was there an answer?

PROFESSOR DORSANEO: Well, my technical answer would be that -- all right. The Supreme Court two years ago in DSC vs. Moffitt held, I think quite correctly -- that's presumptuous to say, but I think quite reasonably that the face of the record in a

writ of error appeal includes the statement of facts as well as the transcript. I was the petitioner's counsel, so I find that a particularly favorable decision.

But it could be the case that once upon a time that that language "on the face of the record" also spoke to the issue of preservation. I think Rusty is probably right, but my answer would be that whatever the preservation rules are for people who are defaulted they ought to be the same whether those people appeal in one month or six months, whether it's a writ of error appeal or an ordinary appeal, and that's not how the problem should be handled about whether they should get some ruling from the trial court about anything.

PROFESSOR ALBRIGHT: So it just needs to be that when a defaulter is appealing it's clear that they couldn't have preserved error so you are looking for these --

PROFESSOR DORSANEO: Right.

PROFESSOR ALBRIGHT: -- jurisdictional type errors.

PROFESSOR DORSANEO: I wouldn't

require them to do anything to make the complaint about service or insufficiency of the evidence to support an unliquidated, you know, damage claim.

PROFESSOR ALBRIGHT: Well, would you have the same review, like new trial review, like you would in Craddock vs. Sunshine?

PROFESSOR DORSANEO: Yes. And you would miss that boat if you waited.

PROFESSOR ALBRIGHT: Okay. But you have gone beyond the 30 days. So you haven't filed your motion for new trial.

PROFESSOR DORSANEO: So you don't have an equitable motion for new trial.

PROFESSOR ALBRIGHT: So you are saying there is no error in failing to grant the motion for new trial, but now it's after -- it's between 30 days and six months, and I am appealing because it's not that it was --

PROFESSOR DORSANEO: They served some kind of gas station.

PROFESSOR ALBRIGHT: Yeah. Not that it wasn't abuse in discretion but there

is some kind of jurisdictional problem here. There was some gross error that appears from these records.

HONORABLE SCOTT A. BRISTER: Fundamental error.

PROFESSOR DORSANEO: Well, it could be a service problem, typically a service problem. In many default judgment cases it's a problem of the sufficiency of the evidence to support the damages.

PROFESSOR ALBRIGHT: Right. Okay. But it will be something that appears in the entire record?

PROFESSOR DORSANEO: Yes, ma'am.

HONORABLE C. A. GUITTARD: Now, if as Rusty suggests the term "face of the record" gives a broader review than an ordinary appeal would, which is contrary to what the cases have said, but if that's true, then we ought to say that in connection with our Rule concerning preservation of appellate complaints.

MR. MCMAINS: Well, basically it's --

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: I am not advocating particularly either way. I guess one of the things I am curious about is we now have Supreme Court law, U.S. Supreme Court law, that basically says if it's a no service case they are going to win on a bill of review anyway, and we have law that says if you don't get notice of a judgment within a certain time then you don't have any obligation to do anything up to a period virtually -- what is it? 180 days? Is that our max now? As long as this is double it I am just wondering why if you are going to do away with the writ of error practice why do we keep it at all, and why do you need six months, a six-month writ of error, anyway if you are going to subject everything back to what the Rules are that are applicable to everybody?

HONORABLE C. A. GUITTARD: Well, that's just one provision of a current law that we didn't propose to change. I guess it's based on the idea that if a person has a -- say, is a default defendant then he ought to have more time to have an opportunity to

know what's happened to him, and he ought to not be held to the strict time requirements that an ordinary appellant would.

MR. MCMAINS: Okay. If you are talking about a default judgment, then that's a particular carved out deal, but this is not limited to default judgments.

HONORABLE C. A. GUITTARD: And it would apply to anybody who didn't participate in the trial.

PROFESSOR DORSANEO: The Lawyers/Lloyds case takes the position -- I mean, the logic is that if you didn't participate in the trial you need more time to find out what happened than the time allotted by the ordinary Rules. I frankly think that that's a peculiar solicitude for defaulted defendants that is represented in our Rules in several places, and I would like to see it abolished.

MR. MCMAINS: Well, the problem I have is the way the Rule is read now as proposed to be amended is basically it says if you didn't participate in the trial. It doesn't say that it wasn't your fault that you

didn't participate. The point is if it's not your fault, you have all the remedies in the world under a bill of review practice. There is no real reason for a six-month writ of error to correct a default that ain't your fault, but you can walk away. You can get notice of the trial setting and not come and be entitled to appeal under this Rule, and I am saying I don't think that makes any sense.

HONORABLE C. A. GUITTARD: Well, if the committee wants to abolish the six-months appeal, well, that's a question that our committee didn't really address. So if you want to make that decision, that's fine. I mean, that's not contrary to what we have said, but if you want to preserve that, well, this is not quite as radical a proposal as Rusty is suggesting.

CHAIRMAN SOULES: Well, it's used. There are half a dozen cases in the last year in the advance sheets on writ of error, so if we start taking this away, it's something that's active in the current practice. There are half a dozen reported decisions in the last year.

MR. MCMAINS: But look, if I can respond to that, the reason that's there is because the caselaw right now on bill of review is if you don't take a six-month writ of error then you are going to be barred from doing a bill of review. If you take the six-month writ of error away, every single problem that you have with regards to no notice in terms of notice of the entry of the judgment or whatever is taken care of in our Rules up to 180 days, and if you are outside the 180 days, then you could do a bill of review, and the only thing you lose is another three months. That's all I am getting at. If you have got a -- it's only a three-month difference.

HONORABLE C. A. GUITTARD: But you can complain, for instance, on a six-month appeal on a writ of error since the face of the record just means the whole record you can complain of the sufficiency of the evidence to support the damages, for instance, and some of those cases do that, and well, perhaps you shouldn't have the right to do that, but if so, let's be sure what we are deciding here

about that.

MR. LOWE: Judge, I have one question.

CHAIRMAN SOULES: Buddy Lowe.

MR. LOWE: I think that on bill of review the burden is on you showing that it wasn't your fault.

HONORABLE C. A. GUITTARD: Right.

MR. LOWE: Under this six months you don't have to prove. You have no burden of proving that.

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

MR. LOWE: You just prove records, so I am not saying that's a big step, but that is a difference. I mean, you know, maybe that is a burden that's in this six months. That's why they had to rule like that. In the six months you just have to prove by the face of the record, but they thought then on the bill of review you ought to go further and have to put the burden of proof on that person that it wasn't their fault, and sometimes that becomes an issue.

So they are not -- that might be a difference. It doesn't make a difference, but there is a difference.

PROFESSOR DORSANEO: Buddy, probably in a no service case you make your proof of, no, it wasn't my fault by proving no service, no duty, no obligation, no fault. So probably in a no service case not only do you not need to show a meritorious defense, and you don't have to show extrinsic fraud in no service case because the Supreme Court has already held that, our Supreme Court. Probably all you have to show is no service in a bill of review case when it's no service.

MR. LOWE: But there might be other situations. I don't know. Plus the fact that even in those, what if you you get into the question, well, you know, you knew they were looking for you. Was it your fault that you didn't appear when the sheriff was supposed to come, and therefore, the sheriff has called you? Do you have to do that? Do you get into those issues? I am saying you get into more issues in a bill of review than you do the writ of error.

CHAIRMAN SOULES: Shelby.

MR. SHARPE: Did the committee find some glaring problem with the current writ of error practice that spawned this rule? If it did, I would like for you to articulate that. Otherwise, I recommend that this writ of error practice does not seem to be broken, so therefore, I don't think it needs fixing, and I would, as we did on the transcript, recommend we just leave writ of error practice alone unless there was something that you saw as a bad deficiency in writ of error practice.

HONORABLE C. A. GUITTARD: Well, as I suggested before, and I have this more fully discussed in the memorandum, No. 3 I think it is, attached to the explanation. The problem is using the term "face of the record" in two different senses and the confusion that that causes, and there is still some cases that hold that in a writ of error you can't go into the oral testimony, and there will be that kind of confusion continuing if we continue the writ of error practice with this face of the record requirement.

MR. SHARPE: Well, it would seem to me, Judge, that the best thing to do would be to take our current writ of error practice and just make that one minor clarification and just leave writ of error practice alone as it currently stands.

CHAIRMAN SOULES: Okay. Richard and then Sarah.

MR. ORSINGER: Another distinction between the bill of review and the writ of error is that there is no right to supersedeas in the final court of review. The only possible relief you have of execution of judgment as I understand it would be to get a writ of injunction issued by the Court that issued the judgment against the execution of the writ.

MS. DUNCAN: There is caselaw, however, you can't get that if you did not supersede the writ of error.

MR. ORSINGER: There is? I will have to get that. I have got that in a case right now. So there is a big difference. You can supersede this judgment by filing a supersedeas bond, but you can't supersede a

bill of review. That's a distinction that would make a real difference to some defendants, and I would also say that I have done some research in the area. There are some courts of appeals that say if you don't preserve error by failing to show up, you cannot complain on appeal. There is others that say if you weren't at trial, you can't be held to the preservation requirement.

Whereas most defense to me is where you have incompetent evidence that comes in without an objection in a prove-up on a default such as rank hearsay or even speculation, no objection to it or anything else. Can you bring in written statements of people, hearsay, inadmissible, no hearsay objection? If it comes in without an objection of substantive evidence, we have the potential for the real abuse of proving up the damages on a default if we don't let defaulted defendants raise complaints about the sufficiency of the evidence without having weighed at least their hearsay complaint, that the hearsay is incompetent. So I think that if we do move from the writ of error practice

into the appellate practice I would want to say something about the preservation so that we don't lose the favorable caselaw that we do have. As Rusty said, I think we run the risk of losing it if we move it from writ of error to appeal and say nothing about preservation requirements.

HONORABLE C. A. GUITTARD: You want it to say something about the preservation requirements?

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: Just a note that I think one of the other reasons that this was done, if you will look at Rule 45 on pages 41 and 42, the Rule as it now stands says how you perfect an appeal by writ of error and no more, and it doesn't tie in with any of the rest of the Rules on briefing schedules or brief contents or anything else. So that was part of as I remember the motivation for incorporating the writ of error practice into the regular appellate practice.

CHAIRMAN SOULES: I'm sorry. I didn't understand what you said. There is no briefing schedule on the --

PROFESSOR DORSANEO: You jump over, jump back into the regular rules as soon as you get the writ of error perfected.

MS. DUNCAN: Maybe you do.

PROFESSOR DORSANEO: Well, the other rules talk about appeal or writ of error, appeal or writ of error, appeal or writ of error.

MS. DUNCAN: Now they do.

PROFESSOR DORSANEO: I don't like the writ of error practice because I don't think somebody should get this extra time. It's as simple as that. Now, I have used the writ of error appeals successfully. Almost every time I have used it I was very happy to have the extra time, but it always was the result of somebody not doing what they otherwise should have done that I really couldn't have justified on any kind of a fair basis, I mean, not showing up for the trial and also not perfecting the appeal after getting notice of the judgment. If the time is long enough for ordinary defendants who are diligent in protecting their rights to perfect an appeal, why give these other people,

assuming they have been served and everything else, why give them extra time? I don't see the point in it from the standpoint of the way our system operates.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Well, the other problem I have is that everybody's justification thus far for the preservation of the writ of error assumes that you are talking about a default case. There is no such limitation, and therefore, what this says is that when you have a trial setting and the other side doesn't show up, even if you have conclusively proved they had notice, even if they are at the courthouse and they just don't come, that they are going to have extra time to appeal and perhaps even if you want to change the Preservation Rule to make it easier not even have to object to evidence that is otherwise incompetent. They just don't have to show up.

Why should a person who doesn't show up be improved in their appellate position? That makes no sense at all to me. Particularly in a non-default context. Now, that's -- and I

guess that's the biggest problem that I have with it right now, is it just says "didn't participate." It doesn't have anything to do with whose responsibility it was for not participating.

MR. LOWE: But Rusty, don't you think that most people who, I mean, you know, have a lawyer and so forth are not going to just say, "Well, you know, I am not going to participate," and they have taken a big disadvantage because certainly I have seen trials that Mike tried just as well with me not being there, but that's not ordinarily the thing I would brag about. So I think that as a practical matter if that person has made that choice, he's made such a bad choice we ought to give him some advantages.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Well, doing away with writ of error procedure completely seems to be a pretty big issue that would require some more study. Can we kick it back to the committee to look at the bill of review and see if it represents a viable

alternative if we did get rid of writ of error? I just don't think it's the kind of thing that we should decide right now.

HONORABLE C. A. GUITTARD: Well, we're willing to consider the question that hasn't been before us before as to whether there ought to be a six-month review anyway. We hadn't considered that. If that's something that you think ought to be abolished, well, well and good.

MR. ORSINGER: That's not anything the committee -- the committee needs to write the language, but the committee is just going to get together and vote for or against six months. We really ought to know right here whether six months is something that's desired or not. If we want the six months, we can rewrite it at the committee level, and if not, there is really no point in taking the policy question back to the committee.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: It seems to me there is nothing wrong with study.

I mean, I am having trouble thinking of anything other than defaults that applies to writ of error. An SMU law student could look that up in 30 minutes on Westlaw and find out how many writ of errors other than default judgment situations there have been. There might be some situation we are not thinking about.

PROFESSOR DORSANEO: Well, one very common one is a divorce case that's proved up where the trial is the presentation of the agreements to the trial judge and only one of the spouses is there.

HONORABLE SCOTT A. BRISTER: It's a post-answer default.

PROFESSOR DORSANEO: No, no. This is service, everything is fine. It's settled. There are agreements incident to divorce and only one of the spouses goes to the prove-up. Okay. Well, now people who know about writ of error appeal know that you must get the one who doesn't go to sign the draft of the judgment, that signing the agreement and incident to divorce is not participation in the actual trial. So either

you have the wife go to the prove-up and stand there or you have her sign the agreement incident to divorce if your husband, ex-spouse, wants to get married again before six months. I mean, and that's the reality of it because otherwise you may have a writ of error appeal. It may not be successful, but that's one of the things that I don't like about it. Why does it take so long to get this over with? When it's over, it should be over.

MR. ORSINGER: I would say as a family lawyer that there is only one case that I know about where that has happened, and that's a published case where the courts have ruled on that, but in my experience in the family law practice if you have a deal if it's going to fall apart, it falls apart before the final judgment is signed. Once the final judgment is signed then most people won't appeal, can't even find a lawyer that would appeal, because you have waived all error except for lack of jurisdiction in the Court; isn't that right, if you have entered into an agreed judgment?

PROFESSOR DORSANEO: Probably. Bernie Stubbs wouldn't agree with your analysis. No. He's the one guy.

MR. ORSINGER: Yeah. Well, I don't think that has -- I don't think we need to preserve that or squash it out because of the effect on family law because I think that most of the family law deals fall apart between the prove-up and the signing of the original decree, and you know about it then.

CHAIRMAN SOULES: Okay. Would somebody articulate then the policy issue that you want to get a consensus on? No sense in going back and doing that work if --

PROFESSOR DORSANEO: As I understand they want to know whether in a no service case the bill of review remedy is an acceptable substitute that wouldn't be --

PROFESSOR ALBRIGHT: A no notice case.

PROFESSOR DORSANEO: -- An Alexander vs. Hagadorn impossibility

PROFESSOR ALBRIGHT: A no notice case because you could be served but not have notice of the trial date, for

instance.

MR. LOWE: Yeah. Look, if we wanted to do away with just the writ of error, then you could just change the caption "appeal by party not appearing at trial," and start out "A party may appeal a final judgment who didn't appear by complying with the following requirements" and just do away with the language, if that's what we are trying to do away with, and make it all just part of an appeal, but the main thing as I see it is Rusty says that there is a lot of confusion caused by what's the face of the record, but I have heard a lot of confusion talking about this, too.

PROFESSOR DORSANEO: Let me say one other thing.

CHAIRMAN SOULES: Let's bring this to closure, though.

PROFESSOR DORSANEO: We will also examine whether it ought to be the party not participating in the trial or somebody else, maybe somebody who wasn't served, maybe that -- Rusty's comments all have to do with the fact that that category is perhaps broader

than it ought to be in fairness to all of us.

HONORABLE C. A. GUITTARD: Well, the question should be whether or not we should abolish the six month review.

PROFESSOR DORSANEO: And if not, how should it be changed?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: How many feel that the six-month review should be abolished?

PROFESSOR ALBRIGHT: We don't know yet.

HONORABLE SCOTT A. BRISTER: I don't know. If it's nothing other than defaults, if defaults are what's covered, then all defaults ought to be under the same Rule, bill of review or writ of error. If it's something else...

HONORABLE C. A. GUITTARD: Well, when a post-judgment, a post-answer default, a fellow answers and then doesn't come he is entitled to a six-month appeal. Should he have one? I don't know, but that's what we ought to decide.

HONORABLE SCOTT A. BRISTER:

But it seems like that ought to be covered by the Gold, Smith, Hagadorn and whatever. It's the clerk's fault and --

HONORABLE C. A. GUITTARD: In other words, it should be a bill of review problem.

HONORABLE SCOTT A. BRISTER: It can be taken care of fine by the bill of review.

HONORABLE C. A. GUITTARD: Okay. That's the question to solve.

CHAIRMAN SOULES: Does the subcommittee want any guidance from the committee as a whole right now?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay. What would you like to have answered?

HONORABLE C. A. GUITTARD: We want an answer to the question of should a six-month review be abolished.

CHAIRMAN SOULES: Okay. Let's take a show of hands, and I understand some people don't feel like they can vote on that because they don't have enough information. Okay. First, Shelby.

MR. SHARPE: I think Rusty has got one point that we should address before we vote on that.

CHAIRMAN SOULES: That's fine. What is it?

MR. SHARPE: And that is failure to appear without fault because his statement that you know about it and you just don't show up, I realize that's not -- but it could happen. I think that's the thing that's really sticking in the craw of a lot of folks is somebody just knows about it but just flat doesn't show up, maybe just out of orneriness, but to me a default or a judgment nil dicit which is entered, which is basically a judgment after having answered, those situations need to be addressed, and I think if you want to get rid of the writ of error practice, hey, that's fine. Let's just go get rid of the writ of error practice and leave it down to appeals and bill of review and just go with that. I think that would be great.

HONORABLE C. A. GUITTARD: That's the question.

MR. ORSINGER: I would propose

that we break it into two steps. The first vote is, is there anyone here who wants to wipe it out no matter what your excuse is, and if that fails, then let's find out if we want to wipe it out if your excuse is that if you just turned around and walked out of the courtroom, you knew there was a trial and you chose not to come. That's where Rusty's issue is going to start splitting votes.

MR. MCMAINS: Well, okay.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: If I can make one clarification because I went over this rather fast. I was mentioning the difference between 180 days or 90 days or 180 days, whatever the Rules are. With regards to the notice that basically means that if you don't get notice of the entry of a judgment, I mean, our current Rules provide remedies. If you are in the judgment and you don't get notice of it, then the times don't start to run until you get notice of it. Now, your burden under that Rule I understand is to go get a finding that you didn't get notice of it, and that's right now one of the remedies that you have

basically in addition to the kind of automatic remedy of you have got 30 days to find out if you didn't know there was anything going on, but it seems to me that that basic practice, you are entitled to an appeal from that as well, specifically under our Rule now, so that you have got a period a maximum of which is under the Rule up to -- the times don't start to run and they are extended only up to a maximum, and I don't remember what the number is.

MR. ORSINGER: 90 days.

CHAIRMAN SOULES: 90 days.

PROFESSOR ALBRIGHT: 90 days.

MR. MCMAINS: And that includes basically the time in which you can file a motion for new trial. You can get all of the appellate relief, do all of the things you want to do in the trial. So you have already got three months if you are assuming that you didn't get notice of the judgment. I mean, all of your times are already pushed back by three, by up to three months if nobody sent you notice of the judgment, and if you got notice of the judgment, the question is why

should you be treated any differently just because you didn't show up frequently or maybe even after you had notice of the trial and didn't show up, and you get to take advantage of that and say, okay, here's a guy that didn't have notice of the trial and did have notice of the judgment, and he does his thing, and here is somebody else who just ignores both of them, and he gets an extra three months?

It just seems silly. We seem to have accommodated everybody who's going to know that there was a judgment entered against them. Apart from them you have the bill of review practice, and why shouldn't they have the burden in a bill of review, I guess is my point. I mean, the judgment is entitled to some integrity unless they are no service judgments, in which case they are void, and that remedy is available now.

CHAIRMAN SOULES: Okay. What does the committee need guidance on? We need to get something stated here.

MR. ORSINGER: I think we ought to make a motion that we don't allow any kind

of six-month review under any circumstances, see if it passes. If it passes, that's the end of the argument. If it doesn't pass, then we have got to find out --

HONORABLE C. A. GUITTARD: Then we repeal Rule 45.

MR. ORSINGER: That's right.

MR. MCMAINS: If I may have one other thing, from the standpoint there is, of course, a Rule that specifically gives you additional time in the event of service by publication.

MR. ORSINGER: Two years.

MR. MCMAINS: Two years already.

MR. ORSINGER: To file a motion for new trial.

MR. MCMAINS: So that's already in there, too. So again you are really talking about affected service as being a valid service in some fashion and still no appearance.

CHAIRMAN SOULES: Okay. So state the proposition.

MR. ORSINGER: I am going to

move that we eliminate the six-month delay, whether it's under the form of a writ of error or the form of an out of time appeal, for all purposes, and let people fall back on if they got no notice, their 90 day remedy or a bill of review, which they can file up to four years after the judgment, or if it's citation by publication, file a motion for new trial up to two years after the judgment. Those are the only remedies. Just eliminate the six-month out of time review. That's my motion.

MR. MCMAINS: Second.

CHAIRMAN SOULES: It's moved and seconded. Those in favor show by hands. Eleven. Opposed? Eleven to seven in favor of abolishing, what, Rule 45?

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: Rule 45. And leaving the party to whatever other appellate remedies are available; is that correct, Richard?

MR. ORSINGER: That's right.

CHAIRMAN SOULES: You didn't

mean to be comprehensive in your list of the other appellate remedies that are available?

MR. ORSINGER: I thought I was, but I may not have been.

CHAIRMAN SOULES: Well, you did intend to be, but if you weren't, we can include the others as well, right?

MR. ORSINGER: Right.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: Now, was that enough of a vote for us to assume it's done, or was that too close?

HONORABLE SCOTT A. BRISTER: It was for the committee to look at it.

PROFESSOR ALBRIGHT: I think the committee still needs to look and make sure that all parties that we want to protect are adequately protected.

PROFESSOR DORSANEO: I will make as good as a report as I can make on this subject.

CHAIRMAN SOULES: All right. The inclination is to abolish Rule 45 unless there is some issue that we haven't looked at here that should bring it back to our

attention, right? The committee is going to look at that?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: Okay. So charged. Next?

PROFESSOR DORSANEO: I am going to exercise discretion here not to take up our draft of Appellate Rule 52 at this point because I think that may be part of the same thing we were talking about, and I am not sure we are ready yet, but so that would take us all the way up to in terms of the policy question of significance to Rule 74, which deals with briefs in the Courts of Appeals. There is a companion -- which that's on page 60. There is a companion Rule for applications for writ of error in the Supreme Court on page 68.

HONORABLE SAM HOUSTON CLINTON: Why are you skipping over statement of facts, Rule 56?

CHAIRMAN SOULES: Rule 56 on page 61. I must have that wrong. What page is it on, Judge?

HONORABLE SAM HOUSTON CLINTON:

61. Statement of facts.

MR. ORSINGER: It's on page 51.

HONORABLE SAM HOUSTON CLINTON: Oh, I'm sorry. Yes. I can't read.

MR. ORSINGER: That's that small font.

PROFESSOR DORSANEO: We can do that one. Go ahead, Judge. Why don't do you that one?

HONORABLE C. A. GUITTARD: The question is with respect to the presumption of completeness of the record when a party files his statement of points to be relied on. Now, apparently the Supreme Court when they adopted that some years ago felt that if you specify the points relied on and then request a statement of facts limited to those points that that ought to be the complete record for the purpose of the appeal and that if the appellee thinks some additional part of the record should be included he has the right to designate that and even by amendment he could have it brought before the Appellate Court at a later time.

So but some of the Courts of Appeals have

held that if there is a question of sufficiency of the evidence to support the fact finding that the whole record has to be there even though you have limited your points under Rule 53. That apparently was not the intent of the Rule originally, and the intent of the Rule in which we undertake to spell out is that the record that is presented on appeal is presumed to be the entire record, and if there is a question to be reviewed in the light of the entire record, then that should be considered the entire record, and those civil appeals, those appeals cases, intermediate Court of Appeals cases, that say the contrary ought to be in effect overruled.

Now, the Court of Criminal Appeals, though, has taken the position over a very strong descent by Judge Clinton that there is a Constitutional problem of reviewing the sufficiency of the evidence in the light of the entire record and that the presumption shouldn't apply in that case. Well, if that's the prevailing doctrine of the Court of Criminal Appeals we ought to make it a special exception, a specific exception for that

situation in criminal cases. Otherwise, we should say that the Rule means exactly what it says, and that is that if a party specifies the grounds upon which he appeals then there should be a presumption that the record presented on appeal is the entire record for the purpose of that review.

CHAIRMAN SOULES: Okay. Well, of course, Judge, there -- I can't find the cite, but there is a case called Englander that's a '68 case from the Supreme Court of Texas itself.

HONORABLE C. A. GUITTARD: But that is a case where this Rule was not followed. In other words, in the cases where you don't specify under Rule 53 what the points are that you are relying on, then there is no presumption. The presumption is that there is something that's not in -- that's not shown on appeal but might be in the record that would sustain the judgment. That's the situation when you don't follow Rule 53.

PROFESSOR DORSANEO: D.

HONORABLE C. A. GUITTARD: 53(d). But if you do follow Rule 53, that

takes the case out of the Englander Rule and raises the presumption which is contrary to the presumption in the Englander case.

PROFESSOR DORSANEO: It reverses the presumption.

CHAIRMAN SOULES: Yeah. Not everybody reads Englander that way. That wasn't the discussion.

PROFESSOR DORSANEO: This is the bad case, the Schafer versus --

MS. DUNCAN: Well, that puts it in perspective, doesn't it?

CHAIRMAN SOULES: Well, the idea of Englander was that the trial court's judgment is the trial court's judgment, and if the parties want to attack that judgment for factual or legal sufficiency then there are standards of review that apply, and you just cannot limit that appeal by not taking up a full statement of facts because the Court has to look at the full statement of facts to review factual or legal sufficiency, and so this doesn't work on factual and legal sufficiency points, and the parties can't by doing whatever they are going to do with the

record or doing whatever they are going to do with their briefs attack the trial court's judgment any other way than on the fixed standard of review. That was the rationale behind Englander whenever it was decided because the Supreme Court rejected this and said so in that opinion that the application of this Rule to legal and factual sufficiency points, and it was intentional.

PROFESSOR DORSANEO: Well, there wasn't any Rule 53(d) when Englander was decided.

HONORABLE C. A. GUITTARD: That's right. And the Rule 53(d) was adopted in order to reverse the Englander presumption in that limited class of cases. As a matter of fact, I stood right -- it wasn't in there.

CHAIRMAN SOULES: There was a counterpart of this in the Rules at the time.

PROFESSOR DORSANEO: And it's still in there, and it's misleading. It talks about if you don't go with an abbreviated statement of facts that they are going to hurt you for it. Now, we know under the Rule of Englander vs. Kennedy that if you don't go

without a complete statement you are going to get hurt worse unless you can use 53(d), and now there is nothing in 53(d) right now that says that you can't use it in the Englander context, and I guess the committee thought that this new case Schafer vs. Conner, which is consistent with Englander, is probably not the good approach, that the better approach is to let the record be as big as it needs to be but no larger than it needs to be.

CHAIRMAN SOULES: Okay. Sarah. Then --

MS. DUNCAN: The committee was not unanimous on this. Maybe I am the only descender. I personally think Schafer was a correct and good decision. In my view it is the appellant who has the burden to bring up whatever record that appellant thinks is necessary to demonstrate reversible error, and I don't think the appellant should be able to shift the burden to the appellee to sift through the record and determine what parts of the record are necessary to disprove a showing of reversible error, and in my view that's what this proposed amendment does.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Well, I guess I have more kind of a pragmatic question in terms of practice because I haven't read all of the amendments, of course, that we have done, but my recollection is that we now -- that these Rules theoretically require that you advance the cost of the statement of facts, and my question is whose burden is it to pay if somebody were to choose this remedy and to say, okay, I am going to make a factual sufficiency complaint on damages, and there are only these three pages involved, and in reality there are 800 pages involved in terms of in view of the other side, the other side makes that request. Is it the appellant's burden to pay for it under the Rules as they are now drafted, or does the appellee have to pay for that?

HONORABLE C. A. GUITTARD: Well, the point is that if the appellant doesn't request enough of it and the appellee brings additional portions of the record up that the appellant has not brought up, then the appellate court has the discretion to

reverse the costs, put all those costs on the appellant.

MR. MCMAINS: Well, I understand. But remember now the current Rule as I understand what we are now doing, though, we are saying that it's the appellee that -- you have got to advance the costs.

PROFESSOR DORSANEO: No. It says "pay or arrange to pay."

MR. ORSINGER: Yeah. But you can't get your statement of facts until they are paid in full.

MR. MCMAINS: I want my 792 pages. I know what that means to the court reporter. It means I better write them a check.

PROFESSOR DORSANEO: Your point is a good point, but arrange to pay may be theoretically you have to arrange by mandamus.

MR. ORSINGER: No. This is a specific Rule here that says you are not entitled to the statement of facts. It's here. It's g.

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

MR. ORSINGER: They are entitled to be paid in full before they have to deliver the statement of facts to you.

MR. MCMAINS: Right.

MR. ORSINGER: Now, we have the problem under the current practice I don't think the Rules right now tell you who has to pay when the appellee wants to add, and I think it would be unfair to let an appellant say "I am only going to have my client's testimony typed up and pay for that" and then the appellee has to front the cost for all the other witnesses. If we are going to do it, the appellee should be able to elect and make the appellant pay, and if that was abusive then let it be adjusted on the assessment of costs at the end of the case.

HONORABLE C. A. GUITTARD: Well, we can, I think, cure that by an amendment which would say that the -- when the appellee designates additional portions of the record that it be the appellant's burden to include that and to pay for it.

MS. DUNCAN: You are still shifting the burden to the appellee to go

through the record. For instance, on a no evidence point to go through the record and determine whether there is some evidence in the record that's not included on appeal that will support the jury's finding, or if you have got charge error like on -- you are still putting the burden on the appellee to go through the record and determine whether during opening statements, any part of the testimony, closing arguments, whatever, they can cure the alleged error in the charge that's been brought forward on appeal.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: It seems to me in the vast majority of the cases there are very discrete, distinct different parts of the trial. I mean, the vast majority of our trials are personal injury cases. If you say there is insufficient evidence of the damages, then you are not going to have the expert witnesses. You are not going to have the eyewitnesses. You just get the other people, and it seems to me ridiculous to make you bring up the eyewitness' testimony so the

Court of Appeals won't "gotcha," you didn't -- when all that's left out has nothing to do with it.

Similarly, if it's an insufficient evidence and negligence, bringing up the doctor's testimony who treated the patient and who knows nothing about what happened in the car wreck is a waste of expense. Now, clearly in the complex cases that's a harder problem, but in the complex cases it's more likely they are going to bring up all the record anyway because of a bunch more witnesses and stuff like that, but the vast majority of trials and the ones that would benefit most from saving expense it seems to me is a reasonable approach when the jury asks for testimony, you know, what is so-and-so's testimony, we have a dispute about what so-and-so said on so-and-so. It's never more than two or three pages. I mean, the vast majority of cases it is discrete portions of the record. It seems to me nothing wrong as long as Rusty's point about cost is not unfairly shifted.

CHAIRMAN SOULES: Anyone else have anything to say about this? Mike

Hatchell

MR. HATCHELL: To try to sharpen the focus, the problem we have in the wake of Schafer vs. Conner is that the present rule is just flatly misleading to somebody who doesn't do a lot of appeals. It implies that you can take an appeal on a limited record and get full review when in truth and in fact by a case construction of the Rule you can't do that. I would take the position the fact that Schafer vs. Conner is even much broader than factual sufficiency review because it says any point that requires review of the entire record, which would be admission of exclusion of evidence and things of that nature. So what we really need to decide is, is the concept of limited record appeal worth preserving against the concerns that Sarah raises of burden and cost-shifting to the appellee.

MR. ORSINGER: Can I make a proposal that might be a midground for somebody, or maybe it's not? Is that you should be able to elect to include all or none of a witness' testimony but not to be able to

selectively include some pages and skip some pages and include more pages. Would that make it any easier for you, for example, Sarah, if you were to say "I am going to take eight witnesses, and it's up to you if you want to bring up the other five"? Or is the problem just as bad?

MS. DUNCAN: I don't think that would solve the problem. I mean, you are still going to have -- an appellee is still going to be required to go through the undesignated testimony on the portions of the record.

MR. ORSINGER: But you could adapt more easily to what Judge Brister was saying because if you know, for example, that three witnesses testified on liability only and what's going up is damages, you don't even really need to read those guys' testimony to know to exclude them, do you?

MS. DUNCAN: I agree with Judge Brister that there needs to be a procedure for a limited appeal, but I don't think either the current Rule or the proposed Rule adequately addresses that need without significantly

shifting the burdens or giving the potential for significantly shifting the burdens.

CHAIRMAN SOULES: Dan Johnson.

MR. JACKSON: David Jackson.

CHAIRMAN SOULES: I mean Jackson, excuse me.

MR. JACKSON: We do need to put some parameters on it because I have had requests for partial transcripts of depositions, and a lawyer will ask you something crazy like give me every question and answer that he answered "I don't know," and you know, you can spend a lot more time putting that together than you can just giving them the whole transcript.

HONORABLE C. A. GUITTARD: Bear in mind in Schafer vs. Conner that the opinion shows that they didn't comply with 53(d). They didn't state the grounds, the points that they are going to rely on. So our present question really wasn't before the Court then, but the problem is that's the way it has been interpreted.

CHAIRMAN SOULES: Okay. Does somebody have a proposition?

HONORABLE SCOTT A. BRISTER: Yes. I propose we adopt the committee's suggestion with an amendment to be added about with discretion to the Court of Appeals to assess costs if unreasonably restricted to unfair designation on a limited appeal.

MR. ORSINGER: Who would pay the initial cost of getting the statement?

HONORABLE SCOTT A. BRISTER: You have got to pay what you designate, but if it's unreasonably restricted -- well, otherwise you have every little plaintiff in every little car wreck case who wants to appeal a discrete, simple issue has to request the whole trial, even when everybody knows if it's on liability the moaners and groaners, the doctors have nothing to do with it. Otherwise, you waive sufficiency of no evidence. You just waive it. You have to pay for all of it.

MS. DUNCAN: By the same token when there is payment of the statement of facts to consider as a cost of appeal there are people who won't -- who will exercise that privilege more responsibly and who will truly

sit down and say, "Is there a sufficiency to appeal here in light of the fact that it's going to cost me however many thousands of dollars to get my record prepared?" And you are enabling them to shift that cost, for instance, to the defendant and then saying "Defendant, don't worry. We will shift it back to the plaintiff from whom you can never collect, but don't worry about it." And that's just not -- I don't think that's going to be workable. I think everybody is going to file a partial statement notice, and they are going to shift the costs for preparing the statement of facts to the nonappealing prevailing party.

CHAIRMAN SOULES: Then there is another side to that that's been discussed here before, too, and that is whenever the plaintiff or the appellant tries to limit the statement of facts if the appellee can designate "free" and force that back on the appellant to start with they are going to go ahead and do so just because they want to include it altogether and make the appellant pay for the whole thing. It's a dilemma

that's -- I don't know what the resolution is. Let's see. Rusty.

MR. MCMAINS: Well, just I understand Judge Brister's desire to make appeals more efficient or economical, but the fact of the matter is -- and this is kind of a chicken and egg problem -- most appellate lawyers that I know, many of whom are in this room, that have taken referred appeals, cases they didn't try, find things in the record to support a proposition that the trial lawyer never thought about. Just like we all get opinions from the courts saying this evidence proves this, and you had nobody ever took that position before.

So until you see it, the idea of designated basically gives an awful lot of credence to the trial lawyer that is not necessarily born out by subsequent events with regards to the drafting of the appeal and the appellate documents or the opinions of the Courts of Appeal, and I frankly do not disagree that we are misleading people in the sense that you can appeal on an abbreviated statement when in reality you can't, and that

needs to be corrected, but I am not sure that it's that much more advisable or will make it any easier to shift the costs.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: The example I used earlier was governmental immunity. There might be instances where determining whether a governmental employee shares a municipality's immunity or doesn't can be determined strictly on the basis of the pleadings and the legal arguments, and I think we are all struggling with wanting to not burden those parties or the system with a full record and a full appeal in that situation.

What I am suggesting is that neither of the two procedures that we have got works to do that, but that doesn't mean that we can't create a procedure that will accomplish that; for instance, a certification procedure with the trial court where the parties say, "This is what we want to appeal, Judge. This is all we think that will be necessary to do that." The trial judge sanctions that and says go to the Court of Appeals. That's one possibility. I'm sure there are others, but I am not

arguing against a limited appellate procedure. I am arguing against the two ways that we have as not being effective to do that fairly to all parties.

CHAIRMAN SOULES: All right. The proposition though was that we adopt 53(d) with some provision concerning costs, and we haven't decided what that is.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. That was your proposition, wasn't it?

MR. ORSINGER: Judge Brister's.

CHAIRMAN SOULES: Judge Brister's and who seconded it? Anybody? Richard. Okay.

Okay. Those in favor show by hands. Nine for. Those opposed? Five opposed. So nine for and five opposed. Okay. And the -- what are we going to --

MR. ORSINGER: I would like to move on the cost allocation. I think that the party who's appealing the judgment should pay for the costs and that the appellee if there are portions to designate can simply indicate

what should be included and divulge upon the appellant to pay for it.

HONORABLE SCOTT A. BRISTER: What if they don't pay for it?

MR. ORSINGER: Then it's an incomplete statement of facts.

HONORABLE SCOTT A. BRISTER: Nil dismissed.

MR. ORSINGER: No. Then the presumption applies.

HONORABLE C. A. GUITTARD: Then the original presumption applies.

CHAIRMAN SOULES: Okay. Any comment on that? Is there a second?

HONORABLE C. A. GUITTARD: I have no objection to that.

CHAIRMAN SOULES: Okay. The motion is that if the appellee designates additional portions of the statement of facts that the appellant has to pay or make arrangements to pay, I suppose, or the words that you-all are using, and failing that the presumption does not apply.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: So it's either go ahead and pay for what the appellee has designated or bring up the entire statement of facts.

MR. MARKS: Well, doesn't that take us right back to where we were a minute ago?

CHAIRMAN SOULES: John Marks.

MR. MARKS: Doesn't that take us back to where we are right now?

PROFESSOR DORSANEO: No. One thing it does, what it does, it lets lawyers who don't want to be messing with each other for no particular reason to have the case appealed without running afoul of the presumption. It lets the lawyers agree that the presumption does not apply that this record is enough, and that's a good thing.

MS. DUNCAN: That's a good thing.

JUSTICE HECHT: But if you were the appellee?

PROFESSOR DORSANEO: Yes. I would not mess with somebody unnecessarily if I was the appellee.

MR. MARKS: As a matter of course isn't the nonappealing party going to designate the rest of the statement of facts?

HONORABLE C. A. GUITTARD: Not necessarily.

MR. ORSINGER: Let me also say that you could have a curative -- a provision that the appellate court could assess those extra costs against the appellee if they felt like the designation was unnecessary.

HONORABLE C. A. GUITTARD: Right.

MR. ORSINGER: They already have that authority.

CHAIRMAN SOULES: They have that authority.

MR. ORSINGER: And so in a sense it's self-correcting. Although you may make the appellant pay the money on the front end if it's an abusive designation you are going to have to reimburse the appellant on the back end, and that is some kind of safeguard against that being abused.

MR. LATTING: Does it ever happen?

CHAIRMAN SOULES: Yes. Not often but --

MS. DUNCAN: Eve Evelett's taken it up on a motion.

PROFESSOR DORSANEO: But now if the appellant doesn't request a complete statement and you are the appellee, you just smile.

CHAIRMAN SOULES: Does it ever happen that the costs are changed on appeal, that part of the costs are charged against the appellee? Is that your question, Joe?

MR. LATTING: Because of an abusive designation.

MR. ORSINGER: Yeah. Sure. Particularly on things like where somebody designated the voir dire be taken up, but there is nothing in the case on the voir dire sometimes the appellate courts will assess the voir dire costs regardless of who won or lost the appeal. We are relying on them to intervene in these situations, but we can make the Rule more specific if we want by saying if the request is unjustified.

CHAIRMAN SOULES: There is at

least one reported decision in the last year in the advance sheets where the appellate court reorganized the costs of the appellate record. So it does happen.

Okay. Any further discussion? Okay. Those in favor of Richard's motion show by hands. Keep them up, please. 13. Those opposed? That's unanimous.

Now, this doesn't say -- none of that is in the Rule right now. So that has to be written in, correct?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: Luke?

CHAIRMAN SOULES: Yes. Alex Albright.

PROFESSOR ALBRIGHT: I would like to encourage Sarah to try to write a rule that she's apparently thinking about for a different way to limit appeals at the hearing the next time, and it might be that's a better alternative than what we are doing.

HONORABLE C. A. GUITTARD: I think that Sarah is on our committee, and I

would encourage Sarah to bring it before our committee.

CHAIRMAN SOULES: Okay. So charged if Sarah will accept the charge.

PROFESSOR DORSANEO: Sarah, are you on the Advisory Committee Appellate Subcommittee?

(Ms. Duncan nods negatively.)

PROFESSOR DORSANEO: We need to put her on there.

CHAIRMAN SOULES: Okay. If she wants to be on there.

PROFESSOR DORSANEO: She's gone to all the meetings anyway.

MS. DUNCAN: That's because we joined the two groups. We have pretty much joined the two groups.

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: Actually we are ignoring the fact that it started out as an appellate section committee, aren't we? We are now operating under the foot offices of the Supreme Court Advisory Committee.

MS. DUNCAN: If that's true then --

MR. ORSINGER: Yeah. I think --

HONORABLE C. A. GUITTARD: Well, Luke just put you on it.

CHAIRMAN SOULES: Well, I want her to accept that. What we have done is we have made committee assignments at the beginning and then, of course, announced and invited anyone who wanted to volunteer to be on any other committee to let us know because it's just your election if you want to be on a committee you are not on right now, let me know, and I will see that your name is given to the Chair of the subcommittee, and you will be made a member of the subcommittee. Sarah can let me know on that and I'll take care of making that assignment. What's next, Bill?

PROFESSOR DORSANEO: 74.

MS. SWEENEY: Page or Rule?

PROFESSOR DORSANEO: 60.

CHAIRMAN SOULES: Judge Clinton, do you see any problem with Rule 53? It's got some language in there to address the concerns that you apparently had in your descent of concurring --

HONORABLE SAM HOUSTON CLINTON: Well, I don't believe it's going to reach it, but I don't believe you can reach it in view of the opinion of the Court.

HONORABLE C. A. GUITTARD: Our proposal is to make an exception for criminal cases in light of that opinion that you descented from.

HONORABLE SAM HOUSTON CLINTON: That's right.

HONORABLE C. A. GUITTARD: And you would approve that kind of provision, right?

HONORABLE SAM HOUSTON CLINTON: Right. Well, I don't have any choice.

MS. DUNCAN: It's the Constitution.

CHAIRMAN SOULES: You won't if you keep on writing descents. You have written your descent.

HONORABLE SAM HOUSTON CLINTON: Yeah, I have.

CHAIRMAN SOULES: Okay. 74 on page what?

PROFESSOR DORSANEO: 60.

CHAIRMAN SOULES: Page 60.

PROFESSOR DORSANEO: Now, we will have to make conforming changes to paragraph (a) because of the notice of appeal discussions that we had. I think probably that conforming just gets changed in terms of the parties to the appeal, parties to the trial court's final judgment. I think it probably just gets changed back to trial court's final judgment, but that's not a big thing.

The big issue is in paragraph (d). It was -- well, basically the two types of approaches stating the matter that's going to be brought to the appellate court as a way to challenge the judgment, the more so-called issue practice which is common throughout the country could even be said to be the more modern practice, and that doesn't necessarily mean it's any better than our practice or the point of error practice.

The point of error practice, the point of error as Mike Hatchell has explained it has at least two parts, maybe three parts, talking about who; and we would be talking about the

trial court erred, and then you would identify in what respect by granting or denying a motion for instructed verdict, and then it's at least customary to give in good advocacy to give why. So who, what, why, point of error practice. Points of error cannot be abstract statements of legal issues. Let's say they couldn't be, you know, whether a defaulted party must receive service by personal delivery in a trover case. All right. That's an abstract question. That's an issue in a broader sense.

The question is, do we want to retain our point of error practice, which is more defined and identifies the particular ruling about which complaint is made? It let's you as a person getting the brief locate the ruling in the record to see if that was the ruling that was made, if there was a preservation of the complaint properly; or do we want to also authorize a broader statement of the issues as a way to, you know, identify what the meat in the coconut is about, what this brief is about, what this case is about?

MR. ORSINGER: Can you give a

sample of an issue presented, Bill?

HONORABLE C. A. GUITTARD: He just did.

PROFESSOR DORSANEO: I just did. I gave an abstract one, but it would be whether emotional distress damages are available in a negligent infliction of emotional distress case, whether Section 46 of the restatement section of torts requires proof of malice, whether the tort of whatever requires this or doesn't require that. It doesn't have anything to do with this case exactly. It doesn't have anything to do with the particular ruling in this case. Okay. But it's in a broader sense what the appeal is about.

CHAIRMAN SOULES: Okay. Sarah Duncan.

MS. DUNCAN: The Rules still -- the proposed amendment (d) still requires that the issue be stated in the terms of the circumstances of the case. So I am not sure that the real distinction between issues and points of error is abstract versus particularized. I think in the better -- in

the best courts a point of error is probably fairly indistinguishable from issue practice. Unfortunately Texas has a long history with points of error that is not what the better courts are doing today, and my view at least in the committee was if we say point of error or issue maybe we can get rid of some of that baggage and some of the multifarious points of error holdings that are unjustified. Maybe we can just move the ball forward a little bit and not get so picky.

PROFESSOR DORSANEO: In the past we have been picky where they are not supposed to be picky.

MS. DUNCAN: But they are.

PROFESSOR DORSANEO: But there is still some pickiness afoot, not too much. Like flies in the pool game but not too many, as Marlon Brando said.

MS. DUNCAN: Pickiness, pickiness.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: Sarah, are you saying that this is really more of a change in

name only and not a real change in the way we would present our disputes?

MS. DUNCAN: No. I think it is a -- there is now an option to -- under issue practice you don't have to be as worried about picky. So yes, I think it could have -- I mean, we wouldn't be suggesting it if we didn't think that it requires change.

HONORABLE C. A. GUITTARD: In other words, this is simply to broaden the point of error practice and make it less technical.

MR. ORSINGER: But you still have to tie everything down to a ruling in your point or in your statement of the issue presented, or can you liberate from that and get down to the core legal issue?

MS. DUNCAN: I think the real substance that is important to me, at least, is the second sentence: "The statement of an issue or point presented will be deemed to comprise every subsidiary question fairly included therein." That's from the United States Supreme Court rule, and that to me is what is wrong with the point of error practice

traditionally in Texas, and that is you end up with 75 points of error because you want to make sure that every evidentiary ruling, every charge ruling, every motion ruling is included when what the real question is was this employee immune in all the different ways that we have raised.

CHAIRMAN SOULES: Isn't that sentence in the Texas decisions, the Supreme Court decisions?

MS. DUNCAN: United States Supreme Court?

CHAIRMAN SOULES: No. Texas Supreme Court decisions.

MS. DUNCAN: It depends on what year you are looking at.

CHAIRMAN SOULES: Well, the recent ones. You can read down into the argument presented to determine what the point of error may mean.

MS. DUNCAN: I don't remember having seen that in the Texas Supreme Court opinions.

CHAIRMAN SOULES: And I guess where my question is leading is why not just

insert that sentence into old (d) and not call this something else?

MS. DUNCAN: Because you are still going to have -- in my view you are going to have it anyway, but hopefully we could get rid of some of it. You are still going to have people reaching back into the 1930's caselaw on points of error and saying, "Well, we understand that they have added that sentence in here, but this is the law of Texas." I mean, I think with issues presented it gives the Supreme Court a way to say, "No, now, wait. We are looking at a little different practice here, guys. You can forget about all that old law." I mean, as initially proposed it was the issues presented without reference to points of error, but it was the view of the majority of the committee that we should offer the two as alternatives.

CHAIRMAN SOULES: Steve.

MR. HERRING: Do you have an alternative proposal that would just be the abstract statement of the issue as it still says?

MS. DUNCAN: The issue is

presented the way they have it in the Fifth Circuit in the Federal Courts.

MR. HERRING: But the committee decided not to recommend that as it's first.

MS. DUNCAN: Majority.

CHAIRMAN SOULES: Steve, did you have your hand up on this?

MR. SUSMAN: I'd like to -- I mean, I think Sarah is right. We need to get everyone's mindset out of the old past and say this is a new era, and it's no longer some game or "gotcha" where to write an appeal you have got to go hire some expert who knows the mine fields. You just tell the Court what's wrong, I mean, what's the legal issue, what's wrong here. You can say it in writing as simply as you can say it orally. It's impossible -

CHAIRMAN SOULES: Mike Hatchell. I'm sorry I cut you off there, Steve. What were you saying?

MR. SUSMAN: I was saying you ought to be able to say it in writing as simply as you can say it orally, which is impossible under the current Rules.

CHAIRMAN SOULES: Okay. Mike Hatchell.

MR. HATCHELL: This practice is essentially that that's used in the Federal circuits and the Supreme Court of the United States, and it works very well there. In 30 years of practice I have never had a point problem in Federal Court. You have them all the time in state court, and now recently we have begun to see some courts of appeals who want to keep people out on the merits going back to the 1930's concept of multifarious points.

And the second thing is in addition to just freeing ourselves from technical procedural trappings I think the statement of the points is much more meaningful. They move them forward in Federal practice to where the judges, that's the first thing they see, and well-drafted statements of the issues are very, very meaningful to the Court and very, very instructive to the Court as to what's actually involved. Our practice is so technical I never read the points because they are so boring, and I think that this really

will improve the quality of briefing in many respects in addition to getting rid of these technical problems that prevent review on the merits.

CHAIRMAN SOULES: Rusty, you had your hand up. Anything to add?

MR. MCMAINS: Largely just in the context the real question I have is -- and I do not appear to have the same draft we are working from, but at any rate does it say issues or points?

CHAIRMAN SOULES: This does.

MR. MCMAINS: Will it continue to say issues or points?

HONORABLE C. A. GUITTARD: Yeah.

MR. MCMAINS: I guess one of the problems I have, remember earlier Steve's complaint about the notion that we Identify -- when we took away the identification of appellee and we took away notice to them of their involvement, now the suggestion is basically that we take away points that would identify specific rulings or whatever by which at least if you knew what

the ruling was you would know whether you were implicated in it or not and present rather an abstract question of law. So the treatment of that in my judgment, one slight problem here is that coupled with what we had done earlier that you really do have to read the entire brief to figure out whether or not you are likely to be involved.

MS. DUNCAN: Rusty, the Rule still requires that you support by reference to pages in the record where the ruling or other matter complained of is shown.

MR. MCMAINS: Again, that just says -- that's just a reference to the record. I am talking right now we have Rules which say, including in the motion for new trial rules, requirements that you do, quote, "cross points," not any kind of cross-issue or any abstract statements but points specifically, which theoretically we know what that means under our current practice. The issue that is now proposed is one which doesn't have really a defined term in appellate practice, in Texas appellate practice.

If we are going to look to the Federal

principles to see, Mike's right. Federal Courts don't have any problems with the issues. That's because basically the Federal Courts have the ability to determine plain error. They will also bounce you and reverse cases or write rulings that were never raised below. They have that authority. They can just take the case and run wild with it. That's not what our practice is and hopefully isn't what it will become.

But right now one of my concerns is that we don't -- that we have places that refer to points specifically in our Rules that we have kept even from votes today, and to try and change the term from "points" thinking that's going to do anything, I don't know that That -- that we are accomplishing that because of this cross-points requirement and how it is you do cross-points in your rights to, quote, "cross appeal." And I think if you take away points that you even take away more notice to people who might not have thought they were involved in the appeal. But anyway that's -- I don't like the technicality stuff either. Don't get me wrong, but I don't know that

changing the name of it is going to change the attitude of Courts of appeals who are determined to try and avoid work.

CHAIRMAN SOULES: Anyone else have anything on this? I suppose the Chair of the committee is moving that we adopt 74, changes to 74(a) and (d); is that right?

HONORABLE C. A. GUITTARD: A hasn't --

CHAIRMAN SOULES: Oh, you are going to do some work on that.

HONORABLE C. A. GUITTARD: Well, on (a) it's also a question of whether you have to name all the parties individually, and (a) would permit you to just omit the addresses of the parties that are represented by counsel. The present Rule would require that your brief state the names and addresses of all the parties, and that is burdensome and unnecessary if you have got a lawyer there who you can name and give his address and telephone number and so forth.

PROFESSOR DORSANEO: So we would take out "address"?

MS. DUNCAN: Yeah. It should

be marked out.

PROFESSOR DORSANEO: That's why I didn't mention it because I thought something happened in the committee meeting.

HONORABLE C. A. GUITTARD: You have to give the names and addresses of counsel but not the party.

MS. DUNCAN: But this doesn't have "addresses" in reference to parties crossed out.

PROFESSOR DORSANEO: In the second line -- at the end of the first line of (a) we need to cross out "and" and then "addresses of" at the beginning of the second line, such that it says "A complete list of the names of all parties," blah, blah, blah, "and the names and addresses of their counsel."

HONORABLE C. A. GUITTARD: Yeah. All right. Cross out that at the end of the first line there "and addresses of parties."

CHAIRMAN SOULES: Okay. What are you going to do about parties that don't have lawyers?

MS. DUNCAN: That's the last sentence.

HONORABLE C. A. GUITTARD: You have to give their addresses unless you can't find them. Then you have to certify you can't find them.

MR. ORSINGER: You want to leave the sentence to say "the names of all parties to the trial court's final judgment and the names and addresses of their counsel"?

PROFESSOR DORSANEO: Yeah. Just cross out "and addresses of."

MS. DUNCAN: Right.

PROFESSOR DORSANEO: I got it. I have it.

MR. ORSINGER: Just take out "names"?

PROFESSOR DORSANEO: Cross that out.

MR. ORSINGER: Take out "and addresses"? Take out "and addresses"?

HONORABLE C. A. GUITTARD: Yeah. Take out "and addresses."

CHAIRMAN SOULES: All right. And then (d), is there a second to that

motion?

MR. SHARPE: Luke?

CHAIRMAN SOULES: Shelby Sharpe.

MR. SHARPE: You are going to need to change the title on (a). It should be "Identity of All Parties and Counsel to the Trial Court's Final Judgment" because just "Names of All Parties to the Trial Court's Final Judgment" is not an accurate description of what's in (a). It should be "Identity of All Parties and Counsel to the Trial Court's Judgment."

CHAIRMAN SOULES: Okay. Make that change to the caption so that it reflects what's in the body. Steve Susman.

MR. SUSMAN: Can we simply eliminate the first sentence of this Rule on the ground that it's a demonstration to the public of the hypocrisy of our profession? The first sentence, I have never heard anything so outrageous. "Briefs shall be brief."

HONORABLE C. A. GUITTARD: That's Judge Polk's.

MR. SUSMAN: Huh?

HONORABLE C. A. GUITTARD: That's Judge Polk's contribution.

MR. SUSMAN: That is the most ridiculous thing I have ever heard. That's what's wrong with our profession.

MR. LATTING: Plus it's in non-serif type.

MR. SUSMAN: Seriously that ought to come out. That is ridiculous "Briefs shall be brief," and then it goes on to say 50 pages.

MR. ORSINGER: The only real Rule is "Briefs should be brief under 50 pages." That's the real Rule.

CHAIRMAN SOULES: I think Judge Polk put that in before we had a page limitation.

MR. ORSINGER: It's still a standard to emulate, isn't it?

HONORABLE C. A. GUITTARD: That's hoardatory.

MR. ORSINGER: Hoardatory. That's right.

HONORABLE C. A. GUITTARD:

Hoardatory.

CHAIRMAN SOULES: Before we get to Steve's point there -- okay. Those in favor, is there a second to a motion to adopt 74(a) and (d) on the way they are now set forth on pages 60 and 61? Any second?

MS. DUNCAN: I second.

CHAIRMAN SOULES: Second. Okay. Those in favor show hands. Those opposed? Okay. That's unanimous. Unanimous in favor of the changes.

HONORABLE C. A. GUITTARD: Now, there is also in this Rule, there is two other changes. When you talk about in subdivision (e), "whereas a brief of appellee," we have written into that Rule a provision that is taken from the civil rules but which perhaps ought to be here.

PROFESSOR DORSANEO: This is the one that Rusty was talking about, the last paragraph of Rule 324 over in the Civil Procedure Rules really is about the appellee's brief. So we thought we would put it with the rest of the information.

HONORABLE C. A. GUITTARD: This

doesn't change the law. It just puts it where people can probably find it easier.

MS. DUNCAN: And now we won't even find it at all.

PROFESSOR DORSANEO: Right. I won't be able to find it now.

HONORABLE C. A. GUITTARD: Then there is also in subdivision (a) a provision with respect to the appellant's brief in reply. There is no present provision concerning the reply brief, and this would prescribe for the reply brief that at first it should be confined to the issues or points in the appellee's brief and that it should not exceed 25 pages, and that it should be filed within 25 days after the filing of appellee's brief. This would eliminate coming right up on the day of oral argument or maybe the day before with your reply brief. You have got to do it a little sooner than that.

PROFESSOR DORSANEO: I was handed one, an argument, on Wednesday, and that happens in some courts that permit it, and that's a little late.

MR. ORSINGER: May I inquire,

this means that the appellant is entitled to 75 pages of briefing, and the appellee 50? That's what this Rule does? Now the times are equal on oral argument and heretofore the page numbers --

MR. SUSMAN: No. The times aren't equal.

MS. DUNCAN: No.

MR. SUSMAN: Huh-uh. 30 to 20.

MR. HERRING: No. They are equal.

MS. DUNCAN: No. It's 20/20.

MR. ORSINGER: You just take part of your time and if you want to reserve it.

MR. SUSMAN: What are you talking about? In Houston I just argued a case on 20 minutes to open, 10 minutes to rebut, and the other side gets 20 minutes.

MR. ORSINGER: Well, let's just be conscious of that decision. I am not totally sure that I am in favor of allowing in more briefing by one party than the other, but if that's what we are in favor of let's just be aware of it.

CHAIRMAN SOULES: Does the appellee get to respond to the appellant's reply brief?

MR. ORSINGER: No.

MS. DUNCAN: You cannot leave of court. I mean, we are not changing -- we are not giving the appellant something that they don't have under the current practice. We are trying to regulate what they already have.

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

MS. DUNCAN: The problem now is that different courts have different rules about when reply briefs are due or they have no rule at all.

MR. ORSINGER: Well, I would propose that we reduce it to 15 or 10 pages rather than 25 because it seems to me if you are truly rebutting what's in the appellee's brief then you don't need one-half of an entire brief to do that. It seems to me that that tilts the briefing, and briefing is really essential in the appellate dynamic as far as I am concerned.

PROFESSOR DORSANEO: I don't mean to be facetious but I would like to require them to reply within 200 pages, you know, because I think that you are not really helped by giving too many pages, see, to the court.

MR. ORSINGER: It's not going to get read, you are saying.

PROFESSOR DORSANEO: And in my experience this appellant brief in reply really might end up being the main appellant brief because that's when you finally join issue with the people.

HONORABLE C. A. GUITTARD: That's the practice now.

PROFESSOR DORSANEO: Well, really it's 50 more. The practice now is they get 50 more pages.

MR. ORSINGER: Judge Hecht, you are going to be reading a lot of these. Does it make any difference?

JUSTICE HECHT: I am not going to be reading that many of them actually. You know, I think every judge, every appellate judge, will tell you the shorter the better.

I mean, we are arguing about 50 pages, 25 pages, but it's more what's said, and the bulk of it is 99 percent of the cases are going to be misdirected. We preach that sermon a lot.

MS. DUNCAN: I guess that's why I don't care if it's 15 pages or 25 pages because I don't think I have filed maybe one 50-page brief in the last five years, and I don't know that I have ever filed a 25 page reply.

MR. ORSINGER: Okay. Well, I guess I don't care. If we are going to be ignored, then I don't care.

CHAIRMAN SOULES: Well, why shouldn't this be the subsequent reason? I mean, why is the appellee cut off? Here is what concept that we have in filing the replies, and some of the courts of appeals have this, too: You can file your reply up to seven days or up to ten days before oral submission, and what they are really looking for is an update in the caselaw since this appeal has been pending for a year. You filed your briefs, and the briefs joined a year ago.

Now you are to oral submission, and you

have got a year of jurisprudence in the meantime, and the courts of appeals, in our experience they want to see what the more recent cases are, and you know, competent appellant lawyers are going to know what those are on both sides. You are going to pretty well know what that reply brief is going to look like before you get it, and you both get it on the same day, ten days ahead of oral submission, and there is seldom anything in there that you haven't seen or didn't expect.

And so what we are doing here is we are setting a time when an appellee must -- or an appellant must reply or I guess waive a reply of 25 pages max, and the appellee has no reply anyway. So what does that do about the 10-day Rule in the courts of appeals or on getting them current? You just go and talk about these cases that you never had a chance to brief because it didn't exist in the original papers. Steve Susman.

MR. SUSMAN: Well, I believe that that's usually the case; I mean, that if there is some new case you can talk about it orally or ask permission of the Court to write

him a letter after the argument, that you can always -- I mean, we have got to put an end to the brief writing at some point in time. This missiles race gets too expensive, and we have just got to stop it. You can always on the grounds of the new cases find something else to write about and write another 20 pages. So I think it should be stopped.

Now, you may have a point. It may be that based on the way the courts set their cases in the various courts of appeals that the appellant's reply brief, you know, the final brief should not be filed until a certain time close to the argument, but I don't see what's wrong with this. It's kind of like the pattern in Federal Court, and I think it's fine.

CHAIRMAN SOULES: Shelby Sharpe and then I will get to Sarah. Sarah had some points. Go ahead.

MR. SHARPE: I think this Rule is a good Rule on when the appellant should reply to the appellee's brief because, one, the appellant is responding to either a misstatement of the record or a misstatement

of some authority that's in it. So I think this Rule is good. With respect to new authority that comes out after that, that's a supplemental brief. It's not a reply to the opposition brief, and you can always file that with leave of court. So I think Steve is correct. We need to put a time limit on when the appellant is going to respond to the appellee's brief. If the appellee has misstated, then, hey, let's get it done in a short period of time and get on with business.

CHAIRMAN SOULES: If that's what we think we are doing, I don't have any problem with it, but if we are cutting off briefing at the end of the 25th day and the appellant's replies, and that's it --

MR. SHARPE: This says "a reply brief." I do not interpret that as a supplemental brief that brings new authority that's come out since you filed your brief. This is a reply to the other side's brief.

CHAIRMAN SOULES: Okay. Sarah.

MS. DUNCAN: I at first thought that I liked the San Antonio practice better where you file within one week of argument and

then I started thinking, no, because if somebody is not like me and they actually start preparing for argument before more than a week before they are not going to have the reply brief argument around which to construct their argument. The one thing that -- what I think is missing from our state practice is a Rule 28(j) letter like they have in Federal Court and to use that to bring the appellate court current cases but without going through 25 or 30 more pages of briefing, and we don't have that, but I think, you know, I think you're right. This is a mandatory -- a brief you get to file as a right. If you want to ask leave of court to file something else, you are certainly welcome to do that.

MR. ORSINGER: Could we include a comment that the courts retain the power to permit the filing of supplemental briefs or something?

PROFESSOR ALBRIGHT: Well, that's in (m).

MR. ORSINGER: (M) does that already?

HONORABLE SAM HOUSTON CLINTON:

Yeah. (M) already does that.

MR. ORSINGER: Okay. Well, then I will withdraw it.

CHAIRMAN SOULES: Okay. So the motion to recommend to the Supreme Court, how much of this --

HONORABLE C. A. GUITTARD: Subdivision (k).

CHAIRMAN SOULES: Just subdivision (k)?

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: Why aren't we doing --

CHAIRMAN SOULES: 74(k).

PROFESSOR DORSANEO: Did we do (e) yet?

MR. ORSINGER: We haven't done (e), (f), or (g).

HONORABLE C. A. GUITTARD: Well, we did (e). That's the one about just putting in the provisions of the civil rules into the appellate rules where they belong.

MR. ORSINGER: I don't think that's been voted on yet.

CHAIRMAN SOULES: It hasn't

been.

MR. ORSINGER: Listen, why don't we just sweep them all in?

HONORABLE C. A. GUITTARD: Okay. Now (f) is another question. That is whether the appellant ought to have the -- or whether the parties ought to be allowed to make a summary of their entire argument. Well, they briefly do that anyway, and this just spells it out in the Rules. So the real question there is should they be required to do that, or is that just an option? Now, (g), that goes out in view of the previous decisions that the committee made.

CHAIRMAN SOULES: Okay. So you are withdrawing (g)?

HONORABLE C. A. GUITTARD: Yes.

MR. SHARPE: Is (g) out?

HONORABLE C. A. GUITTARD: As well as this one.

CHAIRMAN SOULES: As well as what?

PROFESSOR DORSANEO: We have some other conforming things to do.

CHAIRMAN SOULES: Okay. So the

motion from the committee then, subcommittee, is that we adopt the changes to 74(e), (f), (k).

PROFESSOR DORSANEO: We can talk about --

CHAIRMAN SOULES: Is that (n)?

PROFESSOR DORSANEO: We can talk about -- yeah. Those are Intentionally -- (h) is going to go back in here. All right.

CHAIRMAN SOULES: Okay. You-all make the motion so that I am not making any --

MR. SHARPE: Mr. Chair, can we have some discussion on that?

HONORABLE GUITTARD: (M) doesn't have anything new. It just has this last sentence that is transposed from a different Rule.

CHAIRMAN SOULES: All right. Would someone from the committee make a motion then relative to 74? We have dealt with 74(d).

MR. ORSINGER: (A) and (d).

CHAIRMAN SOULES: (A) and (d).

Someone make a motion.

HONORABLE C. A. GUITTARD: I move we adopt the committee's proposal with respect to subdivision (e), (f), and (k).

CHAIRMAN SOULES: Second?

(Mr. Herring raises hand.)

MR. SHARPE: Mr. Chair, a discussion on that?

CHAIRMAN SOULES: Moved and seconded. Discussion?

MR. SHARPE: By putting this in here with respect to the summary of argument I really don't think we need that in our Rule. I think that should be left to each individual brief writer as to whether or not he wants to put a summary in it or not. This has the potential -- it says "The summary argument may be included either after the preliminary statement or at the conclusion of the brief."

People do that now from time to time. People don't do it now from time to time. I think this right here may very well be construed by some people as requiring that there must be a summary either in one place or the other but not whether you can have it or

not have it, and some cases just flat don't need a summary because they are just not that long or not that complicated a case that needs it. There is nothing that restricts you from putting it in there, and as Judge Guittard pointed out, it's very often done. I think this is going to add to the length of time in doing some briefs, and I think that increases costs, and I just don't believe we need a summary of argument requirement in here.

CHAIRMAN SOULES: It's not a requirement. It's only permissive the way this is written.

PROFESSOR DORSANEO: Well, we can make it clear. "Summary of the entire argument may be included in the brief."

MR. LOWE: If desired.

PROFESSOR DORSANEO: No. "Either after the preliminary statement or at the conclusion of the brief."

CHAIRMAN SOULES: We can make it clear.

MR. ORSINGER: Shelby is interpreting that to require that it be in one place or the other.

MR. SHARPE: Yeah. The indication is you have got to have it one or the other.

CHAIRMAN SOULES: The court reporter needs a break, so we will take ten minutes. Okay. Ten minutes and be back here at 3:40.

(At this time there was a recess, after which the hearing continued as follows:)

CHAIRMAN SOULES: Okay. Now, those of you on the subcommittee, someone on the subcommittee who has been following this state the proposition again so that we can take a vote on what we were looking at. Before Shelby came up with his thoughts we had as I understood a motion on the floor to adopt several changes in Rule 74 that are shown as --

MS. DUNCAN: (E), (f), and (k).

CHAIRMAN SOULES: (E), (f), and (k); is that right? Okay. Those in favor show by hands. Those opposed? All right. That's unanimous.

MS. DUNCAN: If you really feel

strongly about something you know how to get it done.

PROFESSOR DORSANEO: The next one or ones, please take a look at (l) first, a one-sentence addition indicating when a motion for extension to file a brief may be filed. We believe this is a clarification, not really a change.

HONORABLE C. A. GUITTARD: But there are those on the committee that were concerned about some courts of appeals that wouldn't let you file a motion for extension after the time for filing the brief, and we wanted to hear that.

CHAIRMAN SOULES: Okay. Any opposition to that?

MS. DUNCAN: Can I point something out?

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: I just would like to point out -- and after reviewing a file this week I am not sure I am still in favor of it but --

HONORABLE C. A. GUITTARD: I thought this was your idea, now, Sarah.

MS. DUNCAN: No. My idea was that there has been some disagreement as to whether you had the 15-day window after the date a brief was due in which to file a motion for extension of time. So my proposal was just to make it clear that that 15-day period was the same for briefs as it was for everything else. Bill's concern was that you have never been limited to that 15-day period after the date the brief was due. I went through a file this week in which the brief was due, for instance, in March of '91. It was ultimately filed 18 months later, and the motion for extension of time was not filed until after, substantially after, the 15 days after the date the brief was due. This Rule permits you to file a motion for extension of time to file a brief any time.

PROFESSOR DORSANEO: It doesn't require the Court to grant it, though.

MS. DUNCAN: Right.

MR. LOWE: That's right.

MR. ORSINGER: I think that's the current Rule anyway.

MS. DUNCAN: Right.

CHAIRMAN SOULES: Any opposition to that? If there will be no opposition that will be considered unanimously approved.

PROFESSOR DORSANEO: And (m), you could look at that, but I guess (m) that comes from (m) and (n), or am I wrong? Where did that come from?

HONORABLE GUITTARD: It's a different rule that we are -- this is the existing --

HONORABLE SAM HOUSTON CLINTON: It's in the Rules somewhere now.

HONORABLE C. A. GUITTARD: It's already in the Rules. It's no change.

HONORABLE SAM HOUSTON CLINTON: I don't know where it is.

MS. DUNCAN: It's in the amendment of supplementation of the record Rule.

MR. HERRING: You are just moving it?

HONORABLE C. A. GUITTARD: Yeah. Just moving the local --

PROFESSOR DORSANEO: That's the

wrong place.

MS. DUNCAN: Rule 55 is it.

CHAIRMAN SOULES: Okay. Those in favor of the changes indicated in 74(m) show by hands. Those opposed? That's unanimously approved.

PROFESSOR DORSANEO: We are going to modify (o), as Richard Orsinger indicated earlier to make it clear that we are talking about the person who is made an appellee by the appellee's cross-points, but that's part of a larger rewrite on that overall subject of notice of appeal, cross-appeal, et cetera.

MR. ORSINGER: Luke, before we leave the Rule I would like to mention one thing.

CHAIRMAN SOULES: All right. Go ahead.

MR. ORSINGER: I think that some years ago the Rules were amended to delete the reference to including the statement of facts in the brief, and still I think it is customary for appellate lawyers to do it. I do it in most cases, and most of the

lawyers I have against me do it, and I, in fact, think that it's appropriate and sometimes helpful to do that, and I am wondering why we don't put a provision in there that a statement of facts, summary statement of facts, may be included because we are doing it. I mean, I think 95 percent of the appellate lawyers do it anyway even though there is no authority to do it.

There is one Supreme Court case that said it's permissible when the facts relate to more than one point of error, but as a practical matter it's hard for the appellate court to figure out what the case is without getting a little bit of a story at the beginning of the brief about who did what to who. Now, we can go ahead with the practice we have now, which is to pretend like that's permissible. Nobody's brief is ever struck because of it, but since we are all doing it, or if the other appellate lawyers in here will express an opinion, and I think we are all doing it. Why don't we all do it?

PROFESSOR DORSANEO: The proposal which is not in this package now

would be that we add a new subdivision that would identify the way that a fact statement, an optional fact statement, would or could be developed for placement in the appellant's brief and then by incorporation in an appellee's brief. Now, we could do that. Almost all of our standard treatises that talk about this subject talk about the fact statement.

HONORABLE C. A. GUITTARD: The question is whether or not the fact statement should include the facts related to all the points. Now, when I was counsel for the appellant I used to select as my first point one that would give an overall view of the facts of the case, and then when I got to the subsequent points I would give the additional fact statement that was particularly relevant to that point. And do we want to preserve that kind of a practice, or is that permissible?

MS. DUNCAN: Whatever we do I would like to make it optional because for me, at least, what the points are, what the facts are, I mean, sometimes the facts just don't

matter at all. It's strictly a procedural case, and I would like to have the option not to have a statement of facts.

PROFESSOR DORSANEO: Sometimes the facts are not very helpful.

MS. DUNCAN: That's right. More times than not.

HONORABLE C. A. GUITTARD: Well, Richard, I suggest that since you are now on the subcommittee and since this hasn't been drafted that you draft it and present it to our subcommittee meeting on the 8th of April.

MR. ORSINGER: Will do.

PROFESSOR DORSANEO: That would take us I believe to 75. We have 75 and 84, just to give you a preview 75, 84, and then a larger policy question on page 66 in terms of what I think is particularly important.

75 speaks for itself. The Council of Chief Judges wanted the ability for Courts of appeals to decide criminal cases without oral argument where oral argument would not materially aid the Court in determination to the issues of law and fact as I understand it,

and Judge Clinton can tell us more about this. This is a controversial question to some extent in the criminal context because somebody might request oral argument and not be able to show up for it or whatever so --

HONORABLE SAM HOUSTON CLINTON: Not be able to what?

PROFESSOR DORSANEO: Not be able to show up.

HONORABLE SAM HOUSTON CLINTON: Oh, show up.

MS. DUNCAN: Being incarcerated.

MR. ORSINGER: Like someone in prison who wants to make a pro se appearance.

CHAIRMAN SOULES: You are probably not going to do that, are you, Judge?

HONORABLE SAM HOUSTON CLINTON: No. We don't do that. We are not going to allow that.

HONORABLE C. A. GUITTARD: Also Chief Justice McCloud was the one that brought this before the committee and said that particularly in cases that are transferred on equalization of the docket that there is a

real problem about oral arguments in some of those cases and that I am not just quite clear what his problem was, but Sarah, you want to answer that?

MS. DUNCAN: One of the problems he mentioned was that they will get 50 cases from Dallas, and out of those 50 cases oral arguments are requested in five, and they have to choose either to go sit in Dallas to hear those five cases in the regular order of things or whether to try to hold enough transferred cases to make it worth their while to go sit in Dallas for a week of oral arguments, and he was saying, you know, that it just seems like a tremendous expense and bother when the oral argument doesn't help anyway. That was his point.

HONORABLE SAM HOUSTON CLINTON: Well, did he think as a general proposition that oral argument doesn't help, and that's the reason?

HONORABLE C. A. GUITTARD: No. That's not. The reason why is that the Court ought to have the discretion to determine from the briefs before it whether oral arguments

would help or not, and personally I always like to hear oral arguments.

HONORABLE SAM HOUSTON CLINTON: Me, too.

HONORABLE C. A. GUITTARD: But that was the suggestion. When this Rule was written in actually to give the courts this authority in civil cases I was opposed to it, but apparently nobody seems to make a big objection to it.

HONORABLE SAM HOUSTON CLINTON: Well, the predicate was being laid about not wanting to go to Dallas unless necessary. It didn't have any connection in my mind with whether that was materially -- oral arguments were materially related to the determination of the issue, but if that's what they want to do, since we ourselves reserve the right to determine who can argue the case or whether the case will be argued I suppose I don't have any objection to it.

MS. DUNCAN: I think that he would like the discretion.

HONORABLE C. A. GUITTARD: Yeah. That's right.

PROFESSOR DORSANEO: He also thought it particularly unhelpful when it doesn't really occur.

CHAIRMAN SOULES: Frequently, almost every time I have appeared now in the Court of Appeals they will call criminal cases where oral argument has been requested, and no one shows up.

HONORABLE SCOTT A. BRISTER: Is that right?

CHAIRMAN SOULES: So they might go to Houston to sit for five cases and have no one show up.

HONORABLE SAM HOUSTON CLINTON: But that's a different problem than what this Rule is talking about.

CHAIRMAN SOULES: That's right. I agree.

HONORABLE SAM HOUSTON CLINTON: That's what I was getting at.

CHAIRMAN SOULES: Okay. Any opposition then? You don't have any opposition to this, Judge?

HONORABLE SAM HOUSTON CLINTON: No, no.

CHAIRMAN SOULES: Anyone else have any opposition? That will be unanimously approved. That was 74(f).

PROFESSOR DORSANEO: And the damages for delay is --

MR. ORSINGER: No. That was 75(f).

CHAIRMAN SOULES: I'm sorry. 75(f). Thank you.

PROFESSOR DORSANEO: The damages for delay on page 65 is a simple change unless we messed it up somehow to make damages for delay in civil cases applicable to original proceedings as well as appeal.

MR. ORSINGER: Well, mandamuses, especially if you read Justice Hecht's opinions, mandamuses are almost never going to -- or many cases are almost never going to fit into the proper mandamus slot, and I don't know what the statistics of them are, but it's probably a pretty low number of mandamuses that are actually granted, probably a lower number than the cases that are reversed on appeal, and this is kind of scary to me. What if you have an excellent legal

argument, but you really have an adequate remedy by appeal? Does that mean that you should be sanctioned because although you had a good legal argument, you know, you shouldn't have been there on a mandamus and --

PROFESSOR DORSANEO: Well, if you were taking it -- if you were doing the mandamus for delay.

MR. LOWE: Yeah.

MR. ORSINGER: Well, it isn't going to delay anything unless some court voluntarily stays itself or unless the appellate court stays it.

MR. LOWE: No.

HONORABLE SCOTT A. BRISTER: No, no, no, no, no. I had a trial six weeks ago finished by the Texas Supreme Court.

MR. LOWE: Yeah.

MR. ORSINGER: Yeah. That's what I am saying. Unless some court Decides --

HONORABLE SCOTT A. BRISTER: Leave has still not been granted. We are just briefing the issue. That case has been on file a couple of years. It's my humble

opinion several lies in the petition for leave, which got -- after I had denied several continuances he has gotten it granted because the briefing schedule has passed. It will be months before I get back to it.

MS. DUNCAN: And that was part of the reason people wanted these original proceedings included in the sanctions because apparently there is some abuse of original proceedings.

MR. HERRING: There has to be a poor delay and without sufficient --

MR. ORSINGER: Well, I think --

CHAIRMAN SOULES: One at a time. Okay. Richard and then --

MR. ORSINGER: If somebody lies in the pleading, then we can address that through the grievance system, but the problem I have with the sanctions on mandamus actions is that sometimes there are extant circumstances that require you to seek appellate relief, and you know it's a long shot going up on a mandamus, and I Really -- gosh, I just really feel differently about sanctioning mandamuses, and besides

which if there is a stay, either the trial court has to stay themselves or the appellate court stays the trial court based on some kind of preliminary showing that there is a decent chance of getting a mandamus, and if that's procured through lying, then grievance ought to take care of that.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Well, you have a two-prong standard here. One is for delay, and the other is rare. It does happen occasionally, but it is rare, and in most cases as you point out you never meet that standard because there wouldn't be a delay. And then without sufficient cause, without sufficient cause is a fairly slippery notion. You might want to look at a groundless standard such as Rule 13 has, but there are some cases where they are used abusively.

CHAIRMAN SOULES: Buddy Lowe.

MR. LOWE: Yeah. There is no question. I have had two cases within the last six months. We have trouble getting a special setting. You get a No. 1 setting, and

you are not going to get another one for a year, and low and behold they try a mandamus. It doesn't go, and then another one, and then right before trial, I mean on Friday, they go to the appellate court, and the appellate court says, "Well, we haven't had a chance to review it. Don't do anything Monday."

Well, there is no panel there, and if I hadn't had a pretty smart trial judge and one that was cooperative, so he brought a panel back on Wednesday, I would have never gotten that case tried. They never went to a jury. They paid what we wanted. It was strictly for delay. So I have had two of them. So don't say it doesn't cause delay, and don't say it's not done for that. That's wrong, and to go to the grievance committee wouldn't have helped my plaintiff any with his sore back.

MS. DUNCAN: Well, and the grievance committee is not going to make any allocation of costs.

MR. LOWE: Right.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I don't think 10 percent is enough. I don't. I mean, it is

the one most frivolous delay tactic that is known to man, is the last minute mandamus to interfere with the trial setting.

MR. LOWE: Right.

MR. SUSMAN: And appeal is never going to cause any delay. I mean, it's all over by the time you appeal. How can an appeal cause delay? This is the delaying tactic of all time.

MR. LOWE: Right. That's right.

PROFESSOR DORSANEO: It says "other amount as the Court deems just."

MS. DUNCAN: That's the reason that "such other amount" was added because several people thought 10 percent wasn't enough.

MR. ORSINGER: You don't even know what the costs are at this point if this is pretrial.

MS. DUNCAN: But you could have taxable costs to the Court of Appeals. You have got cost of filing.

MR. ORSINGER: Oh, well, that's only a few bucks, though.

MS. DUNCAN: Cost of preparing the record, cost for preparing the briefs.

CHAIRMAN SOULES: So what do you do? You put your proof of damages in your response to the mandamus? How does the Court of Appeals decide that?

HONORABLE C. A. GUITTARD: Oh, you can resort to this last phrase "such other amount as the Court deems necessary."

PROFESSOR DORSANEO: I don't know. Just file an answer to it. They will send it back to the trial court or something.

MR. ORSINGER: This is just going to be an abuse of discretion. It could be $5,000 in one case. It could be $50,000 in one case.

CHAIRMAN SOULES: Yeah. I am curious what happens if they deny leave to file. They have never exercised jurisdiction over anything other than motion for leave to file. Is that covered?

MS. DUNCAN: Their jurisdiction attaches when the motion is filed, right?

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Motion for leave --

MS. DUNCAN: Their original jurisdiction.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. That's answered.

HONORABLE C. A. GUITTARD: All this proposal does is just to extend the damages delayed to original relief.

CHAIRMAN SOULES: Okay. Any other discussion on this? Those in favor show by hands. 15. Those opposed? Okay. That's unanimously approved. Did you vote?

MR. ORSINGER: No, I didn't. I backed down.

CHAIRMAN SOULES: Oh.

MR. ORSINGER: I made a hasty retreat.

CHAIRMAN SOULES: I wanted to be sure I got your vote recorded. Here we go. What's next?

PROFESSOR DORSANEO: The next one is not really a draft of a proposal, or is

it a proposal here as well? It's just a note but --

CHAIRMAN SOULES: What page?

PROFESSOR DORSANEO: Page 66, pages 66 and 67. We considered the -- we being the appellate committee -- a change that would have simplified the practice by eliminating the motion for rehearing as a prerequisite for filing a writ of error. The particular fix would have been to have the application for writ of error itself -- I may have to defer to Judge Guittard on this. I may have messed this up. My recollection is not so good on it.

HONORABLE C. A. GUITTARD: Well, I would say this, that there is a sentiment among some lawyers that it doesn't do any good to file a motion for rehearing and that if you are going to the Supreme Court anyway you ought not have to file a motion for rehearing. Well, there is arguments both ways on that, and as an appellate judge when this matter was brought up I felt that as an intermediate judge I would want the opportunity to correct any error that was

going to be complained of in the Supreme Court.

So we in civil -- in criminal cases there is a provision that when a petition for discretionary review is filed the Court of Appeals may consider that within a certain limited time and change its judgment or modify its judgment, and then after it does that then the further motions or petitions for discretionary review can be filed. This proposal was to extend that practice to civil cases. In criminal cases it wasn't necessary to file a motion for rehearing in order to complain on appeal in a higher court.

Now, there are several issues to be addressed here. First is should a motion for rehearing, a point in the motion for rehearing, be required as a directive for review in the Supreme Court? Next question is if not, then should the Court of Appeals have an opportunity to review the application for writ of error, application for discretionary review, and have an opportunity to correct its judgment before it goes to the higher court?

CHAIRMAN SOULES: Okay. As I

get it, the motion of the committee is to --

HONORABLE C. A. GUITTARD: The committee originally adopted this proposal and then at a subsequent meeting withdrew it, but we thought it was -- there were probably enough appellate lawyers that thought it had merit that we ought to at least present it to this committee.

CHAIRMAN SOULES: Does anyone have a motion? Sarah.

MS. DUNCAN: I would like to move that we abolish motions for rehearing as a prerequisite to Supreme Court review.

CHAIRMAN SOULES: So moved. Is there a second?

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Moved and seconded. Any discussion?

MR. ORSINGER: Yeah. The question is, why?

MR. LOWE: Question.

MS. DUNCAN: I think they are a waste of trees. If most appellate court judges were like Judge Guittard and seriously took the motion for rehearing in their opinion

and tried to fix the errors that they agreed existed in the opinion, that's great. If in a particular case you have got errors in the opinion that were not errors that originated in the trial court, maybe there is good reason for a motion for rehearing, and I think in that type of case most appellate lawyers would file a motion for rehearing, but I think in most of the appeals, most of the time, a motion for rehearing is a waste of paper.

It's a waste of time, and it is a way to get trapped or at least to argue in the Supreme Court about whether you have got all the right points of error. I mean, the Court at this point is not particularly picky about points of error and motion for rehearing and whether they hear all your points of error in the application, and that's great, but I just don't see any point in arguing about it.

PROFESSOR DORSANEO: But the sense of your motion was to abolish as a jurisdictional thing, not to abolish it as someone --

MS. DUNCAN: No. If somebody wants to do it, if they think they have got a

shot at changing the Court's mind --

MR. LOWE: Question.

MS. DUNCAN: -- And you have got a split panel opinion, go for it.

MR. LOWE: Look, I have got a question. Does that include then giving the appellate court after the application of writ of error is filed so many days to do something? Because what happens if in the meanwhile, you know, our laws change sometimes within a week or so. We see that, and a new case comes out. I mean, a lawyer, he is mad, he says, "I am not going to give them a chance to act again. I am just going to tell the Supreme Court to bust them."

Why shouldn't that Court of Appeals have a chance; say, "No, the law has changed now, and we reverse it." Why not give them that right rather than just pass it on? Because if you think if I wasn't happy with the appellate judges I wouldn't give them a chance. I would say, "Boy, I got you now," and then, you know, why not give them, the appellate court, a chance to review that?

MS. DUNCAN: You can do --

under this if we remove the motion for rehearing as a jurisdictional prerequisite you can still do that if the case, the new case, comes down within 15 days after the date of the Court of Appeals' judgment.

MR. LOWE: You can do it. You can do it, but I am saying as a practical matter you think some of the lawyers, they might just, you know, that case came out of the Supreme Court. They are not going to mess with that court they have been unsuccessful with. They will just go straight to the big boys, and so why not give this court a chance to review that? I think that was the reason. Motion for rehearing wasn't put in there just for no reason at all originally. It was put in there because things might develop. They should be -- even though you can't expand your points, law may change, you may think of something, a different approach, and you should be allowed to have that appellate court a chance to review that rather than just taking it straight on.

MS. DUNCAN: If the law changes in that 15-day period I think a lawyer would.

I mean, the chances of getting into the Supreme Court are one in twelve. So who would take a risk on getting into the Supreme Court when you are at least in the Court of Appeals, and you can get them to rule on it?

MR. LOWE: Well --

MS. DUNCAN: So I think most lawyers if they have really got a serious motion for rehearing because of new law, because of a split in the panel, because of a misstated fact that's central to the decision, those lawyers will file a motion for rehearing, but to require it as a jurisdictional prerequisite in my view is not right.

MR. LOWE: I am agreeing it's not a prerequisite. That's not my point. But my point is why not give the Court of Appeals a chance to rule, review the writ of error or application for writ of error and so forth? What's wrong with that?

PROFESSOR ALBRIGHT: It is in Amendment 1, right?

CHAIRMAN SOULES: Yeah. What discipline is there on the appealing lawyer to

file a complete motion for rehearing if it's not going to be a predicate for the Supreme Court appeal?

MR. LOWE: Well, there is not. I mean, it's got to be a predicate. I am not saying that, but as I understand the Rule now, once it's -- the writ of error is filed, application for writ of error is filed with the Court of Appeals. They forward it on. Does the appellate court, does the Court of Appeals then have -- do they review that and act on that, or do they just pass it on?

MS. DUNCAN: Criminal practice they have --

HONORABLE SAM HOUSTON CLINTON: 101, 15 days.

MR. LOWE: Civil.

HONORABLE SAM HOUSTON CLINTON: The difference is that's usually the initiative, is in the members of the panel that decide the case of the Court of Appeals. It doesn't have to be called to their attention by anybody. They have lawyers that sometimes pick it up. The initiative, as I say, is in the Court, not in the party, but I

am up here talking about the party.

MR. LOWE: But is the civil Rule the same?

MS. DUNCAN: No.

HONORABLE SAM HOUSTON CLINTON: No.

MR. LOWE: That's what I am saying.

PROFESSOR ALBRIGHT: That's why they are saying to change it.

CHAIRMAN SOULES: The Civil Rule is where the party has to file motion for rehearing, and it has to include everything you plan to take to the Supreme Court of Texas. This Rule as I am reading it here will give you the option to file a motion for rehearing. If you did so, then you still wouldn't have to have all your points in your motion for rehearing that you intend to raise in the Supreme Court because it's not a predicate for the Supreme Court filing, but it does -- it would extend the time just the way a motion for rehearing has in the past extended the time for filing your petition for writ of error.

HONORABLE C. A. GUITTARD: I think we ought to vote in two sections. One is should it be abolished as a prerequisite? Second, if it is abolished as a prerequisite, should the Court of Appeals have an opportunity in civil cases as well as in criminal cases to review the application for writ of error?

MR. LOWE: That was my point. In voting on that I wanted the second point. I wouldn't abolish it unless I went to the second point. That's why I wanted to -- I guess if you want to divide it, you divide it, but I am not going to vote on the first point.

CHAIRMAN SOULES: But there is still a third point, and that is, if you do file a motion for rehearing, does that delay the time that you have to file your petition for writ of error? Because that's what this looks like it does.

HONORABLE C. A. GUITTARD: Sure.

MS. DUNCAN: Yeah. The way that we had originally written it was if a motion for rehearing is filed, you are on the

same briefing schedule that you are on now. You have got 30 days after the date the Court denies your motion for rehearing to file your application, absent a 130(d) motion.

CHAIRMAN SOULES: Without a predicate? So you could file a motion for rehearing that doesn't address the entire array of things that you intend to take to the Supreme Court, but it could be a rifle shot of one point that you think should be brought to the Court's attention before you go on to the Supreme Court, and if you were to take a rifle shot at that one point that does not limit your Supreme Court appeal, and you don't have to file a petition for writ of error until after 30 days after that's been overruled. Is that the motion?

MS. DUNCAN: Right.

CHAIRMAN SOULES: Judge Hecht.

JUSTICE HECHT: This comes in the council category we talked about earlier. I don't know what will happen, but I suspect that if motions for rehearing are no longer jurisdictional, that it will develop on our Court that if you argue something in a writ of

error that you had a chance to bring it to the attention of the Court of Appeals even after the opinion is written and you didn't do it, it's not a very good, strong likelihood that we are going to be very sympathetic, and that may not be jurisdictional, but as a practical matter, I mean, there may be circumstances where it's important enough that something will override, but we are not going to be very sympathetic to ambushing the Court of Appeals.

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: From the point of view of jurisprudence the question arises as to whether Giving -- assuming that we abolish the prerequisite as a matter of jurisdiction. The question as to whether or not the Court of Appeals ought to be able to review the application, it has seemed to me that the Supreme Court review in the case that the Court has made a bad decision that it otherwise might correct is by no means sure

that the Supreme Court is going to grant a writ of error for that reason, and the Supreme Court's review is discretionary. They have more important cases to consider, perhaps, than this one.

So they wouldn't have to change that, and if the Court of Appeals makes a change, it might be the only opportunity to correct this error. From the point of view of jurisprudence it would seem that giving the Court of Appeals an opportunity to correct any errors that are pointed out in the application for writ of error before it goes to the Supreme Court would result in fewer cases going into the books with that kind of error in it.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would like to ask Justice Hecht if the provision is made that the application for writ of error is filed in the Court of Appeals and they have the power if they wish to review that, would the fact that it was raised in the application only and not in a motion for rehearing work

against the appellant, or is the fact that the courts of appeals know they can review the application and pull back their opinion, do you think that might serve the same purpose?

JUSTICE HECHT: Well, I think it is a good idea to either make it nonjurisdictional or give -- or let the application for writ of error in essence substitute for the motion for rehearing because we will never get out of the quandry of what do you do when you file a motion for rehearing and the Court of Appeals makes some changes, but you are not sure whether it affects the judgment. Perhaps it doesn't, but it certainly affects something else that's material in the opinion. Then do you get to file another motion? Is it jurisdictional? Do you have to file another motion?

I mean, we are trying to rewrite this Rule to clarify when you have to file second motions for rehearing in order to preserve your time, but we, at least so far, we have not been able to make that clear because our Court still gets -- every time this is a problem our Court gets a motion for extension

of time to file the application for writ of error because they don't want it to be tied to the ruling on the first motion, and their time has run out, and they shouldn't have filed a second motion. Or they should have filed a second motion, and their time has not yet run, and they are just always caught in that never, never land.

So I think it's good to do one or the other, but I also think it's a good idea to give the Court of Appeals some opportunity to correct mistakes that they made or to call to their attention the change in the law, and again, I just would doubt that over time the Supreme Court would look very favorably on applications that had not given the Court of Appeals a chance to do that.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I just had a question. If the question is whether it's jurisdictional and mandatory or optional, if it's optional, why wouldn't any attorney who thought that there was any possibility that this court, this intermediate court, the Court

of Appeals would change its decision because of a change in the law or because of if they made a mistake, why wouldn't he or she just file a motion for rehearing? Why do you have to make the application for writ of error reviewable by the Court of Appeals?

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I mean, I can think of a lot of times where you don't want to -- I mean, I can think of times where you would not want the Court of Appeals to have another shot at doing it right. I mean, you know they are going to rule against you. Okay. It's just whether they are going to be able to articulate.

MR. YELENOSKY: Articulate.

MR. SUSMAN: Yeah. And why give them -- why teach them how to screw you? I mean, why make it easy for them? I mean, just say, you know, you have presented the argument. You can read the card. You know that it ain't going to change the result. Why waste time?

CHAIRMAN SOULES: Pam.

MS. BARON: I think the problem

that Judge Hecht raised is not answerable. The problem is that if you give the Court of Appeals the opportunity to review the application for writ of error, they correct it then. Then you have to file a new application for writ of error. I think the motion for rehearing problem is going to be around no matter what. If we call the right of the Court of Appeals to correct its opinion and judgment, we are still going to have it, and I don't know how you cure it. I can't think of a way to do that.

CHAIRMAN SOULES: Okay. Mike Hatchell.

MR. HATCHELL: Let me add to Pam's comments. One of the difficulties with the Rule that we adopted was, Pam, if the Court of Appeals reads the application and says, "Hey, they have got me here. Let's change the basis and leave the judgment the same," your time for filing application for writ of error has run out. You don't get to file another one as I understand it.

MS. BARON: Right.

MR. HATCHELL: So your

application for writ of error doesn't even match up with the basis for the holding, and it's probably going to be denied.

HONORABLE C. A. GUITTARD: Under our proposal, Mike, you would have the opportunity to file another application.

MR. LOWE: Right.

MR. HATCHELL: I don't think so.

MR. LOWE: Or supplement it.

CHAIRMAN SOULES: Isn't it correct that if the Court of Appeals hands down an opinion in connection with the overruling of a motion for rehearing that you have a right to a further motion no matter what?

HONORABLE C. A. GUITTARD: On a motion for --

CHAIRMAN SOULES: On a motion for rehearing.

MR. HATCHELL: Yeah. That's under the present practice.

PROFESSOR DORSANEO: Well, we can fix that.

CHAIRMAN SOULES: And if you

do, then your time for filing a petition for writ of error doesn't run until that later motion.

HONORABLE C. A. GUITTARD: That's what the present Rules provide with respect to the application for discretionary review.

CHAIRMAN SOULES: And petition for writ of error.

HONORABLE C. A. GUITTARD: Well, I mean there is no right now. Under the present Rule unamended you have to file for rehearing, but if we adopt the criminal practice in civil cases where you don't have to have a motion for rehearing but you give the Court of Appeals an opportunity to review the application or the application for writ of error, then if the Court of Appeals changes its opinion then you can amend or file additional applications for writ of error, just like you can file additional petitions for discretionary review under the present Rules in the criminal cases.

CHAIRMAN SOULES: Okay. And what is this proposal? How is that addressed

here, or is it?

HONORABLE C. A. GUITTARD: The proposal would simply -- well, would simply extend to civil cases the same procedure that the present Rule provides with respect to criminal cases.

CHAIRMAN SOULES: Could you -- Rusty, did you have something?

MR. MCMAINS: Well, I was curious about that. Are you suggesting that the Rule as current as you are proposing it is that you just kind of if they change the opinion, you say, "Well, forget that one. Here is my new application for writ of error."

CHAIRMAN SOULES: File a new application for writ of error. That was exactly my question. Do you have to?

HONORABLE C. A. GUITTARD: Well, you wouldn't have to, but you would probably want to if it's material.

PROFESSOR ALBRIGHT: Where is that in the Rules relating to filing it?

MS. DUNCAN: 101.

PROFESSOR ALBRIGHT: But it doesn't say anything about briefing it again

or filing a new petition.

CHAIRMAN SOULES: Did you say 101?

PROFESSOR ALBRIGHT: 101.

PROFESSOR DORSANEO: Well, we are talking about our draft proposal.

MR. ORSINGER: Yeah. This is just a comment. The actual language didn't get brought forward.

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

Well, I would suggest that if the committee is interested in the proposal that we can bring back the exact language which would require also some changes in some subsequent Rules including the one about filing -- the time for filing the petition for writ of error.

PROFESSOR DORSANEO: That's really what we want to know. Does anybody want us to work on this?

CHAIRMAN SOULES: The way -- so that I guess maybe we can understand it. At least I would like to understand what it is you would be working on. I guess it would be

a plan by which the procedure would be that a motion for rehearing could be filed or not.

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Whether filed or not it would not be a predicate to be -- a requisite to the petition for writ of error or any point in the petition for writ of error.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: If one is filed, then the Rules we have got would just follow in sequence. Any time the Court changes its opinion, you can file another one.

HONORABLE C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: Until finally the last one is overruled and then your time for petition of writ of error would have run.

MR. ORSINGER: Not overruled. They don't have a certain period of time to overrule your application for writ of error.

CHAIRMAN SOULES: No. I am over on application for rehearing.

MR. ORSINGER: Oh, okay.

CHAIRMAN SOULES: Then the

Court would have a chance to look at the petition for writ of error for 15 days even though it's already --

HONORABLE C. A. GUITTARD: If it doesn't --

CHAIRMAN SOULES: -- Considered all the motions for rehearing.

HONORABLE C. A. GUITTARD: If it doesn't review it, it doesn't make any change, then it sends the application on to the Supreme Court.

CHAIRMAN SOULES: Now, that's the scenario if you do file a motion for rehearing. If you don't file a motion for rehearing, you file a petition for writ of error within 30 days of the time that the Court renders its decision, and if there is no change while that Court has preliminary jurisdiction, that goes to the Supreme Court for decision.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: If there is a change, then you may or may not have to thereafter file another petition for writ of

error, and you-all haven't decided on that one yet.

HONORABLE C. A. GUITTARD: Our proposal as originally adopted and subsequently withdrawn would amend other Rules to give you the opportunity to file another application for writ of error.

CHAIRMAN SOULES: If you wished but you would not be required to do so.

HONORABLE C. A. GUITTARD: Right.

CHAIRMAN SOULES: Okay. So that's the general picture of what they are saying do we want the Appellate Rule Subcommittee to work on that? If so, they will work on it. If not, we will leave things the way they are.

How many feel they should work on this project? Show by hands. 13 votes for. And against? Two. Looks like you-all have some additional work to do then, and you are so charged. Three, 13 to 3. Was there a hand up?

MR. LOWE: Yeah.

CHAIRMAN SOULES: Okay. For a

comment? Oh, Harriet Myers.

MS. MYERS: I guess I am -- can somebody explain to me why we need the option of a motion for rehearing if you are going to have the application for a writ of error serve that function? I wasn't quite clear on why you would reserve that option that would throw the time -- I thought one of the reasons you wanted to use the writ of error process was to streamline the timetable, and what you do with the motion for rehearing, if I am hearing it correctly and maybe I am not, you just bog down again with the limit, the time extensions, and so am I hearing that wrong Or --

CHAIRMAN SOULES: Looks like the two purposes would be, one, to buy time so at least you would buy time until the Court of Appeals rules on the motion for rehearing while you are trying to get your petition together while you are trying another lawsuit at the same time. So you might be able to buy some time. The second is that you might actually -- and this may enhance the Court of Appeals' scrutiny of a motion for rehearing.

You might file a rifle shot motion for rehearing that they would pick up and get their attention better rather than a long litany of the predicates that we are now filing just because we have to go to the Supreme Court on all of those points. So there may be a real reason for shortening it and then shortening what's required, abbreviating what's required to get the Court's attention to that may be more -- a higher degree of scrutiny plus buying time. I don't see any other reason for it, but someone else may.

Rusty, did you have a comment?

MR. MCMAINS: Well, I just wanted to articulate if it hasn't already been done basically the problem I have with the notion that you would take away any preservation features of the motion for rehearing is that it is effectively then an expansion of the jurisdiction of the Texas Supreme Court. Right now there is a restriction to those issues. One of the problems that we currently -- that one currently faces is that if you have a

complaint about the judgment of the Court of Appeals, you don't like it.

Maybe you are prepared to live with it depending on whether the other side files an application for writ or whatever or a motion for rehearing, but you have got to file a motion for rehearing to preserve that complaint if you have got a complaint to the judgment. Otherwise, you are not going to be able to take it up. So that in reality before a party under the current practice has to file an application for writ of error he will know whether or not he is at risk with regards to something that he may have won, either as against another party or as against that party. Maybe he didn't win at all, but he may have won something.

That other party may not file a motion for rehearing. If they don't, then they are not going to be able to take it up on an application for writ. That issue is out of the case. You can define the issues that are going to the Supreme Court. We have that opportunity now because of the fact that it's a preservation document. Now, if in truth and

in fact what Justice Hecht says is true, that the Court is going to frown on not having brought it up anyway, then unfortunately what we have done is insert a surreptitious preservation practice in saying that the Supreme Court says, "Well, if they didn't really think enough of it to bring it up to the Court of Appeals, then we are not going to think that much of it either." Then basically we have sub silentio incorporated our current practice it seems to me, you know, and it being de facto a preservation --

MR. LOWE: Right.

MR. MCMAINS: -- issue or consequence anyway. But from a standpoint of being able to advise a client when you have got an opinion on the Court of Appeals that you may not be fully satisfied with but may be willing to live with, right now depending upon what everybody does in the motion for rehearing stage, when that stage is completed you now know pretty much whether or not you want to take an application for writ and what the risks are in the Supreme Court. Under the proposed Rule and the abolition of it as a

preservation document you will not know, and you will have no way of knowing until the Supreme Court decides to do something, and they may do something as they frequently do without even hearing oral argument, so...

CHAIRMAN SOULES: Does anyone want to change their votes after hearing that? Okay. Then the committee should note those remarks made by Rusty and go on forward with your work on this subject. Okay. What's next?

MR. SHARPE: Luke?

CHAIRMAN SOULES: I'm sorry. Harriet, I didn't see your hand up.

HONORABLE C. A. GUITTARD: I would like to respond to Harriet.

MS. MYERS: Well, and I guess what I was going to ask, if -- depending on what Judge Guittard says, and I know Sarah had her hand up, too, but if the committee is going to look at it again I would really appreciate them proposing two alternatives, one with and one without any rehearing process, rather than coming back with one that includes that in there.

CHAIRMAN SOULES: Okay. Is there enough consensus on the committee for them to work on two Rules?

MR. LOWE: Right.

CHAIRMAN SOULES: One is there would be -- no motion for rehearing would be available.

MR. LOWE: Right.

CHAIRMAN SOULES: And the other it would be available along the lines as previously discussed. How many feel that we should look at both of those alternatives? 13. Those opposed? Okay. That's unanimous that we look at both of those alternatives.

Okay. What's next?

HONORABLE C. A. GUITTARD: The question arises as to -- with respect to an affidavit of inability under proposed Rule 45.

CHAIRMAN SOULES: What page are you on, Judge, of your report if you are on one?

PROFESSOR DORSANEO: 42, page 42.

CHAIRMAN SOULES: 42. I have got 42.

HONORABLE C. A. GUITTARD:

There is uncertainty in most Courts of Appeals as to whether or not a contest to an affidavit of inability should be under oath. The Rule doesn't require it. Some courts say it doesn't have to be. On the other hand, some courts say it should be under oath. Now, the committee simply proposes that we ought to decide one way or the other and write into the Rule whether they ought to be under oath or not.

Now, another question that's been raised here today concerning that by one of our clerk members is that we ought to adopt the same provision with respect to affidavits of inability to pay that are in the Civil Rules, and that is that the affiant ought to specify the reasons why he is unable to pay and give some information that substantiates his statements that he is unable to pay. I think that has merit, and I think our committee would like to look into that, but the only thing that's really before this committee now is whether or not an oath should be required for the contest for the affidavit.

CHAIRMAN SOULES: Okay. Those who think an oath should be required, please show by hands. One.

MR. ORSINGER: No, not for contest. I'm sorry. I was confused. I withdraw that.

MR. HERRING: In the trial level under 145 there is no affidavit required on the contest, right?

MS. WOLBRUECK: There is no contest.

MR. ORSINGER: How would you be able to swear to someone else's assets anyway?

PROFESSOR DORSANEO: If I can tell a little bit of a funny story, and partially on myself, when we did the appellate rules statements and referrals we did actually consider this question, the committee, the combined committee, and decided to take the requirement out that the contest be sworn that was in the prior Rule basically on the idea that how could they swear to that?

HONORABLE C. A. GUITTARD: Yeah.

PROFESSOR DORSANEO: Unless you

just swear to it because you have to. But then I had forgot about that and so we had no comments, and some silly person mentioned those prior cases in a work on this subject and preserved the controversy down to the present time.

MR. HERRING: Rule 145(1) says that "Defendant may contest the affidavit by filing a written contest giving notice," and I don't see anything that says it must be under oath at least at the trial level, attest to an affidavit of inability.

CHAIRMAN SOULES: I saw no hands up then for requiring that the contest be under oath. Those that feel the contest need not be under oath show by hands. Okay. Now, that's unanimous that it need not be under oath.

MR. YELENOSKY: Luke?

CHAIRMAN SOULES: Rule 45(c) on page 42.

HONORABLE C. A. GUITTARD: Now, we have a proposal --

CHAIRMAN SOULES: Steve Yelenosky had a comment.

MR. YELENOSKY: I just want to say that we haven't taken this up, I guess, with respect to the Rules of Civil Procedure, but there has been a proposal for the change in the affidavit of inability at the initial filing of a lawsuit that has been proposed by the State Bar Committee on Services for the Poor, and a draft of that has been sent to the clerks on our committee, and there has been some discussion of that, and what happens -- if anything happens with that that may reflect on this Rule as well, but we don't need to take that up now, I guess, and I had one other question though on this particular Rule, and I guess it comes up elsewhere as well.

The affidavit that is by the person swearing the inability to pay says "unable to pay the cost of appeal or any part thereof" and then part (f) talks about paying to the extent of ability, and are those two things congruent, or do you -- I mean, in my situation with legal services people can honestly swear almost by definition that they can't pay anything. Are there instances in which the Court is actually -- somebody is

swearing they can't pay anything and then the Court is asking them to pay part of it? Are they able to swear "I can't pay all of it, but I can pay part of it"? I don't know. I mean, what the Rule literally says is they have to swear they can't pay any part thereof when the truth may be, as the Court may decide, that they can pay a portion of it.

PROFESSOR DORSANEO: Well, when I started practice a long time ago people would be asked, "Do you smoke? Do you have a couch?" Okay.

MR. YELENOSKY: Right.

PROFESSOR DORSANEO: And I think that's how it was interpreted 25 years ago.

MR. ORSINGER: That was the problem.

PROFESSOR DORSANEO: Yeah. But that's not the way it's been interpreted lately although it remains the same. It may be interpreted that way in particular trial courts, but I think the appellate court opinions are a little less hostile to people proceeding as paupers than they were 25 years

ago.

MR. YELENOSKY: Well, I guess the question is pointedly literally the Rule doesn't allow somebody to swear that they can pay a portion. Literally you have to swear that I can't pay any part thereof. At least that's how I read it.

CHAIRMAN SOULES: Yes.

MR. YELENOSKY: "The appellant is unable to pay the costs of appeal or any part thereof." Yet the Court has the authority under (f) to order payment to the extent of ability. So if you have an honest person who says "I can't pay this full amount," they have no option. They either have to pay the full amount or they're in the position of lying and saying, "I can't pay anything."

MS. DUNCAN: It needs to be written affirmatively so that they say "I can pay so much of the cost of the appeal" or "I can pay none at all."

MR. YELENOSKY: Right. And again, I think this impacts clients more maybe in a higher level of income than my clients

almost by definition, but there are people who honestly would want to tell the Court maybe that they can only pay a portion.

MS. DUNCAN: But what if we said an affidavit stating that part of the costs the appellant can pay, if any?

MR. YELENOSKY: Well, I don't know the exact language.

MS. DUNCAN: Or something like that.

MR. YELENOSKY: And maybe that's appropriate to send back to committee, but I am just raising whether the question can be answered and the committee can be asked To --

PROFESSOR DORSANEO: It really should say "unable to pay the costs of appeal or some part thereof."

PROFESSOR CARLSON: It does.

PROFESSOR DORSANEO: That's how I always interpreted it.

PROFESSOR CARLSON: It does.

MR. YELENOSKY: Well, I think that it's been interpreted. It says Literally -- literally it says "The appellant

is unable to pay the cost of appeal or any part thereof" and when we have had people swear to it, we haven't had a problem, but the way we have interpreted it is "I can't pay anything," and that's usually true. These people are on governmental assistance and have been unemployed for some period of time.

PROFESSOR DORSANEO: Because they have money from --

MR. YELENOSKY: Yeah. Well, right. But it maybe should say "some."

CHAIRMAN SOULES: Well, I don't know if that word would fix it or not, but let's give the committee that charge to fix that so that the affidavit will state either that the appellant is unable to pay any portion of the costs or to what extent the appellant is limited in paying the costs, and I don't know what the words are.

MR. HERRING: Make it consistent with 145.

CHAIRMAN SOULES: With 145?

MR. HERRING: And you are going to include the specifics there, but you are going to want to change the language in 145.

MR. YELENOSKY: Right.

MR. HERRING: Because it doesn't say "in part." It says "pay the costs." You just ought to make them consistent.

CHAIRMAN SOULES: So we want to conform 145 to what is done in 45?

PROFESSOR DORSANEO: 145 says "I am unable to pay the court costs," but I gather the sense of it is to be more general. "I am unable to pay the court costs" --

MR. HERRING: Well, if you look at the first part of the Rule it says a person who is unable to afford --

PROFESSOR DORSANEO: Afford, right.

MR. HERRING: -- the costs, and defines that as a person who is receiving a governmental entitlement or otherwise has no ability to pay costs. So the language is not very good in either one right now.

HONORABLE C. A. GUITTARD: Okay. We will consider it.

CHAIRMAN SOULES: Okay. So charged.

HONORABLE C. A. GUITTARD: Does anyone have an objection to Rule 121(a)(2) which says "The original proceedings" --

CHAIRMAN SOULES: Do you have a page number for us on that, Judge?

MR. ORSINGER: Page 76.

PROFESSOR DORSANEO: 76. Yes. The Rule -- you have to go by the page numbers because some of these Rules are not in numerical sequence.

HONORABLE C. A. GUITTARD: Page 76, the present Rule provides that you -- if you are having a mandamus against the trial court you name the judge as the party respondent and then you also serve the real party of interest and let him argue. Now, some trial judges are sensitive to being named in these proceedings. So the proposal would be to make the real party of interest a respondent, and while the judge would still Be -- or other official would still be respondent, he is not to be named in the title of the proceeding. Is there any objection to that?

CHAIRMAN SOULES: Any objection

to that?

MR. ORSINGER: Well, I would observe that their name is only published in the mandamus application if granted and that this might be a good incentive to make district judges sensitive to the fact that the mandamus may, in fact, be published. I mean, I am not sure that publishing the name of a judge who has used his discretion in the process of a trial is a bad public policy.

CHAIRMAN SOULES: Judge McCown promised to be here tomorrow.

MR. ORSINGER: I will say it to him. If it is a point of concern for a trial judge, that means they are going to make all that much more a sober decision about whether to rule or not.

CHAIRMAN SOULES: Okay. Anyone else?

MR. ORSINGER: I am not sympathetic with the district judges.

CHAIRMAN SOULES: Okay. There is a proposal then or motion to amend 121 as indicated in the portion to the parts 2(A) and (B), 2(A) and 2(B).

I guess we are just talking about 2(A). The motion to amend 121 as indicated on page 76, paragraph 2(A). Is there a second?

MS. DUNCAN: Second.

CHAIRMAN SOULES: Motion made and seconded. Further discussion? Those in favor show by hands. Those opposed? Let me count the first hands again. I have got five opposed.

MS. DUNCAN: Wait. This is for?

CHAIRMAN SOULES: This is for. 10 for and 5 opposed.

MR. ORSINGER: For the record that was 121(a)2(A), I believe.

CHAIRMAN SOULES: 121(a)2(A). That's right. Okay. What's next?

HONORABLE SAM HOUSTON CLINTON: Are we just skipping around here?

PROFESSOR DORSANEO: Yeah.

HONORABLE SAM HOUSTON CLINTON: I would like to get some sense of -- I forgot I can't be here tomorrow. I would like to get some sense of the committee on Rules 11 and 12, the court reporters and statement of

facts. There are some changes made here that our court is very interested in, and they may be related to others, too, and that is the role of the court reporter vis-a-vis the lawyer in getting the statement of facts.

Present law since about 1984 was that the appellant has that responsibility, and there are provisions here that would put the responsibility of preparing and filing and Et cetera on the court reporter, and I would like to get some idea here. For example, there is another change, too, in Rule 11 that the court reporter now is charged with keeping custody of all exhibits. At the present time the clerk has that responsibility.

MS. WOLBRUECK: I was just going to say --

HONORABLE SAM HOUSTON CLINTON: And that responsibility has moved back and forth over the years. I think because the clerk has security vaults and everything, and the court reporter sometimes does not, but that aside they are now coming back and wanting the court reporter to keep custody of all the exhibits and then have some other

duties in connection with preparing of the record and those exhibits and everything, and I am not asking for any final motion, but we ourselves are working on this, and so that's why I would like to get some kind of sense as to what the feeling is here today.

CHAIRMAN SOULES: I think the feeling was, Judge, that we talked about earlier, was that the court reporter should be responsible for filing the statement of facts and that the court reporter that actually took the record would have responsibility, but also the current court reporter of the court, if it's not the same, would in addition to the court reporter who took the record would also have responsibility to see that it gets filed. We didn't talk about exhibits, and I can see how maybe particularly in criminal cases it might even be more important for that function to be left with the clerk.

HONORABLE SAM HOUSTON CLINTON: I'm sure the DPS and all the DEA and all the rest of them would not want the court reporter worrying about marijuana and drugs and all that sort of things.

MR. ORSINGER: I think the logic for that is that the exhibits are treated as part of the statement of facts, and since the court reporter does the statement of facts, but technically the court reporters have offices that they come and go, and the district clerk may lose an election but there is still a big district clerk's staff, and they have vaults, and it seems to me that the evidence ought to remain with the clerk's office, which has continuity, and not with the individual reporter that can come and go depending on whether they have a baby or whatever the reasons are that somebody would go, freelance.

MS. DUNCAN: Are you then going to require that the court reporter's notes go into the record also?

MR. ORSINGER: No. Because I think that the court reporters protect their notes, but if you go back in the court reporter offices you will see exhibits. You will see pieces of automobile engines and all kinds of stuff that are kind of stuck there leftover from trials, and I really don't think

that the court reporters as a practical matter who have just one little bitty office to have all of their records including their notes and all exhibits that it's fair to say that they ought to keep all the exhibits on all of their cases.

CHAIRMAN SOULES: Well, logically, too, there is a courtroom deputy clerk who is there who's present whenever the exhibits are gathered up and passed back out everyday.

MS. WOLBRUECK: Not in all counties.

CHAIRMAN SOULES: Not in all counties? I didn't know that.

MS. WOLBRUECK: I was just going to bring that up, Judge, before you did because I was reading Rule 11 also. Sitting here as a clerk I would love to say this is a wonderful idea, but in reality I could also see that I think, you know, the exhibits should probably stay with the clerk. We do have the storage. That's not true. We do not have the storage facility, but in reality we probably have more storage facilities than

what the court reporters do.

I can see that probably statewide the court reporters would possibly shout at -- I don't know, David, you know how --

HONORABLE PAUL HEATH TILL: May I ask a question?

CHAIRMAN SOULES: Yes, sir.

HONORABLE PAUL HEATH TILL: It appears to me this just says that the court reporter has custody of it. It doesn't say where she has to store it. It doesn't say anything here that it has to be in her office or anything of the sort.

HONORABLE SAM HOUSTON CLINTON: But in light of the way it has developed it seems like they are giving the custody back to the court reporter like it used to be before it was given to the clerk. That's some of the reason I am asking these questions in order to get it thrashed out.

MS. LANGE: I believe the court reporters after the trial turn over all the exhibits to the clerk and then if they need to borrow something for their statement of facts, they check it out and get what they need and

then turn it back in, and there is a trail of paper to follow that exhibit, but it does, I think, need to stay with the clerk.

HONORABLE PAUL HEATH TILL: Again, though, to me it appears that the court reporter is responsible for keeping up with these exhibits and keeping up with what's where and who has it, and if they have it with the clerk or whoever it doesn't change the fact that the court reporter would be the one responsible. They are the one that wants to keep it together and keep sure that they have everything prepared for their transcript I would think.

CHAIRMAN SOULES: Okay. That would be a change. What you are looking at would be a change, Judge, which is what we are talking about.

MS. DUNCAN: In fact, it depends on the court. It will not be a change in most civil courts --

HONORABLE PAUL HEATH TILL: No.

MS. DUNCAN: -- In most counties.

HONORABLE PAUL HEATH TILL: No,

it won't.

MS. DUNCAN: If you would go around now and tell people by-the-by "Did you know that the clerk is supposed to prepare the original exhibits and send them up to the Court of Appeals" they will look at you like you are crazy as they did me.

HONORABLE PAUL HEATH TILL: You are absolutely right.

MS. DUNCAN: And I said, "No, don't you see? Don't you see Mr. Green's office, this says the clerk is supposed to send up the original exhibits." And they said, "Well, we are just not going to do it. We don't have the personnel. We don't have the copy machines," blah, blah, blah.

You go to the court reporter who is sitting there with physical possession of the exhibits, and she says, "Well, no. The Rule says that the clerk needs to do it, and I really don't want to spend the time to copy these exhibits." So whichever it is it's going to be changing somebody's practice somewhere and that's why I don't think --

HONORABLE PAUL HEATH TILL:

Very well put.

MS. DUNCAN: -- That should not be the basis upon which we make our decision as to who will keep and prepare the original exhibits.

CHAIRMAN SOULES: I don't see how having a court reporter in control of the exhibits in a criminal case could work.

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest that I move that the Rule be revised so that the clerk has the custody of the exhibits as now but that the court reporter when ordered to send up original exhibits has responsibility to get the exhibits from the clerk and file it with the appellate court and for the statement of facts.

PROFESSOR DORSANEO: Now, there is a Rule of Civil Procedure now, 75(a) that says "The court reporter or stenographer shall file with the clerk of the court all exhibits which were admitted in evidence or tendered on a bill of exception during the course of any hearing, proceeding, or trial." I guess from a lawyer's perspective we don't really know

how that is even meant to work. Is that meant for everyday to be turning in the exhibits that you got that first day and then get them in the morning or is it at the end of the proceeding, or what's the preferred way to go about handling this?

MS. WOLBRUECK: The preferred way right now is it's been done after the completion of the trial, when trial is --

HONORABLE SAM HOUSTON CLINTON: After what?

MS. WOLBRUECK: After the completion of the trial. Then the exhibits are turned over to the clerk, and then also, see, 14(b) gives us the ability to dispose of those exhibits also.

CHAIRMAN SOULES: Right.

PROFESSOR DORSANEO: See, another thing that may ultimately happen is that these Rules on duties of court reporters and clerks and all of that probably, I would anticipate, that will move to the Rules of Civil Procedure and all be put in one place so that somebody can read them and know what is supposed to happen.

CHAIRMAN SOULES: 75(a) and 75(b) adopted in 1967 --

PROFESSOR DORSANEO: Are hiding over here.

CHAIRMAN SOULES: They say exactly what's supposed to happen. The court reporter is supposed to file them with the clerk. We don't know when, whether it's daily or whatever, and then the Court allows the withdrawal of the exhibits. The court reporter has access to the exhibits. Lawyers have access to the exhibits.

MS. WOLBRUECK: That's right. It's all there, and really to me because many times you do have visiting court reporters and for that visiting court reporter to take those exhibits physically with them or whatever their procedure would be, I don't see that that would be real workable.

PROFESSOR DORSANEO: It even troubles me that if the trial takes weeks that the court reporter would have them for that period.

MS. WOLBRUECK: That's right. But usually that procedure is worked out

normally. Of course, if you tell all the clerks in the state of Texas, they would love to get rid of the exhibits, and I want you to know that, but in reality I think that it's a better place to be kept.

CHAIRMAN SOULES: Okay. Anything else on this, whether it's the clerk or the reporter? David Jackson.

MR. JACKSON: Functionally the court reporter only needs them to prepare the statement of facts, and that's all he needs them for as far as --

HONORABLE SAM HOUSTON CLINTON: Somebody has got to do copies of the exhibits and put them in the statement of facts. That's the court reporter.

MR. JACKSON: Well, that can be when they turn everything over to the clerk for filing or if the court reporter has to file it with the Court of Appeals.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: I would like to comment that sometimes in jury trials I have had the experience where we would have a

different court reporter on a different day, and we might have one for the first week and a different one for the second week, and sometimes in Bexar County anyway for one reason or another the official court reporter doesn't transcribe the trial, and they get in a freelance court reporter, and I just I think that this would be a nightmare after six months to track down who has the exhibits. Whereas if you leave them with the district clerk they are always going to be in some office where there is always some continuity.

CHAIRMAN SOULES: Okay. Maybe we have got this proposal. How many feel that the exhibits should be handled as the Rule presently requires, kept by the clerk? Show by hands. Those opposed? Okay. That's the house to one. So we will leave the exhibits in the custody of the clerks and Rule 11, whatever this is, (a)3 I suppose it is on 31 will be rejected.

Okay. What's next?

HONORABLE C. A. GUITTARD: Mr. Chairman --

CHAIRMAN SOULES: I'm sorry.

Pam.

MS. BARON: Well, we have moved off of 121, and I had had a couple of comments on the Rule before we moved off of it. Is it possible to go back to it?

CHAIRMAN SOULES: Yes. Judge Clinton wanted to look at No. 12, too. Does that take care of your concerns, Judge? We did have a consensus of this committee sometime earlier that the duty to file the statement of facts would be on the court reporter.

HONORABLE SAM HOUSTON CLINTON: Rather than the appellant?

CHAIRMAN SOULES: Rather than the party or the lawyer.

HONORABLE SAM HOUSTON CLINTON: Just as long as that's understood, that's fine with me.

CHAIRMAN SOULES: Okay.

HONORABLE SAM HOUSTON CLINTON: And it's going to be very fine with a whole bunch of lawyers and judges who have been sending me mail.

CHAIRMAN SOULES: So I guess

that concludes. Let's go ahead and take a consensus on the changes shown on Rule 12 on page 32 to the effects that we just stated that the duty to file a statement of facts is on the court reporter, including responsibilities on the current official court reporter of the court in which the record was made, and that may need some clarification. Those in favor show by hands. Okay. Those opposed? That's unanimous in favor.

HONORABLE SAM HOUSTON CLINTON: If we can move across the page to Rule 18 talking about the appellate court clerk there, following up on that, monitoring -- the new thing is monitoring the record, which means the clerk of the appellate court is going to see to it that everything is done kosher and timely, I think.

HONORABLE C. A. GUITTARD: Right. That works in with proposed Rule 56.

CHAIRMAN SOULES: Those in favor then of 18(a) show by hands, on page 33. Those opposed? Okay. We are unanimously in favor of that also.

HONORABLE SAM HOUSTON CLINTON:

All right.

CHAIRMAN SOULES: Judge, we do appreciate very much your being here, and I do want to prioritize any of these considerations that you particularly want to focus on today, if there are others. Do you have any others in mind?

HONORABLE SAM HOUSTON CLINTON: Well, there are others also that relate to the exhibits, but there has been some things that have been said here today contrary to our procedures, as I understand it, but we will be working on it. The original exhibits don't go up in the criminal cases unless the judge orders them.

HONORABLE C. A. GUITTARD: Well, that's true in civil cases as well.

HONORABLE SAM HOUSTON CLINTON: Well, I misunderstood what somebody had said.

MS. DUNCAN: Now, the dichotomy that exists now I think, at least in my experience, is that if you are going to have a copy of the exhibits go up it's the court reporter's responsibility to prepare them.

HONORABLE SAM HOUSTON CLINTON:

To prepare the copy?

HONORABLE C. A. GUITTARD: Right.

MS. DUNCAN: To prepare the copy, to bind them, to index them, et cetera, et cetera. But if you are going to go up on original exhibits as now written --

HONORABLE C. A. GUITTARD: You have to get an order.

MS. DUNCAN: That is the clerk's responsibility, and that's not something that's commonly known. So when you go up on original exhibits you can end up with the clerk and the court reporter disagreeing about whose responsibility it is to deal with the original exhibits and bind them and all that stuff.

HONORABLE C. A. GUITTARD: Well, now I suggest that if it's the clerk's responsibility to keep custody of the exhibits that if the trial court orders the exhibits to go up, then we provide that the reporter gets the exhibits from the clerks and files it with the Court of Appeals as a part of the statement of facts in lieu of the original

exhibits only when the court orders it in accordance with the Rules.

HONORABLE SAM HOUSTON CLINTON: Well, we have got a Rule that deals with that. That's contrary to the Rule that we have. When you just said "in lieu of the copies," I believe.

HONORABLE C. A. GUITTARD: What's your gripe, Judge?

HONORABLE SAM HOUSTON CLINTON: That the exhibits go up but that the copies are already there, and sometimes the parties want to see or the Court itself wants to see the original exhibit and compare it to the copy to make sure that -- so the original exhibits are sort of in a class of their own. They are neither exhibits attached to the statement of facts nor are they in the transcript, although they are more like a supplemental transcript than the statement of facts. And that's the way our procedure runs.

MS. DUNCAN: And in civil cases I think it's true that you don't go up on the original exhibits unless you have got very voluminous exhibits that nobody wants to pay

to have copied and that it would be silly to have copied.

CHAIRMAN SOULES: Well, the TRAP rule dealing with original exhibits is 51(d), and that's under the transcript, and that's under the clerk's duties.

MS. DUNCAN: That's right. And if you look in the court reporters rule on the following page, it requires the court reporter to send up all of the evidence designated by the parties in their request for perfection of statement of facts.

CHAIRMAN SOULES: Where is that?

HONORABLE SAM HOUSTON CLINTON: But with the copy.

MS. DUNCAN: The next one.

HONORABLE SAM HOUSTON CLINTON: The copies are usually done, not the originals.

MS. DUNCAN: And I think in most civil trials the court reporters and attorneys have interpreted that to mean if you are going to go up on a copy of the exhibits they will be prepared by the court reporter

and considered part of the statement of facts. So we have a dichotomy as to original exhibits and copies of exhibits.

PROFESSOR DORSANEO: We probably ought to get yours if it's all written out because my own belief is that there is no uniform practice in civil cases.

HONORABLE SAM HOUSTON CLINTON: We have it somewhere. I mean, it's in the Rules in criminal cases. Just what he read from the part about the transcript.

MS. DUNCAN: It's not limited to Criminal Rules.

HONORABLE SAM HOUSTON CLINTON: It is in the -- well, I am not sure whether it is or not, but it is in the part about transcript. Well, as I said, I don't view it as a part of the transcript. I view it as sort of a supplemental or stand alone because the judge has to make certain findings. He has to make certain orders, safekeeping orders and all that kind of thing, which is not what's done in the transcript, and besides you-all have already taken care of the transcript.

CHAIRMAN SOULES: Okay. Well --

HONORABLE SAM HOUSTON CLINTON: Whatever Rule he was citing from.

CHAIRMAN SOULES: Well, let's charge the Appellate Rule Subcommittee with clarifying how copies are forwarded by the court reporter. I don't see that.

HONORABLE SAM HOUSTON CLINTON: I will tell you where most of that is. It's in our appendix, Rule 1 of our appendix.

MS. DUNCAN: Uh-huh. That's -- the Rule itself says "all the evidence," but it's in the appendix, and it says the court reporter is defined as to bind and index.

HONORABLE SAM HOUSTON CLINTON: How to do the index of all exhibits and cross-reference and all that jazz.

CHAIRMAN SOULES: In the appendix?

MS. DUNCAN: That was the problem.

HONORABLE SAM HOUSTON CLINTON: Well, we approved what we do.

CHAIRMAN SOULES: All right.

Can you-all --

MS. DUNCAN: No. We have to know what you want to do. Our committee decided that it should be the court reporter who prepares and indexes, et cetera, the exhibits. Now, as far as who has custody of it, who knows.

CHAIRMAN SOULES: All right. Is it the consensus of the committee that in the general -- ordinarily in appeals copies go, not the originals of the exhibits, and that that process of copying, indexing, and sending the copies to the appellate court should be done by the court reporter and be the responsibility of the court reporter, but the original exhibits would stay in the custody of the clerk unless the Court makes an order under -- well, I just looked at it a minute ago -- that the original exhibits be used and then provides for safekeeping and so forth.

MS. DUNCAN: But it's the clerk's -- is it the clerk's responsibility to do with the original exhibits just as the court reporter would do with the copies of the

exhibits, that being to index them, to bind them, to blah, blah.

PROFESSOR DORSANEO: Okay. Any need for that in a civil case do you think?

MS. DUNCAN: Oh, I think some courts might like to have an index.

CHAIRMAN SOULES: First my proposition and then if it passes we will decide who has to index the originals if that's what's used.

Okay. Those in favor of what I just said in terms of be it the court reporter's responsibility to get copies of the exhibits and index them and send them to the appellate court with the statement of facts unless the trial judge orders original exhibits sent. How many in favor of that? Any opposition? Okay. Let me see the hands up again on those in favor. 15. And those opposed? One. Okay. 15 to 1. Now, if the court --

HONORABLE SAM HOUSTON CLINTON: Excuse me. Our Rule does not provide that you send the original instead of the copies. You send the original on a special situation by the trial court. Somebody asks them usually

to say, "Get the originals up there." Usually it's the appellate courts.

CHAIRMAN SOULES: Right.

HONORABLE SAM HOUSTON CLINTON: And there they are not in lieu of the copies. They are in addition to the copies.

CHAIRMAN SOULES: Okay.

HONORABLE SAM HOUSTON CLINTON: That's why it is up to the clerk to do it rather than the court reporter.

MS. DUNCAN: Because the court reporter has already done his or her thing.

HONORABLE SAM HOUSTON CLINTON: Because all of that is very carefully done under the supervision of the judge.

CHAIRMAN SOULES: Okay. Let me just --

HONORABLE SAM HOUSTON CLINTON: According to our Rule anyway.

CHAIRMAN SOULES: Yeah. Let me word it this way: If 51(d) is invoked, and that can be invoked either by the trial judge who decides that the appellate court should see the original exhibits or by the appellate court who says -- who tells the trial judge

that they want to see the original exhibits but if 51(d) is invoked --

MS. DUNCAN: Or by a party.

HONORABLE SAM HOUSTON CLINTON: Or by a party.

CHAIRMAN SOULES: Well, but it's got to be either by a trial judge order or an order from the appellate court in any event whether it's requested by --

HONORABLE SAM HOUSTON CLINTON: Well, it's normally got to be by a trial court's order.

CHAIRMAN SOULES: So if 51(d) is invoked how many feel that it is then the responsibility of the clerk to do whatever is necessary in terms of indexing or other activities to see that the originals are gotten to the appellate court, not the responsibility of the court reporter? Okay. How many -- those in favor show hands. 12. Those opposed? One.

PROFESSOR DORSANEO: Two.

CHAIRMAN SOULES: Two. I'm sorry, Judge Guittard. I didn't see you there. I apologize to you for not seeing your

hand.

So that's the way it will be and the Appellate Rule Subcommittee is charged with drafting something to that effect.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Judge Clinton, does that conform to your wishes as well?

HONORABLE SAM HOUSTON CLINTON: I think -- well, it's not my wishes. That's kind of the way we have been doing it, so I am just trying to protect what we have been doing.

CHAIRMAN SOULES: Oh, I see. What else do you see here that you would like for us to focus on?

MR. ORSINGER: Luke, before we leave Rule 12 can I ask one favor? We talk here in the last sentence about substitute reporters.

CHAIRMAN SOULES: By way of time, we are going to have to stay and finish these Appellate Rules tonight. We have too much to do tomorrow. So we are just going to

have to hang tough and get this done, so there we are.

MR. ORSINGER: We talk about the substitute reporter and the official reporter's responsible, but in the comment we talked about the predecessor of the official reporter. Our Rule ought to include the predecessor as well as any substitute that they bring in.

CHAIRMAN SOULES: It will be up to the committee, to the subcommittee, to write so that there is a chain of authority and even some supervisory authority in the current official court reporter at the time a record is ordered to get that done. So charged. Okay?

HONORABLE C. A. GUITTARD: Now, there is a matter of considerable moment, Rule 184(c).

PROFESSOR ALBRIGHT: Page?

HONORABLE C. A. GUITTARD: On page --

CHAIRMAN SOULES: Pam, you had a -- you wanted to go back to 121 first, right?

MS. BARON: I sure did.

CHAIRMAN SOULES: Okay. Let's do that and then we will pick up with a new one. 121 on what page?

MS. BARON: It's on page 76 and 77.

CHAIRMAN SOULES: Page 76 and 77.

MS. BARON: I just had three or four additional changes I would recommend for the committee's consideration. As a staff attorney for the Supreme Court for four years I have looked at a number of petitions and briefs and motions, and it's a mess. It's a mess mostly because the Rule isn't providing enough guidance to people who do not file these in the ordinary course to know what they should look like. You will get petitions that are very repetitive of briefs.

You will get petitions and briefs that don't have tables of contents or indexes of authorities because there is no requirement for that in the Rules, and I guess the four suggestions I would make is, first, on subsection (a)2(E) which says, "The petition

shall include or be accompanied by a brief." The petition and brief should always be the same document. There is no way to divide them into two and not have them just be a total repetition of each other. It's just extra paper. It's an extra binding task. It doesn't make any sense at all. Secondly, I would require that --

CHAIRMAN SOULES: Okay. Would that be accomplished, Pam, by deleting the words "or be accompanied by"?

MS. BARON: Yes.

CHAIRMAN SOULES: To say, "The petition shall include a brief of authorities and argument in support of the petition."

MS. BARON: Right. I would also --

CHAIRMAN SOULES: Any opposition to that? Okay.

HONORABLE C. A. GUITTARD: Well, I proposed that several years ago, and it didn't get adopted by the Supreme Court.

CHAIRMAN SOULES: Well, Pam's got more authority. All right. You win on that one.

MS. BARON: All right. The second thing is I would require the combined petition in brief to track the briefing rules of the court you are in, either 131 or 136 depending on whether you are in the Court of Appeals or Supreme Court. That way you would get a statement of jurisdiction, a table of contents, and index of authorities. You would not need points of error, but if we are moving to an issues statement, issues statements would work great in a petition and brief on mandamus. It would be nice to have them in there to let the Court know what on earth is going on and what you want, because you can't find them when you read them.

CHAIRMAN SOULES: Okay. That would be to conform to which briefing rules?

MS. BARON: Well, it would be Either --

MS. DUNCAN: 74 or 131.

MS. BARON: 74 or 131.

CHAIRMAN SOULES: Or 131. Okay. So we would add something to (E), I guess, that the briefs shall conform to Rule 74 or 131 and then whatever adjustment needs

to be made to that language.

MS. BARON: Right.

CHAIRMAN SOULES: Since it's a mandamus as opposed to an appellate brief the appellate subcommittee --

HONORABLE C. A. GUITTARD: Could we say something to the effect "to the extent applicable"?

CHAIRMAN SOULES: Something to that effect?

MS. BARON: Right. That would be great.

CHAIRMAN SOULES: All right. Any opposition to that? Okay. That's approved.

MS. BARON: Third, if you look at subsection (c) and (e) that has caused considerable confusion. Almost any practitioner who reads this looks at (e) and thinks they have seven days to reply to the motion, and that's not right. What it means is that you have seven days to reply after the Court has already told them they can file the petition, and chances are you are going to lose, and most people are very confused by

that. I just suggest a little alteration in wording in (c) and (e).

In (c) I would say, "The court may request that respondent submit a reply," and I would just spell it out "to the motion for leave to file petition for writ of mandamus." And then in (e) I would say, "The clerk shall notify by mail all identified parties and their attorneys," and so forth, "of the granting of the motion for leave to file petition for writ of mandamus, the filing of the petition" and so on and so forth. At least there is some chance that somebody reading it will recognize there is a difference between the motion and the petition. People don't know that there is a difference when they read these, and they are very confused by that.

CHAIRMAN SOULES: Okay. So you would add to (c). We are on page 77 now. So this is going to be Rule 121(c). "The court may request that respondent submit a reply" and insert "to the motion for leave to File" --

MS. BARON: "Petition for

writ."

CHAIRMAN SOULES: "Petition for writ of mandamus."

MS. BARON: Yes.

CHAIRMAN SOULES: Comma, and then pick up "and in that event" and so forth.

MS. BARON: Yes.

CHAIRMAN SOULES: Okay. Any opposition to that? Being no opposition, that is approved. And then let me get -- I didn't follow the next proposal. I was writing on (c).

MS. BARON: Okay. On (e).

CHAIRMAN SOULES: Okay. On 121(e).

MS. BARON: Yeah. "The clerk shall notify by mail all identified parties and their attorneys of record if represented by counsel of the granting of the motion for leave to file petition for writ of mandamus, the filing of the petition" -- I guess "and the filing of the petition" and then so on and so forth as it's now provided.

CHAIRMAN SOULES: Well, it's really the filing of the --

MS. BARON: They don't know what the filing of the petition means. They think that means the filing of the motion. The petition isn't technically filed until the Court grants leave to file the motion, and anybody -- most practitioners who read this don't know there is a difference.

CHAIRMAN SOULES: Shouldn't the clerk notify all identified parties of the filing of the motion for leave?

MS. BARON: Well, that's up in (c), and they don't do that. They don't do that.

PROFESSOR ALBRIGHT: Isn't it too late to respond?

MS. BARON: It's too late. An answer at that point is not very useful.

PROFESSOR ALBRIGHT: So why do we need (e) because don't they do that after they have issued their opinion?

MS. BARON: Well, they haven't issued the opinion yet. What they have said is "We are very interested in hearing that, and you have a pretty good chance of success." The better time to file your reply is before

the Court has acted on the motion obviously. Most people don't understand there is a difference between acting on the motion and filing the petition, and considering the motion is different than filing the petition. The petition is never filed until the Court has granted the motion, and if you try to explain that to somebody, they will look at you like you are crazy.

CHAIRMAN SOULES: Well, should this language, "and in that event, the clerk shall notify all identified parties," should that come out of (c)? That's not done; is that right?

MS. BARON: Well, no. (C) is correct in that the Court -- different courts act differently. The Supreme Court will usually call you and say if they want a response to the motion. You still can file one, but the Court will tell you if it's specifically interested. Courts of appeals read them -- some courts of appeals read this differently and follow the 10-day motion practice that's in the general Rules, I think Rule 15, that says you have 10 days to reply

to a motion. That's not in here either, which is confusing, and that differs, I think, from court to court whether they give you that 10-day written notice.

CHAIRMAN SOULES: Okay. So going to (e), "The clerk shall notify by mail all identified parties and their attorneys, if represented by counsel, of the," what?

MS. BARON: "Granting of the motion for leave to file petition for writ of mandamus."

I'm not sure you even need to say "filing of the petition" because it's so confusing.

CHAIRMAN SOULES: Well, I guess the court -- the clerk in the same notice can say "The motion for leave to file has been granted, and the petition has been filed."

MS. BARON: Right.

MR. ORSINGER: Now, there is no provision I can find that the filing of the motion that the Court gives notice.

MS. BARON: That's correct.

MR. ORSINGER: Are you aware of that? Don't you think they ought to?

MS. BARON: No.

MR. ORSINGER: No? Okay. No notice.

CHAIRMAN SOULES: Okay. Is anyone opposed to Pam's suggestion on 121(e), that the clerk not only give notice of the filing of petition but gives notice that the motion for leave to file has been granted and the petition has been filed? Any opposition to that?

MR. SHARPE: No opposition, but down on (e) where you are going down to the fourth line, it says, "And serve upon relator an answer or brief of authorities," and should it say "an answer including" to be consistent with what Pam has been saying?

MS. BARON: Yes. That's good.

MR. SHARPE: "An answer including the brief of authorities."

CHAIRMAN SOULES: All right. Any opposition to that? Okay. Anything else on 121(e)?

HONORABLE C. A. GUITTARD: Mr. Chairman, I am not sure that we have gone far enough to simplify this procedure. Under current Rules you can go in for a mandamus and

you have to have three things. You have to have a motion for leave; you have to have a brief; you have to have a petition of mandamus. Now, we have said you just have to have two of them. My question is, why can't we reduce that to one? You file a petition with a brief, and you pray that the Court grants leave to file this petition, and if granted, then the Court grants the following relief. Why should we have a separate motion for leave to file?

MS. DUNCAN: Since you have to file the other stuff anyway.

HONORABLE C. A. GUITTARD: Yeah. That's right.

MS. BARON: I think that's true in almost all cases. Sometimes it's nice to have a separate motion because there you have a remote chance that if emergency relief is requested that it is more apparent. Often it's difficult to know if emergency relief is requested by reading of a very long petition and brief.

CHAIRMAN SOULES: I would guess that the Court would want to docket the motion

for leave without docketing the petition, and there would then be a motion on file to docket, for the Court to dispose of on its docket.

MS. DUNCAN: That keeps the same cause number, doesn't it?

JUSTICE HECHT: That keeps the same number.

HONORABLE C. A. GUITTARD: You could put the motion in your petition, and then you could go ahead and docket it and then when you file the -- when the motion is granted then the petition serves as a brief and basis for your relief.

MS. BARON: Well, I would support a combination of motion, petition, and brief.

CHAIRMAN SOULES: Can we just say that, that the motion and petition can be combined in a single --

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: Something.

HONORABLE C. A. GUITTARD: Optional.

CHAIRMAN SOULES: Optional.

MR. ORSINGER: But why are we maintaining the motion anyway? Isn't that just a vestige of a former year?

MR. SHARPE: Huh-uh.

HONORABLE C. A. GUITTARD: That's true.

MR. ORSINGER: Is there a reason, logical reason, that the motion should be separate from the petition?

MS. DUNCAN: That's what we are saying. You still have to have a motion. It's just that it can be included in there.

MR. ORSINGER: No. You don't still have to. I mean, we are making a decision about whether this should go in or not.

MS. DUNCAN: Well, you don't have automatic -- you can't file an original proceeding as a matter of that.

MR. ORSINGER: Well, I mean, that's because the Rules say you can't.

HONORABLE SAM HOUSTON CLINTON: No. That's because basically it's a matter of discretion of whether the Court wants to hear

any of it.

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

HONORABLE SAM HOUSTON CLINTON: And that's why you have the motion for leave.

HONORABLE C. A. GUITTARD: But you have a motion for leave. It's just contained in the same document.

MS. DUNCAN: Right.

CHAIRMAN SOULES: Okay. Pam.

MS. BARON: I have one last comment, and that's on section (d) on temporary relief. There on line 2 it says, "The Court may grant temporary relief only after granting the motion for leave to file." Well, that's not true, or it's not being followed. The Supreme Court regularly grants temporary relief before granting leave to file. The Third Court of Appeals in Austin has recently started doing that. I don't know how other Courts of appeals interpret that, but I am sure that some feel limited by this language. I guess there is an issue whether "after" means after or it means after just depending on whether or not the Court decides

it does.

CHAIRMAN SOULES: So you would propose just delete the word "after"?

MS. BARON: Well, I don't have a recommendation. I just think it's an issue that needs to be considered, but I think that we are getting inconsistent actions among Courts of appeals because of that word.

CHAIRMAN SOULES: Judge Clinton.

HONORABLE SAM HOUSTON CLINTON: If I may interject my view, I would think that the Court would feel more comfortable about granting any temporary relief after it is said we will grant the leave to file because otherwise the Court may -- somebody may say, "Well, wait a minute. Where is your jurisdiction over any kind of subject matter? You haven't granted any leave to file yet."

MR. LOWE: But what really --

CHAIRMAN SOULES: Buddy Lowe.

MR. LOWE: -- Happens is the court in Beaumont, you file that, and you are close to trial or something, and the chief judge will call the trial judge. He will say,

"Look, don't start this trial because we haven't," and so that's pretty temporary relief and can end up being permanent if you don't get to trial for another year. So they are doing that now. I mean, I call that temporary relief, and so if the judge Hasn't -- that's not Rolaids, but it's relief. If the judge doesn't have time to do something and it's real urgent, then, you know, it's too late. So it has to be interpreted that way.

CHAIRMAN SOULES: Even backing up into the discovery process where you don't have a trial setting if you go to the trial judge and the judge orders discovery made in the face of a privilege claim and you ask the Court to stay the order pending mandamus review and the trial judge denies that stay of the trial judge's own order, I don't know how long I have before I have got to give up my privileged documents. I don't know whether I have got to do it today or whatever. The trial judge may say "Do it today" or in three days, and I guess we have all had experiences where the Court of Appeals will decide that there is enough substance for it to issue a

stay, but they haven't decided yet whether they are going to grant leave to file, and so there should be -- not there should be, but we should at least consider the fact that the Court of Appeals or the appellate court may want to grant temporary relief while considering the motion for leave.

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest that although if it's something the Court feels it will have a tendency to grant temporary relief without granting a leave to file I would think that the better practice would be for whenever they grant any sort of relief they ought to grant leave to file.

HONORABLE SAM HOUSTON CLINTON: Leave to file. Exactly.

CHAIRMAN SOULES: Well, the Court has jurisdiction over the matter because it has jurisdiction over the motion for leave, so it can grant temporary relief --

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

CHAIRMAN SOULES: -- While it's considering the motion for leave.

HONORABLE C. A. GUITTARD: Yes. But if they have to consider the motion for leave to such extent they ought to go ahead and grant it. They don't have to grant the permanent relief. So all they have to do, if they come in with a petition for Temporary -- application for temporary relief, if it looks like they need temporary relief, give them temporary relief, grant the motion for leave to file, and then dispose of it in regular order. I don't see any point in granting the -- in withholding your decision on leave to file while granting temporary relief.

HONORABLE SAM HOUSTON CLINTON: By definition if they are entitled to some kind of relief, though, you need to grant leave to file, so you can consider it, actually consider it.

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

CHAIRMAN SOULES: Just keep in mind how hard it is to get a mandamus, get a leave to file granted, and if the Court has to do that before they can grant any kind of

temporary relief, is that going to be worse than better? I don't know. Chuck Herring.

MR. HERRING: Yeah. The practice that I have seen locally is that on a true emergency, the one in lieu of deposits, where you have an order to turn over privileged documents at 1:00 o'clock this afternoon you have barely got time to get a motion on file for emergency relief, much less package up everything else, and in those types of rare emergencies I think that it should be the exception. I agree. In most instances there should be time, and there should be everything laid out in front of the Court of Appeals, but there needs to be that exception, I think, allowed by the Rule because that's what courts in true emergencies are doing now anyway, and I would be in favor of modifying the Rule so that at least current practice is recognized in those situations. So I agree that standard practice should be, as you say, in the normal case.

HONORABLE SAM HOUSTON CLINTON: Yeah. The more you chip away at it, the less it will be standard.

CHAIRMAN SOULES: There is one other problem here, and that is that the appellate court may not want to act on the motion for leave until it has the transcript of the discovery hearing. It may decide that it will rely on the representations of the lawyers to state the discovery pending getting the record, but it's not going to grant leave or certainly not grant mandamus until it has that record, and that may be some passage of time, days or at least hours, before you get the record.

HONORABLE C. A. GUITTARD: You can grant leave without granting mandamus, of course.

CHAIRMAN SOULES: So anyway.

MR. LOWE: But, Luke, the way the trial judges look at a mandamus is not a friendly ally, and there is more dignity to granting the leave, and that's always been that way. I mean, to the trial judge it means, boy, I mean it's bad enough he had to grant -- let them file it, but, boy, when you say, "No. I am not even going to let you file it," that means something to the trial judge.

I can tell you I have got some friends on the trial bench, and that's the way they interpret that, and to say that there is an emergency and you have got to preserve your jurisdiction like so, you have to rule these until the cat's -- you know, hold these documents and so forth or whatever to hold up the trial. To say that when that comes along you have got to grant it, that means you grant leave every time there is an emergency, and you have to hold something up, and it shouldn't be given that dignity. I think there is a dignity to the trial judge, or they see it, when the grant -- when the leave is granted.

CHAIRMAN SOULES: Well, let's just take a consensus if we can on those, how the committee feels about whether the appellate court should be able to grant emergency relief only with granting the motion for leave, or on the other hand, without granting the motion for leave. Okay. Those who feel that emergency relief should be allowed only when the appellate court has granted leave to file the petition for writ of

mandamus show by hands. One.

Those who feel that the court -- that the appellate court should be permitted to grant emergency relief without granting a motion for leave show by hands. That's 10 to 1 in favor of the appellate courts having the ability to grant emergency relief without granting motion for leave to file petition for writ of mandamus. That's probably fixed by just deleting the word "after," but I am not certain of that. "After" in the second line of 121(d), but we will also need to look at the Rules elsewhere to see if something else needs to be fixed. Pam.

MS. BARON: Did you have another comment on this part? Go ahead then. I'm sorry.

CHAIRMAN SOULES: Okay. Elaine.

PROFESSOR CARLSON: I just wanted to say I would think under the Government Code 21.001, which gives the appellate courts the authority to -- in the exercise of its jurisdiction and enforcement of its orders to issue any writs and orders

necessary in aid of its jurisdiction. I have always read that as authority to grant a stay at the appellate level, and I think the caselaw would bear that out.

CHAIRMAN SOULES: So it's there anyway.

PROFESSOR CARLSON: I think the power exists now.

CHAIRMAN SOULES: Pam.

MS. BARON: One last comment on subsection (b) on service. I don't know how we can correct this, but I think that when parties ask for emergency relief and then stick their petition, motion, and brief in the mail to the other side certified mail or return receipt requested that's unconscionable because it's going to take five or six days to get to the other side, and they are asking for relief today. There should be provision that when emergency relief is requested that service be made on other parties in the same manner as made to the court, that if it's by messenger, that you do it by messenger or by overnight delivery or by some sort of exigent carrier to give the other side notice that

it's been filed before emergency relief is actually granted.

MS. DUNCAN: Maybe overnight, but I mean, if you are talking about messenger service on all parties in a multi-party action you could be talking about tens of thousands of dollars.

MS. BARON: No. I understand that. I was thinking if they were in the same city as you. If they are in other cities, that becomes more complicated, but there should be some sort of expedited service in that situation that does give the other side notice of what you are doing.

MS. ALBRIGHT: What about, isn't there a provision in the temporary restraining order Rule that says if you know they are represented by counsel you have to give a telephone call or something?

MR. HERRING: A 680 call.

MR. LOWE: It's not in this. I got notice from the Court that one had been refused before I knew it had been filed, by the Supreme Court clerk.

CHAIRMAN SOULES: Well, if

there is a way to fix that, give that some thought. We will have the Appellate Rules Subcommittee give that some thought. I am sure there is a way to fix it.

HONORABLE C. A. GUITTARD: The appellate court will not grant emergency relief without getting in touch with the respondent and giving them an opportunity to state their position, but I understand sometimes it doesn't happen.

MR. LOWE: That's how they call and --

CHAIRMAN SOULES: Service is a problem, too, because if you fax it it's only served -- you have a Three-day Rule and then you have got a 5:00 o'clock Rule and all kinds of problems with that, too.

PROFESSOR ALBRIGHT: Well, Rule (d) --

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I'm sorry. Rule (d), temporary relief, says that you can get it without notice. The court can grant it without notice. So it seems like isn't the

problem that when you know that they are represented by counsel and you should give them notice that you need to do it? There may be situations where you feel like you can't give proper notice, and under the T.R.O. Rule you have to explain to the Court why you were asking for relief without notice. So why can't we just put into this Rule, the Temporary Relief Rule, the same provisions that are in the T.R.O. Rule? Would that solve the problem?

MS. BARON: It might work. I don't know.

CHAIRMAN SOULES: Maybe we could say that the movant shall provide actual notice to all other parties at the time it's filed. That's not service, but it's actual notice, which is different than service. Maybe that's a way to fix it, something along those lines would probably be workable. Anything else? Bonnie.

MS. WOLBRUECK: Are you finished with that Rule? I was going to --

JUSTICE HECHT: Let me make one comment on it. Judge Guittard, I wish also in

121(3) in the revision of the record you would consider some language that obligates the relator not to present a record that is misleading.

HONORABLE C. A. GUITTARD: Does that have to be said?

MR. ORSINGER: Will they follow it even if you say it?

JUSTICE HECHT: It does have to be said. The way it's written now technically you could bring in a record that as you look at it it looks like you are entitled to relief, but if you knew what was missing, it would be clear that you weren't entitled to relief, and all the Rule obligates the relator to do is bring in enough to show that he is entitled to relief, and we need some countervailing provision.

HONORABLE SAM HOUSTON CLINTON: I'm sorry. What are you talking about now?

JUSTICE HECHT: On the record, top of page 77, 121.

HONORABLE SAM HOUSTON CLINTON: Yeah. Okay. All right.

JUSTICE HECHT: We need some

provision that you won't present a misleading record. I know that's kind of hard to say because the parties haven't, but by the same token it ought not to be affirmative.

HONORABLE C. A. GUITTARD: Well, I think the sanction rule that we have just approved, will that take care of that, Judge Hecht?

JUSTICE HECHT: Well, when it's for delay and without reasonable basis, and I don't know if it would take care of it or not.

HONORABLE C. A. GUITTARD: How do you say it shouldn't be misleading? Just say it shouldn't be misleading?

JUSTICE HECHT: Well, that's how come I moved the burden to you.

HONORABLE C. A. GUITTARD: Okay. We will try to come up with something.

MS. BARON: Luke, I just thought of one more thing. I am sorry.

CHAIRMAN SOULES: Yeah. Maybe that can be done by saying "a complete and sufficient record" or "the concept will be germane to the issues presented" so that it would be a complete record on those issues and

not just a one-sided record on those issues.

MR. LOWE: That would cover it because I had a situation for a case in Matagorda County, and they tried to mandamus because they wouldn't transfer it to Beaumont. It was dismissed and filed in Beaumont, and then when they filed a mandamus they didn't tell them they had already filed a mandamus to have it in Beaumont, the very place now they didn't want it. So the record was totally incomplete, and when the Court got the complete record he chastised them, but on the basis of what they filed it -- so a misleading record can be incomplete. Yeah.

CHAIRMAN SOULES: A complete record on the issues presented or something to that effect?

MR. LOWE: Yeah. Right.

CHAIRMAN SOULES: Madam Baron.

MS. BARON: One other comment on the record. I think in the Supreme Court the record should include any order or opinion of the Court of Appeals. Often those aren't included.

CHAIRMAN SOULES: Should that

include -- are you contemplating that that would include the order denying leave --

MS. BARON: Yes.

CHAIRMAN SOULES: -- From Court of Appeals?

MS. BARON: Yes. Or any opinion that would deny leave or opinion granting the leave, also.

MR. LOWE: It should include motions filed in the same matter in another court. I mean, you know, the record is incomplete there because they didn't -- you know, that was particulate of our record here but --

CHAIRMAN SOULES: Well, Pam's -- you are broadening what she is saying and probably deliberately so.

MR. LOWE: Right.

MS. BARON: Yeah. I wouldn't require necessarily the briefs from the Court of Appeals. We have got enough trouble as it is, but just the orders, any orders the Court of Appeals has issued.

CHAIRMAN SOULES: Why would you need to file, Buddy, in the Supreme Court the

motions and so forth that were filed in the Court of Appeals so long as you file the order?

MR. LOWE: No. No. I am not talking about that. I am talking about to have a complete record if this matter has gone before another court or something, papers you filed there if it's the same matter, then all of those things should be brought forward to the Court to review. Because a lot of times a mandamus pertains to no jurisdiction or venue or something like that, and so all of those things would relate to that, and they shouldn't just file a part of a record. So orders or motions in other courts. Maybe you wouldn't want to get that broad and maybe just complete record would be sufficient, but those could be important.

CHAIRMAN SOULES: All right. So be sure -- I am trying to be sure that I understand what you are suggesting. You are saying that when a petition or motion for leave of file and tendered petition is presented to the clerk of the Supreme Court of Texas that must be accompanied by everything

that got filed in the Court of Appeals and it's order.

MR. LOWE: Well, now --

HONORABLE C. A. GUITTARD: I point out that section (a)1 says now "The motion for leave to file in the Supreme Court shall state the date of presentation of the petition to the court of appeals and that court's action on the motion or petition or the compelling reason that a motion was not first presented to the court of appeals." Now, you would amplify that by requiring the order and the whole proceeding before the Court of Appeals be included in the record and be presented to the Supreme Court; is that right?

MR. LOWE: Right.

CHAIRMAN SOULES: And Pam is saying the order and not the rest of it.

MS. BARON: Right. I wouldn't require the --

CHAIRMAN SOULES: Order and any opinion.

MS. BARON: Order and opinion.

CHAIRMAN SOULES: But not the

rest of the materials.

MS. BARON: Right.

CHAIRMAN SOULES: Okay. How many feel that any additions to (a)1 should be limited to the Court of Appeals' order and any opinion?

MS. DUNCAN: Why don't we try additions to subsection 3, (a)3? Not (a)1.

HONORABLE C. A. GUITTARD: Yeah. That would take care of it.

CHAIRMAN SOULES: What is it? (A)1 is what I am looking at.

MS. DUNCAN: I was thinking (a)3.

CHAIRMAN SOULES: Well, if we are going to expand what's required when you file in the Supreme Court should that be the entire record of the Court of Appeals or just the Court of Appeals' order and any opinion? Okay. How many feel that it should be the entire record in the Court of Appeals?

MR. LOWE: I think it should because the Court might want to review it.

CHAIRMAN SOULES: How many feel that we should provide that the order and any

opinion be a requirement of filing in the Supreme Court? Eight. And how many feel that there should be no change? Okay. So eight, the sense of the committee is that we should require the Court of Appeals' order and any opinion of the Court of Appeals to accompany the filing in the Supreme Court of Texas.

Okay. What's next? Anything else, Pam, on this? Bonnie.

MS. WOLBRUECK: I didn't want to change ideas if you were still on that.

CHAIRMAN SOULES: Okay. Sure.

MS. WOLBRUECK: If you are finished with that, I wanted to direct some thought to page 81 on the order directing the form of the record on appeal, and this is just a problem that's of the existing order. About the middle of the page in regards to the transcript there is a sentence that says about how the clerk shall arrange the transcript, and then it says "separating each preceding instrument or other paper one from another in such a manner that each is readily distinguishable."

Recently my Court of Appeals has

determined that that should be by adding an additional sheet of paper in between each document and stating on each sheet of paper what the document is, and that's really added a great deal of extra burden and made it real cumbersome along with adding a lot of extra pages to the appeal. I am wondering if what that -- maybe Justice Hecht can tell me exactly what that means or why that is in there.

HONORABLE C. A. GUITTARD: It's started on a new page is all it means.

MS. WOLBRUECK: And I am just wondering because that's the way my Court of Appeals has determined that, and so all of my transcripts now are going up with this extra sheet of paper in between each document, and it's really quite a burden.

MR. HERRING: You have to label each thing?

MS. WOLBRUECK: Label each one of those pages.

MR. SHARPE: The Third Court of Appeals is the only one that requires it in the state of Texas.

MS. WOLBRUECK: Yes. I'm sure that it is.

CHAIRMAN SOULES: What court is that?

MS. WOLBRUECK: No. That's right here, the Third. In Austin. In Austin.

MS. LANGE: San Antonio does, too.

MS. WOLBRUECK: Okay. San Antonio does too then, but I would like that not to read like that if that's the way that it's being defined. And throughout the years that has been handled differently. I know at one time we put it in, and they said, "Oh, don't ever put that in. That just adds too much burden to it. Just please don't ever do that again." And we took them out and now we are having to put them back in again. So it's become -- you know, it's quite a burden right now.

MR. LOWE: So you have to read the document and interpret it and then put that interpreted --

MS. WOLBRUECK: Yeah. On a piece of paper, a sheet of paper.

MR. LOWE: The appellate judge ought to be able to interpret the document.

JUSTICE HECHT: That's a motion?

MS. WOLBRUECK: Yes. That's a motion.

CHAIRMAN SOULES: That's a motion.

MS. LANGE: I second it.

CHAIRMAN SOULES: Okay. Those in favor say "I." Opposed?

MR. ORSINGER: What do we write down the motion says?

CHAIRMAN SOULES: The motion says that the Appellate Rule Subcommittee of the Supreme Court Advisory Committee is charged with revising this so that it's --

MR. ORSINGER: So that it can't be interpreted this way?

CHAIRMAN SOULES: That it's clear that the only thing that goes up are the copies of the papers. They don't have to be separated by some kind of divider between the instruments and that no additional labeling is required by the clerk.

HONORABLE C. A. GUITTARD: We sure are micromanaging things there, aren't we?

CHAIRMAN SOULES: For the Third Court.

MR. ORSINGER: Well, why don't we just put it in the comments that the Third Court can't do this.

CHAIRMAN SOULES: Maybe the Supreme Court could just send an order to Judge Carroll.

MS. WOLBRUECK: Yeah. Justice Hecht may can help us out right now.

CHAIRMAN SOULES: But see if some writing can be done on that to help out here.

MS. DUNCAN: Tabs would sure be nice.

MR. ORSINGER: You can put tabs on your copies.

MS. DUNCAN: I do.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: While we are on exhibits can I raise another exhibit question?

CHAIRMAN SOULES: Yes.

MS. BARON: On page 71, Rule 132(a), the last sentence of that that says "The clerk of the court of appeals need not forward any exhibits that are not documentary in nature." That's historically been a problem. I don't know what the answer is to it, but lots of appellate clerks think that this means any exhibits don't need to be forwarded, and often the Supreme Court will not get documentary exhibits. For example, administrative records are not routinely forwarded because the clerk has decided they are nondocumentary.

Now, I don't understand that, but then you have to go and ask the Supreme Court to have the administrative records sent over from the Third Court over to the Supreme Court, or a separate bound volume of exhibits might include the critical leaks that's at issue somehow is not in the Supreme Court record. Now, if you are on the ball, you will go to the Supreme Court and check the record, but not everybody can do that. I don't know how you can cure that other than to say if it's paper, it's documentary.

MS. DUNCAN: Are they interpreting nondocumentary --

MS. BARON: I don't know if that's the problem or if it's because the exhibits are kept in a different place, and they don't find them when they send them, but if you call the Supreme Court's clerk's office, often you will find that your exhibits didn't make it, and in administrative appeals in Austin that's particularly a problem because the administrative record doesn't get sent. I don't see how the Court does anything without the administrative record.

CHAIRMAN SOULES: I guess it's obvious, but why doesn't the Supreme Court take the same record that the Court of Appeals has?

MS. BARON: Well, I don't know why they shouldn't either.

MR. ORSINGER: Well, sometimes you might have half of a Volkswagon, and you don't want that up in the Supreme Court.

CHAIRMAN SOULES: Well, they don't want it in the Court of Appeals either.

MR. ORSINGER: Well, let's

leave it in the trial court.

MS. DUNCAN: And if you don't go up on the original exhibits, it won't be there.

CHAIRMAN SOULES: So if the Court of Appeals decides it needs to see the half of a Volkswagon, it can have them, but it can't send it from there to the Supreme Court?

MR. ORSINGER: Unless the Supreme Court accepts it.

CHAIRMAN SOULES: Unless the Supreme Court wants to see it, too. Well, that makes sense.

HONORABLE C. A. GUITTARD: Can we go to some other Rule here?

CHAIRMAN SOULES: I am not sure that we can fix all of those.

MS. BARON: No. It's just a warning to everybody to check your records, I guess.

CHAIRMAN SOULES: Check the records. Okay. Maybe we can put that in. Be sure you check your record when it gets to the Supreme Court.

MR. ORSINGER: Well, the

Supreme Court could issue an ancillary order that would be essentially a communication to the Court of Appeals and address the administrative law problem.

MS. BARON: Well, there is really only one court that does that. I don't know how we can solve that.

CHAIRMAN SOULES: Okay. Let's finish up. I mean, the Supreme Court meets with the judges of the courts of appeals. Some of these things ought to be able to be resolved just by dialogue between the judges of the Supreme Court and the judges of the Court of Appeals, telling them how they have got an issue that's come up and they think it ought to be resolved a certain way. I mean, maybe that's one way it can be worked out, too. Is there anything else now in the Appellate Rules?

HONORABLE C. A. GUITTARD: Yeah. I have something.

CHAIRMAN SOULES: Okay.

MS. DUNCAN: Can I remind the committee that the parking garage closes at 6:00?

CHAIRMAN SOULES: Yeah. We have got to go. All right. Well, that's going to conclude the appellate part of this session.

HONORABLE C. A. GUITTARD: Let me just say here that if anyone has any objection to any of the other proposals or as we have heard here has any other suggestions for changes in the Appellate Rules, please let us know so we can get some attention to it before it comes before the whole committee.

CHAIRMAN SOULES: Okay. We are adjourned until 8:30 in the morning.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS LEA NESBITT, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 18, 1994, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for this hearing are $1,202.00.

CHARGED TO: Luther H. Soules, III

Given under my hand and seal of office on this the 4th day of April, 1994.

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