MINUTES OF THE
SUPREME COURT ADVISORY COMMITTEE
MARCH 17-18, 1995

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock on Friday, March 17, 1995, pursuant to call of the Chair.

Friday, March 17, 1995:

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

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

Ex-officio Members present: Hon. Sam Houston Clinton, Hon William Cornelius, David B. Jackson, Kenneth Law, Hon. Paul Heath Till and Hon. Bonnie Wolbrueck

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

Ex-Officio Members absent: Doyle Curry, Paul N. Gold, Doris Lange and Thomas C. Riney.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

Chairman Soules brought the meeting to order.

Professor Bill Dorsaneo presented the report on the Appellate Rules. He asked for any problems with the redlined rules be brought up at this time. Minor revisions to TRAP Rules 53 and 180 were brought to the attention of the Chair.

A discussion was had regarding the Supreme Court Order Directing the Form of Transcripts. Bonnie Wolbrueck brought up a concern regarding how the clerk decides who the appellee and appellant are, who the attorneys are and who is suppose to get notice. Changes will be made to this rule to fix this problem.

Amendments to Rule 4(c)(1) was brought up for discussion. The proposal is to delete "petitions and applications". In addition it is proposed to add that three copies of motions are to be filed instead of six. Chairman Soules proposed that "in accordance with these rules" be deleted and "in the appellate court" be substituted.

Rule 4(d)(4) is brought up for discussion. The rule has been reworded to eliminate ambiguity and the Subcommittee moves its adoption.

Steve Susman presented the report of the Subcommittee on the Discovery Rules.

Rule 10, Expert Witnesses, was brought up for discussion. Rusty McMains expressed concern regarding the language "only as set forth in this rule" in Rule 10(1), Request. Discussion followed. Steve Susman proposed the following language "only as set forth in this rule or as ordered by the Court." Discussion followed. A vote was taken and Rule 10(1) was passed with no opposition.

Rule 10(2), Designation of Expert Witnesses, was brought up for discussion. Steve Susman advises the rule should read "When requested, the plaintiff shall designate ... whichever is later." Discussion followed.

Alex Albright suggests this rule go back to subcommittee for revisions. Steve Susman agrees. Steve Susman explains the general theory is that assuming both plaintiff and defendant have been requested to designate their experts, that the timing should be 60 days before the end of discovery period, and that 15 days thereafter the defendant needs to designate. Everything else in the rule is designed to accomplish all the discovery of experts during remaining 60/45 days. Discussion followed.

Richard Orsinger suggests allowing disclosure to be required in answers to interrogatories. Discussion followed.

A vote was taken on adding to the interrogatory information the identity and general subject matter of experts. The vote carried by a vote of eleven (11) to (2) two.

Paula Sweeney brings up a concern about breaking up the taking of someone's deposition into different days. Discussion followed. It was agreed by the Committee to leave things the way they are. Rule 10(2) is sent back to the subcommittee to fix all of the items discussed.

Steve Susman inquires whether there is any opposition to the notion that there is going to be a time period, 60 days before the end of the discovery period, where you've got to make these disclosures, on request, and the defendant goes 15 days after the plaintiff. Discussion followed. Chairman Soules comments there needs to be fuse on the request.

Richard Orsinger proposes deleting the last sentence of Paragraph 2 "failure to timely designate shall be grounds for exclusion". Discussion followed. A vote was taken and the proposal was unanimously approved.

A vote was taken on the concept of Rule 10(2) and the rule was unanimously approved.

Rule 10(3), Disclosure of General Information, was brought up for discussion.

Professor Dorsaneo questions the language in the last paragraph of Rule 10(3): "if the expert has firsthand knowledge of relevant facts". A proposal is made that the sentence be changed to read "However, if the expert is not within the control of the party, the party need not provide ...". Discussion followed. Steve Susman proposes using the term "retained" rather than "employed by". The proposed sentence now reads "is not retained by or within the control".

Discussion was had regarding Mike Gallagher's concern that if someone has been retained during the course of the litigation or prior to the litigation but at a point in time when information was developed, it's going to relevant. Doesn't want the rule to give someone the right to not disclose information that may have been provided to them by an expert. Is talking about an expert who has been designating and then de-designated.

Discussion continued regarding the last paragraph of Rule 10(3).

Discussion was had regarding what the expert reviews and the attorney client privilege issue.

A discussion was had regarding attorneys' fees testimony.

Steve Susman moves that it is the subcommittee's position that Rule 10 itself is not to be used to enlarge or diminish any existing privilege. The subcommittee would be in favor of putting this in a comment.

A vote of ten (10) to one (1) in favor of having a comment that Rule 10 is not intended nor should it be construed to enlarge or diminish any privilege.

Richard Orsinger expresses his concern regarding Rule 10(3)(e). Does "disclose" mean identify or does it mean produce. Discussion followed. Chairman Soules suggests "identify the documents that he's seen that have been previously produced and produce the document that have not been previously produced". A vote was taken and there was no opposition to this change.

A vote was had on Rule 10(3) with all members voting in favor of the rule.

Carl Hamilton raises concerns regarding Rule 10(2) and the 15 day fuse for defendants to designate. Discussion followed. A proposal was made that the days for designation of experts be changed from 60/10 to 75/30. A vote was taken and the proposal was passed unanimously.

Rusty McMains raises a question regarding what happens when you have counterclaims and cross-claims. Discussion followed. Chairman Soules proposed changing the rule to say that the 75 day period is the time to designate experts on the parties' claims for affirmative relief. Discussion followed. Professor Dorsaneo suggests adding "under the pleadings" after "claims for affirmative relief"

Rules 10(4), Additional Discovery, and 10(5), Reports, were brought up for discussion. Richard Orsinger proposes changing "A party may obtain further discovery..."

to "A party may obtain other discovery...". Mr. Orsinger also suggested deleting the term "discoverable" from the first sentence of paragraph 5. No opposition was made to that change.

A vote was taken on Rule 10(4) and 10(5) and both were unanimously approved.

Rule 10(6), Expert Depositions, was brought up for discussion. Rusty McMains proposes deleting the word "reasonably" from "reasonably available" in the first sentence. There was no opposition to this change.

A vote was taken on Rule 10(6). The vote was in favor of Rule 10(6) by a vote of twelve (12) to three (3).

Rule 10(7), Supplementation, was brought up for discussion. Richard Orsinger expressed a concern over the word "subsequently" in the first sentence. On the second line Mr. Orsinger proposed changing "reviewed by the expert must be provided as available" to say "must contemporaneously be provided". Discussion followed. Mr. Orsinger subsequently proposed using "as soon as possible" instead of "as available". Discussion followed. Professor Albright suggested "reasonably promptly". Steve Susman suggested "as soon as practicable". Discussion followed. Chairman Soules suggests "provide to the other side when available" as opposed to "as available". A vote was taken and "reasonably promptly" was approved by a vote of eleven (11) to two (2).

A discussion was had regarding Richard Orsinger's concern over the word "subsequently" in the first sentence. Judge McCown indicates this problem will be fixed in the redraft.

Richard Orsinger expressed concerns over the language in the second line "reviewed by the expert must be provided to the other side". "To the other side" should be changed to "to the other parties".

Richard Orsinger brings up a discussion regarding sanctions for failure to observe the supplementation deadline. Should we have a sanction rule that's tailored to hired experts? Steve Susman advises the two different supplementation rules are going to be treated the same way and combine them together.

A vote on Rule 10(7) tailored to meet the discussion was had. Rule 10(7) was approved unanimously.

Rule 10(8), Discovery of Expert Witnesses, was brought up for discussion. Chairman Soules advises that Rule 10(8) will be rewritten in view of the discussion today about oral depositions at different times and limited information you can get by way of interrogatories.

A discussion was had regarding trying to force the other side to give the details of an witness' opinion in interrogatories.

Justice Guittard presented the Appellate Subcommittee report.

Rule 4(d), Filed Papers - General Rules, was brought up for discussion. The subcommittee moved that briefs, statement of facts, and transcripts can be printed on both sides of the paper. The motion was seconded by Pam Baron. Discussion followed. Justice Guittard proposed striking "and shall use only one side of each sheet" and substituting "both sides of the paper if its bound so it 's to lie flat when open and the printing does not show through the paper". Discussion followed.

The proposal is as follows: Deleting "shall use only one side of each sheet" and in lieu thereof put "may be printed on both sides of the paper if bound so as to lie flat when open and the print on one side will not show through the other side". A vote was had on these amendments resulting in a vote of thirteen (13) in favor and four (4) opposed.

Discussion followed regarding the fact that the statement of facts and transcript rules will have to be changed also.

Justice Duncan moves that the transcript on 8 1/2 x 11, bound on the left side. If the papers are in excess or on 14" paper they be reduced to fit. Printing on both sides is optional. Discussion followed. A vote was had and the motion passed with a vote of twelve (12) in favor and six (6) opposed.

Rule 7, Attorney in Charge; Withdrawal of Counsel, was brought up for discussion. Professor Dorsaneo proposed adding the following language to the end of the last sentence in paragraph (c): "for the purpose of receiving and transmitting information or notices received from the court". Stephen Yelenosky suggests they get rid of the 15-day provision. Mr. Yelenosky also suggests that initially the notice is sent to the attorney in charge from the trial court, if the attorney is going to continue on in the appeal he is to notify the court within a certain period of time, otherwise the notices are sent to the party. Discussion continued.

Professor Dorsaneo proposes adding at the end of (c) "shall be deemed the attorney in charge for the party for the limited purpose of receiving and transmitting communications from the court or other counsel with respect to the proceeding in the appellate court until a notice of non-representation containing the information set forth in this paragraph is filed".

Justice Guittard proposes adding "This rule does not govern the attorney's duty to the client but only the identity of the attorney to whom notices should be sent."

A discussion was had regarding using "attorney in charge".

Chairman Soules instructs that the rule is going to be discussed paragraph by paragraph.

Rule 7(a), Attorney in Charge, was brought up for discussion. Rusty McMains expressed concern over the language "first document filed". Professor Dorsaneo suggests "document, other than notice of non-representation".

Rule 7(b), Communications Sent to Attorney in Charge, was brought up for discussion. Stephen Yelenosky proposed adding the following language "Until such time as the attorney in charge for the party in the trial court notifies the appellate court otherwise that attorney has responsibility for passing along communications to the party." or "If the attorney is not going to proceed as the attorney in charge in the appellate court he or she has responsibility for communications to the party until notifying the appellate court otherwise" and eliminate paragraph (c). Discussion followed.

Rule 7(c), Notice of Non-Representation, was brought up for discussion. Chairman Soules proposed changing the title to "No Attorney in Charge". The last sentence of (b) becomes the first sentence in (c). Then you take out the time period altogether. Take out the entire last sentence. Also need to take out "by the clerk in accordance with paragraph (b)". Change "sent the notice" to "receives the notice". Stephen Yelenosky pointed out the "If" needed to be deleted in "If the attorney in charge...". Discussion followed.

Chairman Soules brings up the issue of in what period of time should the notice of non-representation be required, if it is going to be finite. Discussion followed. A vote was taken on whether or not to have a finite time. The vote was eight (8) in favor of a finite time and four (4) opposed.

A discussion was had regarding how much time. A vote was taken on 15 days. 15 days was approved on a vote of six (6) in favor and four (4) opposed. Chairman Soules proposes that the last sentence stays in. Discussion followed. A vote was taken on whether the last sentence is in or out. On a vote of eight (8) to four (4) the sentence stays in.

Discussion continued regarding Rule 7 in general and the attorney's responsibility to the client. Justice Cornelius proposed adding a statement that these rules relate only to the responsibility for receiving notices from the appellate court and do not affect in any way the attorney-client relationship. Justice Guittard proposes adding as the last sentence in (c) "If the attorney does not timely file the notice of non-representation, notice and copies may be sent to that attorney." Discussion continued regarding the notice of non-representation.

Chairman Soules proposed breaking out the second sentence of (b) and put that under "No Attorney in Charge" and that's all (c) would be. (B) would be if there is an attorney in charge, you serve the attorney in charge. If there is no attorney in charge, you notice the attorney in charge in the trial court and then follow with withdrawal. Chip Babcock proposed changing "the clerk may send" to " the clerk shall send".

Discussion continued regarding filing a motion to withdraw vs. filing a notice of non-representation.

Justice Guittard proposed rewording last sentence of (c) as follows: If the attorney does not timely file the notice of non-representation, notices and copies may be sent to that attorney, but the attorney's obligation to his client is not otherwise affected." Discussion followed.

Discussion was had regarding the 15 day time period.

Discussion was had regarding the duty/responsibility of the attorney.

Lee Parsley explains why the rule was written the way it was and what it was trying to accomplish.

Chip Babcock comments that the solution of an hour ago would solve both problems. Take second sentence of (b) and made it (c) and delete (c). Chairman Soules proposed making withdrawal applicable to attorneys in charge as defined. Add "in charge" after attorney in the second line of (d). Discussion followed. Chairman Soules revises his proposal to say "attorney in charge and any other attorney of record in the appellate court shall be permitted to withdraw". Also suggests adding language that makes it clear that this attorney shall not be considered attorney in charge or attorney of record in the appellate court. Discussion followed.

Richard Orsinger proposed the following language "All notices required by these rules will be sent to --". Professor Dorsaneo proposed deleting "The attorney who was in charge for any party other than the appellant in the trial court shall be deemed the attorney in charge for that party on appeal" and refer back to Rule 4 which says "service on a party represented by counsel shall be mailed to that party's attorney in charge."

Chairman Soules indicates that the problem is ongoing communication during the appeal. The rule doesn't tell the parties who to communicate with when there is not an attorney in charge.

Discussion continued.

A vote was taken on whether a lawyer should have some way to notify the appellate court that they are not representing the client on appeal and to send papers to the client and that's all they have to do. A vote of eight (8) to three (3) was had in favor of this concept.

A discussion followed on whether or not to have a drop-dead deadline. A vote was taken on whether or not there should be a finite time for a lawyer to send his notice to notify the client. The vote was six (6) in favor and seven (7) opposed.

Richard Orsinger proposed they draft the rule two ways and let the Supreme Court decide.

A vote was taken on who feels that the consequences of missing a deadline is they have to file a motion to withdraw. Nine (9) in favor. Three (3) members feel there should be no consequence.

The rule will be drafted one way with no deadline using Justice Cornelius' language. Justice Guittard proposing using the limiting language whether there is a deadline or not. Justice Cornelius proposed changing the word "affect" to "govern" or

"control". "This rule is not intended to govern the relationship between an attorney and a client. It's just for notice purposes only."

A vote was taken on whether Judge Cornelius' suggestion should go in both versions or only the one that has no time limit. Everyone agrees that it should go in both. A vote was taken on whether something to this effect should be in the notice of non-representation.

A discussion was had regarding whether or not the client has a right to object.

Rusty McMains suggests that the notice of non-appearance has to bear the client's signature. Discussion followed. A vote was taken on whether there should be either a concurring signature of the client or a notice that they have a right to object in a notice of non-appearance. The vote was nine (9) to (5) in favor.

A discussion was had on whether the notice of non-appearance, notice of non-representation, should be limited in use to those circumstances where the client signs the notice.

A vote was taken that the notice is only valid if it contains the client's signature. For the automatic non-representation it has to have the clients signature. The vote was eight (8) in favor and four (4) opposed.

Professor Dorsaneo brings to the attention of the committee that paragraph (b)(3) of Rule 9 concerning costs needs to be deleted from the March 13 report to conform to a prior vote of the committee.

Rule 18, Duties of the Clerk of the Appellate Court, was brought up for discussion. Justice Guittard explains the rule changes and moves its adoption. There being no opposition Rule 18 was approved.

Rule 22(b)(3), Public Access to Appellate Court Records, was brought up for discussion. Discussion followed regarding in camera inspection and sealing court records. Chip Babcock proposed deleting subdivision 3 altogether. Discussion followed. Justice Guittard asks whether there is any occasion for filing a document in camera in the appellate court that hasn't been filed in camera in the trial court.

Chairman Soules reads the amendment to paragraph (3) as follows: "documents, papers or other items filed with the trial court or in an appellate court in camera for the purpose of obtaining a ruling on the discoverability of the documents, papers or other items". Discussion followed.

New proposal is as follows: "documents, papers, or other items filed with the trial court or in an appellate court in camera solely for the purpose of obtaining a ruling on the discoverability of the documents, papers or other items."

Richard Orsinger suggested putting "in camera" before "the trial court" or to say "filed in camera with the trial court or the appellate court". Justice Cornelius proposed "in camera with either the trial or the appellate court".

Richard Orsinger brings up the issue of whether or not this applies in family law. Suggests the following language "relating to documents, papers, or items filed in the appellate court relating to an action originally arising under the family code." Chairman Soules suggests "filed in an appellate court for review of an action originally arising in the family code". Chip Babcock suggests adding after "family code" "including an original action to review the decision of a court in the family code". Chairman Soules suggests "documents, papers, or items filed in an action originally arising in the trial court under the family code". Richard Orsinger expressed a concern over new stuff that wasn't filed in the trial court. Justice Guittard suggested "arising in the trial court or related to a proceeding in the trial court under the family code".

The meeting was adjourned until 8:00 o'clock a.m. Saturday, March 18, 1885.

Saturday, March 18, 1995:

Supreme Court of Texas Justice and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

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

Ex-officio Members present: Hon William Cornelius, David B. Jackson, Hon. Paul Heath Till and Hon. Bonnie Wolbrueck

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

Ex-Officio Members absent: Hon. Sam Houston Clinton, Doyle Curry, Paul N. Gold, Doris Lange, Kenneth Law and Thomas C. Riney.

Others present: Lee Parsley (Supreme Court Staff Attorney) and Holly H. Duderstadt (Soules & Wallace).

TRAP 53, The Statement of Facts on Appeal, was brought up for discussion. Justice Guittard advises the proposal is that the court presumes that since both parties have an opportunity to designate whatever they need, that they're going to designate whatever is pertinent with respect to the no-evidence review. And the appellate court can

presume that there's nothing that would be pertinent to the no-evidence review that hasn't been designated. Discussion followed.

Justice Duncan comments that we need to be very clear that we are changing the rule that historically has put the burden on the appellant to bring forward a record showing reversible error, and by doing that we are effectively changing the standard of review. Discussion continued.

A vote was taken to find out whether we should change what's been proposed in Rule 53(d) and (e), in light of the conversation today. How many feel that Rule 53 as written on pages 84 and 85 should go to the Court as is? Six (6) in favor. Seven (7) feel it should be changed. Two abstaining votes.

Chairman Soules suggests deleting the words "was unnecessary" in the fourth line of underlined words and insert "could not reasonably have been anticipated to have a bearing on the appeal". And change (3) to correspond as well. A vote was taken with nine (9) in favor and (5) opposed.

Justice Guittard provided a report on a rule to deal with administrative appeals. Justice Guittard recommends adding a provision for a time for filing the petition for review. Make it 30 days after the final order in subparagraph (c). Discussion followed. A discussion was had regarding what would happen if the record isn't filed within 30 days. Professor Dorsaneo proposed changing Rule 56, Duties of the Appellate Clerk, to say "on expiration of 90 days, or 30 days in the case of an accelerated appeal or 30 days in the case of a Rule 54 appeal". Justice Guittard proposed "on expiration of 90 days, or 30 days in the case of an accelerated appeal, or an appeal from a state administrative agency under Rule 54".

The committee's recommendation is to make the changes in (c) and otherwise insert new Rule 54 of materials as drafted. A title for this rule is discussed. Justice Guittard proposed "Direct and Removed Appeals from Administrative Orders".

A vote was taken on Rule 54 and was approved on a vote of sixteen (16) in favor and one (1) opposed.

Rule 51, The Transcript on Appeal, was brought up for discussion.

Rule 51(a), Contents, was brought up for discussion. Proposed changes to (a) adds two additional items which have to be put in the transcript: (1) request for a statement of facts under Rule 53(a), and (2) any statement of points under Rule 53(d). Justice Guittard moves for adoption. Discussion followed. There being no opposition the changes to Rule 51 (a) are approved.

Rule 51(b), Written Designation, was brought up for discussion. In the proposed rule on page 75 there was language deleted that should not have been. Only part of the sentence beginning with "Failure to timely make the designation.." should have been deleted. Only the phrase "tendered within the time provided by Rule 54(a)." should be deleted. There being no opposition that change to Rule 51(b) is approved.

Rule 53(m)(2) was brought up for discussion. The proposal is that the entire first sentence is changed as indicated. Discussion followed.

A discussion was had regarding the use of a tape recorder to tape proceedings.

Rule 55(a), Omissions from the Transcript, was brought up for discussion. The proposal is to add the language shown dealing with what to do if missing material cannot be found in the clerk's office. There be no objection this amendment is approved.

Rule 55(c), Inaccuracies in the Statement of Facts, was brought up for discussion.

Professor Dorsaneo brings up a problem in Rule 55(a). He is troubled by the geography of the missing materials. Discussion followed. Justice Cornelius suggests striking "in the clerk's office" but Richard Orsinger says that means you have a duty to search the courthouse. Professor Dorsaneo takes back his problem.

Discussion continue regarding Rule 55(c). There being no opposition to the changes to TRCP 55(c) the rule was unanimously approved.

Rule 55(d), Record in Administrative Appeals, was brought up for discussion. A vote was taken on Rule 55(d). The changes carry on a vote of twelve (12) to one (1).

Rule 74(l), Appellee's or Cross-Appellee's Filing Dates, was brought up for discussion. "Prior to the call of the case" is being stricken and "before the date set for submission" is being inserted. Discussion followed. Chairman Soules proposed the language "Before the date set for submission or dismissal of the cause". Richard Orsinger proposes adding the two timetables together and say by the 55th day. Justice Cornelius proposes that the appellee may file his brief within 25 days after the date that Appellant's brief was due.

The new language would be "within 25 days after the date the appellant's brief was due. There being no opposition this change to Rule 74(l) was unanimously approved.

Rule 90(i), Opinions, Publication and Citation, was brought up for discussion. Justice Duncan proposed deleting subdivision (i). Discussion followed. Judge Brister suggests "opinions that are not designated for publication shall not be cited as authority". Discussion was had regarding citing cases that are not published. Professor Dorsaneo suggests making a distinction between being authoritative or as authoritative. Richard Orsinger proposed "should not be considered an authoritative statement of the law".

Justice Duncan made a motion that Rule 90(i) be amended to read: "Unpublished Opinions. Opinions designated not for publication may be cited as authority by counsel or by a court, and due weight may be accorded them, so long as a copy of the opinion is provided to the court and all counsel". Justice Guittard proposed "Opinions designated not for publication are not authoritative and shall not be cited without providing a copy to the court and opposing counsel". Joe Latting seconded the motion. Justice Till proposed adding the word "complete", a complete copy. David Perry proposed saying unpublished opinions may be cited as persuasive, taking out the word "authority".

A vote was taken on Judge Guittard's proposal. The vote was nine (9) in favor with six (6) opposed.

A vote was taken on the main motion. Before the vote was actually taken there was further discussion.

Chairman Soules reads the proposed rule as follows: "Unpublished Opinions. Opinions designated not for publication are not authoritative and shall not be cited without providing a complete copy to the court and all other parties".

Professor Dorsaneo proposes an amendment as follows" "Opinions designated not for publication are not authoritative precedent and shall not be cited as persuasive authority without providing a complete copy to the court and opposing counsel", or "parties". Justice Guittard accepted the amendment. Discussion followed.

Richard Orsinger proposed splitting it up into two sentences. Put a period after "authoritative precedent."

Harriett Miers proposed deleting the word "authoritative". Justice Guittard objected to the amendment, no second, proposal fails.

Chairman Soules reads the proposed rule as amended as follows: "Unpublished Opinions. Opinions designated not for publication are not authoritative precedent. They may be cited as persuasive if a complete copy is provided to the court and all other parties. Joseph Latting seconded the proposed amendment.

Justice Duncan suggested "They may be cited as persuasive if the citing party provides a complete copy to the court and all other parties".

Mike Gallagher makes a motion to take out the whole thing. The motion is seconded. The motion failed on a vote of three (3) in favor and the rest opposed.

Chairman Soules again reads the proposed rule as amended as follows: "Unpublished Opinions. Opinions designated not for publication are not authoritative precedent. They may be cited as persuasive if the citing party provides a complete copy to the court and all other parties. By a vote of thirteen (13) in favor and three (3) opposed Rule 90(i) is passed.

Rule 130(a), Filing of Application in Court of Appeals, is brought up for discussion. The amendment would read "The Supreme Court may review the final judgments of a court of appeals by writ of error if a timely motion for rehearing has been overruled." There being no objection Rule 130(a) is passed.

Rule 132(b), Filing and Docketing Application in Supreme Court, was brought up for discussion. The subcommittee proposal is to delete "expressage or carriage of" and insert "expense of mailing or shipping". There being no objection Rule 132(b) is amended.

Rule 182, Judgment on Affirmance or Rendition, was brought up for discussion. The rule in our book needs to be changed to reflect the current rule.

Rule 190(b), Motion for Rehearing, was brought up for discussion. The proposal is that in the first sentence of (b) we strike everything from "The motion shall state ...", delete paragraph (c), subdivision (d) would be amended by deleting "after notice in which to file answer" and adding "after service of the motion in which to file an answer". Paragraph (d) would read "The parties shall have five days after service of the motion in which to file an answer". The rest of the rule would be retained.

Professor Dorsaneo proposed changing the five days to ten days. There being no opposition 10 days is approved.

There being no opposition Rule 190 is approved as amended.

It is proposed by the subcommittee that an order of the Supreme Court be provided for an administrative basis as to what's to be done with old records. Justice Cornelius expressed some concern over subdivision (2), suggests "immediately after final disposition" be deleted. Discussion followed.

Professor Albright expressed concern with using the term "court records" in paragraph (a)(1). Discussion followed. Professor Albright suggested "Papers are defined as all documents included in the transcript, or in the statement of facts, and any other papers or items made part of the record on appeal or otherwise filed, or presented for filing and received, in an appellate court. Justice Duncan says we still have a "record on appeal" problem. Discussion continued. Richard Orsinger suggests using the word "papers". Discussion continued.

Chairman Soules reads the proposed subdivision (a)(1) as follows: "Papers" defined. Papers are all documents included in the transcript or in the statement of facts and any other papers or items filed or presented for filing and received in the appellate court."

Professor Albright proposed "Papers include the record on appeal. The record on appeal is defined as the transcript and statement of facts as supplemented." She also proposed changing "papers" to "court papers". The title will need to be changed to "Court Papers".

Chairman Soules goes through the rule indicating where "court records" needs to be changed to "court papers".

Paragraph (b)(2) is discussed. Justice Guittard proposed striking "which" in the second line and inserting "that".

Paragraph (b)(4), Original papers and exhibits in appeals, is discussed. After discussion the proposed rule would read as follows: "Without regard to the determination of whether the court papers of a case should be permanently preserved, within thirty days

after final disposition of an appeal, any original papers or exhibits shall be returned to the trial court pursuant to Rule 51(d) and 53(M).

In paragraph (b)(5) "records" is changed to "papers".

Paragraph (b)(6) should read "(1) destroy the papers the court determines show not be preserved; and (2) turn over to the State Archives the court papers that the court has found should be permanently preserved.

Richard Orsinger questioned why we have paragraph (b)(5), All other papers and exhibits. Lee Parsley suggested putting paragraph (5) at the end of paragraph (4). David Perry proposed that "Original papers and exhibits" should be No. 1 because everything else does not apply to it. Chairman Soules advised that (4) will become (1), (1) becomes (2), (2) becomes (3), and (3) becomes (4). A discussion was had regarding whether or not subparagraph (5) is needed. Justice Guittard disagrees with renumbering. (1), (2) and (3) should stay as they are and (4) and (5) should be put together.

Richard Orsinger proposed the following language "Except as provided in subdivision (b)(4), the appellate court shall keep and preserve all other court papers, except duplicates, until their ultimate disposition". Justice Guittard says take out "other". Chairman Soules suggests "Pursuant to" instead of "except as provided in".

Paragraph (c), In the Supreme Court, is brought up for discussion. Chairman Soules proposed the following change in the language of paragraph (c)(1): "The Supreme Court keeps and preserves all court papers of that case until those court papers are turned over to the State Archives".

Paragraph (c)(3) will be amended to read "In all other cases, the Supreme Court returns the record on appeal to the court of appeals, keeps and preserves all other court papers of that case, except duplicates, until they are turned over to the State Archives."

There being no opposition the Order of the Supreme Court Regarding Disposition of Court Papers in Civil Cases is approved.

A discussion was had whether or not this was going to be just a miscellaneous docket order. Justice Guittard recommended putting it in the rule book. The recommendation will be made to the Supreme Court that this order be put in the rule book.

Rule 48, Deposit in Lieu of Bond, was brought up for discussion. Bonnie Wolbrueck brought some problems with this rule to the Chair's attention. Chairman Soules outlines what the changes to the rule need to be with input and suggestions from various members of the committee. The amendments to Rule 48 were unanimously approved.

The meeting was adjourned.