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7 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
8 MARCH 18, 1994
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19 Taken before Anna L. Renken,
20 Certified Shorthand Reporter and Notary Public
21 in Travis County for the State of Texas, on
22 the 18th day of March, A.D. 1994, between the
23 hours of 8:30 o'clock a.m. and 12:50 o'clock
24 p.m., at the Texas Law Center,
25 1313 Colorado, Austin, Texas 78701.

COPY

SUPREME COURT ADVISORY COMMITTEE

MARCH 18, 1994, Morning Session

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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

1 CHAIRMAN SOULES: Come to
2 order. We did mail out minutes of the
3 November meeting and the January meeting.
4 Does anyone have any revisions or comments on
5 the minutes of the November 19, 20 meeting or
6 the January 21, 22 meeting? Steve Susman.
7 MR. SUSMAN: I found the
8 minutes of certainly the first meeting
9 virtually incomprehensible. No. I mean it
10 looks as if someone -- I mean there aren't
11 whole sentences even in it. It's hard to say
12 what went on.
13 CHAIRMAN SOULES: Okay. So --
14 MR. SUSMAN: Let me see if I
15 can find examples, because I read them on the
16 plane coming over here.
17 Yes. Page, of the November
18 meetings, page two, the third paragraph, "The
19 Committee voted unanimously for permitting the
20 trial judge on some standard to award
21 attorney's fees for reasonable expenses on a
22 motion to compel discovery."
23 And then look at the next two
24 paragraphs. I really don't understand what is
25 going on here. "Another vote was had on the

1 court having the power to award expenses
2 including attorney's fees on ordinary motions
3 to compel. The vote was 18 to 18. A motion
4 was made that the policy is that district
5 judges should not have the power under any
6 circumstances to award fees nor expenses in
7 connection with a simple motion to compel.
8 The Committee voted 14 for and 19 opposed."
9 I just -- I mean, I'm not. I
10 can't really figure out what we -- I was at
11 the meeting. I can't remember exactly, and
12 this is not refreshing my recollection.
13 CHAIRMAN SOULES: Okay.
14 MR. SUSMAN: I think the
15 problem, Luke --
16 CHAIRMAN SOULES: We'll
17 re-draft these. And we'll get them on the
18 table at another meeting.
19 MR. SUSMAN: I think the
20 problem is that I really think some lawyer, I
21 mean, someone from one of our firms or someone
22 has got to be designated to stay here and take
23 minutes live. I sense that what has happened
24 is someone has gone through the transcript
25 where there's a vote just, you know, but I

1 don't think it's an effective way of doing
2 minutes, because it's really the entries are
3 meaningless on these things. I find them
4 meaningless.
5 CHAIRMAN SOULES: We'll re-do
6 them. I'll re-do them and try to get them.
7 MR. YELENOSKY: We didn't
8 decide to do minutes until after we had those
9 meetings, so it was a difficult task for
10 whoever put it together, I'm sure.
11 MR. SUSMAN: Impossible.
12 MR. YELENOSKY: Yes. So I
13 appreciate somebody trying to do it from the
14 transcripts.
15 MR. LOW: It might be a
16 difficult task even at the time.
17 MR. YELENOSKY: Yes. I think
18 this is exactly what we said.
19 MR. SUSMAN: Yes. But it
20 seems to me that one of the advantages of
21 trying to do it at the time is that it forces
22 us to be clear about what we are deciding; and
23 I think one of the great dangers of dealing in
24 a committee form like we are doing is that we
25 keep going back and re-doing the same thing

1 depending on who attends the next meeting,
2 come back and vote it again and keep voting
3 it; and it will never move forward unless we
4 can somehow memorialize what we have decided
5 and then kind of have the agreement that we,
6 you know, barring some major move to
7 reconsider we won't just keep going back and
8 rehashing the same thing; and I think you need
9 accurate, contemporaneously prepared minutes
10 by someone who understands what the discussion
11 is to accomplish that. That's all I'm saying,
12 because I know in connection with doing our
13 discovery subcommittee stuff we kept minutes.
14 And it helped, because I couldn't remember by
15 Thursday what we had decided on Saturday --
16 CHAIRMAN SOULES: Right.
17 MR. SUSMAN: -- we wanted to
18 do. And having minutes prepared by
19 someone -- I had an associate of our office
20 come up and prepare minutes; and he did
21 prepare the minutes like on Monday, so when
22 you got around -- when the Committee members
23 got around to writing stuff on Thursday and
24 Friday, we could look at the minutes and say,
25 "Ah, here is what we decided to do," fairly

1 accurate.
2 CHAIRMAN SOULES: Well, Holly
3 is not here today, because she is ill, so I
4 don't have anybody to take the minutes. Does
5 anyone want to volunteer? Or I'll just try to
6 keep up with them as we go.
7 MR. ORSINGER: (Raises hand.)
8 CHAIRMAN SOULES: Okay.
9 Richard Orsinger. And then we'll go back
10 through and try to improve the drafts that we
11 have of the first two meetings and get them to
12 you again.
13 We want to welcome Judge
14 Clinton and of course Justice Hecht to our
15 meeting today and all of you. I think the
16 order of business would probably indicate that
17 we take up the Appellate Rules first, and then
18 we'll either look at discovery or sanctions
19 and go on from there as time permits.
20 Bill, are you ready for your
21 report and Justice Guittard --
22 PROFESSOR DORSANEO: Yes.
23 We're ready.
24 CHAIRMAN SOULES: -- on
25 Appellate Rules? Okay. Let's proceed. Does

1 everybody have those Rules? Did you mail
2 those out, Bill?
3 HONORABLE C. A. GUITTARD:
4 Holly mailed them out.
5 PROFESSOR DORSANEO: Holly
6 mailed those out.
7 CHAIRMAN SOULES: Okay. Very
8 good.
9 HONORABLE PAUL HEATH TILL: Do
10 you have an extra copy? I didn't go by my
11 office before I came here.
12 CHAIRMAN SOULES: Are there any
13 extras? I don't think so, judge. Let me
14 check and see if I've got any.
15 HONORABLE SAM H. CLINTON: I
16 have one. I don't have an exact copy of what
17 you have. I have got another copy from some
18 other source.
19 MR. SOULES: Are these going
20 to be the same (indicating)?
21 HONORABLE C. A. GUITTARD:
22 They're the same.
23 CHAIRMAN SOULES: Okay. Here
24 you go (indicating).
25 PROFESSOR DORSANEO: I'm going

1 to defer to Judge Guittard who has been acting
2 as the Chair of the Committee On State
3 Appellate Rules of the Appellate Practice And
4 Advocacy Section of the State Bar of Texas for
5 the past two years. The proposals for the
6 most part that are in the report provided to
7 the Advisory Committee were developed in the
8 meetings of the Committee on State Appellate
9 Rules, so Justice Guittard.
10 HONORABLE C. A. GUITTARD: Thank
11 you. I want to make it clear that there was a
12 good deal of commentary here which the members
13 of the Committee are not particularly
14 responsible for. They're responsible. I
15 think they voted on the actual proposals, but
16 there is a good deal of commentary that I've
17 added here that I don't think you ought to
18 attribute to them. So and that includes this
19 summary and explanation that I have at the
20 beginning here which I hope has brought some
21 overview of the different proposals.
22 Now, there are some
23 significant changes in the proposals, and
24 there's also a good many that are of minor
25 consequences. I don't know whether we ought

1 to consider them all at the same level, go
2 through them one by one, or whether we ought
3 to consider the significant ones first; but
4 that's up to the pleasure of the Committee.
5 Unless somebody has a better
6 idea, well, I'll just start with the
7 beginning, the earliest of the proposals. As
8 you see, you have first here my summary and
9 explanation, and then after the summary and
10 explanation there is a memoranda of law I have
11 prepared here on some of the more difficult
12 questions involved; and then after that on
13 page 25, for some reason the first 24 pages
14 are not numbered, but on page 25 it begins our
15 cumulative report.
16 We also have -- now, this is
17 not a complete report, because we also have
18 some proposals concerning the Rules of Civil
19 Procedure which are not before you, and they
20 will be brought before you at a later
21 meeting. There are also a number of matters
22 still under consideration by our Committee
23 what will be brought before you at a later
24 meeting.
25 I'd also point out that there

1 is one error in the report, and that is the
2 proposed Rule 46 which has to do with security
3 for costs in the trial court. That's an
4 earlier draft which the Committee didn't
5 approve, so just strike this proposed new Rule
6 46 out of your explanation -- of your report.
7 The main proposals of
8 consequence are, number one, to make the,
9 abolish the appeal bond, the cost bond as a
10 method of perfecting an appeal, require all
11 except in the case of an affidavit of
12 inability to pay, require the appellate costs
13 be paid in advance, dispense with the bond,
14 and have the appeal perfected by notice of
15 appeal. That's one of the more far reaching
16 proposals.
17 Another is with respect to the
18 record instead of having the lawyers being
19 primarily responsible for the preparation of
20 the record; and we have proposed that once the
21 lawyer makes a request for a transcript and a
22 statement of facts that the clerk and the
23 official reporter be responsible from then on
24 out for filing the transcript and the
25 statement of facts, that that dispenses with

1 any questions of extension of time. The
2 appellate court then would have to -- the
3 clerk of the appellate court would have to
4 monitor the filing of the record and see that
5 it's filed and make contact with the reporter
6 and the clerk if it doesn't come up on time.
7 Those are the major proposals;
8 and so I will proceed through the Rules with
9 the minor and major ones as we go along.
10 First, Rule 1, I guess as in Alice In
11 Wonderland we ought to start with Rule 1. The
12 Rule 1 provides that no appeals -- our
13 amendment for Rule 1 which has to do with
14 local Rules provides that "no appeal shall be
15 dismissed for noncompliance with a local rule
16 without notice to the noncomplying party and a
17 reasonable opportunity to cure the
18 noncompliance."
19 There's been some complaints
20 that appeals have been dismissed because the
21 appellant didn't have notice of a local Rule
22 and didn't comply with a local Rule. So we
23 thought it would be only fair to give the
24 appellant a notice and an opportunity to
25 comply before his appeal is dismissed.

1 Now, what do you want to do,
2 Mr. Chairman? Do you want to take action on
3 each of these as we go along?
4 CHAIRMAN SOULES: I think so.
5 I think that's the best way to do it. Any
6 controversy over the proposed amendment to
7 Rule 1, Texas Rules Of Appellate Procedure
8 Rule 1(b) by adding the sentence that is
9 underscored here on page 25? Those in favor
10 show by hands. Opposed show by hands. That's
11 unanimously approved.
12 HONORABLE C. A. GUITTARD: Rule 2
13 now provides that the appellate court has the
14 authority to suspend the Rules in criminal
15 cases. It seems that if they can suspend the
16 Rules in criminal cases, there is no reason
17 why they shouldn't have the same authority to
18 suspend the rules in civil cases, except the
19 Committee thought that they should not have,
20 that the court should not have the authority
21 to extend the time for perfecting an appeal.
22 So we proposed there in Rule 2(b) to say that
23 any appellate court in which the appeal is
24 pending may susspend the Rules provided that
25 the court will have no authority to extend the

1 time for perfecting the appeal in a civil
2 matter except as provided by the Rules. Okay.
3 CHAIRMAN SOULES: Any comment on
4 this? Sarah Duncan.
5 MS. DUNCAN: One minor
6 modification. I believe nothing --
7 MS. SWEENEY: Could you speak up,
8 Sarah.
9 MS. DUNCAN: "Nothing" in the
10 third line from the bottom I believe needs to
11 be capitalized.
12 HONORABLE C. A. GUITTARD:
13 Right.
14 CHAIRMAN SOULES: Any other
15 discussion on the proposed change to Rule
16 2(b)? Those in favor show by hands. Those
17 opposed. That's unanimously approved.
18 HONORABLE C. A. GUITTARD: Rule 4
19 has been considerably expanded and made more
20 comprehensive. It now instead of just
21 applying to motions it applies. Every paper
22 that a lawyer files practically in the
23 appellate court will now come under Rule 4
24 under this proposal including original
25 proceedings. So Rule 4(a) said "Each motion,

1 petition, application, brief or other paper."
2 So that pretty well covers the whole range of
3 papers that are filed.
4 So do you want to --
5 PROFESSOR DORSANEO: Piece by
6 piece on that.
7 CHAIRMAN SOULES: Okay. Let's
8 take it piece by piece. This is the first
9 paragraph (a), any discussion on proposed
10 changes to Rule 4(a)?
11 MR. LATTING: Why don't you
12 just say "any paper that is filed," if you're
13 going to say "motions, petitions, applications
14 or other papers"?
15 PROFESSOR DORSANEO: Because
16 primarily because of the other Rules that talk
17 about "motions, petitions applications,
18 briefs." I agree with you that "any paper" --
19 MR. LATTING: Okay.
20 PROFESSOR DORSANEO: -- would
21 comprehensively cover that, but we thought
22 this was clearer. Perhaps only a lawyer would
23 think so.
24 CHAIRMAN SOULES: Any other
25 discussion? Those in favor of the proposed

1 change to Rule 4(a) show by hands. Opposed.
2 That's unanimously approved.
3 HONORABLE C. A. GUITTARD: And
4 Rule 4(b) which has to do with the designation
5 of lead counsel I believe we have a parallel
6 provision in the Rules Of Civil Procedure in
7 the trial context; but this provision
8 says -- this is a new provision. Would say
9 "Each motion, petition, application, brief or
10 other paper shall designate the lead appellate
11 counsel for the party or parties on whose
12 behalf the paper is filed. In the absence of
13 such a designation the first attorney whose
14 personal signature appears on the paper shall
15 be considered lead counsel for the purpose of
16 receiving notices and other papers. Lead
17 counsel may designate one other attorney to
18 receive notices and copies also."
19 So that if you have 40
20 parties, or you just need to -- all
21 represented by the same counsel, you can just
22 and there are several other counsel involved,
23 well, you just have to send the notice, send
24 papers to one counsel, and both the opposing
25 counsel and the clerk sending notices would

1 just have to deal with one lawyer.
2 CHAIRMAN SOULES: Okay. When
3 Rule 8 was changed some time ago they dropped,
4 they took out the word "lead counsel" and
5 substituted the words "attorney in charge."
6 HONORABLE C. A. GUITTARD:
7 That's in the Rules Of Civil Procedure.
8 CHAIRMAN SOULES: In the Rules
9 Of Civil Procedure, that's right. And the
10 reason for --
11 HONORABLE C. A. GUITTARD: I
12 don't think there is any reason for any
13 difference. If you want to substitute
14 "counsel in charge" for "lead counsel," that
15 makes no difference to us.
16 CHAIRMAN SOULES: Alex
17 Albright.
18 PROFESSOR ALBRIGHT: When you
19 read this Rule, the Rule 4(b) it seems to
20 indicate that since each paper can designate
21 lead appellate counsel, can you change it like
22 from your first brief to your response brief
23 where in Rule 8 of the Rules of Civil
24 Procedure it's on the occasion of a party's
25 first appearance through counsel the

1 attorney's whose signature first appears in
2 the initial pleadings shall be the attorney in
3 charge? So do you we want to make -- is this
4 our purpose to make it so that you can have
5 different lead counsels as the appeal
6 proceeds, or do you want to make it so that
7 it's just the first person on the first brief
8 that is filed or the first paper that is
9 filed?
10 HONORABLE C. A. GUITTARD: I
11 think that's a good point. I think it ought
12 to be changed.
13 CHAIRMAN SOULES: Why don't we
14 just leave that up to drafting to make 4(b)
15 conform more to Rule 8, because Rule 8 is
16 taking care of more problems than this is.
17 Any objection to that? We'll just return that
18 to the Committee.
19 MR. HERRING: Do I understand
20 right, judge, that as lead counsel I can also
21 designate another lawyer who also must receive
22 copies of each notice and brief?
23 HONORABLE C. A. GUITTARD:
24 Yes.
25 MR. HERRING: What is the

1 effect of not serving one of the two counsel
2 or party?
3 HONORABLE C. A. GUITTARD:
4 Well, it's like --
5 MR. HERRING: Is that
6 ineffective service?
7 HONORABLE C. A. GUITTARD:
8 It's like if you don't serve anybody at all,
9 what happens? You have to -- there are
10 certain procedures that the Rules provide if
11 not served.
12 PROFESSOR DORSANEO: (Shakes
13 head.)
14 MR. HERRING: I see Professor
15 Dorasaneo shaking his head that it would not
16 be effective service. Is that your
17 understanding?
18 PROFESSOR DORSANEO: It would
19 be rude behavior.
20 MR. HERRING: Rude behavior.
21 Rude but effective behavior.
22 HONORABLE SCOTT A. BRISTER:
23 Right.
24 CHAIRMAN SOULES: Why have
25 that? Why does that have to be in there?

1 That seems to me that might be creating
2 problems. Why?
3 HONORABLE C. A. GUITTARD: So
4 that if there are six different firms
5 representing the same party, that the clerk
6 and the opposing counsel will know who to
7 serve, not just serve everybody.
8 CHAIRMAN SOULES: But why
9 not -- I guess, my guess though is why not
10 just have it on the responsibility of the
11 clerk and adverse counsel to serve one person;
12 and if they want to accommodate others, that's
13 fine. They can make some agreement to do
14 that. But if they don't, they don't have to,
15 and co-counsel is responsible for
16 distribution. That's the way it works under
17 Rule 8.
18 MR. YELENOSKY: Why not just
19 have it read exactly like Rule 8?
20 PROFESSOR DORSANEO: Okay.
21 MR. LATTING: I'm for that.
22 MR. HERRING: Let's vote on it
23 then.
24 CHAIRMAN SOULES: Okay. Those
25 in favor of serving only one counsel as

1 opposed to having some Rule for some
2 additional service show by hands. Opposed.
3 One opposed. The house to one in favor of
4 service on one counsel.
5 MS. BARON: Luke, can I explain
6 why?
7 CHAIRMAN SOULE: Sure.
8 MS. BARON: Appeals are a
9 little different than the trial court because
10 you do often have appellate counsel and trial
11 counsel, and it is a lot easier if you can get
12 the clerk to serve both of them at the same
13 time to avoid confusion and delay in
14 communication. That's why I'm objecting to
15 that. I don't think it's that hard to serve
16 two counsel in an appeal for the appellate
17 clerk, and it really does assist when you have
18 new appellate counsel.
19 HONORABLE SCOTT A. BRISTER:
20 All the appeals I see and sheets there are six
21 lawyers listed. Sometimes, you know, six a
22 side. Three with one firm: Joe Jones,
23 Joe Smith and Mary Smith all from Baker &
24 Botts. Do we need to serve all three of
25 them?

1 MS. BARON: No. I'm happy
2 with the Rule as proposed, which is that you
3 serve one lead and one other designated
4 counsel that I would normally designate as
5 prime counsel.
6 MR. LATTING: Serve the
7 bottom one, and that's the one who is doing
8 the work.
9 HONORABLE SCOTT A. BRISTER:
10 That's right.
11 MR. LATTING: That ought to
12 be the Rule.
13 MS. DUNCAN: That's just the
14 opposite.
15 CHAIRMAN SOULES: I think the
16 tension is between having the question about
17 service and then accommodating several
18 counsel. Does anyone want to change their
19 vote on that?
20 HONORABLE C. A. GUITTARD: One
21 thing about the clerks in the Courts Of
22 Appeals, they would just love this. They have
23 so much mailing to do. And in these cases
24 where they have to send notices and copies of
25 subpoenaes to all counsel, it would really

1 simplify their operation just to have one
2 lawyer served.
3 MR. YELENOSKY: But Pam does
4 make a good argument about the peculiar
5 situation about the appellate practice; and I
6 don't think you should serve several lawyers.
7 Maybe one other does make more sense in that
8 situation than it does in the trial court.
9 MS. BARON: I'd also add it
10 kind of gives you a little safety net. In the
11 event the mail goes astray, there is one other
12 person who is getting the information too.
13 MR. YELENOSKY: Which would
14 also work in the appellate situation.
15 MS. SWEENEY: Luke, I'm
16 persuaded by that. I don't know if there are
17 enough people here that want to re-vote; but I
18 know when we hire appellate counsel it's a
19 little nerve-wracking. All of a sudden the
20 lawsuit has gone out from under you, and you
21 have no clue unless they remember to send you
22 immediately what's been filed what they're
23 doing to your case that you've been working on
24 for nine years. So I kind of -- I'd be
25 persuaded it makes more sense to have a

1 designation of one other.
2 MR. LATTING: Isn't that the
3 responsibility of the attorneys rather than
4 the clerk to take care of that sort of thing?
5 HONORABLE C. A. GUITTARD: Yes.
6 CHAIRMAN SOULES: Did you have
7 your hand up? Buddy Lowe?
8 MR. LOW: Yes. Plus the fact
9 that, you know, if you change it, the lawyer
10 may, you know, shouldn't do it, but could slip
11 up and think, "Well, so and so got this also,
12 and I've talked to him, and he's going to take
13 care of this element of it" or something. I
14 guess any change we need to be sure that the
15 lawyers are on notice of and don't rely on
16 some old procedure so they don't stump their
17 toe and name somebody like me. I would
18 probably change my vote.
19 MR. SOULES: All right. So I'll
20 just ask how many favor permitting a lawyer,
21 for a party to designate another lawyer for
22 the same party on whom notices must be
23 served. I guess we then have to decide what
24 the consequence of that is. But and the only
25 reason I'm setting it aside is I guess that

1 would be step 2. We're not voting on that
2 piece of it right now.
3 So how many feel that a party
4 should be permitted up to two lawyers to have
5 separate service? Twelve. Okay. Those who
6 feel that service should be restricted to one
7 per party. Five. Eleven to five for up to
8 two.
9 MR. ORSINGER: Luke, you said
10 twelve, right?
11 CHAIRMAN SOULES: Twelve.
12 HONORABLE SCOTT A. BRISTER:
13 Couldn't you if you're amending it according
14 to 8, 8 allows -- Rule Of Civil Procedure 8
15 "unless another attorney is specifically
16 designated therein," you could make it "unless
17 one additional attorney is specifically
18 designated therein."
19 CHAIRMAN SOULES: That's really
20 designed to take care of when there's a change
21 in the attorney in charge.
22 HONORABLE SCOTT A. BRISTER:
23 Right. But with a little work, you could
24 allow somebody to add one extra one if you
25 want to.

1 CHAIRMAN SOULES: I think we
2 have already. Thank you, judge. I think we
3 have already returned the Rule to the
4 Committee to make it conform more to Rule 12,
5 and now we're adding to it. And that would be
6 an easy way to do it, apparently an easy way
7 to go.
8 What's the consequences of
9 not serving, of serving only one whenever you
10 have been told to serve two?
11 MR. ORSINGER: I would comment
12 that you should not negate what was filed.
13 The most that should happen is it should
14 permit the other party an extension of time to
15 respond. I don't think you should negate an
16 appellate document simply because only one of
17 the two lawyers was served. Otherwise
18 deadlines may be missed.
19 MR. LOW: Wouldn't our other
20 Rule take care of that? You could file a
21 paper for some extension. You know, if that
22 did cause you some harm or something, couldn't
23 you -- wouldn't the other Rule take care of
24 that where we said everything but perfecting
25 the appeal, you know, the court papers and so

1 forth the Court has a right to extend
2 everything but the time to perfect appeal, and
3 that would come under what Richard is saying.
4 CHAIRMAN SOULES: Do any of
5 the Appellate Rules run from time of service,
6 or are they all from time of filing?
7 PROFESSOR DORSANEO: They're
8 all from time of filing. It would at least be
9 a strained construction to think that service
10 is part of filing especially the way filing is
11 defined.
12 MR. LOW: Yes.
13 MS. BARON: I didn't expect
14 there to be any consequence. I think that
15 it's nice to have it in the Rule. Right now I
16 suppose you could ask for an extension if you
17 did not get served properly, but that's really
18 all there is anyway if you don't get served.
19 I suppose there are some extensions on
20 applications for writ of error if you don't
21 get notice from the appellate clerk for the
22 final judgment, and there are some provisions
23 like that. I suppose that you could argue if
24 one counsel gets service and one doesn't, what
25 the effect of that is on your right to an

1 extension, but I think that it's always
2 discretionary with the Court anyway.
3 CHAIRMAN SOULES: Sarah
4 Duncan.
5 MS. DUNCAN: It seems to me
6 there are some things that aren't subject to
7 the extension rule, for instance, a request
8 for transcript or statement of facts. And I
9 would prefer just to subject it to a harmful
10 error analysis. Can they show some harm? And
11 if they can show some harm, they can have an
12 extension for whatever it is.
13 MR. ORSINGER: If I'm not
14 mistaken, I don't think we have a punishment
15 Rule for failure to give notice even for the
16 one attorney who under the current version is
17 entitled to notice. There is some case law,
18 like if you have a limitation of appeal and
19 you don't give notice, that it may be waived
20 and things like that. But why should we
21 introduce a punishment Rule at all, because
22 then you've got to start arguing over what is
23 punishment depending on what is filed. Why
24 don't we just go along with the Rule the way
25 it is now.

1 CHAIRMAN SOULES: Anything
2 else on 4(b). Okay. That's back to the
3 Committee and with the instructions that were
4 indicated by the vote. What's next, Judge
5 Guittard?
6 HONORABLE C. A. GUITTARD:
7 Professor Dorsaneo will discuss.
8 PROFESSOR DORSANEO: 4(c) is
9 more or less self explanatory. The main
10 change is the change from 10 days to 20 days
11 for something that is mailed in time, but
12 doesn't get there. The idea is that the mails
13 are less efficient than they had been in the
14 past. And in fact the last sentence provides
15 even relief from the 20-day requirement. The
16 elimination of the words "or writ of error"
17 will be explained later. Basically writ of
18 error appeal denominated as such is being
19 eliminated such that all appeals will just be
20 called appeals, so that's not really a
21 change. That's a corresponding change.
22 And, you know, the change from
23 "filing" to "delivering" is just to clarify
24 that it says now "the filing shall be made by
25 filing," which is a little bit circular.

1 Unless somebody has a question, I would move
2 that.
3 We did get some correspondence
4 from the Court about the First Class United
5 States mail requirement here, but I think we
6 ought to leave that until later rather than
7 trying to redraft the whole thing.
8 MR. LATTING: What's the
9 issue about the United States?
10 PROFESSOR DORSANEO: Well, if
11 somebody sends it by some other mail method.
12 MS. DUNCAN: Fed Ex.
13 MR. LATTING: A more reliable
14 method.
15 HONORABLE SCOTT A. BRISTER:
16 Quicker and cheaper.
17 MR. LATTING: Quicker,
18 cheaper, more reliable, who would want to
19 encourage that?
20 CHAIRMAN SOULES: There's an
21 opinion where the matter which -- the item was
22 sent UPS and did not get there on the day it
23 was to be filed, but got there within the time
24 it would have been valid under United States
25 Postage, and they held that the appeal was no

1 jurisdiction because they used UPS instead of
2 the United States Post Office.
3 MR. LATTING: Well, I move we
4 change that Rule.
5 CHAIRMAN SOULES: This does
6 not change the Rule.
7 PROFESSOR DORSANEO: This does
8 not change that.
9 MR. LATTING: Something ought
10 to.
11 MR. ORSINGER: He's moving to
12 amend the Committee proposal is what he's
13 doing, and I second that.
14 MR. LATTING: Not formally.
15 But that just seems like a silly way to run
16 it.
17 CHAIRMAN SOULES: Well, then
18 you get into all the issues of the integrity
19 of the array of the universe of people that
20 could be used for making delivery, and that is
21 a real issue.
22 MR. HERRING: What happens if
23 Joe Latting starts his own mail service the
24 day before?
25 MR. LATTING: I wouldn't do

1 it.

2 CHAIRMAN SOULES: And then his

3 neighbor does too, and his neighbor is not too

4 careful about what he'll swear to about when

5 he got the article to get it to the court.

6 PROFESSOR ALBRIGHT: I read

7 an article. We may be required by the Federal

8 Statutes to have it this way, because

9 apparently the Post Office statutes require

10 you to use the mail unless there is a

11 reason --

12 MR. YELENOSKY: Unless it's

13 urgent.

14 PROFESSOR ALBRIGHT: It's

15 urgent.

16 MR. LATTING: In fact, there

17 may be a Postal Inspector in here right now.

18 PROFESSOR DORSANEO: Change it

19 and put me in there. That would be all

20 right.

21 CHAIRMAN SOULES: I'll take

22 it.

23 MR. YELENOSKY: Apparently,

24 yes, I saw something on that, that Postal

25 Inspectors have gone after some businesses and

1 audited the mail and determined that they sent
2 some mail which was not urgent, however that
3 is defined.
4 MR. LATTING: Every appeal I
5 ever file is urgent.
6 MR. YELENOSKY: And they had
7 not used the U.S. Mail, which has a monopoly
8 for non-urgent mail, and they were fined.
9 MR. LATTING: Yes. I don't
10 think that's our problem.
11 MR. YELENOSKY: That's the
12 currect law. Now, there is a move to change
13 that; but of course the Post Office's response
14 is it is a monopoly, so....
15 MR. HATCHELL: I wonder,
16 Judge Guittard, if there is not a problem with
17 4(d) referencing the only way you can prove
18 proper mailing is by a certificate of
19 mailing. A certificate of mailing is an
20 official United States Postal document; and I
21 would suspect that very few people use those.
22 We use them in our office.
23 But like if you mail something after hours,
24 you really can't get one. The way the Rule
25 reads now that's the only way that you can

1 prove. And I don't think we're trying to
2 preclude counsel giving just an affidavit or
3 verifying the certificate of service that's
4 attached to a document.
5 HONORABLE C. A. GUITTARD:
6 Well, they say the certificate of mailing is
7 the prima facie evidence; but that's not the
8 only evidence, I suppose.
9 MR. HATCHELL: That's right.
10 It's not the only evidence.
11 HONORABLE C. A. GUITTARD:
12 Now, that's not a proposal that we considered
13 in our Committee; and I suppose this Committee
14 of course is at liberty to make additional
15 proposals.
16 MR. ORSINGER: The last
17 comment, the last sentence appears to
18 foreclose any other manner of proof besides
19 certificate of mailing. The second to last
20 sentence merely makes it prima facie, so we
21 might need to be careful about what we say in
22 the last sentence, because it appears that an
23 affidavit would not be adequate proof.
24 HONORABLE C. A. GUITTARD: In
25 other words, 10 days to present to the clerk a

1 proof of mailing?

2 PROFESSOR ALBRIGHT: Yes.

3 MR. ORSINGER: If we decided

4 as a matter of policy that an affidavit from a

5 lawyer or a lawyer's employee is going to be

6 adequate for this purpose, is it? Or do we

7 require them to shake hands with the postal

8 employee?

9 CHAIRMAN SOULES: As I

10 understand what the current decisions to be

11 you have to actually have the Post Office post

12 mark. Your mail meter is not good enough; or

13 your own notations on a certificate of mailing

14 about when something went out, that's not good

15 enough. You have to take the article to the

16 Post Office. You have to, and get your

17 certificate of mailing stamped, and you can't

18 get a post mark on an article that has been

19 posted with metered mail, with metered

20 whatever you call it, metered postage, because

21 the post mark cancels the stamp. Unless there

22 is a stamp on there they won't post mark the

23 article that is being transferred. So the

24 only thing you have got at that point is a

25 certificate of mailing, and that has to be

1 stamped by the post office and not your own
2 notation. And that's what I think the current
3 decision on it is.
4 HONORABLE C. A. GUITTARD:
5 Mr. Chairman, I suggest that we keep this
6 certificate of mailing as a prima facie proof,
7 but not the only proof, and that this last
8 sentence be changed to read "If the instrument
9 is not received by the clerk by the 20th day,
10 then the filing party shall have 10 days to
11 present to the proper clerk proof that the
12 instrument was timely and properly mailed,"
13 and so forth.
14 Now, you might want to detail
15 what kind of proof they have.
16 CHAIRMAN SOULES: Okay. See
17 if I have got this right. "If the instrument
18 is not received by the clerk by the 20th day,
19 then the filing party shall have 10 days to
20 present to the proper clerk proof that the
21 instrument was timely and properly mailed."
22 HONORABLE C. A. GUITTARD:
23 Sarah had a problem with that.
24 CHAIRMAN SOULES: Okay. Sarah
25 Duncan.

1 MS. DUNCAN: Perhaps I'm
2 distrustful. I'm a little uncomfortable with
3 not having an independent third party post
4 mark or proof. I'm also very uncomfortable
5 with implying that the clerk is going to have
6 to make this determination of what is
7 satisfactory proof. I think they would
8 unanimously rather not be in that position.
9 CHAIRMAN SOULES: I think we
10 have got a clerk whose hand is up.
11 MS. WOLBRUECK: Well, I
12 realize that this section of the Appellate
13 Rules happens to deal with the appellate court
14 and the appellate clerks. But since the
15 discussion is up about mailing, one of my
16 concerns is actually Rule 5 right now which
17 reads almost identically to this as far as the
18 receipt by the clerk.
19 I don't know if you realize,
20 but the way Rule 5 reads and the way it reads
21 it almost requires the clerk to keep every
22 envelope so that we know when something
23 is -- and we do not do that. I mean, we
24 cannot, you know, legibly and visibly be able
25 to keep every envelope.

1 So what you're requiring here
2 is either for the clerk that is not an
3 attorney to make a determination if something
4 is timely filed, or else to keep everything to
5 prove when we received it. And I think that
6 that's an extra burden that is placed upon the
7 clerk by this Rule along with Rule 5.
8 CHAIRMAN SOULES: That's a
9 good insight. Sarah Duncan.
10 MS. DUNCAN: I had precisely
11 that happen recently, and an envelope didn't
12 go up with the transcript; and it was a very
13 simple matter, because I had my certificate of
14 mailing. I faxed a copy to West Texas and we
15 were done. And I think if we get beyond
16 identifiable third-party proof of mailing,
17 we're going to create some problems.
18 MS. BARON: Well, it depends
19 on how much you care about one day I guess is
20 what it comes down to, Sarah. And I think the
21 courts would like things that are close to be
22 timely filed; and if counsel comes in and
23 swears that it was mailed on the right day,
24 most courts should be willing to accept that
25 without having to make them go down to the

1 Post Office before 5:00 o'clock when they've
2 got a deadline and get the post office
3 employee to sign something.
4 I don't think the Rule is
5 that -- should work that harshly. I'm not
6 sure that it does. When we'd get applications
7 up at the Supreme Court we would get the
8 envelopes as a routine matter; and I think
9 that the Court was not interested in trying to
10 bounce appeals that were 12 hours late if
11 there were a close question. I don't think
12 that the Appellate Courts want to get rid of
13 appeals on this basis. I do think they want
14 to give everybody opportunity to get their
15 appeals in, and I'm not sure the Rules should
16 be impossible or so difficult that you have to
17 be down at the post office by 5:00 o'clock.
18 I also think we should
19 consider regulated carrier delivery which
20 would include -- not include Joe Latting who
21 is not a regulated carrier, but would include
22 Federal Express, Airborne and so on and so
23 forth.
24 MS. DUNCAN: I would too.
25 CHAIRMAN SOULES: Yes. I

1 think probably what Pam is saying is that if
2 we open this up to other reasonable matters of
3 proof and other reasonable deliverers of the
4 packages, that there may be some fudging, but
5 we're all force fed that all these deadlines
6 are rigid, and if you don't meet them, off
7 with your head. Is that really necessary
8 maybe? If there is a little bit of slippage,
9 a day or two or something like that, or is it
10 better to maybe run the risk of some fudging
11 and not have that rigidity?
12 HONORABLE C. A. GUITTARD:
13 Under our amendment to Rule 1 about -- or
14 Rule 2 about extending the Rules, that would
15 give the slippage. That would give that to
16 the appellate court to slip a little.
17 PROFESSOR DORSANEO: We have
18 Rules about slippage anyway in every area for
19 every paper. All we're talking about here is
20 again liberalizing this little Rule which over
21 time has become more and more liberal. And if
22 we're going to take the time to sit and try to
23 re-engineer the whole thing, we're not going
24 to get past page 32 here.
25 We can hear the suggestions

1 about, okay, put in regulated carriers if
2 that's makes sense in light of the controversy
3 with the Post Office, certificate of mailing
4 or other proof; but the main thrust of this is
5 we're now liberalizing and proposing to
6 liberalize it again beyond the way it is -- it
7 has been liberalized before; and you know, I
8 just would counsel to keep that in mind.
9 MS. DUNCAN: I'd just like to
10 point out that what subdivision (c) and the
11 certificate of mailing I think are designed to
12 do is provide a very simple, very inexpensive,
13 very certain way to get something filed when
14 it was mailed on the correct day. It doesn't
15 foreclose a motion for extension of time or
16 affidavit or whatever proof someone or showing
17 that Federal Express was used and that
18 something actually was shipped out on a
19 certain day by Federal Express or some other
20 regulated carrier. And I think that the
21 problem I have with trying to encompass
22 motions for extension of time within this Rule
23 is that you're going to lose this as a cost
24 efficient mechanism for proof of mailing upon
25 a certain date.

1 I mean, if you start getting
2 into motions, you're talking about the cost of
3 the motion, cost of the affidavit, the cost of
4 the proof, the time period of waiting for the
5 court to Rule on it, the stress of waiting for
6 the court to Rule on it, whereas this is a
7 certainty.
8 PROFESSOR DORSANEO: The
9 regulated carrier one is I think a real issue;
10 but I don't think we're ready to put that in
11 there; but this happens. This is going to be
12 automatic. You're not going to have any
13 motion for extension. You take the
14 certificate of mailing to the clerk over this
15 thing that probably doesn't happen very often.
16 It doesn't get there in the 20 days. Then
17 it's over.
18 MS. DUNCAN: It's done.
19 PROFESSOR DORSANEO: Or it's
20 supposed to be over. It's filed. It was
21 filed on time, so you don't need an
22 extension.
23 CHAIRMAN SOULES: If it's
24 within 20 days.
25 PROFESSOR DORSANEO: Right.

1 CHAIRMAN SOULES: If it's
2 received within 20 days.
3 PROFESSOR DORSANEO: Or within
4 30 days if you get the last sentence.
5 CHAIRMAN SOULES: Okay.
6 MR. LATTING: Bill, what
7 happens if Steve Susman decides to use Federal
8 Express instead of the Post Office and his
9 appellate papers don't reach the court for six
10 or seven days, until six or seven days after
11 the deadline? What shape is he in then? Does
12 he then have to be in the position of filing a
13 motion?
14 PROFESSOR DORSANEO: Right.
15 MR. LATTING: Whereas if he
16 had used the Post Office, he wouldn't have to
17 file a motion.
18 PROFESSOR DORSANEO: Right.
19 CHAIRMAN SOULES: You can file
20 at the court, or you can file in the United
21 States Post Office box.
22 MR. LATTING: But you can't
23 file on Federal Express?
24 CHAIRMAN SOULES: But you
25 can't file on Federal Express. So if you're

1 going to use Federal Express, Federal Express
2 has to get it to the clerk by the filing
3 deadline. That's the way the Rules are set up
4 right now.
5 MR. LOW: What would be wrong
6 with --
7 CHAIRMAN SOULES: And I think
8 that's the way it works in the Federal system
9 too.
10 MS. DUNCAN: You can't use
11 Federal Express. In the United States Court
12 you will be held to be out of time.
13 MR. LOW: What would be wrong
14 with the parties, if Steve Susman and I decide
15 we don't trust the mail and we don't trust
16 this, we want Airborne, and Steve Susman and I
17 just file a designation, and that's going to
18 be that that's who we'll use, Airborne. We
19 like them. He likes them, and he and I agree
20 rather than going to regulated carrier. I
21 mean, I don't know what a regulated carrier
22 is. What's the definition of it? And why
23 couldn't we file something, designate that as
24 to our documents? Under this Rule we
25 couldn't. We are stuck with the mail. But if

1 we want to, why couldn't the parties file the
2 designation of another carrier?
3 CHAIRMAN SOULES: Does anyone
4 else have any comment on whether somebody
5 besides or some entity besides the United
6 States mail should be within the purview of
7 this Rule for extending? Actually it doesn't
8 extend the time for filing, because when it's
9 received by the clerk it gets filed back on
10 the day it was mailed. It just allows
11 retroactive filing if you use the mail. It
12 doesn't allow retroactive filing if you use
13 anything else unless you come under a click
14 motion.
15 PROFESSOR ALBRIGHT: I have a
16 comment on something else.
17 CHAIRMAN SOULES: Should we
18 just take a -- let's take a consensus here
19 anyway and see whether or not the Committee
20 should go forward with that. How many feel
21 that entities other than the United States
22 mail should be within the purview of this
23 proposed Rule 4(c) show by hands. Nine.
24 Those opposed. Nine. Let me take it again.
25 Hold them high. Those in favor of additional

1 entities hold up hands.

2 MR. LATTING: Regulated

3 carriers we're talking about.

4 CHAIRMAN SOULES: Well, I

5 don't know. I don't know whether that adds

6 anything. That's the reason I didn't use it.

7 Eleven in favor. Those opposed. Ten. So

8 it's eleven to ten.

9 MS. DUNCAN: I'll change my

10 vote. If it's even, we don't have to worry

11 about it.

12 CHAIRMAN SOULES: Give that

13 some thought.

14 PROFESSOR DORSANEO: I've

15 already thought about it. I've already

16 thought about it.

17 CHAIRMAN SOULES: My

18 experience as Chair is if you have got a dead

19 heat like that, it doesn't really determine

20 very much in the long run, because they're

21 going to be looking at it again some day.

22 Shelby Sharpe.

23 MR. SHARPE: With respect to

24 the sentence that has been added which says

25 "have 10 days," 10 days from what?

1 MR. LOW: Additional.
2 MS. DUNCAN: Ten days after
3 the 20 days.
4 MR. HERRING: Ten additional
5 days.
6 MR. SHARPE: That's what I was
7 thinking it would mean. But suppose that the
8 person who mailed it doesn't find out that it
9 didn't get to the clerk 18 days later or maybe
10 20 days later. How do you know when something
11 doesn't get there? Because sometimes the
12 clerk's --
13 CHAIRMAN SOULES: What's wrong
14 with a phone call?
15 MR. SHARPE: -- paper when
16 it's received coming back to you, sometimes
17 that is slow.
18 CHAIRMAN SOULES: What this
19 helps you with is right now you don't know
20 until the last day that it didn't get there.
21 You mailed it, so it should when received be
22 filed on the day of mailing; but you don't
23 know whether it gets there, and the tenth day
24 comes and goes, and there isn't any escape
25 hatch except under click which usually gives

1 you five more days.
2 MR. SHARPE: Should we add 10
3 days from, and then at least either say "the
4 deadline" or something instead of just saying
5 "from 10 days"?
6 CHAIRMAN SOULES: 10 days
7 should be precise when it starts.
8 MR. SHARPE: You need a
9 starting point.
10 CHAIRMAN SOULES: Right.
11 MR. SHARPE: That's the only
12 question I raise.
13 MR. ORSINGER: Is this
14 precise?
15 CHAIRMAN SOULES: Shelby
16 doesn't think it is.
17 MR. ORSINGER: Until the 30
18 days. Rather than saying "10 more days," you
19 can say "until the 30th day."
20 MR. SHARPE: Why don't we just
21 let the Committee have that, because they're
22 going to report back anyhow. It's just a
23 thought for them to address either to do
24 something with or not.
25 CHAIRMAN SOULES: Need to look

1 and see whether the 10-day grace period is
2 precise enough to really know when it is; and
3 if not, do some revisionary writing on that.
4 MR. SHARPE: Correct.
5 CHAIRMAN SOULES: Alex.
6 PROFESSOR ALBRIGHT: If you're
7 talking about changing "filing" to "delivery,"
8 you need to change it with when something is
9 filed with a specific justice, you say that
10 "any justice may permit the papers to be filed
11 with him." You should say "delivered to him"
12 I would think if the whole purpose of these
13 changes is to define filing as delivery.
14 HONORABLE C. A. GUITTARD: Well,
15 it still says "filing" and it says how filing
16 is done. Filing is done by delivery. It
17 didn't seem to make much sense to say "you
18 file by file."
19 PROFESSOR ALBRIGHT: Right.
20 So you should also -- you should file by
21 delivering to the clerk or delivering to a
22 specific justice, right?
23 HONORABLE C. A. GUITTARD:
24 Whenever it says "file," then it refers back
25 to this and you file by delivery.

1 PROFESSOR ALBRIGHT: Except
2 you deliver to the clerk." Except any justice
3 may permit the papers to be filed with him,"
4 shouldn't that be "delivery"?
5 MR. HERRING: Rule 74 at the
6 trial level I think says "filing."
7 PROFESSOR ALBRIGHT: I think
8 their whole purpose was to change that. Also
9 more in the middle where you change the 10 to
10 20 days tardily, "tardily" means to me that
11 you have another date that you're referring
12 to, and there's no date that you're referring
13 to. Do you mean that if it's received by the
14 clerk not more than 20 days after it was
15 mailed?
16 MR. ORSINGER: After the
17 deadline. Not after it was mailed.
18 PROFESSOR ALBRIGHT: Okay.
19 After the filing date.
20 MR. ORSINGER: Yes. After the
21 filing deadline.
22 PROFESSOR ALBRIGHT: Okay.
23 Maybe it should say that.
24 MR. HERRING: Yes. Rule 5
25 says on or before the last date of filing the

1 same.

2 PROFESSOR ALBRIGHT: Yes.

3 MS. SWEENEY: Could we make

4 that "justices him or her"?

5 PROFESSOR ALBRIGHT: Yes.

6 That was another thing, because we said --

7 MS. SWEENEY: "Him or her."

8 PROFESSOR ALBRIGHT: --

9 someplace else if we're going to start doing

10 "him or her," we need to do it everywhere.

11 PROFESSOR DORSANEO: Yes.

12 That's the first thing I like that people have

13 said.

14 HONORABLE SCOTT A BRISTER:

15 "Him or her" is so stilted. How about "or to

16 any justice of the court"? "Delivering to the

17 clerk or to any justice of the court."

18 PROFESSOR ALBRIGHT: "The

19 justice shall note."

20 MR. ORSINGER: You may want to

21 permit the justices to decline to accept

22 filings, or people will be tripping to their

23 door. This makes it optional whether the door

24 is open or not to the justice; and it should

25 stay that way. Otherwise it will be abused.

1 PROFESSOR ALBRIGHT: "Any
2 justice may agree to accept."
3 CHAIRMAN SOULES: Okay. I
4 think we ought to say "on or before the last
5 day for filing." We tried to make that
6 uniform in the Rules Of Civil Procedure
7 whenever we changed it to mail works if you
8 mail it on or before the last day. You used
9 to have to mail it before the last day, the
10 day before the last say. So we came up with
11 some things that we thought was consistent.
12 It probably isn't throughout, but we tried to
13 make it that way. Justice Hecht.
14 JUSTICE HECHT: What is the
15 reason for defining filing for Rules 301 and
16 329b and 296 and 298 under the Rules of Civil
17 Procedure in the TRAP Rules? It seems to me
18 like that's as long as the provisions are
19 parallel, which I think they are, there is no
20 real problem there. But if there should be a
21 difference, I would think that most
22 practitioners filing a Rule under 329b of the
23 Civil Rules would look to the Civil Rules to
24 see when it was filed.
25 CHAIRMAN SOULES: Bill, do you

1 have a response to that?

2 PROFESSOR DORSANEO: I agree

3 with that.

4 MR. ORSINGER: That's the

5 second change you like.

6 CHAIRMAN SOULES: Justice

7 Guittard, do you have any response to that?

8 HONORABLE C. A. GUITTARD: I

9 don't know any reason why this parenthetically

10 should be in there.

11 MS. BARON: I'm guessing that

12 the reason it is is many of these are motions

13 that you file once you haven't gotten notice

14 from the clerk timely for your appeal, and

15 they're actually motions that relate once you

16 are already at the appeal stage. But I would

17 agree it seems like either the Rule 5 needs to

18 be changed under the Texas Rules of Civil

19 Procedure to have 20 days, or -- they do need

20 to be parallel in some way.

21 HONORABLE C. A. GUITTARD: I

22 think this was put, this parenthetical was put

23 in there because it says "any matter relating

24 to an appeal," and thought that there was a

25 hiatus here in that if this parenthetical

1 wasn't there, that kind of motion wouldn't be
2 within the scope of this Rule as relating to
3 time for making appeal.
4 MR. HATCHELL: These Rules
5 don't apply to trial documents unless we make
6 them.
7 MR. ORSINGER: The easiest
8 solution is to cause the Rule Of Procedure to
9 conform to this 20-day time table. Why don't
10 we just agree to do that and not worry about
11 it.
12 CHAIRMAN SOULES: I think Bill
13 indicated earlier that there were going to be
14 some, or Justice Guittard did, that there were
15 going to be some revisions to the Rules Of
16 Civil Procedure necessary as a consequence of
17 whatever we do here; and that may be one of
18 them.
19 Is anyone opposed to doing
20 that, what Richard is just saying, that is,
21 having the Rules Of Civil Procedure conform to
22 whatever we do here in TRAP 4(b)? And there
23 is no opposition, so that should be one of the
24 ancillary Rules that you-all look at.
25 PROFESSOR DORSANEO: So we're

1 going to take out this parenthetical and
2 reconsider whether the exact same
3 parenthetical should be articulated in either
4 Civil Procedure Rule 4 our 5, whichever one it
5 is. I think 5.
6 CHAIRMAN SOULES: Any
7 opposition to that? No opposition to that.
8 MR. ORSINGER: Just in the
9 event we revisit the question of alternative
10 methods of delivery, I don't know how many of
11 you know it, but I think the 10 largest cities
12 in Texas have post offices that are open 24
13 hours a day and can give you a post mark up
14 until midnight.
15 I'm sorry. You can get a
16 proof of mailing until midnight. I've done it
17 many times. And so what we're saying about
18 losing access to the post office may be true
19 in outerlying areas; but in the large
20 municipal areas or large cities of Texas you
21 can get to a post office one minute until
22 midnight and get a proof of mailing in almost
23 all of our big cities here in Texas.
24 CHAIRMAN SOULES: Okay. Let
25 me see. Bill, go with me on it and Justice

1 Guittard. In the third line after "clerk" I
2 guess we're going to add "or any justice."
3 HONORABLE SCOTT A. BRISTER:
4 Are you talking about (c) now?
5 CHAIRMAN SOULES: (c) on page
6 27.
7 MR. ORSINGER: No. If you do
8 that, then you're making it mandatory that the
9 justice accept the file. You need to leave
10 that clause in there that leaves it optional
11 with the justice to accept filing.
12 PROFESSOR DORSANEO: Let's
13 just replace "him" with the words "the
14 justice."
15 CHAIRMAN SOULES: "The
16 justice," okay. So that's the only change in
17 the first sentence. Then --
18 PROFESSOR ALBRIGHT: Then
19 there's a "he."
20 CHAIRMAN SOULES: What was
21 that, Sarah?
22 MS. DUNCAN: Alex' comment
23 about "delivery" instead of "filing."
24 CHAIRMAN SOULES: "By
25 delivering, to permit the papers to be

1 delivered to the justice."

2 PROFESSOR DORSANEO: Fine.

3 MS. DUNCAN: Just to

4 parallel.

5 HONORABLE SAM H. CLINTON:

6 You've got a "he," so you've got to change

7 that too, I guess.

8 CHAIRMAN SOULES: We're going

9 to change the "he"s and "she"s or "him" and

10 "her"s to whatever they are. If it's the

11 justice, it is the justice. If it's the

12 judge, it's the judge. If it's a party, it's

13 a party, okay, all the way through the Rules.

14 Is that acceptable with everybody? Just have

15 to figure out how to do that in every case.

16 And then some of that already we've passed in

17 the previous Rules that we've looked at that

18 will need to be fixed.

19 And then delete the

20 underscored portion starting with "including

21 the motion," ending with "TEX.R.CIV.P.,"

22 delete that entire parenthetical.

23 And then insert for tardily

24 "on or before the last days for filing same."

25 MS. DUNCAN: You're going to

1 have to have it after, "after the last date
2 for filing."
3 PROFESSOR DORSANEO: "After
4 the filing deadline."
5 MR. LATTING: That's better.
6 PROFESSOR DORSANEO: That's
7 too clear. That's painfully clear.
8 HONORABLE C. A. GUITTARD:
9 We've already -- we've got above here the
10 phrase "last day for filing." Now, if we're
11 going to change that expression, we ought to
12 change it both places, if you're going to.
13 PROFESSOR DORSANEO: Why would
14 anybody think to change it? I'll accept the
15 parallel "after the last day for filing."
16 HONORABLE C. A. GUITTARD:
17 That sounds good enough for me.
18 HONORABLE PAUL HEATH TILL:
19 Instead of the word "tardy," right?
20 PROFESSOR DORSANEO: Yes.
21 CHAIRMAN SOULES: Rusty.
22 MR. MCMAINS: Did you mean
23 last presubscribed date? The problem I have
24 is this Rule is actually setting the time for
25 filing, so it becomes self effacing if you say

1 the deadline for filing, because that's what
2 this does is it extends it if this is saying
3 that this is the deadline for filing and you
4 go further and try and say but counting from a
5 date when in reality you are extending it
6 anyway. So you have to refer to a designated
7 or, you know, specified or something; but just
8 say deadline --
9 CHAIRMAN SOULES: Let's find
10 words that we can use. But it's the same day
11 both places in the same sentence, so we ought
12 to describe it the same way with the same
13 words, it seems to me. What those words are
14 don't matter to me.
15 HONORABLE C. A. GUITTARD:
16 It's understood then that means the last day
17 that the Rule is proscribed.
18 CHAIRMAN SOULES: After the
19 last day for filing. Okay.
20 MR. ORSINGER: You could say
21 "recieved by the clerk within 20 days."
22 CHAIRMAN SOULES: Okay. Then
23 in the third line from the bottom we were
24 going to delete "a copy of the certificate of
25 mailing showing" and insert --

1 HONORABLE C. A. GUITTARD:
2 Well, I don't know. There was some problem
3 about that. That's what -- we talked about
4 that, but I'm not sure that's the best way to
5 go. Is it?
6 PROFESSOR DORSANEO: I don't
7 know if we voted on that.
8 CHAIRMAN SOULES: We may not
9 have taken that up. We need some direction on
10 that. "If the instrument is not received by
11 the clerk by the 20th day, then the filing
12 party shall have 10 days to present to the
13 proper clerk."
14 PROFESSOR DORSANEO: "Shall
15 have 10 additional days" would be fine with
16 me.
17 CHAIRMAN SOULES: "Shall have
18 10."
19 PROFESSOR DORSANEO:
20 Additional days. I don't know why anybody
21 would think that's not 10 more.
22 HONORABLE C. A. GUITTARD: Why
23 don't you say "more."
24 CHAIRMAN SOULES: "To present
25 to the proper clerk" something to show that

1 the instrument was timely and properly mailed
2 under this Rule. What is the something? Must
3 it be a copy of the certificate of mailing, or
4 can it be other proof? Right now other proof,
5 the certificate is prima facie, isn't it?
6 PROFESSOR DORSANEO: I would
7 speak in favor of requiring people to be
8 trained to go, if they're running the risk of
9 missing a filing deadline and they don't want
10 to do a motion for sure, to go and get a
11 certificate of mailing. If it's easy to do
12 before 9:30 or before midnight in the 10
13 largest cities, what's the big deal? We could
14 teach people to do that. That's the prudent
15 thing. That's the right thing to do.
16 HONORABLE PAUL HEATH TILL:
17 What about everybody in the state that doesn't
18 live in the 10 largest cities?
19 PROFESSOR DORSANEO: There's a
20 lot of inconvenience in that respect.
21 MR. ORSINGER: That's the
22 price you pay for living in a small town.
23 HONORABLE PAUL HEATH TILL: I'm
24 not sure we'd care to project that attitude to
25 the rest of the state.

1 MR. ORSINGER: Well, if I am
2 not mistaken, we still have the right to do
3 this by affidavit by filing the motion for
4 extension with the Court of Appeals. So what
5 we're talking about here is not are you dead,
6 completely dead, never to come back if you
7 don't get your certificate of mailing. If you
8 don't get your certificate of mailing, you
9 have got to fall back on a motion and then the
10 mercy of the appellate court supported by
11 affidavit; and that's not so harmful, because
12 if you don't get your certificate of mailing,
13 you just attach an affidavit to your motion,
14 and if you're believable, they'll grant it,
15 and if you're not, they'll deny it. So there
16 is a safety net there already; and we don't
17 necessarily need to make this into a safety
18 net.
19 MR. HATCHELL: Well, Richard,
20 by extending it out to 20 days, you don't know
21 you need to do this until your 15-day window
22 for filing a motion is expired.
23 MR. ORSINGER: Good point. If
24 you don't realize it until after your 15-day
25 deadline, then we're not really giving them 20

1 days. We're only giving them 15 days.

2 CHAIRMAN SOULES: Is that

3 expressed in the other Rules here?

4 PROFESSOR DORSANEO: No.

5 CHAIRMAN SOULES: How do we

6 reconcile that? That seems to be something

7 that seems pretty important. Or is it?

8 PROFESSOR DORSANEO: I don't.

9 I think we're giving people a lot of

10 opportunity to do this the right way. And

11 frankly, I don't engage in the practice of

12 mailing on the last day. I don't think that's

13 good lawyering. I mean, really. Why do we

14 want to cut people so much slack that they can

15 take advantage of us?

16 CHAIRMAN SOULES: Well, if the

17 receipt is kept at 10 where the United States

18 post office has to work in 10 days, then you

19 know within the 15-day click period that you

20 have got to do something. You may have to do

21 something. If you have a stamped -- it

22 doesn't say that here, which may be something

23 we need to say -- a stamped certificate of

24 mailing, you can automatically get it fixed in

25 the next 10 days. If not, you have got to

1 file a motion before 15 days go by, if I'm
2 lining up the periods right. But if we change
3 the 10 days receipt to 20, then you're past
4 the click period.
5 MS. DUNCAN: I think we've
6 solved the problem by amending Rule 1(b). I'm
7 sorry -- Rule 2(b) providing for a suspension
8 of the Rules in Civil cases. If you don't
9 have your certificate of mailing, if you don't
10 file a motion for extension within 15 days,
11 then you fall back on suspending the Rules in
12 Civil cases. And that, Lord, to me that ought
13 to be enough.
14 PROFESSOR DORSANEO: I would
15 hope the Rules don't get suspended just
16 because somebody can't figure out how to get
17 something filed with all of the opportunities
18 you have to get relief. It's not sympathetic
19 here. It is not very hard to do this.
20 MS. BARON: This isn't
21 liberalizing the Rule. It's making it harder
22 if you have to have a certificate of mailing
23 to avoid a motion for extension. Right now
24 you don't. You can have a post marked copy of
25 your letter, or you can have an affidavit of

1 counsel. Staff attorneys at the courts look
2 at these all the time to decide if they are
3 filed timely. It's not done by the clerk at
4 least at the Supreme Court in deciding whether
5 something is timely filed, and you don't have
6 to always have a motion for extension. And
7 this is saying that you do unless you have a
8 certificate of mailing; and that's worse.
9 PROFESSOR DORSANEO: I propose
10 as Chair of the Appellate Rules Subcommittee
11 of this Committee that we suspend
12 consideration of this last sentence and just
13 don't have it in here at all and just go from
14 the 10 days to 20 days; and that liberalizes
15 it way beyond what it is now if the last
16 sentence is causing people a lot of
17 difficulty.
18 CHAIRMAN SOULES: Okay. We're
19 going to wind this up pretty quick and just
20 send this back to the Committee.
21 MS. DUNCAN: The reason for
22 the last sentence, is it because let's say
23 that you don't make the window. You mail it
24 on the right date. You don't make the 10- or
25 20-day window, whichever it is. There is no

1 procedure in the Rules as they exist today
2 without this sentence for getting your
3 instrument filed with the appellate court, and
4 that was all this sentence was intended to do
5 is say if you present your certificate of
6 mailing to the clerk, you get to file your
7 writ or your cost bond or whatever.
8 CHAIRMAN SOULES: Let's -- the
9 Chair is going to recommit this to the
10 Committee with the directive to be sure that
11 somehow this lines up with the click 15-day
12 period if that period is going to be retained,
13 and so that there is less confusion about
14 that. There is obviously confusion in here in
15 this Committee about that. And then we'll
16 look at a rewrite at another meeting, but not
17 today. Okay. Next.
18 PROFESSOR DORSANEO: The next
19 paragraph is really meant to not say anything
20 new, only to say what is said in Rule 4 now
21 and also in Rules 120 and 121 clearly.
22 HONORABLE C. A. GUITTARD:
23 That's right. It also provides that only one
24 copy of the record needs to be filed.
25 PROFESSOR DORSANEO: Right. I

1 think that's -- in my view that's also a
2 clarification, but you could have read the
3 Rule before as requiring multiple copies of
4 the record.
5 MS. DUNCAN: There is not
6 much substantive change in any of subpart
7 (d). The main reason for it is to get all of
8 the filing and number of copy requirements up
9 front rather than having to go to each
10 individual Rule when you're filing something.
11 PROFESSOR DORSANEO: When the
12 original Appellate Rules were drafted we made
13 the effort to try to have the general
14 provisions function as general provisions, but
15 because of our prior history of hostility to
16 general provisions of this jurisdiction that
17 proved to be a more difficult task than we had
18 realized. So we're still continuing to try to
19 get all of it in one place, and we probably
20 haven't succeeded yet, but progress.
21 MR. YELENOSKY: I just have a
22 question.
23 CHAIRMAN SOULES: Yes.
24 Stephen Yelenosky.
25 MR. YELENOSKY: Why is there a

1 distinction between copies and the original in
2 part two? Why is it 12 copies? I
3 just -- this is not something I understand.
4 12 copies for writ of error and the original,
5 and 11 copies for petition for discretionary
6 review.
7 PROFESSOR DORSANEO: The two
8 courts look at the 12 pieces of paper
9 differently.
10 MR. YELENOSKY: I mean, I
11 assume people file their original and 11
12 copies or original and 12 copies, whatever,
13 they file their original in every instance.
14 So it just seems that that --
15 PROFESSOR DORSANEO: I think
16 on the Civil side we don't consider a copy to
17 be a copy. They're all the same.
18 MR. YELENOSKY: Oh, I see what
19 you mean. The word "copy."
20 PROFESSOR DORSANEO: On the
21 criminal side it seems pretty clear from the
22 drafting over time that at least when we did
23 this before that we're talking about an
24 original and then 11 copies, but a distinct
25 original. Is that right, Judge?

1 HONORABLE SAM H. CLINTON: And
2 another reason for that is just the simple
3 matter of convenience on the part of the State
4 prosecuting attorney, if you read the next
5 sentence. The State prosecuting attorney is
6 just a step or two away from the clerk's
7 office, and he doesn't have to send them to,
8 all 12 to the Court Of Appeals. He can just
9 walk across the hall and deliver the 11.
10 That's the reason there is a breakdown there.
11 That's one of the classical reasons. I don't
12 know of any other, frankly.
13 MS. BARON: On Subpart 3 on
14 original proceedings if you look at Rule 121,
15 there technically is no record. It may be
16 that you're referring to exhibits and that
17 only one set of exhibits needs to be filed.
18 PROFESSOR DORSANEO: Well,
19 that's -- you're looking at our proposal?
20 MS. BARON: Right. The
21 parties designate.
22 PROFESSOR DORSANEO: No. Our
23 proposal for Rule 121?
24 MS. BARON: Is there one in
25 here? I didn't see one.

1 MR. ORSINGER: By definition
2 there is no record of a mandamus.
3 PROFESSOR DORSANEO: By
4 definition if that's how you define it. Look
5 at page 67, please. There is a proposal
6 to -- right now the Rule talks about records
7 and relevant exhibits.
8 MS. BARON: Right.
9 PROFESSOR DORSANEO: And now
10 but doesn't exactly explain very much. The
11 Rule as stated right now says "The petition
12 shall be accompanied by a certified or sworn
13 copy of the order complained of and other
14 relevant exhibits." Now, it depends on how
15 you look at that as to whether those relevant
16 exhibits are the record, or if they're not the
17 record, they're relevant exhibits. I've
18 always looked at it as that's the record; but
19 that's not a sufficient description of the
20 record.
21 And the way we have always
22 taught it at Continuing Legal Education
23 programs,
24 et cetera, is that the record ought to be what
25 the appellate court needs in order to consider

1 the request for relief in the original
2 proceeding. So we've endeavored to draft a
3 definition of the record for an original
4 proceeding: "Shall consist of a certified or
5 sworn copy of the order complained of and any
6 filed paper that is material to relator's
7 claim for relief, together with the portion of
8 the evidence presented, if any, in a properly
9 authenticated form, as shall be necessary to
10 demonstrate the relator's right to the relief
11 sought." I drafted it, so I like what it
12 says. It conforms to my practice.
13 MR. BARON: That's great.
14 CHAIRMAN SOULES: Okay. That
15 takes care of that problem.
16 PROFESSOR DORSANEO: That's
17 all we have on (d).
18 CHAIRMAN SOULES: Okay. Any
19 further comment on proposed 4(d)? Those in
20 favor show by hands. Those opposed. That's
21 unanimous.
22 PROFESSOR DORSANEO: On (e)
23 with Justice Guittard's permission and Sarah
24 Duncan's permission I'm going to ask Sarah to
25 talk about this part.

1 MS. DUNCAN: This might be
2 controversial.
3 PROFESSOR DORSANEO: In our
4 Appellate Rules Committee various proposals
5 came from various sources; and people on the
6 Committee who know more about it might be
7 better able to.
8 HONORABLE C. A. GUITTARD: The
9 question is basically if you're going to limit
10 the length of briefs, how do you make sure
11 people don't fudge? So Sarah, there has been
12 some problems with the Federal Courts about
13 this and the kind of type, and Sarah has
14 drafted this. So Sarah, could you explain
15 this?
16 MS. DUNCAN: The problem has
17 been in my practice that nobody wanted to get
18 picky about what point size to use. And
19 that's great for people that use readable
20 point sizes in their briefs; but it's been my
21 experience that I'm getting 50-page briefs in
22 eight-point type.
23 The Houston Court Of Appeals
24 1st Court struck some briefs for that reason,
25 and the appellant felt very cheated and said

1 that there was no point size requirement or
2 limitation in the Rules Of Appellate
3 Procedure, and therefore the Court should not
4 have stricken his brief. And it just seems to
5 me that it would make it clearer for everybody
6 if we adopted a Rule similar to the 5th
7 Circuit's Rule, and that way everybody knows
8 where they stand.
9 That's basically what (d)
10 does. There are a couple of things that are
11 different from the 5th Circuit's Rule.
12 Subdivision (e)(2) footnotes, a majority of
13 the Committee was in favor of letting
14 footnotes be in a smaller point size unlike
15 the Fifth Circuit Rule. We went ahead and
16 stuck in Subsection (3) on binding and
17 copying. Just it's pretty much what everybody
18 does; and the judges have fairly unanimously
19 said that they prefer and appreciate having a
20 brief that will lie flat.
21 MS. SWEENEY: What is san
22 serif type?
23 MS. DUNCAN: San serif is --
24 MS. SWEENEY: I'm sorry.
25 San serif.

1 MS. DUNCAN: I don't know how
2 you pronounce it. I just read it. There is
3 no, for instance, on an H you have an upright,
4 and at the top of the upright and the bottom
5 of the upright you have a horizontal line.
6 San serif has no tags at the top and the
7 bottom.
8 MS. SWEENEY: So this is san
9 serif (indicating).
10 MS. DUNCAN: And it's a little
11 more -- this is san serif (indicating). And
12 studies show it's a little more difficult to
13 read.
14 MS. SWEENEY: What we're
15 reading is prohibited? This is what came off
16 someone's word processor, and it's what
17 usually comes off our word processors?
18 MS. DUNCAN: No.
19 MS. SWEENEY: And now we can't
20 use it.
21 MS. DUNCAN: I don't know if
22 Holly changed the type. I had it in
23 triumvirate, which is a san serif type; but
24 it's not what usually comes off a word
25 processor. You have to go buy it, and unless

1 you've got Word Perfect or one of the 6.0
2 versions.
3 HONORABLE PAUL HEATH TILL:
4 Why don't you just say how many words they can
5 use and be done with it? I mean, "You can
6 send in your brief with 500 words or less," or
7 something like that, and be done with it, and
8 not worry about it. I mean, that's what
9 you're trying to do here.
10 MS. DUNCAN: That's certainly
11 an alternative. Subdivision (4) is just moved
12 from the individual brief Rules and then
13 revised as to Option A and Option B on point
14 sizes.
15 MR. LATTING: Do I understand
16 that this is actually going to -- this would
17 be prohibited, the kind of type that this
18 report is being presented to us on?
19 MS. DUNCAN: I don't think
20 most people use san serif types in their -- I
21 don't care care about that one anyway. It's
22 in the Fifth Circuit Rule.
23 MR. LATTING: Oh, it is?
24 MS. DUNCAN: That's why it's
25 in here. Nobody on the Committee as far as I

1 know has strong feelings about san serif type
2 at all.
3 PROFESSOR ALBRIGHT: Luke
4 Soules uses san serif all the time.
5 CHAIRMAN SOULES: I think
6 that's our default.
7 MR. YELENOSKY: The judge's
8 suggestion, I don't know who else has
9 considered that, but that makes some sense if
10 the objection is the length of the brief to
11 designate words perhaps, because for one thing
12 is the word processor, your computer can count
13 the words; and for another thing, if you want
14 to use a different type, fine. You can figure
15 out what the number of words per page for the
16 particular type of type you use is once and
17 then from then on you know what the
18 translation is into pages, and you don't have
19 to get in to designating types of type and
20 all, and have some, you know, leeway, but
21 people can easily figure that out now. And if
22 it's typewritten, you may want to specify
23 something, because it's harder to see, or you
24 can just use the words for that as well.
25 CHAIRMAN SOULES: We've got a

1 problem here in the function of the Committee,
2 and I don't know how really to get it on the
3 table; but if we're going to micromanage these
4 Rules to the point of some of these changes,
5 it's going to take us a long time to work
6 through these Appellate Rules and even the
7 Rules of Civil Procedure changes. And if
8 that's what we're going to do, then we're
9 going to have to revise the approach of the
10 Committee to its task. We don't have time to
11 do this meeting every other month and get the
12 Supreme Court work product by the end of the
13 year that it absolutely mandates, so we've got
14 to do -- I don't know how to really approach
15 that with the Committee, but we're -- it's 10
16 after 10:00. We started at a quarter 'til,
17 and we're again micromanaging Rules even with
18 what kind of type face that can be used.
19 Maybe that's what we need to do. The
20 Committee certainly has the prerogative to
21 undertake that level of change, if that's what
22 we want to do, but it is going to change our
23 approach to the meetings.
24 HONORABLE C. A. GUITTARD:
25 Mr. Chairman --

1 CHAIRMAN SOULES: And I'd like
2 to hear from Judge Guittard on that, and Bill.
3 HONORABLE C. A. GUITTARD:
4 That's the reason I had in my summary here
5 specified certain issues and with the idea
6 that perhaps the Committee could go through
7 and make those, make a pronouncement on those
8 issues and which would take care of the major
9 decisions to be made; and then if we want to
10 go back and take it word by word, line by
11 line, we can, but it was my thought that
12 perhaps we ought to decide the major questions
13 first before we go back and do it line by
14 line.
15 CHAIRMAN SOULES: Well, of
16 course, this Committee can't pass on anything
17 that is not looked at with scrutiny in open
18 session.
19 HONORABLE C. A. GUITTARD:
20 Sure.
21 CHAIRMAN SOULES: And how much
22 change are we going to be willing to
23 entertain, this Committee? Are we going to be
24 willing to entertain change at the level
25 demonstrated by these proposed Rules or not?

1 Steve Susman, please comment on that question.
2 MR. SUSMAN: I mean, I
3 understand the question. I thought the
4 function of this group was to deal with the
5 big picture by and large. I mean, I think
6 Judge Guittard is right. Give us the big
7 issues, get the feedback on the group on where
8 people stand on the big issues; and then if
9 the Committee has -- I mean, you know, if the
10 group feels strongly on a big issue, then the
11 job of the Committee is to go back and redraft
12 something.
13 I don't think we ought to be
14 going through these Rules word by word. I
15 don't think we'll ever finish. I don't think
16 we are doing anything to advance justice or
17 the system of justice or the administration of
18 justice; and I think it's a phenomenal waste
19 of time for very talented people to be sitting
20 here going through these Rules. I think we
21 ought to deal with issues. What are the big
22 issues presented? I mean, get the sense of
23 the group on those big issues; and the
24 Committee ought to be -- I think the
25 subcommittees ought to go back and loyally try

1 to reflect what the sense of the group is.
2 MR. LATTING: I'd agree to
3 that.
4 CHAIRMAN SOULES: It's the
5 level of detail that's the problem, I think.
6 And I don't know if that's -- in other words,
7 the very problems that have been raised here
8 may or may not have been perceived by the
9 Committee as being medium- or large-size
10 issues. There is so much change in here that
11 some of it's got to be given strictly by the
12 Committee.
13 We can take up just the big
14 issues. But then is this Committee going to
15 say, "Okay, we've heard the five big issues.
16 The rest of this book is small issues, so
17 there's a green light for that"?
18 PROFESSOR DORSANEO: Why don't
19 we try to just be more Robert's Rules formal
20 about it, and I can present a section and move
21 its adoption. And if somebody wants to ask me
22 if I want to change it, I can say "no" or
23 "yes" and then we can vote on it and be
24 through with it.
25 We are almost to the point

1 where we're getting to a big issue.

2 CHAIRMAN SOULES: Let's go to

3 that.

4 MS. DUNCAN: No.

5 HONORABLE SAM H. CLINTON:

6 Wait. Wait. Wait. Wait. Wait. As far as

7 we're concerned in the Court Of Criminal

8 Appeals we're a little old fashioned, I

9 guess. We don't use or require others to use

10 just 8 1/2 by 11 paper, so we don't. We don't

11 even -- we use the larger paper ourselves. So

12 we would have trouble with that. I'm speaking

13 of minor things that really turn out in some

14 situations to be major.

15 And the other one is did

16 anybody ever -- I need some help on this, I

17 think. The Supreme Court several years ago

18 put in the use of recycled paper is strongly

19 encouraged. And then the next sentence begins

20 to talk about it as typewritten on heavy white

21 paper. We learned from the Clerk in Dallas

22 that recycled paper as at least the

23 Commissioner's Court up there had ordered to

24 be used is not white.

25 PROFESSOR DORSANEO: It's

1 gray.

2 HONORABLE SAM H. HOUSTON:

3 Whatever it is, it's not white. So there was

4 a big turmoil up there about whether they

5 could use it in the Clerk's office about

6 whether they could -- what were they going to

7 do about allowing stuff to be filed that was

8 recycled but wasn't white. So we gave them

9 special, for our purposes anyway, special

10 leave to go ahead and do it.

11 But my point is you can run

12 into some really big problems here when you

13 try to do so much -- what did you call

14 it -- micromanaging. That's exactly right.

15 PROFESSOR DORSANEO: We can

16 vote this up or down. We don't have to have

17 any of this in our Rules at all and just kind

18 of proceed. The reason why we put it in here

19 is because, well, frankly part of it is we've

20 been micromanaging these Rules ourselves over

21 a period of years. This is an issue.

22 I guess the big issue is

23 should we have the Rules talk about how briefs

24 will be prepared mechanically and technically,

25 or should that just be left to practice? That

1 is a big issue.

2 MS. DUNCAN: A big issue to

3 Don Knight whose application for writ of error

4 was stricken on grounds of type size and

5 margins.

6 CHAIRMAN SOULES: Okay.

7 Richard Orsinger.

8 MR. ORSINGER: I think that

9 part of the problem that we have with this

10 Rule is not that the Committee was reacting.

11 It's part of the problem we have with this

12 Rule is this Rule intrudes too far into what

13 ought to be discretionary with the lawyer.

14 And I'll give you a perfect

15 example. Many people may consider this to be

16 trivial, but this Rule is going to radically

17 affect the way that I prepare my briefs for

18 the following reason: I use 13.5-point font

19 which is larger than what most people use, but

20 I use proportional spacing. I think the

21 larger font with the proportional spacing is

22 easier to read than the smaller font without

23 proportional spacing.

24 Under Subdivision (4) if I use

25 proportional spacing, even though I'm using

1 13.5-point font as opposed to as low as 12,
2 I'm reduced from 50 pages to 40 pages. So
3 that means that if I want to have an
4 additional 10 pages, then I have to make my
5 brief nonproportional 12-point, which I think
6 is harder to read than proportional 13.5.
7 Now, that may not be important
8 to some people in this room, but that's really
9 important to me; and I really wonder why
10 should we be telling people like me that you
11 can't use 13.5-point font proportional
12 spacing, that you have to use nonproportional
13 12-point font. We're going to get in fights
14 like this because we're trying to control in
15 too great a detail the way the lawyers are
16 preparing their briefs. About if somebody is
17 abusing it by running 9-point type, let them
18 file a motion to strike like in Van Ness
19 Whitebud case, and the Court Of Appeals will
20 say "You abused it. You rebrief it or you
21 lose it." And then if they abuse it a second
22 time around, then their brief is struck.
23 The correcting mechanism is
24 there without us trying to regulate. It's
25 like telling me that the next car I'm going to

1 buy is going to be green insteaad of white.
2 Why is that anybody else's decision as long as
3 I'm buying a car that's reasonable to look
4 at?
5 (At this time there was a
6 discussion off the record, after which time
7 the hearing continued as follows:)
8 CHAIRMAN SOULES: Okay. We
9 can either vote this up or down, or what
10 Justice Hecht was suggesting here is that we
11 take the points that the Committee feel are
12 important and then deal with those. On all of
13 the other Rules each member of this Committee
14 as a whole read them and send your criticism
15 to Bill, and then we'll make that part of the
16 record and see if maybe some of the smaller
17 things can get resolved.
18 Is any of (4)(d) now in the
19 Rules other than the --
20 PROFESSOR DORSANEO: The part
21 that's --
22 CHAIRMAN SOULES: --
23 information right at the top?
24 PROFESSOR DORSANEO: That's in
25 the Rule. That's all.

1 MS. DUNCAN: Subsection (4)
2 is included within the general, the specific
3 briefing Rules in each court and the Rule on
4 amicus briefs.
5 CHAIRMAN SOULES: You want an
6 indication whether or not to expand what is
7 currently (4)(d) at all?
8 PROFESSOR DORSANEO: Yes.
9 Vote it up or down.
10 CHAIRMAN SOULES: Up or down,
11 do we expand what is now (4)(d) with some of
12 what may be in (4)(e) and then send letters to
13 Bill as to how you think that ought to be
14 handled? How many feel that some expansion of
15 (4)(d) should be done?
16 MS. DUNCAN: I don't
17 understand the question.
18 CHAIRMAN SOULES: The question
19 is, should we just leave (4)(d) like it is,
20 which is the information at the top of page 28
21 that is not underscored and the information
22 that has been stricken through where it says
23 "and on heavy white paper in clear type"?
24 MR. ORSINGER: That's (4)(e)
25 and not (4)(d).

1 CHAIRMAN SOULES: No. Well,
2 it's currently (4)(d), but it's shown here as
3 (4)(e).
4 MR. ORSINGER: I'm with you.
5 MS. BARON: Luke, are we
6 voting old Rule, new Rule?
7 CHAIRMAN SOULES: Old Rule or
8 some new Rule.
9 MS. BARON: Okay.
10 CHAIRMAN SOULES: Okay. Old
11 Rule show by hands. Ten. Okay. Some new
12 Rule show by hands. Four. By ten to four
13 that would be rejected, so you don't need to
14 rewrite that.
15 So move to something important
16 or what you say is important, and then we will
17 note those items; and then the others we'll
18 reserve for written comments to the
19 subcommittee.
20 PROFESSOR DORSANEO: You can
21 look through as we move forward. I don't
22 believe there is anything --
23 MS. DUNCAN: (f) is important.
24 PROFESSOR DORSANEO: (f) is
25 going to be important, but I think we can

1 discuss it. Let's take up (f) now. One of
2 the big issues in this package involves who
3 gets copies. Several years back the Rules
4 were amended up and down the line to provide
5 that all parties to the trial Court's judgment
6 would be entitled to get copies -- I'm
7 overstating it a little bit -- of everything.
8 The idea was that even though
9 they were not particularly interested in doing
10 anything at the moment, they would be
11 interested in keeping up with the proceeding
12 to make certain that something bad wasn't
13 happening to them. We have changed or
14 recommended a change to that philosophy; and
15 if you'll look at (f), you get kind of the
16 idea with respect to "copies of briefs shall
17 also be served on any other party to the trial
18 court's judgment that has filed a request for
19 copies of briefs."
20 The issue comes up in a
21 variety of places, but the larger issue is
22 should we change the philosophy from giving
23 copies of everything to all persons who are
24 parties to the judgment, or should we only
25 give copies of things to people who request

1 them.

2 HONORABLE C. A. GUITTARD:

3 That, Mr. Chairman, is a part of a larger

4 problem. And that is, what do we do with

5 respect to the notice of appeal? Does the

6 notice of appeal specify who is the party to

7 the appeal? Our traditional practice in Texas

8 has been that the appeal bond specifies who

9 the appellees are. And if you're not named as

10 an appellee in the appeal bond, you're not

11 affected by what the appellate court does.

12 That's true also of a case of

13 writ of error which must specify the adverse

14 parties. That's been the traditional Rule.

15 However, the Supreme Court some time ago

16 amended the Rule to say that instead of making

17 the bond payable to the appellee, you can make

18 the bond payable to the clerk. So under that

19 Rule you can avoid the requirement to specify

20 the parties to the appeal, the adverse

21 parties. Now, there are some problems with

22 that.

23 PROFESSOR DORSANEO: Perhaps

24 the best way to proceed in the Committee would

25 be since these matters are related to take our

1 proposed Rule 13 first to get up to the idea
2 of what would the notice of appeal be about.
3 Since now appeals are perfected by bond or
4 cash deposits ordinarily it wouldn't be
5 necessarily clear to the Committee members
6 about the notice of appeal discussion.
7 Why don't we look at our
8 proposal on 13 first. This is a big issue,
9 the issue being should we have appeals? Maybe
10 not 13.
11 HONORABLE C. A. GUITTARD: The
12 main place it appears is in Rule 40.
13 PROFESSOR DORSANEO: Rule 40.
14 Yes. Then 40. 13 is just an aspect of it.
15 Should we have notice of appeal as the method,
16 the main method, I guess the method for
17 perfecting the appeal --
18 HONORABLE C. A. GUITTARD:
19 Right.
20 PROFESSOR DORSANEO: -- rather
21 than some sort of security device? And that
22 is an issue of significant change.
23 CHAIRMAN SOULES: That begins
24 on page 35 of the materials.
25 MR. LATTING: Would you

1 summarize the pros and contras of each of
2 those, Bill? Just tell us how this comes up.
3 And what are the issues here?
4 PROFESSOR DORSANEO: I guess
5 the issue is how does an appeal get started.
6 MR. LATTING: Right. Either
7 by filing of a bond or notice of appeal.
8 PROFESSOR DORSANEO: Yes.
9 MR. LATTING: What difference
10 does it make? What do you think?
11 HONORABLE C. A. GUITTARD: The
12 point is if -- going back to the question.
13 The Rule was amended several years ago to
14 provide that you have to make arrangements
15 with the court reporter and pay them in
16 advance, or pay them in advance or make
17 arrangements with them. Okay. You can't do
18 that with the clerk. We propose that you have
19 the same arrangement with the clerk. You have
20 to pay the clerk for the transcript before it
21 starts unless you file an affidavit of
22 inability.
23 Now, if you're going to
24 require the costs of appeal to be paid in
25 advance, why have a bond to secure the costs

1 that you've already paid. So it makes sense
2 then to have the appeal perfected by a notice
3 of appeal.
4 PROFESSOR DORSANEO: It's an
5 odd way. It's frankly an odd way to file the
6 appeal, to start the appeal perfecting the
7 appeal to post bond. That's very odd. And we
8 proposed to do away with that and to
9 substitute a notice of appeal that will have
10 informational requirements that would be
11 discussed next. If we go to notice of appeal
12 as a method for starting the appeal rather
13 than bond or cash deposits, then the next
14 question is what would the notice of appeal
15 look like.
16 MR. LATTING: What I was
17 asking you is why isn't that clearly a better
18 way to do it? Why don't we just go ahead and
19 do it and move on? Is there some --
20 PROFESSOR DORSANEO: We think
21 it clearly is a better way to do it, but the
22 devil is always in the details. What should
23 the notice of appeal say?
24 MR. LATTING: Then we're
25 micromanaging it.

1 PROFESSOR DORSANEO: Not too
2 much.
3 HONORABLE C. A. GUITTARD: I
4 think the Committee needs to decide whether to
5 dispense with the bond and go to a notice of
6 appeal.
7 CHAIRMAN SOULES: How many
8 feel that we should dispense with the bond and
9 go to a notice of appeal?
10 MR. MCMAINS: There are some
11 questions I have about the deposit stuff. I
12 haven't read the deposit stuff in here. Do
13 they pay the court costs, or is there a
14 requirement contemporaneous with the notice
15 that you pay, or do you do something to take
16 care of the cost in the trial courts?
17 HONORABLE C. A. GUITTARD:
18 There was -- the way the proposition as
19 presented now after you pay your costs in
20 appeal, that's the only provision with respect
21 to the cost. Now, there was before the
22 Committee a proposal that since the bond now
23 also secures the cost of the trial court as
24 well as the appellate courts, that there as
25 proposed Rule 46 was drafted before the

1 Committee that says that you could go and sort
2 of like you do for trial court costs and Rule
3 the party for cost. The proposal was that you
4 could require the appellant against whom a
5 judgment for cost was rendered to give
6 security for the costs in the trial court; and
7 if he didn't give security, you could certify
8 that to the appellate court and the appellate
9 court take appropriate action and dismiss or
10 what not. That proposal appears before in
11 this -- in these Rules --
12 PROFESSOR DORSANEO: As 46.
13 HONORABLE C. A. GUITTARD: --
14 as 46, but the Committee did not adopt that.
15 PROFESSOR DORSANEO: I
16 perceive Rusty is really probably, and correct
17 me if I'm wrong, asking about the arrangements
18 to be made with the court clerk and the court
19 reporter. In the draft of Rule 51 which deals
20 with the transcript that this change is
21 recommended upon perfection of the appeal
22 which would be by filing a notice of appeal
23 and payment or arrangement to pay the fee. So
24 the concept with respect to the clerk is added
25 of paying the clerk or arranging to pay.

1 MR. MCMAINS: That's for the
2 transcript.
3 PROFESSOR DORSANEO: For the
4 transcript. The same idea is contained in I'm
5 sure 53, yes, reporter's fees. "The appellant
6 shall either pay or make arrangements to pay
7 the official reporter."
8 HONORABLE C. A. GUITTARD: And
9 that's not new.
10 PROFESSOR DORSANEO: The
11 concept of arrangement to pay is not new.
12 It's the same concept that is articulated in
13 the Rules now for the statement of facts.
14 MR. MCMAINS: The only thing I
15 was trying to emphasize is at the start of
16 this explanation was that when you had decided
17 to pay the court reporter and to pay the clerk
18 in advance there was no longer any reason for
19 the bond is to explain to people who don't do
20 the work on a regular basis, that's not true.
21 The bond right now does in fact cover costs
22 occurred in the trial court.
23 PROFESSOR DORSANEO: That's right.
24 MR. MCMAINS: In addition to the
25 costs for the statement of facts and the

1 transcript. So when you pay the statement of
2 facts and the transcript you have not
3 discharged the obligation nor have you secured
4 the obligation nor do I take it in the absence
5 of Rule 46 being adopted the security for cost
6 do we make any requirement that they secure --
7 PROFESSOR DORSANEO: That's
8 exactly right.
9 MR. MCMAINS: -- the costs in the
10 trial court at all. So that at least now
11 while it's seldom enough given the cost of
12 litigation these days, at least now there is a
13 bond and a bonding company usually that is
14 standing there, or $1,000 cash, or whatever
15 that is standing there for the trial court
16 costs. That's what you in actuality are
17 proposing to do away with.
18 PROFESSOR DORSANEO: In a
19 technical --
20 MR. MCMAINS: It's a matter of
21 pragmatics.
22 PROFESSOR DORSANEO: -- sense
23 only, because in reality that $1,000 bond
24 doesn't ever pay the cost of the trial court.
25 MR. MCMAINS: It doesn't ever

1 cover it all.

2 PROFESSOR DORSANEO: Right.

3 It's only theoretical coverage is what I'm

4 saying to begin with.

5 PROFESSOR C. A. GUITTARD: Has

6 anybody had an experience where you collect

7 the cost of the trial court out of the

8 appellate bond, appeal bond?

9 PROFESSOR DORSANEO: (Nods

10 affirmatively.)

11 MR. MCMAINS: Yes.

12 HONORABLE C. A. GUITTARD: I

13 think our Committee didn't adopt Rule 46

14 because they really didn't think that was a

15 problem.

16 PROFESSOR DORSANEO: We

17 actually thought that somebody would use that

18 device as a weapon.

19 MS. DUNCAN: In fact, the

20 discussion as I remember it is why should the

21 fact that one party wants to take an appeal

22 entitle the appellee to something they would

23 not have had absent that appeal, and that is

24 security for the costs in the trial court?

25 Why should the appellant be penalized for

1 taking the appeal beyond the cost and delay
2 associated with the appeal?
3 MR. LOW: Simply because if he
4 didn't do that, they could get out of
5 execution or certificate or something. He
6 wants to stay the whole thing.
7 PROFESSOR DORSANEO: We're not
8 talking about staying anything.
9 MR. ORSINGER: You still can
10 get a writ of execution --
11 MS. DUNCAN: That's right.
12 MR. ORSINGER: -- on your
13 costs unless supersedeas bonds.
14 MR. LOW: Yes. Okay. Well,
15 you're right.
16 PROFESSOR DORSANEO: The fact
17 of the situation is I think the Committee's
18 view basically, and we can get to the details
19 next, is that it's a better way to start the
20 appeal by notice of appeal than by these
21 security devices which don't really accomplish
22 their own objectives to begin with. We went
23 to the $500 and then $1,000 numbers to make
24 the filing of the appeal something that you
25 could just do without getting permission from

1 some functionary as to the amount. We
2 recommend that to advance that to just say
3 "All right. We're just going to file a notice
4 of appeal," and that perfects the appeal.
5 CHAIRMAN SOULES: The appellee
6 can move to increase that bond, that $1,000.
7 PROFESSOR DORSANEO: Yes.
8 MR. ORSINGER: Absolutely.
9 CHAIRMAN SOULES: And it
10 happens. It certainly has happened to me.
11 MR. LOW: Bill, right now the
12 only instrument you have to file to perfect
13 the appeal is the bond or something in lieu
14 thereof, is it?
15 PROFESSOR DORSANEO: Right.
16 MR. LOW: Okay. So you file
17 one instrument. You're still going to file
18 another instrument, so there's not change.
19 You haven't shortened anything. You just call
20 it a notice of appeal instead of bond; but the
21 truth is that when you get the bond that's
22 pretty good notice that you're appealing.
23 PROFESSOR DORSANEO: Actually
24 is isn't much notice of much.
25 MR. LOW: Why?

1 MR. DORSANEO: Well, just read
2 one and see what it tells you. It --
3 MR. LOW: Well, when I see
4 that I know --
5 CHAIRMAN SOULES: I'm trying
6 to let Bill chair this since he's the
7 subcommittee Chair.
8 MR. LOW: I'm sorry.
9 CHAIRMAN SOULES: But you're
10 still going to have to talk one at a time on
11 the record.
12 MR. LOW: I understand.
13 CHAIRMAN SOULES: And so if
14 Bill is responding, people hold on until he's
15 done, and then let him call on somebody around
16 the table. And Bill, if you'll take care of
17 that, I'll stay out of the way.
18 PROFESSOR DORSANEO: Fairly
19 stated it would be when you show sombody this
20 and say "This is what you file to file an
21 appeal," the normal reaction is "Oh, really."
22 I mean, it doesn't seem to say anything about
23 that. It's exactly -- it's a bond or a $1,000
24 cash deposit. And then there isn't really one
25 piece of paper. Then you have to do other

1 papers to make it clear that you satisfy the
2 requirements of the Rule.
3 MS. WOLBRUECK: As a clerk I
4 just want to say that we think this is an
5 excellent idea. As the Rule is right now as
6 Bill has stated the Rule does not allow for
7 security up front as far as payment of the
8 transcript to the trial court clerk. The
9 court reporter, the Rule does state that.
10 Occasionally then we receive the cost bond and
11 then try to after the appeal is completed to
12 secure our cost out of that cost bond.
13 Number one, we do not have the
14 authority to approve that cost bond, and it's
15 unbelievable what types of cost bonds we do
16 receive. This past week I got seven in one
17 day. Out of seven of them, five of them the
18 principal didn't even sign the bond. So there
19 are certainly problems involved in the cost
20 bond. The other ones the signatures were not
21 legible, and the principal in the securities
22 were not even written on the top of the bond.
23 So, I mean, I realize these
24 are unusual situations, but I did receive
25 seven in one day, but five had very many

1 problems with them. So again going back to
2 the fact that after an appeal is complete
3 after a year or so then the clerk goes back to
4 the principal of the securities on the bond
5 and try to get payment of our costs, and most
6 of the time that's not possible.
7 So you know, I think that this
8 is a very good Rule as far as the clerks are
9 concerned. The notice of appeal then is one
10 document to where we've been receiving notice
11 of appeal and also cost bond in many
12 incidences, so this is one document to contain
13 the information in it. So, yes, we think this
14 is an excellent tool for us.
15 PROFESSOR DORSANEO: If the
16 concept of using a notice of appeal in lieu of
17 some sort of an inadequate -- let's call it
18 that -- security device at least for a number
19 of cases, then we can go on to the more
20 complicated issue of what should it say. Now,
21 the contents of the notice are at the bottom
22 of page 36 and the top of page 37.
23 The biggest issue that came
24 before the Committee involved the idea of
25 whether you should be required in the notice

1 to name the appellees against whom relief is
2 sought. Now, consider this: You have the
3 trial Court's judgment; and the trial Court's
4 judgment even if you're interpreting it and
5 say, "Well, who is dealt with in this
6 judgment"? Well, some people before the trial
7 Court are going to be dealt with in the
8 judgment who are before the trial Court, are
9 going to be dealt with in the judgment
10 explicitly. Other people will be dealt with,
11 but they may not even be mentioned. They
12 might have disappeared much earlier from the
13 scene. But in a sense all of these prior
14 parties are parties to the trial Court's
15 judgment because the judgment includes the
16 litigation and perhaps the prior orders. At
17 least conceptually it does.
18 Some people aren't going to
19 like the judgment, and they will nominate
20 themselves to be appellants, and they will
21 seek relief or plan to seek relief from the
22 judgment that will affect others. You can
23 think of it as they will plan to seek relief
24 from others, if you like, who are benefited by
25 the judgment.

1 The question is, should the
2 person who prepares the notice of appeal be
3 required to name the appellees against whom
4 relief is sought on appeal. Currently, as
5 Judge Guittard said, you can name the clerk in
6 the -- as the obligee on the bond, so you
7 don't need to in the bond identify the
8 appellee anymore. Although there is a case
9 out of Dallas, Fueterfass case I think that
10 talks about not identifying the appellee. It
11 I think had been once clearly the law that you
12 had to make the bond payable to the appellees
13 and that was an identification of the
14 appellees. That's either debatable now, or
15 you don't have to do it now.
16 Our issue is should somebody
17 who is filing an appeal have to say who the
18 other parties are? And the next issue or
19 related issue is if they don't, what happens
20 to them? Our proposal is that the failure to
21 name any parties to the trial Court's judgment
22 in the notice should not affect the appeals
23 with respect to the parties named; and with
24 respect to adding additional people we have an
25 amendment of notice provision saying that the

1 amendment may add or omit parties or correct
2 defects or omissions, and that that can be
3 done at any time until after filing the
4 appellant's brief by filing an amended notice
5 in the appellate court.
6 So our proposal hotly
7 contested in the Committee is that the notice
8 of appeal satisfy these technical requirements
9 including identification of the appellee, but
10 with the idea that there shouldn't be a
11 penalty imposed in any respect for bringing in
12 another appellee down the road if that is what
13 you want to do.
14 HONORABLE C. A. GUITTARD: I'd
15 like to point ought too that the thinking of
16 the majority of the Committee I've attempted
17 to set it out in a manner of law which comes
18 right after the -- unfortunately these pages
19 are not numbered. Right after the summary and
20 explanation, and before the actual proposals
21 apply of the memorandum of law number one,
22 identification of parties to the appeal which
23 I have attempted to give the thinking of the
24 majority of the Committee on why the appellees
25 ought to be identified.

1 It seems to the majority of
2 the Committee that fundamental fairness, even
3 perhaps due process would seem to require that
4 if you're going to seek relief that affects a
5 certain party, you ought to name that party,
6 that if you simply leave it open so that any
7 party might be affected and they don't know
8 whether they're affected or not, they'll have
9 to continue to pay their lawyer to examine
10 every paper that is filed with the court even
11 though that party may not be involved in the
12 appeal at all, that none of the relief prayed
13 for in the appellant's brief would affect that
14 party at all. But if unless their notice of
15 appeal specifies who the parties are, then the
16 party that is not affected by the appeal can't
17 simply go his way and say, "Well, that's
18 over. I don't have to worry about that
19 anymore." He has to file. He has to hire a
20 lawyer to keep up with the proceedings.
21 And we would propose that if
22 he really wants to keep up with the
23 proceedings, he can file a request, and then
24 everything would have to be -- the orders and
25 the briefs would have to be sent to him. But

1 other than that if he's named, if he's not
2 named as a party to the appeal, then he can
3 assume that the appeal is over and that he has
4 no longer any problem with that particular
5 case, and that this is an important matter to
6 the appellees to know or to parties other than
7 the appellants to know whether they're
8 appellees or not, and that's what we propose.
9 CHAIRMAN SOULES: Okay. When we
10 amended the Rules sometime back to require
11 that briefs and orders from the appellate
12 court be served on all parties to the trial
13 Court's judgment we had had hours of debate
14 where concerns were expressed about how
15 appellant proceedings after trial Court's
16 judgment could affect parties to the trial
17 Court's judgments that were unaware that that
18 was going on because they were not being kept
19 informed, and that's what was done to fix that
20 so they would be informed about --
21 HONORABLE C. A. GUITTARD:
22 That's right.
23 CHAIRMAN SOULES: -- those
24 things. And the biggest complaint that I've
25 heard has been from some clerks who they feel

1 like they're overburdened by having to send
2 papers to parties to the trial Court's
3 judgment that are not parties to the appeal.
4 But if we could resurrect some of that if it's
5 even necessary to -- maybe it's not a problem
6 and we fixed something that didn't need fixing
7 some time ago.
8 Mike, I think you had some
9 input into that, Mike Hatchell and Rusty.
10 MR. HATCHELL: I'm very
11 opposed to their having to identify appellees,
12 because as an appealing party I don't know who
13 the appellees are. I think this requires a
14 level of specificity that just far exceeds the
15 benefits that are gained by it given the fact
16 that the notice of appeal must be served upon
17 all these people in any event.
18 I'll give you two examples.
19 I'm in one case in East Texas where there are
20 3,000 plaintiffs who I have -- I mean, that's
21 going to be longer than my brief to list those
22 people. And what if I drop one of them?
23 Well, they say that they're not going to
24 dismiss my appeal; but I guarantee you
25 somebody is going to come in and use this to

1 get sanctions against me and everything.
2 The other thing is in Judge
3 Guittard's memo, which is very well done, we
4 have the case of Turner, Collie & Braden in
5 which sombody's judgment was reversed by the
6 Supreme Court because it was inextricably
7 interwoven with relief given to the other
8 appealing party. The other appealing party
9 had no reason to know that that party would be
10 becoming, quote, "appellee" as to him. And so
11 my problem is I cannot identify all the
12 appellees that might be considered as such in
13 light of a subsequent appellate court
14 judgment. I just cannot predict that.
15 It's a level of specificity
16 that I don't think is required. We ought to
17 be moving toward a simpler form. The Fifth
18 Circuit form is on one page and does the job
19 remarkably well.
20 HONORABLE C. A. GUITTARD: I
21 would like to point out that to really send a
22 copy of a brief to a party that looks at it
23 and says, "Well, this doesn't affect me," this
24 doesn't help him. What can he do? Suppose
25 later on the appellate court in my view goofs

1 up and does something that affects him,
2 affects him when it shouldn't. Well, what is
3 he going to do? It seems like to me that we
4 ought to do something to protect him in the
5 first place. We ought to if he's going to be
6 affected, he ought to be named as an appellee
7 so that he can come in and do the one thing
8 that will protect his rights if they need to
9 be protected, and that is to defend the
10 judgment in his favor. Merely to send him a
11 copy of a brief, he probably wouldn't even pay
12 any attention to that.
13 In the Braden case, the
14 Turner, Collie & Braden case he didn't know
15 about it until the Supreme Court's judgment.
16 Now, we would also propose to amend the Rules
17 that unless he's named as a party, he's not
18 affected by the appellate court's judgment.
19 That would change the practice in the Turner,
20 Collie & Braden case so that this party that
21 didn't think he was a party to the appeal and
22 had no occasion to appear in the appellate
23 court and would not have had any occasion to
24 appear in the appellate court even if he had
25 been given copies of all of the briefs, this

1 would protect him so that he would not be
2 affected by it. We would propose to amend
3 certain Rules, as you'll see there, to provide
4 that that just wouldn't happen.
5 So it was a strong feeling of
6 the majority of the Committee that there ought
7 to be some certainty for persons other than
8 appellants to know whether or not they are
9 parties to the appeal and whether they will be
10 affected by the judgment; and the best way to
11 do that is to have them named, have the notice
12 of appeal name who the adverse parties are.
13 MR. MCMAINS: Well, I gathered
14 from the beginning comment, the second
15 comments were coming that the effect of not
16 naming them is to mean they're not parties to
17 the appeal. And the problem with that is that
18 much like Mike has suggested, frequently
19 because something happens in the court of
20 appeals or perhaps because the law changes on
21 the way to the Court Of Appeals or on the way
22 from the Court Of Appeals, conditions have
23 changed. You may have -- there may be claims
24 and cross-claims that didn't exist when you
25 started the effort. And to suggest that, you

1 are going to be confined, because you're
2 talking about limiting the appellate court's
3 jurisdiction.
4 You are saying that the action
5 of the appellant pre appellant's brief
6 absolutely bars then the ability of the
7 appellate court to render the judgment, quote,
8 as the current Appellate Rules say that the
9 trial court should have, because he doesn't
10 have all the parties before him, can't
11 possibly. We're going to have to amend that
12 section too.
13 The classic example is where
14 let's just take a straight-up PI case with
15 several people involved, but somebody gets
16 only hit five percent. They don't want to
17 appeal. They're not jointly and severally
18 liable. There's a contrib finding. The
19 Plaintiff is satisfied maybe with his contrib
20 finding, but the other Defendant appeals. He
21 may not list the five-percent Defendant as an
22 appellee even though he thinks he was 95
23 percent at fault. And the Plaintiff may also
24 think that that Defendant was all together at
25 fault; but then if there is a reversal and

1 remand based on the fact that there is
2 insufficient evidence of the primary against
3 the person who you have it -- who actually had
4 most of the judgment against them, then you're
5 saying that the appellate court can't send the
6 whole case back, that the five-percent
7 Defendant who nobody appealed against,
8 basically what you're saying is in fact he
9 owes five percent.
10 So you have dichotomized the
11 judgment. You have divided the judgment and
12 basically say, "Okay. That five percent, that
13 is covered" even though it's embroiled within
14 the joint and several liability finding
15 against the other Defendant. You're dealing
16 with cross actions in these kind of things in
17 terms of constructions of judgments if we're
18 going to have only one judgment because
19 otherwise you are accomplishing a severance by
20 notice of appeal. That's what is happening.
21 HONORABLE C. A. GUITTARD:
22 That would happen under the present Rules if
23 you file a bond and name the appellees in the
24 bond.
25 MR. MCMAINS: That's not true,

1 Your Honor, because frankly most of the bonds
2 I never file a bond that isn't in the name of
3 the clerk. I don't know anybody that does it
4 carefully that does.
5 HONORABLE C. A. GUITTARD: If
6 you filed a bond that is payable to the
7 appellee, then you have that same situation.
8 MR. MCMAINS: But there are
9 some courts that I think properly construe the
10 Rule and say that filing it payable to a
11 particular appellee is only a defect in form
12 that can be amended at any time, which is what
13 our current Rule says.
14 HONORABLE C. A. GUITTARD:
15 That's right.
16 MR. MCMAINS: And it can
17 include anybody; but it still is not a
18 restriction or doesn't limit the power of the
19 appellate court. You can get relief to
20 non-appealing appellants, as Your Honor is
21 very well aware, if it is essential to the
22 relief you are giving to the appealing
23 appellants.
24 What you are doing is
25 requiring that the appealing appellant

1 anticipate who else might need relief along
2 with him even though he's not seeking any
3 relief against him, and that's silly; and a
4 person on the other side doesn't know that he
5 wants anything from this other guy either
6 until somebody gives relief against this other
7 fellow; and you just can't sort. In my
8 judgment, you can't sort that out.
9 I mean, there are some
10 specific things I can see with regards to the
11 times, for instance, if you file a notice of
12 limitation of appeal and you're saying that
13 you can amend the document to include other
14 people that is the original notice of appeal
15 up to the time of the appellant's brief.
16 I'm just not sure what all
17 these things you are basically trying to carve
18 out at one point, but allow expansion at
19 another point, and in the mean time either
20 limit the scope of the appeal, don't limit the
21 scope of appeal; and that Rule says there is
22 no way to limit the scope of the appeal except
23 by filing a notice of limitation of appeal.
24 And now you're telling me that, no, the way is
25 just dropping them out as an appellee. That

1 to me is just it's an incredible limitation of
2 jurisdiction of the Court Of Appeals and the
3 Supreme Court in regard to fashioning
4 judgments.
5 HONORABLE C. A. GUITTARD: I
6 would just point out that if you name an
7 appellee, then the appellate Court's judgment
8 is limited to the appellees that are named;
9 and this would be no different. It doesn't
10 affect it, as the courts have said, in the
11 case where an appellee is not named. It's not
12 jurisdictional. You can amend.
13 Well, this provision provides
14 that you can amend too. So it would be the
15 same result as if you had named certain
16 appellees, certain parties in the bond, but
17 had not named others.
18 MS. BARON: Well, just looking
19 at the Rules as a practical approach to the
20 practitioner who doesn't want to mess up, if
21 I'm an appellant, I'm going to list every
22 party as an appellee. So it doesn't really
23 have the benefit of keeping people who aren't
24 at issue in the appeal out. The problem
25 arises is what if I'm appellee and I think

1 other appellees should be included on the
2 appellant's notice, because if I go down, I
3 want them going down with me.
4 PROFESSOR DORSANEO: Pam, I
5 don't think that's probably right, what you're
6 saying, because there will be people who were
7 parties to the trial Court's judgment who you
8 will no longer be thinking about. And they
9 should be out of the picture.
10 MS. BARON: Well, but I've got
11 a malpractice carrier, and I have got a
12 premium I'll pay. I'm not going to drop
13 somebody if there is some remote chance that
14 the judgment could touch them. I'm not.
15 MS. DUNCAN: I am strongly
16 opposed to this; and that is precisely one of
17 the reasons. I think if you name everyone who
18 could conceivably be an appellee from the date
19 the petition was filed including everybody
20 dropped out by motions for summary judgment,
21 sanctions, death penalty sanctions, whatever,
22 I think it is good grounds for a motion for
23 sanctions against you when in fact someone can
24 show that there was never a possibility or a
25 hope for seeking relief against that person,

1 and I think we are requiring people to be
2 prescient as to what the appellate court will
3 do, and I think we're creating an increidible
4 malpractice trap.
5 PROFESSOR DORSANEO: Sarah,
6 what do you do when they call you, when you
7 send me the notice of appeal, and Mike would
8 send that cost bond to every one of those
9 3,000 people, so he knows who they are, right?
10 What will you do when I call you and say, "You
11 sent me this. Are you really after me, or am
12 I just in here, not really here, and you
13 satisfy a formality"?
14 MS. DUNCAN: When that
15 happened with me I was actually on the other
16 side, and it was I was the one who suggested
17 that we serve all parties to the trial court's
18 judgment, because I had an appellant who would
19 not tell me whether he was seeking affirmative
20 relief against my client or simply trying to
21 shift the comparative fault finding.
22 PROFESSOR DORSANEO: Because
23 he doesn't have to tell you now, right?
24 MS. DUNCAN: That's right.
25 He doesn't have to tell me, but I think the

1 reason he didn't tell me is because he didn't
2 know and he couldn't tell. It could
3 conceivably -- he could not predict what the
4 Court Of Appeals or the Supreme Court would do
5 with that judgment. And my response to that
6 was "If you will give me copies of the briefs,
7 I will make a determination on behalf of my
8 client, consultation with by client as to what
9 if anything we're going to file in that
10 appeal."
11 MR. LOW: Luke, let me raise a
12 question. Rusty said "What if you have this
13 five percent and then your case comes back?"
14 Well, why would that be a problem? Wouldn't
15 that be tantamount to that five-percent
16 Defendant saying "I'm agreeing to pay this,"
17 the Plaintiff saying "I'm willing to accept
18 this five percent if they don't appeal"? So
19 in effect they have settled theirs. Why would
20 that be different if they just got together
21 during the appeal and say "Okay. I'm taking
22 your five percent; I'll settle with you"?
23 Why would that be so complicated? It could be
24 settled. Why wouldn't that be construed just
25 as tantamount to a settlement of that five

1 percent and then you go on and try the case.
2 It's not really a severing out, but that's
3 what it would be.
4 CHAIRMAN SOULES: Well,
5 remember. There are a lot of new faces here.
6 Whenever we were talking about this some years
7 ago we talked about the briefs and the orders
8 and the judgments of the appellate courts.
9 MR. LOW: Right.
10 CHAIRMAN SOULES: And part of
11 that discussion was that the briefs may define
12 what the parties think is the appellate
13 dispute, but the Court of Appeals and the
14 Supreme Court may decide something entirely
15 different. They're not necessarily bound by
16 the briefs, or sometimes they don't seem to
17 feel like they're bound by briefs of the
18 party; and all of a sudden this judgment comes
19 down from the Court of Appeals that affects
20 somebody that the briefs never indicated would
21 be affected. At that point that party has now
22 been affected and who gets a copy of the Court
23 of Appeals order opinion and decision and
24 judgment and says "Hey, wait a minute. That
25 affects me. Up to now I wasn't affected."

1 And they can enter the appeal at that point
2 and seek relief. At least that was the
3 discussion that we had some years ago when we
4 made these changes.
5 PROFESSOR DORSANEO: We're not
6 sure whether they can enter the appeal at that
7 point.
8 MR. LOW: That's right.
9 PROFESSOR DORSANEO: All we
10 know is they are sent papers, and somehow
11 maybe they can enter the appeal and protect
12 themselves. Under our proposal that shouldn't
13 happen, but I think also in our proposal if it
14 does happen, they could still enter the
15 appeal.
16 MR. HATCHELL: Let me just
17 give, to answer Buddy's, the one that really
18 concerns me, and this is just typical of what
19 I think can happen. A Plaintiff sues
20 Defendant. Defendant files a contribution
21 claim against Defendant 2. Plaintiff doesn't
22 sue Defendant 2. Maybe the limitations have
23 run, or maybe he just doesn't want to bother
24 about it. Defendant 1 gets a instructed
25 verdict on no liability. Plaintiff appeals.

1 Plaintiff doesn't give a rip about D-2,
2 doesn't name them as an appellee. The Court
3 of Appeals reverses and remands. I have lost
4 my contribution claim against D-2 because the
5 notice of appeal limits the Court of Appeals'
6 jurisdiction. Why should that happen in a
7 notice of appeal that I had no control over?
8 MS. DUNCAN: You have to file
9 a cross-suit under these Rules.
10 CHAIRMAN SOULES: What was
11 the response?
12 MS. DUNCAN: Under these
13 Rules anyone who is not named as an appellee
14 but who thinks they might could conceivably be
15 affected and want to preserve the right as an
16 appealing party would file another notice of
17 appeal.
18 MR. HATCHELL: Which is
19 frivolous because you cannot appeal if you're
20 not aggrieved by a judgment.
21 MS. DUNCAN: But I'm just
22 saying that's what these proposals would
23 require you to do.
24 MR. LATTING: This is a tough
25 question, because there are valid points on

1 both sides, but I have to come down on the
2 side that says that a person -- I'm talking
3 about members of the public, not lawyers. It
4 seems to me a person is entitled to know if he
5 or she is being kept in or brought into
6 court. And I can imagine my attempt to
7 explain to some friend of mine who says,
8 "Look. Am I a party to this appeal? They're
9 going to appeal. It's going to take another
10 two years. It's going to cost another
11 $50,000." And I say, "Well, I don't know.
12 You can't tell. The person who is appealing
13 just won't say whether you're involved in this
14 or not, and you may be or you may not be."
15 That just doesn't make any sense to me. And
16 it seems to me that if you feel like you will
17 or might have rights against a party, that
18 it's a relatively simple matter to list their
19 name and say this person may be affected by
20 this appeal.
21 And similarly if there is an
22 appellee who feels that his rights, Mike, in
23 response to what you said might be affected,
24 let him do the same thing. And as Pam said,
25 as a practical matter aren't you going to list

1 everyone anyway?

2 MS. DUNCAN: No. That's when

3 you will get sanctioned.

4 MR. LATTING: Well, we can

5 deal with that; but the contra to that, Sarah,

6 is that a person now if we don't have this

7 Rule may not know whether she's a party to an

8 appeal, and that doesn't accord with

9 fundamental --

10 MS. DUNCAN: I have --

11 CHAIRMAN SOULES: Justice

12 Hecht had a comment.

13 JUSTICE HECHT: Why don't you

14 just list them all.

15 MR. LATTING: Yes. In fact,

16 that's what I wrote to Judge Brister.

17 Shouldn't I as an appellant name all other

18 parties as a matter of course?

19 JUSTICE HECHT: I don't see

20 what we're accomplishing. It looks like to me

21 like if you are an appellant, just to be on

22 the safe side, you'd list everybody.

23 MR. LATTING: Well, I would,

24 but maybe.

25 CHAIRMAN SOULES: But isn't

1 the practice that on appeal I'm seeking relief
2 of a piece of the judgment that affects some
3 of the parties, but not all of the parties?
4 So I name those parties as appellees because
5 those are the ones I'm seeking relief against,
6 but I give notice to everybody and then
7 everything that happens on that appeal
8 everybody is kept abreast of, and if they
9 think they're affected, they're in.
10 But to name as an appellee a
11 party to the trial Court's judgment against
12 whom the appellant seeks no relief on appeal
13 they're not really an appellee. They don't
14 owe a response. There is nothing being sought
15 against them. At least that's my perception
16 of it. And that may be wrong.
17 MR. MCMAINS: Anybody who
18 wants to defend the judgment is an appellee.
19 Anybody who wants the judgment to stay the way
20 it is is an appellee. Whether or not the
21 appellant cares anything about that particular
22 party is irrelevant. They're either an
23 appellant complaining of the judgment or
24 they're somebody who wants the judgment. It
25 doesn't have anything to do with whether or

1 not the person particularly appealing wants
2 any relief against that party.
3 Like in the five-percent case
4 it may well be that the guy with five percent
5 if the number was big enough would be
6 delighted to appeal, and he may think he has
7 no liability at all. But he's not going to
8 appeal, not going to worry; but you shouldn't
9 be accomplishing the severance, because the
10 idea that you have an aggrieved -- you're not
11 aggrieved by the judgment, but you have some
12 obligation to expand the other side's notice
13 of appeal in order to preserve your
14 conditional rights to relief against them in
15 the construction of the judgment is very
16 strange.
17 What I'm trying to get at is
18 we have in these Rules and have always had
19 this thing which said "There shall be no
20 limitation of the scope of the appeal unless
21 you do X," and we keep writing these Rules
22 suggesting that there is a reason why we've
23 done some of this stuff. If we're limiting
24 the scope of the appeal, if that's what the
25 judge wants to accomplish, that's what I think

1 is wrong. If you haven't limited the scope of
2 the appeal, then I don't think you've
3 accomplished anything, and other than making
4 it pretty much more burdensome and at least
5 more worrisome, because there are some courts
6 that are probably going to hold that even if
7 that's not true.
8 (At this time there was a
9 recess, after which time the hearing continued
10 as follows:)
11 CHAIRMAN SOULES: We are
12 reconvened. Let's try to get a consensus
13 here. It seems to me like the consensus that
14 we scrap the cost bond and use the notice of
15 appeal as the document that perfects the
16 appeal is acceptable as a matter of
17 consensus. We are not going into what it
18 contains yet. Those in favor of that change,
19 just to substitute the notice of appeal for
20 the cost bond on appeal for purposes of
21 perfecting the appeal show by hands. Those
22 opposed. Okay. That's unanimous.
23 Next, Bill, if you can state
24 somewhat succinctly the second part. As I'm
25 perceiving it does the cost bond on appeal

1 have any effect on party issues?
2 MR. ORSINGER: Talking about
3 notices now.
4 MS. DUNCAN: Subsection (5).
5 CHAIRMAN SOULES: The notice of
6 appeal, is that going to have any effect on
7 the party issues different than what --
8 MR. ORSINGER: Are you
9 required to specify the appellees?
10 CHAIRMAN SOULES: Any effect?
11 Are we going to have a change from what we
12 have today?
13 PROFESSOR DORSANEO: The
14 change to require somebody to name the
15 appellees would be -- in the notice of appeal
16 would be a change. Now you're not required to
17 name appellees, but you're required to send
18 copies of your whatever it is to whoever you
19 might make a claim against later, and you're
20 required later to make your claim later.
21 Usually in your appellant's brief possibly
22 arguably you could make some sort of a claim
23 later if the judgment of the Court of Appeals
24 affected you in some way. There would be a
25 change.

1 CHAIRMAN SOULES: If we named
2 the appellees. The cost bond of course
3 doesn't name the appellees. It just goes to
4 every party of the trial court judgment.
5 PROFESSOR DORSANEO: It can.
6 CHAIRMAN SOULES: It can.
7 PROFESSOR DORSANEO: And there
8 is a Dallas case that says that if you don't
9 name the appellees even if it's payable to the
10 clerk, that those people unnamed are not
11 parties.
12 CHAIRMAN SOULES: Insofar as
13 affecting the parties to the appeal, just the
14 issue, focus on that question. We're talking
15 about any effect on the parties to the
16 appeal.
17 MR. ORSINGER: Could you
18 define that? Who is a party to the appeal?
19 CHAIRMAN SOULES: I don't
20 know.
21 MR. ORSINGER: I'd like to ask
22 the question.
23 CHAIRMAN SOULES: And I'm not
24 going to do that, because should the notice of
25 appeal have any different effect on parties to

1 the appeal than the cost bond on appeal has
2 now, then if so, we can get into the issues of
3 that. How many feel that the notice of
4 appeal, if we go to that, should have any
5 effect on the parties to the appeal beyond
6 what the cost bond on appeal has right now,
7 should have more effect? One, two.
8 PROFESSOR DORSANEO: I'll be
9 three.
10 CHAIRMAN SOULES: Three. How
11 many feel that it should have the same effect
12 as far as the definition of parties on the
13 appeal that the cost bond on appeal has right
14 now? Eight. Three to eight. So there's your
15 guidance on that question.
16 PROFESSOR DORSANEO: Why don't
17 we just take out (5), "the names of all
18 appellees against whom relief is sought," and
19 we can make corresponding changes. It's not
20 that big of a deal.
21 HONORABLE C. A. GUITTARD: All
22 right.
23 PROFESSOR DORSANEO: Next
24 notice of cross-appeal, now, we've had this
25 problem of cross-appeals plaguing us for a

1 long time. We think we've finally gotten it
2 whipped. I may find out immediately that it
3 is still winning. But the idea is basically
4 in the courts of appeals now that you don't if
5 you are not an appellant required to -- you're
6 not required if you're not an appellant to
7 cross-appeal to perfect a separate appeal in
8 order to raise requests in your appellee's
9 brief for more relief, even more relief than
10 you got already in the trial court.
11 The first sentence of the
12 proposal embraces that current idea, which is
13 as we'll see in a minute, a little bit more
14 complicated than I stated it. "Unless the
15 appeal is limited by a notice of limitation of
16 appeal as provided in the current language of
17 Appellate Rule 40(a)(5), an appellee may file
18 cross points in his brief complaining of any
19 ruling or action of the trial court without
20 perfecting a separate appeal as against the
21 appellant. And that simply means that you
22 can, quote, cross-appeal by seeking relief by
23 cross point in your appellee's brief.
24 The language as against the
25 appellant in this first sentence of the

1 proposal, Rule 40a Cross-Appeals clarifies the
2 concept, because there are some cases, for
3 example, Young vs. Kilroy Oil Company, and I
4 think it's Justice Ray's concurrence in
5 Donworth it talks about it in most clear terms
6 who are kind of like off to the side. They're
7 not appellants and they're not appellees,
8 because the relief requested by the appellant
9 is not relief from them.
10 Okay. So there are a group of
11 people who are not appellants who as an
12 appellee you might want relief from. So under
13 those circumstances and under the circumstance
14 where there is a notice of limitation of
15 appeal by the appellant you do what the next
16 sentence says. "Within 15 days of the
17 perfection of the original appeal or within 15
18 days after the filing of a notice of
19 limitation of appeal an appellee may perfect a
20 cross-appeal against the appellant who has
21 limited the appeal or any other party to the
22 trial court's judgment as may be necessary
23 because the appellant hasn't sought any relief
24 from them by filing a notice of cross-appeal
25 stating the date on which the notice is filed,

1 the names of all cross appellants."

2 Now, here again we have

3 this -- maybe it's not as big a concern here

4 as it would be in the original notice. The

5 names of all cross appellees against whom

6 relief is sought by the cross-appeal, which is

7 the same problem that we just talked about in

8 specific terms. And the rest of the paragraph

9 talks about the mechanics. The last sentence,

10 "Failure to name any party to the trial

11 court's judgment in the notice shall not

12 affect the cross-appeal with respect to

13 parties named," you know, corresponds to some

14 of what the other notice was about; but really

15 we have a mechanism for doing a cross, for

16 starting a cross-appeal when a cross-appeal

17 would be required by the Rules or the existing

18 case law. Is that fairly stated?

19 HONORABLE C. A. GUITTARD: I

20 would simply add there that so far as a

21 cross-appeal against an appellant is concerned

22 I think we're simply stating what the law is

23 as it finally turned out under the Donworth

24 case. There has been considerable concern and

25 confusion as to whether a party who files a

1 cross-appeal has to go through the whole
2 process of filing or perfecting an appeal; and
3 we're saying that as against the appellant he
4 doesn't have to do that. Now, there is still
5 uncertainty as to what he has to do if he
6 brings in some party if he seeks relief
7 against some party other than the appellant.
8 Does he have to go through the whole process
9 and get a whole new record and all that sort
10 of thing? We're providing here that a cross
11 appellant would only have to add such portions
12 of the record as in addition to the original
13 record that would be necessary to support his
14 cross-appeal. We wouldn't have to go through
15 the whole process, but simply would add the
16 portions of the record that he needs.
17 PROFESSOR DORSANEO: I think
18 fairly stated the existing rules contemplate
19 mostly that there will not be the perfection
20 of a cross-appeal; and then when a
21 cross-appeal is required to be perfected the
22 existing Rules get very unclear about what
23 else you have to do when you're the cross
24 appellant, because that's not really supposed
25 to happen.

1 MS. DUNCAN: I believe this
2 has the same problem as the previous Rule we
3 discussed. In my view it is the judgment of
4 the trial court that's on appeal, not any
5 particular party; and I in my view if an
6 appellee wants to file cross points as against
7 another appellee, he/she/it should be able to
8 do so without having to separately perfect an
9 appeal.
10 PROFESSOR DORSANEO: What are
11 you saying? You would like the first sentence
12 only. But would you like to take as against
13 anyone?
14 MS. DUNCAN: I would take the
15 first sentence and simply strike the rest of
16 the paragraph and strike in the first sentence
17 "as against the appellant."
18 PROFESSOR DORSANEO: Yes.
19 MS. DUNCAN: Everything from
20 there.
21 PROFESSOR DORSANEO: And what
22 it would mean to strike "as against the
23 appellant" would be that you could seek relief
24 from anyone in your appellee's brief; and that
25 is a similar issue. Now, one way to deal

1 with, one kind of semi-compromise would
2 require a cross-appeal notice that wouldn't
3 name the cross appellees.
4 MS. SWEENEY: Say that again,
5 please.
6 CHAIRMAN SOULES: Rusty
7 McMains.
8 MR. MCMAINS: I think it is
9 partly the same problem, but there is an
10 additional problem again depending if you're
11 dealing with complex litigation, in that there
12 may be multiple claims tried. You may have an
13 appealing party who loses only one set of
14 claims that would involve only some of the
15 parties and therefore files a notice of
16 limitation of appeal; as I understand where
17 we're heading, if they file a notice of appeal
18 and a notice of limitation of appeal. But
19 then you're obligated to file a cross notice
20 of appeal if you're one of the parties
21 obviously to that claim and you want to expand
22 the appeal maybe to one of your claims.
23 The problem I have is that
24 suppose that you don't include other people
25 and there are other people who unless you

1 appeal, in other words, it's kind of a
2 progressive thing, because depending upon
3 whether you file a notice of cross-appeal
4 somebody else may not particularly be
5 interested. They may be perfectly satisfied
6 with the limitation to appeal in other words,
7 and there is no similar provision that
8 basically gives any additional time for people
9 who may be implicated in the cross-appeal to
10 do anything else to perfect their rights. And
11 again, I don't know. Maybe if your purpose or
12 if the alternative about leaving who the cross
13 appellees out are means that everything else
14 is up for grabs when a notice of cross-appeal
15 is filed by anybody, which kind of is my
16 perception frankly of the current practice
17 with the appeal bond, then we don't need to
18 worry about the change.
19 But if you do have some kind
20 of limitations, then you don't have any remedy
21 in here for what happens on down the line with
22 regards to the cross-appeals. And that, do
23 you understand what I'm --
24 PROFESSOR DORSANEO: I don't
25 understand all of what you're saying. But you

1 know, from a philosophical standpoint, but a
2 pragmatic one, we have this problem of needing
3 to do something that's generically referred to
4 as a cross-appeal some of the time, and this
5 attempts to cure that problem by limiting what
6 you have to do to filing a notice in the two
7 circumstances when under existing law you have
8 to take some action. Now, it requires you to
9 do it earlier than the action you would be
10 required to take most of the time, okay.
11 Well, I want to take that back. I'm not sure
12 that's really so.
13 Unless we go to Sarah's
14 proposal which frankly would say that you just
15 don't have to cross-appeal period, something
16 like this is the only other option that I
17 see. You just either -- we have to
18 cross-appeal sometimes now, and it's unclear
19 how you do that.
20 MS. DUNCAN: Or when.
21 PROFESSOR DORSANEO: Or
22 when. That needs to be cleared up.
23 MR. MCMAINS: Why do you
24 think it's unclear? Again right now we have
25 an appeal bond practice. But basically the

1 way the Rule reads now you can't limit the
2 scope of an appeal once there is an appeal
3 unless you file a notice of limitation of
4 appeal. If you file a notice of limitation of
5 appeal, all anybody has to do is file an
6 appeal bond. That inures then that
7 everybody's benefit enlarged the scope of the
8 entire appeal to include everybody.
9 PROFESSOR DORSANEO: Well,
10 it's not clear that that is all that they have
11 to do, because they become an appellant, and
12 there is a question as to whether they need to
13 do a separate request for the statement of
14 facts, whether they're treated as an appellee
15 for those purposes or whether they have
16 separate responsibilities with respect to the
17 record. It just goes off into nowhere land.
18 You don't know what your additional
19 requirements are, because the cross-appeal is
20 treated in the Rules like the regular appeal.
21 And as to this third party, you know, as to
22 this third party that's even moreso as to the
23 relief against the person who is contrary to
24 our discussion not really an appellee as to
25 the appellant's appeal.

1 MS. DUNCAN: Well, but that's
2 my problem is that it seems to me that this
3 Rule piggybacks on the previous Rule that we
4 just defeated, because it presumes that some
5 appellees are not in fact appellees as to the
6 appellant or as to one another.
7 PROFESSOR DORSANEO: That's
8 right. To be consistent frankly we'd adopt
9 your proposal. I don't happen to like Justice
10 Ray's concurrence in Donworth or the Kilroy
11 case or the idea that you should have to
12 perfect a cross-appeal in the Court Of
13 Appeals, period. I think it's if we're not
14 going to give notice to the appellees, what's
15 the point of giving notice to these people? I
16 don't see the point. I think we'd be
17 consistent just to do what you say if we do
18 the other thing.
19 HONORABLE C. A. GUITTARD: We
20 don't have a Rule providing for cross-appeals,
21 and so that leaves a considerable
22 uncertainty.
23 PROFESSOR DORSANEO: Well,
24 what Sarah is suggesting is the other
25 philosophical alternative. I guess it would

1 even go so far, why would we have Rule
2 40(a)(5)? That's just why do we have a notice
3 of limitation of appeal? I always wondered
4 why we had that to begin with frankly. That's
5 inconsistent with the idea that you have, you
6 know, one judgment, one appeal, everything we
7 talked about.
8 MS. DUNCAN: It's also
9 extremely problematic. I was talking with
10 somebody the other day who really wanted to
11 limit the costs of an appeal and wanted to
12 appeal one discrete legal ruling, and it's
13 pretty tough to advise somebody to try to
14 limit an appeal or to file a partial
15 statements of fact in any case. I think there
16 are big risks.
17 PROFESSOR DORSANEO: As Judge
18 Guittard says, if we're going to require a
19 cross-appeal to be done in any circumstance
20 that can legitimately arise, we ought to have
21 a procedure for cross-appeal.
22 PROFESSOR ALBRIGHT: I have
23 two things. One is I think the Rule as
24 written is inconsistent because it says if
25 there is no limitation of appeal, you don't

1 have to perfect a separate appeal --
2 PROFESSOR DORSANEO: As
3 against the appellant.
4 PROFESSOR ALBRIGHT: --
5 against the appellant. But then the next
6 sentence says that you do perfect a
7 cross-appeal against the appellant.
8 PROFESSOR DORSANEO: Who files
9 a notice of appeal, notice of limitation of
10 appeal.
11 PROFESSOR CARLSON: It doesn't
12 really say that.
13 PROFESSOR ALBRIGHT: Okay. It
14 doesn't really say that. In any event --
15 PROFESSOR DORSANEO: That's
16 what it means.
17 PROFESSOR ALBRIGHT: Okay.
18 PROFESSOR DORSANEO: The two
19 sentences together mean that.
20 PROFESSOR ALBRIGHT: So I can
21 see lawyers across the land getting confused;
22 but in any event --
23 PROFESSOR DORSANEO: We can
24 clean that up. We can make that clear.
25 PROFESSOR ALBRIGHT: Right.

1 Okay. But it seems to me that what we're
2 doing here when you are filing a cross-appeal
3 you are saying "I have problems with the
4 judgment also." If it's just a two-party
5 case, you're giving notice of that to the
6 person through the brief, because you're
7 saying "I know you're going to read my brief,
8 and here are my problems with the judgment
9 anyway."
10 I think when you have the
11 multiparty situation in the situations we've
12 been talking about earlier there may be people
13 who aren't that interested in the judgment, I
14 mean, interested in the appeal, but they may
15 become interested when you file a cross-appeal
16 raising new points to say "I now have problems
17 with the judgment. Let me tell you about
18 them." It may make sense to say whenever
19 anybody is raising new -- when anybody is
20 starting to raise issues to say "I have
21 problems with the judgment and want to appeal
22 it," that you have to file a notice of
23 appeal.
24 A notice of appeal presumably
25 will be easier to do than the appeal bond

1 practice that we've been doing before. And is
2 it a real problem to say whenever you're
3 raising points whether they're cross points or
4 the original points that you just file a
5 notice of appeal that does not have to
6 identify the persons on the other side, but
7 you're just sending a notice ought to
8 everybody saying "I'm giving you notice that I
9 am appealing this judgment also"? So then
10 maybe other parties might then take notice and
11 say, "Well, maybe I need to look at what
12 points you're raising." Where if they're just
13 buried in a brief, then those other parties
14 may not even notice them.
15 JUSTICE HECHT: As I
16 understand it there are basically three
17 philosophical approaches here. One of them is
18 that if you don't like the lower court's
19 judgment, you have to take steps independently
20 to perfect your right for sanction. That's
21 the Rule in our court, and that's --
22 (At this time there was
23 a brief interruption, after which time the
24 hearing continued as follows:)
25 JUSTICE HECHT: -- the Rule

1 in our court. As I understand it that's the
2 Rule in both the intermediate appellate
3 federal appellate courts and the U.S. Supreme
4 Court.
5 There is another approach
6 which is if one guy unlocks the door,
7 everybody can go in. And both of those
8 approaches are fairly similar in the sense
9 that you're pretty clear on what you need to
10 do under most circumstances.
11 And the third approach that is
12 adopted here is that, well, under some
13 circumstances if you want to complain as
14 opposed to the appellant, then you can do so
15 without doing anything else including
16 attaching the judgment yourself. But if you
17 want to complain that vis-a-vis someone else,
18 then you have got to do anything in addition.
19 And I agree that there ought to be -- this
20 needs to be clarified, because obviously it
21 has come up to us three times, and a whole lot
22 more than that actually, because we still get
23 cases that are raising these kinds of issues.
24 But I wonder why either the first or second
25 approach isn't better.

1 MS. DUNCAN: I would like to
2 speak against the separate perfection approach
3 simply from my own perspective at the time for
4 filing a notice of appeal it is unlikely that
5 I will know whether my client should
6 independently complain of that judgment.
7 Maybe we should get rid of all appellate
8 lawyers and say "If you try the case, you have
9 to appeal it," but I think that the reality is
10 that it will be very difficult for appellate
11 lawyers to know whether to advise a client to
12 separately perfect an appeal within the time
13 provided for perfecting.
14 PROFESSOR ALBRIGHT: But
15 that's easy to take care of by just extending
16 the time for the notice to be the time for
17 filing the brief or something.
18 MS. DUNCAN: Well, but that's
19 my view of what a cross point does is that it
20 perfects an appeal to the extent one needs to
21 be perfected. And from my perspective if I'm
22 required to separately perfect as an appellee,
23 I think what that will mean in practice is
24 that I will separately perfect for every
25 client in every case so that I preserve the

1 right to raise my cross points against other
2 appellees, which I may not, probably won't
3 know until I've read the complete statement of
4 facts and probably spent two weeks working on
5 the brief.
6 CHAIRMAN SOULES: Let me see if
7 there is maybe a division of what the real
8 issues may be. One is perhaps that everybody
9 is willing to stand by, and if nobody else
10 appeals, it's okay. But if somebody appeals,
11 then they'll want to be heard. So right now
12 as I understand it, the Rules, you can't take
13 that risk, so somebody has to perfect because
14 they're afraid somebody else is going to
15 perfect and they want to be sure they're
16 heard, so you get momentum going to have an
17 appeal that no one might take if everybody
18 just let well enough alone.
19 Then you've got this second
20 piece. Well, then there's a daisy chain.
21 Until somebody feels they're affected should
22 they ever have to become involved? The first
23 portion of that, that could be fixed by just
24 saying that if somebody perfects an appeal,
25 that within a certain number of days any other

1 party could also perfect an appeal. Then if
2 everybody is just trying to be bystanders but
3 afraid to be a bystander, you could bystand
4 until the time to perfect the appeal goes by,
5 and if nobody has done it, then you're happy.
6 And if somebody does do it, you're not out of
7 court.
8 To go beyond that and to get
9 into the daisy chain, "Well I'm not going to
10 get involved until I feel like somebody is
11 threatening me" may be a second phase that we
12 may not have to address or may not want to
13 address; but the first part may be something
14 to address separately.
15 MR. ORSINGER: I would like to
16 find out if there is anyone that has a strong
17 opposition to the second alternative that
18 Justice Hecht proposed which is that if one
19 person opens the door, anybody can walk in.
20 CHAIRMAN SOULES: Later.
21 MR. ORSINGER: I'm not sure I
22 see the injustice in that. People may decide
23 to walk in or not depending on what the first
24 brief says; and we're forcing them to take the
25 position on whether they are challenging the

1 judgment or not before they know for sure
2 exactly what is on the plate, and I'm not sure
3 I see the injustice of saying that if anybody
4 is going to fool with the judgment, then
5 everybody who is touched by the judgment can
6 then respond in whatever way they think is
7 appropriate. That seems fair to me, and I'm
8 not sure that I see the public policy that
9 militates against that.
10 MS. DUNCAN: I would also
11 point out that there is a big difference
12 between appealing to the Court Of Appeals and
13 going from by application the Court Of Appeals
14 to the Supreme Court. By the time an opinion
15 is issued by the Court Of Appeals most people
16 have a pretty good idea about what is on the
17 plate; but going from the trial court to the
18 Court Of Appeals everything is open at least
19 to the appellant as things now stand.
20 JUSTICE HECHT: It looks to me
21 like a party can look at the judgment, and he
22 either likes it or he doesn't. And if you
23 have got half a loaf, which may be the case,
24 so you sort of like it, but he sort of don't.
25 And if somebody else is going for the whole

1 loaf, he had just as soon go for it too. But
2 you could do one of the two approaches here.
3 Either you can file a notice within the 10
4 days later, or file it at the same time. But
5 if you wait until you see the brief, then
6 basically the whole thing will always be up
7 for grabs, and there won't be any limitation.
8 There won't be any parameters around an appeal
9 until you get the opinion basically.
10 MS. DUNCAN: But in a
11 multi-party case why would every appellee not
12 file a notice of appeal to preserve whatever
13 rights they may have under this judgment or
14 want in the event that there is a modification
15 of that judgment? Why wouldn't everybody just
16 always file a notice of appeal?
17 JUSTICE HECHT: If you like
18 it, you can say anything in defense of it
19 without ever filing a notice of appeal.
20 CHAIRMAN SOULES: Maybe the
21 issue is when should a cross appellant have to
22 opt in to being an appellant. Now, you've got
23 to opt in when everybody else has to perfect
24 their appeals, if I understand this.
25 MR. ORSINGER: Not as against

1 the appellant; but as against other parties,
2 yes.
3 CHAIRMAN SOULES: Unless there
4 is a limited appeal.
5 MR. ORSINGER: (Nods
6 affirmatively.)
7 CHAIRMAN SOULES: Now, if
8 there were a period of time after the first
9 party perfection of appeal when any other
10 party could opt in basically if there is going
11 to be no appeal, we're happy. But if there is
12 going to be some appeal, we want to be heard.
13 That's one point in time, which is what
14 Justice Hecht suggested. It might be 10 days
15 or some other period of time that this
16 Committee decides to be fair after the first
17 appeal is perfected, first party perfection of
18 appeal.
19 The other beyond that the
20 opt-in period would be whenever you see a
21 brief and you think you ought to be an
22 appellant which is not fixed, but maybe could
23 be given some definition. I'm not saying it
24 couldn't. Is there any sympathy one way or
25 the other as to if we're going to have an

1 opt-in period, should it be some arbitrary
2 number of days after appeal is perfected by
3 one party, or should it be later based on some
4 other standard? Is that enough for people to
5 make a decision?
6 Those who feel that if there
7 is going to be an opt-in period after one
8 party perfects an appeal, those who feel it
9 should be an arbitrary number of days after
10 the initial appeal is perfected show by
11 hands. And then I'm go to ask those who feel
12 it should be keyed to something else. No one
13 feels it should be an arbitrary number of
14 days. How many feel it should be keyed to
15 some other activity in the appeal other than
16 just filing a notice of appeal by the first
17 party? All right. I can't say it.
18 MR. ORSINGER: Let me make a
19 proposal.
20 CHAIRMAN SOULES: I can't say
21 it.
22 MR. ORSINGER: My proposal
23 would be that anyone can opt in whenever they
24 want, and my proposal would include after you
25 see the Court Of Appeals opinion.

1 PROFESSOR DORSANEO: Ah.
2 CHAIRMAN SOULES: How many in
3 favor of that? How many favor leaving the law
4 the way it is?
5 MR. ORSINGER: Nobody knows
6 what that is.
7 PROFESSOR DORSANEO: We
8 actually we have thought about this, and we
9 have in the Briefing Rules a provision for an
10 intervening appellee; and we also have a
11 provision that is similar to what you're
12 talking about under limited circumstances when
13 you find out, when you read that and say "Ah,
14 they weren't supposed to be able to do that to
15 me because I wasn't there."
16 MS. DUNCAN: But in large
17 measure those amendments, proposed amendments
18 came about because of the requirement that you
19 name the parties against whom you're seeking
20 relief in your notice of appeal or cross
21 notice of appeal.
22 PROFESSOR DORSANEO: This
23 isn't the same issue.
24 CHAIRMAN SOULES: Can anybody
25 articulate to me what it is they're trying to

1 fix here?

2 PROFESSOR CARLSON: Yes. I

3 think what we're dealing with is just a

4 question of whether or not a party who is

5 seeking a more favorable judgment on appeal

6 has to give notice that they're going to do

7 that, a more favorable judgment. Not that I

8 want to defend the judgment, but I want

9 something better.

10 JUSTICE HECHT: There are

11 basically two ideas. One is, yes, if you

12 don't like the judgment, either absolutely or

13 conditioned on what the other side may do,

14 then you've got to file a notice of appeal,

15 which is the Rule as I understand it in

16 Federal Court. Or, no, if somebody files an

17 appeal, then everybody else can do what they

18 want to without doing anything else as it

19 appears to them as the case proceeds, or then

20 some limitation as is proposed here between

21 people who are not already appellants or

22 whatever.

23 PROFESSOR DORSANEO: Unless,

24 it seems to me, unless we're going to require

25 the notice to say something that would be of

1 use to someone, and it would just be a
2 formality.
3 PROFESSOR CARLSON: You mean
4 the notice of appeal.
5 PROFESSOR DORSANEO: Or the
6 notice of cross-appeal.
7 PROFESSOR CARLSON: Or notice
8 of cross-appeal.
9 PROFESSOR DORSANEO: If you
10 have to file one because of what you may say
11 or may not say later.
12 PROFESSOR CARLSON: I see.
13 PROFESSOR DORSANEO: That's
14 just a formality. I'm opposed to it if it's
15 merely a formality.
16 JUSTICE HECHT: You are cut
17 off. If you don't file a notice, then you
18 cannot attack the judgment. You can support
19 the judgment any way you want to. You can
20 make arguments, even arguments that are not in
21 response to new things that the appellant has
22 brought up, but you cannot get more from the
23 judgment than you got already.
24 If you want more, you've got
25 to file a notice of appeal, and then after the

1 smoke clears the advantage is that everybody
2 knows these people are trying to get more and
3 these people are not.
4 PROFESSOR DORSANEO: At least
5 we know who the appellants are, right?
6 JUSTICE HECHT: Right.
7 MR. ORSINGER: There are so
8 many things that come to mind. But what do
9 you do if you're satisfied with the judgment
10 as written; but if it's reversed, then you
11 have a complaint that you would like heard.
12 Then you would be forced to file a conditional
13 notice, if you will, and what I see as a
14 replay of our debate an hour or two ago where
15 everyone out of caution is going to have to
16 file a notice of appeal in a multi-party case
17 out of fear that something is going to happen,
18 and then everybody files one and doesn't say
19 anything other than that I'm a player in this
20 game, and nobody even knows what the game is
21 at the time they make that decision, and we're
22 right where we are today only we have a bunch
23 of notices on file instead of waiting to see
24 the briefs and finding out what people's
25 positions are. What have we accomplished by

1 doing that?

2 JUSTICE HECHT: First of all,

3 I don't think it will happen, because it

4 doesn't happen in our court. We do get

5 conditional applications, but they are

6 not -- they are a small percent of the cases

7 that we get. But people do file conditional

8 applications and they say "We like the Court

9 Of Appeals judgment just fine, but if you

10 start monkeying with it, then we want more."

11 And but that's not that much of the time.

12 Secondly, I think what you

13 gain is exactly what Bill said a minute ago.

14 At least you know who the appellants are. And

15 there will be cases I think when multiple

16 parties will out of an abundance of caution

17 file a notice of appeal, but more the

18 prevalent circumstance will be that you will

19 have a good idea when 15 days or 25 days at

20 the most are up, that these are the appellants

21 and these people like the judgment just fine.

22 One of the arguments against

23 that in the past has been, "Well, but the

24 appellant has a special duty to get the record

25 together and do other things to further the

1 appeal along." And to some extent that's
2 modified by the Rules changes that we have
3 here already, but it may not be modified
4 enough. I don't think there ought to be any
5 group identification effort. Now, that has
6 the advantage of making the same Rule up and
7 down the system of both levels of appeal.
8 It seems to me that we could
9 just as well decide that if one person
10 perfects an appeal, then the other people can
11 say what they want to. I do think however it
12 is pretty unworkable to have that going on
13 throughout the perfecting period, because you
14 won't even know as you're filing briefs who is
15 going to respond to it. There will be reply
16 briefs to people that have intervened. And I
17 mean it seems to me there ought to be more
18 formality at that point.
19 MR. MCMAINS: I am slightly
20 troubled by the suggestion that you will know
21 who the appellant is by the filing of a notice
22 of appeal, because I perceive a change here
23 that we haven't discussed. My current view of
24 the law is that if you do not have a
25 limitation of the scope of appeal and somebody

1 perfects an appeal, anybody is an appellant,
2 that is, it inures to the benefit of
3 everybody. Not everybody has to turn around
4 and file an appeal bond obviously.
5 Are you now suggesting that
6 the way that the Rule is being drafted,
7 apparently not from here, but it must be from
8 the perfection stuff we haven't gotten to,
9 that if anybody wants to appeal, they've got
10 to file a notice of appeal, because that's
11 what I am hearing. If the suggestion is that
12 in order to get in the door that the notice of
13 appeal must be filed on behalf of that party
14 in particular and no other -- and any party
15 who wants to appeal had better let them know
16 right now, that's a major change in my
17 judgment from the current practice which is
18 that the appeal bond serves to let everybody
19 know that the case is on appeal and anybody
20 could be appellants.
21 Now, obviously there generally
22 are people who are taking the lead, but you
23 have different people that can be appellants.
24 This is a big change to say that you have to
25 let them know that you're going to appeal

1 right now and that does not inure to the
2 benefit of everybody else, if that's what I
3 understand Justice Hecht and Bill to be
4 suggesting is accomplished.
5 I personally don't think it's
6 accomplished by these succession of Rules
7 we've just dealt with. It may be in the
8 perfection Rules which says you can't appeal
9 if you yourself haven't filed a notice of
10 appeal.
11 PROFESSOR DORSANEO: In some
12 respects it's just what you call it. I mean,
13 you can say that everybody is an appellant if
14 you want, or you can say that everybody is an
15 appellee who is entitled by cross point to
16 seek a better judgment. I think of it more as
17 the latter rather than everybody is an
18 appellant. I just think you can attack the
19 judgment; but in terms of where you stand in
20 the briefing order and all of that or what the
21 end of your designation, how you spell the end
22 of your designation, I frankly am not so
23 sure. I suppose you could say everybody is an
24 appellant, but...
25 MS. DUNCAN: Not everybody is

1 going to be an appellant. Everybody may be a
2 potential appellant.
3 PROFESSOR DORSANEO: I think
4 it's fair to say that if somebody perfects the
5 appeal, then anybody aggrieved by the judgment
6 then assuming the other prerequisites are
7 satisfied can file a brief. I have never
8 really thought about anybody who didn't
9 perfect the appeal filing the appellant's
10 brief.
11 MR. ORSINGER: There is no way
12 to know right now for sure the first person
13 who files the bond is the only appellant.
14 Technically three people could file
15 appellant's briefs based on one appellant's
16 bond. The Rules don't prohibit that.
17 PROFESSOR DORSANEO: I don't
18 think that's right. I think technically you
19 end up being an appellee.
20 MR. ORSINGER: The first
21 person who files the bond is the appellant
22 under the current Rules? Is that what you're
23 saying?
24 PROFESSOR DORSANEO: I don't
25 think that's clear.

1 HONORABLE C. A. GUITTARD:
2 Anybody that is an appellant has to file a
3 bond under current Rule, doesn't he?
4 PROFESSOR DORSANEO: The
5 person who perfects the appeal has to file a
6 bond, but I don't think there is any -- just
7 normally that person stays to be the
8 appellant.
9 MR. ORSINGER: But if there
10 are three people that file bonds --
11 PROFESSOR DORSANEO: I'm not
12 sure how that works out.
13 MR. ORSINGER: -- they can all
14 file appellant's briefs.
15 HONORABLE C. A. GUITTARD:
16 Sure.
17 JUSTICE HECHT: To respond to
18 Rusty, I think he has accurately perceived the
19 differing suggestions. It would be a radical
20 change in the appeal procedure of the Court Of
21 Appeals to go to a system where everybody who
22 does not like the judgment has to file a
23 notice. That is not my understanding of the
24 law now, and that would be a radical change.
25 Generally speaking I think Rusty is right that

1 the law now is that if one person files a
2 notice of appeal, other people can attack the
3 judgment at least vis-a-vis the person who
4 appealed. And with what the Rule attempts to
5 deal with is what about vis-a-vis the people
6 who didn't appeal? And I do think that that
7 needs to be clarified if we maintain that
8 system.
9 But the other one is a viable
10 system also because it is the one that is used
11 in all of the Federal Courts and in our Court,
12 and there is some advantage to having the same
13 system all the way through as opposed to
14 having it in every court you practice in
15 except the Texas Court Of Appeals; but there
16 are disadvantages to it.
17 MS. DUNCAN: Frankly that's
18 one of the few Rules in the Fifth Circuit that
19 I don't think works.
20 CHAIRMAN SOULES: What is
21 that, Sarah?
22 MS. DUNCAN: Having to file a
23 separate notice of appeal from a discrete part
24 of a judgment or a specific order. I think a
25 lot of people -- I've never personally tripped

1 up on it, but I've been involved in appeals
2 where had people been more cognizant of that
3 Rule, they would have filed a separate notice
4 of appeal and they ended up losing their
5 appeal.
6 I think it works fine for
7 courts of limited jurisdiction like the
8 Supreme Court of Texas and the Supreme Court
9 Of The United States. I don't think it works
10 well when you're working from the opinion that
11 says "Here is what is on the plate that's up
12 for grabs in the next layer of courts." I
13 don't think it works well in intermediate
14 Courts Of Appeals that are courts of general
15 jurisdiction over the entire proceeding.
16 PROFESSOR DORSANEO: My
17 attitude is that we ought to either simplify
18 the cross-appeal process. We could simply it
19 even more by not even requiring you to name
20 the cross appellees, put something else in
21 there that you're supposed to say in your
22 cross notice, or we should do away with the
23 requirement for cross-appeals all together.
24 And I think that those are the -- you know,
25 both of those attitudes come from the same

1 basic philosophy that we need to simplify the
2 system, and we either simplify the
3 cross-appeal process or do away with
4 cross-appeals as a part of the system.
5 HONORABLE C. A. GUITTARD: But
6 we have to have something to take place. We
7 have to define what a person that now wants to
8 cross-appeal, what he has to do to get his
9 relief.
10 MR. ORSINGER: The solution to
11 that is you file a brief requesting the relief
12 against the cross parties.
13 HONORABLE C. A. GUITTARD:
14 Then we ought to say that.
15 CHAIRMAN SOULES: When do you
16 file a brief?
17 MR. ORSINGER: When the
18 appellee's brief is due. That's when you have
19 to have your cross points against third
20 parties; and that's my view of what the Rules
21 are today anyway, and I don't see the
22 injustice of that.
23 MS. DUNCAN: And I think
24 that's true as to non-third parties. I think
25 the third parties right now you run a risk of

1 someone saying that you did not separately
2 perfect an appeal and you can't assert cross
3 points against somebody.
4 CHAIRMAN SOULES: Or at least
5 file an appellant's brief on the appellant's
6 briefing schedule.
7 MS. DUNCAN: If third parties
8 are truly outside.
9 MR. ORSINGER: That means you
10 have to post a bond in order to be entitled to
11 file an appellate brief, which I think is
12 right. We're substituting a notice now for
13 that.
14 CHAIRMAN SOULES: Well, if
15 Rusty is right, one cost bond perfects the
16 appeal for everybody, and there is debate
17 about that here at this table.
18 PROFESSOR DORSANEO: I'll
19 agree with Rusty on that if that does away
20 with the concurring opinion of Donworth if
21 that proves he was wrong, because I don't like
22 that, and I like that philosophy better.
23 CHAIRMAN SOULES: Then if
24 you're going to complain about some other
25 party, you need to file an appellant's brief,

1 don't you?

2 JUSTICE HECHT: That's the

3 issue.

4 CHAIRMAN SOULES: On the

5 appellant's briefing schedule.

6 MR. ORSINGER: If you're going

7 to eliminate the idea of perfecting against a

8 third party and require a notice, then even

9 appellees who want to appeal as against third

10 parties are going to be filing notices of

11 appeal and everybody is going to look like

12 they are appellants. Then I guess we'll find

13 out when the briefs hit as to whether you see

14 yourself as an appellant in the main case or

15 just an appellant in a cross-appeal, if we let

16 go of the concept of identifying someone as a

17 cross appellant only, because if we fall back

18 on a system where everybody just files notices

19 of appeal so that they can say anything about

20 anybody, no one really will know who the real

21 appellants are until --

22 MS. DUNCAN: The Fifth Circuit

23 had to pass a local Rule declaring who was

24 going to be considered the appellant for

25 everything that went after the date that the

1 cross-appeal, notice of cross-appeal was
2 filed, because there wasn't "an appellant."
3 There were "appellants," and that was
4 precisely the problem. So they had to pass a
5 local Rule saying "Under these circumstances
6 we now declare, deem this person to be the
7 appellant.
8 PROFESSOR DORSANEO: Computers
9 will do it in most of the Courts Of Appeal.
10 You'll be an appellee whether you call
11 yourself one or not.
12 MR. ORSINGER: Have we
13 simplified it if we leave ourselves in the
14 condition where there is no such thing as a
15 cross-appeal? You either file an appeal
16 notice or you don't. And if you do file one,
17 you can argue against anybody. If you don't
18 file one, you can't do anything but be an
19 appellee and support the judgment. So now the
20 response to that is everyone with even
21 conditional cross-appeal has got to file a
22 notice, and we won't find out I guess until
23 the briefing deadline passes who really thinks
24 they're an appellant and who thinks they're an
25 appellee with cross-appeal. That's where we

1 are, isn't it? And is that where we want to
2 be?
3 CHAIRMAN SOULES: Response to
4 Richard.
5 HONORABLE C. A. GUITTARD:
6 Does anybody think we just ought to forget the
7 cross-appeals and not have any Rules
8 concerning cross-appeals?
9 MR. LATTING: Where does that
10 leave us when you're asking for relief against
11 a non-appealing party?
12 MS. DUNCAN: Third party.
13 MR. LATTING: Third party.
14 PROFESSOR DORSANEO: You'd
15 have to say in these Rules what Sarah said
16 originally. Her proposal was that you can do
17 that and say in the comment that "This is
18 designed to overrule cases such as" --
19 MR. ORSINGER: But, see, the
20 problem is the third party doesn't even know
21 that they are supposed to file a responsive
22 brief until their deadline has passed, because
23 they didn't realize that appellee number one
24 was cross-appealing as to them until appellee
25 number one's brief was filed. And all of a

1 sudden they find out that somebody is
2 attacking the judgment as against them, and
3 they didn't file a response to the appellant's
4 brief because the appellant's brief didn't
5 directly affect them. They want to respond to
6 the appellee's brief which includes the
7 cross-appeal, but their briefing deadline has
8 already expired.
9 MS. DUNCAN: That's why Luke
10 and I several years ago proposed the round
11 robin briefing, and that was rejected.
12 MR. ORSINGER: The third
13 parties then can have a third deadline to
14 reply to the appellee's cross briefs.
15 CHAIRMAN SOULES: Where does
16 it end?
17 MR. LOW: What would be wrong
18 with, I mean, making a decision to start with
19 whether or not you want that judgment to stand
20 or whether or not you want it modified, make a
21 decision? All right. You don't know
22 everything. You don't know what the Court is
23 going to rule, but you're going to make a
24 decision whether you can live with it or you
25 can't. Okay. If you can't live with it, give

1 notice. You don't have to follow up if you
2 decide -- you know, they won't send you to the
3 penitentiary if you give notice and don't file
4 a brief and everything. Give notice.
5 Apparently we simplified it. All right. Now,
6 then if you do that, then you've got your
7 options open. If you don't do that, then your
8 only option is to file whatever you need to in
9 support of that judgment. Now, what's so
10 wrong and complicated about that?
11 CHAIRMAN SOULES: The only
12 trouble I have with that, and we've been face
13 to face with it a couple of times where the
14 trial is over and my client says "I can live
15 with that."
16 MR. LOW: All right.
17 CHAIRMAN SOULES: And I have
18 to say, "Yes. But you're going to have to
19 perfect an appeal by giving a cost bond,
20 because if somebody else does it, you may need
21 to have done that." So now then everybody
22 within the original dates is perfecting an
23 appeal. Now, you have got an appeal going and
24 you really don't know whether anybody is that
25 serious about it. So if you can have one

1 window that if somebody perfects the appeal,
2 anybody else can perfect the appeal within
3 some number of days thereafter, everybody may
4 let the first deadline go by. My guy would
5 have. And maybe everybody else would have
6 too, and it's over.
7 MR. LATTING: If you hadn't
8 used the term "arbitrary number of days"
9 earlier, we would have gotten some support for
10 that. You mean a "certain number of days,"
11 Luke, to give you some solidity and some
12 predictability.
13 CHAIRMAN SOULES: I'll take
14 your word you stated. State it your way.
15 MR. LATTING: "A reasonable
16 number of days."
17 CHAIRMAN SOULES: "A
18 reasonable number of days, a specific number
19 of days."
20 MR. LATTING: Yes.
21 CHAIRMAN SOULES: Okay. "A
22 specific number of days." That's the only
23 issue. And then after that anybody who wants
24 to complain about the judgment has to file an
25 appellant's brief.

1 MR. LOW: Well, then what's
2 wrong with that saying I mean that if you
3 could make a decision whether you want after
4 somebody gives notice then make them either
5 fish or cut bait, make them within two
6 weeks --
7 MR. LATTING: 20 days.
8 MR. LOW: -- or 20 days, or
9 whatever number of days you want to set. They
10 ought to be able to make a decision, because
11 we have to make decisions and set some
12 guidelines, and we can't practice law in these
13 Rules. I mean and so why not do that, the
14 suggestion I made and add 20 days?
15 PROFESSOR DORSANEO: Do what?
16 File another notice. If I get a notice, I
17 file another notice?
18 MR. LOW: No.
19 MR. LATTING: You get 20 days
20 to decide if you want to respond, if you want
21 to file your notice, yes.
22 MR. LOW: Right.
23 MS. DUNCAN: You can't even
24 get the first volume of the record in 20 days.
25 MR. LOW: It doesn't make any

1 difference. Somebody was there during the
2 trial representing your party, or he didn't
3 need a lawyer one. So they know what the
4 basics was in the record. You don't have to
5 read. Somebody knows. So you ought to be
6 able to make the decision whether you want
7 that judgment. You can read the judgment,
8 whether you want that judgment to stand or
9 not. And then if you're worried that somebody
10 else gives an appeal and you see how that may
11 affect it, then extend it 20 days to give that
12 other party a chance to give notice. And if
13 you don't do it, then all you can do is stand
14 there and say "I want this judgment
15 supported."
16 CHAIRMAN SOULES: As a
17 corollary to that that everybody who
18 files -- Party Number 1 files a notice of
19 appeal, so there is going to be an appeal.
20 Now everybody else knows there is going to be
21 an appeal. Anybody else who wants to complain
22 about the judgment has to opt in within a
23 reasonable number of, specific number of days,
24 some reasonable number of days.
25 MR. LOW: All right. Twenty

1 days.

2 CHAIRMAN SOULES: And then is

3 it a corollary that everyone who has filed

4 notice of appeal then would file an

5 appellant's brief raising whatever complaints

6 they have about the judgment, and at that

7 point then cross-appeal is unnecessary because

8 everybody who wants to complain has made all

9 their complaints, and then it's just a matter

10 of the appellee's briefs being filed in

11 response to the opening briefs?

12 MR. LOW: Right.

13 CHAIRMAN SOULES: Is that what

14 you're suggesting?

15 MR. LOW: That's what I'm

16 trying to say.

17 CHAIRMAN SOULES: Any comments

18 about that? Rusty, you had your hand up. I

19 don't know if it was about that or something

20 else.

21 MR. MCMAINS: Well, partly

22 about that. This notion that there is

23 something immutable about the trial court

24 judgment when there is an appeal going,

25 because that's what is at issue. The trial

1 court judgment may change in the Court Of
2 Appeals, and that may then necessitate other
3 things to happen, and there is simply no
4 remedy prescribed. If you don't have a
5 complaint about the judgment in the sense that
6 it doesn't give any relief against you and
7 doesn't really deny any relief you have other
8 than contingent relief, why should you be
9 obligated to ever file a notice of appeal or
10 do anything until somebody has altered the
11 judgment?
12 And our Rules say that the
13 Court Of Appeals should render the judgment
14 the trial court should have and it dates from
15 the date that the trial court should have
16 rendered it. So the trial court judgment is a
17 fluid instrument until the appeal is over, and
18 that's the concern I have about suggesting
19 that there is something immutable about the
20 trial court judgment from which you can make
21 an assessment of what your appellate position
22 is necessarily going to be. That is simply
23 not the reality.
24 CHAIRMAN SOULES: Why is that
25 a problem if we step through the process as I

1 articulated a minute ago? If one party
2 perfects, then everybody else has to file a
3 notice of appeal within a certain, within a
4 number of specific days.
5 MR. MCMAINS: If you are now
6 requiring therefore that a party appeal a
7 judgment that is not adverse to it.
8 CHAIRMAN SOULES: No. If they
9 don't have any complaint, somebody that
10 doesn't have a complaint doesn't have to
11 perfect. All they're going to be doing is
12 filing reply briefs anyway.
13 MR. ORSINGER: They might have
14 a complaint conditioned upon --
15 MR. MCMAINS: They may have a
16 complaint that's contingent --
17 MR. ORSINGER: -- what happens
18 consequently.
19 MR. MCMAINS: They've been
20 denied relief, but only relief that was
21 contingent on relief being granted against
22 them. That's what the hell most of the cross
23 actions are anyway in the practice.
24 MR. ORSINGER: And you're
25 forcing them to say "I'm in the game for the

1 main judgment" when they're only in the game
2 in case the main judgment is turned around
3 somehow.
4 MR. LOW: But if it is turned
5 around, they can file a motion for rehearing
6 to support that judgment. They can go to the
7 Supreme Court, because they've said I want the
8 judgment to stand. Whatever relief is
9 inconsistent with that judgment, then a motion
10 for rehearing or whatever, they can file, go
11 to the Supreme Court on that. You can't
12 predict what the court is going to do. I
13 think that has been evident from opinions
14 lately. But how can you -- I don't mean it in
15 a derogatory sense.
16 So how can you predict?
17 That's just a chance you take. The courts
18 have a right to set the law, but we have to
19 set some guidelines for appeal. If we sit
20 here and try to predict every little isolated
21 situation, we need to set some simple
22 guidelines. We have to predict every day what
23 we think the law is going to be when we
24 appeal. You know, are we going to win this or
25 not? So lawyers go in knowing what happened

1 in the trial court. They go in knowing what
2 the judgment is, and they should know whether
3 or not they want that judgment to stand or
4 whether they want something different.
5 Now, if the court writes an
6 opinion that alters something that's altered
7 that judgment, then they have a right to come
8 in and file whatever they need to support that
9 judgment. But if they're wanting something in
10 addition to that, they ought to give notice of
11 appeal. And it's not a complicated system.
12 CHAIRMAN SOULES: Can you
13 articulate that in the form of a motion?
14 MR. LOW: Well, Joe, you do it
15 for me. Yes, I will if I can restate it.
16 That we have a system so that the notice of
17 appeal if you want to cross-appeal, then you
18 have 20 days to file your notice of appeal
19 after the appellant has given notice. And
20 basically what I'm saying is that if you want
21 to complain of the judgment, you need to give
22 a notice of appeal or notice of cross-appeal
23 within that 20-day period, or otherwise you
24 only have a right to file whatever you deem
25 necessary and the court will allow in support

1 of the judgment or order complained of.
2 CHAIRMAN SOULES: What would
3 be the briefing schedule?
4 MR. LOW: Wait a minute.
5 Don't load me up with too much.
6 PROFESSOR DORSANEO: The
7 briefing court will take care of it.
8 MR. LOW: We'll have to get to
9 that later. I mean, I understand.
10 MR. LATTING: I second that.
11 CHAIRMAN SOULES: The motion
12 is seconded. Questions?
13 MS. DUNCAN: Will sanctions be
14 available for frivolous cross notices of
15 appeal?
16 MR. LOW: Cross notice of
17 appeal is not going to be. I mean, I don't
18 know that you're saying that you're going to
19 appeal against this or that. I think that
20 sanctions could be available if it's done for
21 some bad purpose. But how is anybody going to
22 prove that? I mean, and what's going to be
23 the effect of it? I don't know that
24 sanctions -- I think if we load this thing
25 down with sanctions, we're going to go back

1 into three days of what we went into and
2 whether --
3 MS. DUNCAN: The only reason
4 for the question is I don't mind filing a
5 one-page notice of appeal in every case that
6 I'm involved in if that's what you-all want me
7 to do as long as I'm not being expected to
8 make a very serious determination at that time
9 about whether I really seek any relief.
10 MR. LOW: If you have no
11 legitimate purpose for doing that and there is
12 no way in God's green earth that you would be
13 appealing, then yes, you ought to be
14 sanctioned. But I think the purpose is here
15 is to protect yourself and your client. And
16 the law doesn't impose sanctions for doing
17 that. You're not saying definitely that you
18 are going to appeal. What happens now if you
19 give notice of an appeal and then your client
20 comes in and says "Well, wait a minute; I
21 don't want to appeal; I want to live with this
22 judgment now; I have got this deal, and as
23 long as this is going I can't appeal"? Is
24 that something you can be sanctioned for? I
25 don't know.

1 I think you have a right to
2 abandon your appeal, and I don't think it
3 ought to be sanctioned.
4 MS. DUNCAN: That's right.
5 But that doesn't mean the appeal initially
6 wasn't frivolous, and whatever costs that were
7 incurred by the appellee --
8 MR. LOW: Appellate courts can
9 handle that. They've handled that well so
10 far; and I haven't seen that many.
11 CHAIRMAN SOULES: Okay. Those
12 in favor of what Buddy has propsoed show by
13 hands. Six. Those opposed. Nine. Okay.
14 That's defeated nine to six.
15 MS. DUNCAN: My proposal is
16 that Rule 48 cross-appeal (a), everything on
17 the third line beginning with "as against the
18 appellant" everything in the remainder of the
19 paragraph be stricken, and the purpose being
20 that once an appeal is prefected by any party
21 the entire judgment and all parties to that
22 judgment are available for appellate review in
23 the Court Of Appeals.
24 MR. LOW: Under what
25 guideslines? Appellate review which --

1 CHAIRMAN SOULES: Is there a
2 second?
3 PROFESSOR DORSANEO:
4 Seconded.
5 CHAIRMAN SOULES: Moved and
6 second. Questions.
7 MR. LOW: Under what
8 guidelines, and what are you -- when I want to
9 take the cross-appeal when do I have to do
10 it?
11 MS. DUNCAN: There will be no
12 cross-appeals. There will be cross
13 applications and conditional applications in
14 the Supreme Court, but as far as the Court Of
15 Appeals goes there would be no cross-appeal.
16 PROFESSOR DORSANEO: Except in
17 your appellee's brief you could think of that
18 as a cross-appeal.
19 MS. DUNCAN: Yes.
20 PROFESSOR DORSANEO: You would
21 cross point against the appellant and cross
22 point against somebody the appellant didn't
23 name as an appellee in the appellant's brief.
24 You would in effect use your appellee's brief
25 to given notice to a specific person that

1 you're after them and they would have time to
2 defend themselves.
3 MR. LOW: In other words, to
4 change the judgment now. It's not just
5 to --
6 PROFESSOR DORSANEO: Yes.
7 MR. LOW: -- affirm the
8 judgment change.
9 MR. YELENOSKY: I don't know
10 if this is a friendly amendment or a separate
11 issue we can discuss. But Bill Dorsaneo
12 earlier suggested that maybe we don't need
13 notice of limitation of appeals; and I haven't
14 heard if somebody has a reason why we need
15 that. If not, can we eliminate that from it
16 as well?
17 PROFESSOR DORSANEO: That
18 would be next, Steve.
19 MR. YELENOSKY: Okay.
20 PROFESSOR DORSANEO: If the
21 people like this, they should like that.
22 MR. YELENOSKY: Yes. That's
23 what I think. That's why I'm proposing an
24 amendment, but we can do it separately.
25 CHAIRMAN SOULES: Okay. It's

1 been moved and seconded that we retain, take
2 40a as proposed on page 38 and 39, and that we
3 adopt --
4 MS. DUNCAN: It will have to
5 be a little modified.
6 CHAIRMAN SOULES: That we
7 adopt just the first part of it that says
8 "Unless the appeal is limited in accordance
9 with Rule 40(a)(5) an appellee may file
10 cross points in his brief complaining of any
11 ruling or actions of the trial court without
12 perfecting a separate appeal." And then that
13 ends 40a.
14 HONORABLE C. A. GUITTARD: Let
15 me ask a question.
16 CHAIRMAN SOULES: Is that the
17 motion?
18 JUSTICE HECHT: That's the
19 motion.
20 HONORABLE C. A. GUITTARD:
21 Suppose the original appellee files a brief
22 which attacks a judgment in some different
23 respect. Then this third party who wasn't
24 affected before needs to reply to that. What
25 governs his rights? Is he like an original

1 appellee? He has to -- does he have to file
2 his brief within 25 days after this brief, or
3 how does that work?
4 MR. LATTING: He can't do it
5 in 25 days. Sarah says you can't read the
6 record in 25 days. He couldn't do it.
7 MR. ORSINGER: There is a
8 provision under Rule, the proposed new Rule 74
9 that applies to intervening appellees that
10 says, and this is structured on the idea that
11 we've named our appellees, but we changed
12 that, "Anyone who is not named as a party to
13 the appeal can file an intervening brief
14 opposing appellate relief within 30 days after
15 the filing or service of a brief requesting
16 that relief."
17 So in other words, you've
18 already written a provision here that could be
19 adapted to apply to someone who thought they
20 were on the sideline and suddenly they realize
21 they're in the game and now they have 30 days,
22 should be 25 days, to file their responsive
23 brief.
24 MR. SUSMAN: How do they know
25 they're in the game?

1 MR. ORSINGER: They've got to
2 read the briefs.
3 MR. SUSMAN: That's
4 ridiculous, isn't it? I mean, seriously. I
5 mean, I've got to go through some 55-page
6 appellate brief or appellee's brief and read
7 all the fine print to determine whether
8 something is being asserted against my
9 client. That is an utter waste of time.
10 MR. LOW: I agree.
11 MR. SUSMAN: Something should
12 be done. Why don't you send the guy a post
13 card and say "I'm after you." I mean, do
14 something. That is truly ridiculous.
15 MR. ORSINGER: You're going to
16 have to read all the briefs.
17 PROFESSOR DORSANEO: With
18 anything we've discussed that's going to be so
19 once you voted in favor of the first thing.
20 PROFESSOR ALBRIGHT: How did
21 you vote on the last one?
22 MR. SUSMAN: I didn't even
23 know what you-all were --
24 MR. LATTING: That's what we
25 just did.

1 PROFESSOR ALBRIGHT: That's
2 what just got voted down.
3 CHAIRMAN SOULES: The
4 six/three vote we just took eliminated the
5 definition of anybody -- the necessity for
6 anybody who is going to complain about a trial
7 court judgment making any complaint about that
8 until the briefs are filed.
9 MS. DUNCAN: That's the
10 status quo to a very large extent in the state
11 system.
12 MR. SUSMAN: That's okay. The
13 timing is not the problem. The problem is the
14 notice. I mean, we can deal with the timing
15 by giving the person -- I mean, shouldn't you
16 have to notify that person some way "Look at
17 footnote 13 on page 10; I'm saying something
18 about you; you know, you better read it"?
19 MS. DUNCAN: It will be a
20 cross point.
21 PROFESSOR DORSANEO: You'll
22 find it fast enough.
23 MR. SUSMAN: In other words, I
24 don't have to read the brief to find out.
25 PROFESSOR DORSANEO: Not all

1 of it.

2 MR. LOW: You have to read the

3 points.

4 CHAIRMAN SOULES: All right.

5 MR. ORSINGER: I'd like to

6 propose some clarification of the language on

7 Sarah's motion. The way it's written right

8 now "unless the appeal is limited," I think it

9 should say something like "except to the

10 extent the appeal is limited," because even

11 inside the limited appeal you have a right as

12 an appellee to file within that limited

13 appeal, but now we've changed it to where if

14 anyone limits it at all, it could be argued

15 you have to perfect to raise any arguments;

16 and I think we ought to change that "Except to

17 the extent the appeal is limited in accordance

18 with Rule 40(a)(5), then the appellee may file

19 controls points." That would permit you to

20 continue to file.

21 PROFESSOR DORSANEO: That's

22 right.

23 MR. ORSINGER: Do you see what

24 I'm saying?

25 HONORABLE C. A. GUITTARD: And

1 you still have an opportunity --

2 MR. ORSINGER: Well, that's

3 true, Justice Guittard, if we're going to

4 liberalize all this, then why do we have to --

5 CHAIRMAN SOULES: Actually

6 that language is inappropriate to the motion,

7 isn't it? Not as to the motion, because I

8 read it. What we're really trying to get at

9 is just to say "An appellee may file cross

10 points in his brief complaining of any ruling

11 or action of the trial court without

12 perfecting a separate appeal."

13 MR. YELENOSKY: That's my

14 friendly amendment.

15 MS. DUNCAN: If we are going

16 to do that, then we are moving the limited

17 appeal.

18 PROFESSOR DORSANEO: Yes.

19 MS. DUNCAN: Because with a

20 limited appeal right now if I say I am going

21 to appeal issues one, two and three, unless

22 you also file a notice of appeal, that is the

23 extent of the subject matter that can be

24 considered on appeal. So if everybody is

25 clear that's what we're doing if we take it

1 out.

2 MR. MCMAINS: That's not really

3 true though even under the current Rule. Even

4 in the Rules that we have now the notice of

5 limitation of appeal concept not only must you

6 file one, but it also must be a legitimate

7 limitation of appeal.

8 MS. DUNCAN: Right.

9 MR. MCMAINS: That is it must

10 be a severable claim.

11 PROFESSOR DORSANEO: It's a

12 particularly arcane procedure --

13 MR. MCMAINS: It doesn't

14 matter. You haven't limited it to those

15 issues anyway.

16 CHAIRMAN SOULES: Okay, only

17 one. Anna can only get one person at a time.

18 Okay. Who want's to be next? Sarah.

19 MS. DUNCAN: I was just saying

20 I think there is a very valid place for a

21 limited appeal. I just don't think we have

22 the Rules or the case law to make it work.

23 You can imagine a case in which the only

24 question is the legal issue of immunity for a

25 governmental employee, and you may not need

1 any record other than the pleadings to take
2 that issue up. You just can't do that with a
3 limited appeal now because there are too many
4 risks involved if you don't know not just the
5 standard of review, but also the scope of
6 review. So I guess what I'm suggesting is I
7 think there should be a procedure for that,
8 but I'm not sure the limited appeal is it.
9 PROFESSOR DORSANEO: I agree
10 with that. Steve said a while earlier that we
11 ought to consider whether we have this notice
12 of limitation of appeal as part of our system;
13 and the idea behind the limited appeal no
14 doubt had something to do with limiting the
15 issues, limiting the size of the record,
16 getting the thing decided on the real issue in
17 the case without spending any more resources
18 than necessary.
19 But as Sarah said, it's just
20 not what happens. The notice of limitation of
21 appeal to the extent it's used, which is not
22 very much because it's complicated to know
23 whether you can even use it, is used primarily
24 in my judgment only to impair the ability of
25 the opponent to defend itself by also

1 attacking the judgment; and I don't think that
2 it's consistent with Sarah's proposal if that
3 proposal would be adopted that we ought to
4 retain the notice of limitation of appeal
5 unless at some future time we go back and make
6 it easier to have a bonafide limited appeal
7 that is a fast-track item that's expedited and
8 inexpensive.
9 MS. DUNCAN: And this ties in
10 with one of my earlier suggestions and
11 concerns. Maybe the thing to use as a
12 replacement for a limited appeal is
13 certification of a legal ruling that you take
14 up, and then you can have judicial assurance
15 that you can do it on this record and everyone
16 will know that this is the only question that
17 will be decided in this appeal. But it's all
18 the uncertainties now that make it, as you
19 say, a procedure that only the very
20 sophisticated will use to hurt their opponent.
21 HONORABLE C. A. GUITTARD: We're
22 getting far afield from anything that our
23 Committee considered. Now, perhaps this
24 Committee is disposed to rewrite the Rules,
25 but perhaps it would be better to refer it

1 back to Bill's subcommittee for somebody to
2 work these new suggestions out and then come
3 back to this Committee with a comprehensive
4 suggestion to be made in light of the
5 decisions that the Committee makes here.
6 PROFESSOR DORSANEO: I think
7 all we need guidance on is whether we're going
8 to have Buddy's approach or Sarah's approach
9 to this whole thing, and the rest just kind of
10 writes itself.
11 CHAIRMAN SOULES: Okay. Let
12 me get a show of hands on Sarah's motion which
13 is just to have as 40a, or 40. I guess it
14 would be $40a, "Unless the appeal is limited
15 in accordance with Rule 40(a)(5), an appellant
16 may file cross points in his brief complaining
17 of any ruling or action of the trial court
18 without perfecting a separate appeal." Those
19 in favor show hands. Thirteen. Those
20 opposed. Six. Thirteen to six in favor of
21 Sarah's motion.
22 MR. LOW: Luke, would it be
23 out of order just if it would go that way, I
24 just don't think it's wrong for somebody to
25 have to -- you know before you file your brief

1 that you're going to be complaining to that
2 person. I mean, I just don't think it's
3 right. I mean, our courts have held that if
4 you have a lot of objections or something and
5 you hide the good ones with the bad, I just
6 don't think it's right to hide that point in a
7 brief, as Steve says. You ought to be able
8 to -- something ought to be given to them,
9 "Look. We're fixing to file." I don't know.
10 They ought to be told that they're fixing to
11 be affected before they just get a brief, I
12 mean, to me. But that's just my own personal
13 opinion and Susman too. Isn't that right,
14 Steve?
15 MR. SUSMAN: Uh-huh (yes).
16 MR. LOW: I knew I'd wake him
17 up.
18 MR. SUSMAN: Uh-huh (yes). If
19 Buddy says it's my opinion, it is.
20 CHAIRMAN SOULES: Okay.
21 What's next?
22 PROFESSOR DORSANEO: The next
23 thing that I think we could take up is a major
24 item. It would involve our proposal
25 concerning the record. And the main question

1 relates to the statement of facts.

2 CHAIRMAN SOULES: What page is

3 that on?

4 HONORABLE C. A. GUITTARD:

5 32.

6 PROFESSOR DORSANEO: Justice

7 Guittard said the place to start is to look on

8 page 32 of Rule 12, and I'll pass it to him

9 since he's better prepared on that aspect of

10 it, among other things.

11 HONORABLE C. A. GUITTARD: The

12 basic idea here is that the lawyer ought not

13 to have the responsibility to -- in other

14 words, it's not the lawyer's responsibility to

15 file the record. It is the court reporter's

16 responsibility to get that up, and the lawyer

17 and his client ought not to be penalized if

18 the reporter doesn't do it. So we add here a

19 provision to Rule 12, "When a notice of appeal

20 has been filed and the appellant has made a

21 proper and timely request for a statement of

22 facts and has paid the reporter's fee or made

23 satisfactory arrangements for payment, the

24 appellate court and the official court

25 reporter, rather than the parties, have

1 responsibility to see that the statement of
2 facts is filed. If a substitute reporter has
3 recorded any part of the trial or other
4 proceeding, the official reporter has the
5 responsibility to obtain from the substitute
6 reporter a transcription of such proceedings."
7 And so that then should be
8 considered in connection with the proposed
9 Rule 56 which some of the appellate clerks
10 might think is a little onerous, but it says
11 "On receiving a copy of the notice of appeal
12 from the clerk of the trial court, the
13 appellate court shall endorse on it the time
14 of receipt and determine whether it complies
15 with the requirements of Rule 40 and was filed
16 within the time prescribed by Rule 41(a)(1).
17 One of these proposals here is
18 that the appellate court has jurisdiction of
19 the case from the time of filing the notice of
20 appeal, and then it is up to the appellate
21 court clerk to ride herd on the court reporter
22 to get that record up there. This is sort of
23 an adoption of the Federal system.
24 The subdivision (c) of
25 proposed Rule 56 would say "On expiration of

1 the time for filing the transcript or
2 statement of facts without proper transcript
3 or statement of facts being filed the clerk
4 shall so notify the parties and the trial
5 judge, trial court clerk or reporter. If,
6 after 30 days from such notification no proper
7 transcript or statement of facts is received,
8 the clerk shall refer the matter to the
9 appellate court, which will make appropriate
10 order to avoid further delay and preserve the
11 rights of the parties."
12 I'm not sure that's the very
13 best solution to that, but the principle is
14 that the appellate court should take the case
15 in hand from the time of the filing notice of
16 appeal and see that the official reporter and
17 the clerk of the trial court as well with
18 respect to the transcript do their duty. It
19 shouldn't be the duty of the appellant's
20 attorney to do what the official reporter and
21 the clerk ought to do.
22 So basically that would, under
23 that system then it wouldn't be necessary for
24 the appellant to file motions for extension of
25 time to file statement of facts. That ought

1 to all be taken care of within the judicial
2 system and not by the -- and it shouldn't be
3 the burden of the appellant and his attorney.
4 CHAIRMAN SOULES: As a point
5 of clarification, are you saying that the
6 clerk shall file a transcript and the court
7 reporter shall file the statement of facts?
8 HONORABLE C. A. GUITTARD:
9 That's correct.
10 CHAIRMAN SOULES: Or are they
11 both responsible for filing both?
12 HONORABLE C. A. GUITTARD:
13 No. Each is -- the clerk is responsible for
14 the transcript, and the reporter for the
15 statement of facts.
16 CHAIRMAN SOULES: Okay. Let's
17 hear from Doris. And, Justice Hecht, you had
18 something to say.
19 JUSTICE HECHT: As a further
20 point of clarification, the transcript would
21 contain photocopies of other materials that
22 are already in the original papers and are
23 part of the record. Is that right?
24 HONORABLE C. A. GUITTARD:
25 No. Our proposal is that's another change

1 that the Committee ought to pass on, that
2 instead of having the transcript consist of
3 copies of the papers, that the Federal
4 practice be adopted of just having the clerk
5 bind up the papers that are requested or that
6 are specified in Rule 51 and send them up for
7 the use of the appellate court, and when the
8 appellate court gets through with it just send
9 them back.
10 And so that's not such
11 a -- getting the clerk to do that is not very
12 expensive. It's not much of a problem. It's
13 mainly the statements of facts that is the
14 problem, and that should be the duty of the
15 official reporter.
16 CHAIRMAN SOULES: And another
17 point of clarification. Are we talking about
18 the official reporter at the time that the
19 filing is supposed to be made?
20 HONORABLE C. A. GUITTARD: I
21 guess whoever is the official reporter at the
22 time the filing should be made, right.
23 CHAIRMAN SOULES: That court
24 reporter may be gone, may not have an official
25 capacity.

1 MR. ORSINGER: May even have
2 died.
3 CHAIRMAN SOULES: Or whatever
4 reason.
5 HONORABLE C. A. GUITTARD: I
6 think maybe some more consideration ought to
7 be given to the situation where there is a
8 change in the official reporters. I think we
9 perhaps ought to make some provision for that
10 that we haven't yet addressed.
11 CHAIRMAN SOULES: There is
12 only one court reporter probably that is
13 directly in the chain of official duties, and
14 that would be the one who is of course the
15 official reporter at the time it is supposed
16 to be filed.
17 HONORABLE C. A. GUITTARD:
18 Right.
19 CHAIRMAN SOULES: If somebody
20 else is gone --
21 MR. ORSINGER: The problem is
22 the one who has to develop it is the one who
23 is gone, and that's the one who ultimately you
24 need to put in jail if they won't give you the
25 statement of facts. And so we have to be sure

1 that somehow the legal duty falls upon the one
2 really doing it so that you can put them in
3 jail if they won't.
4 CHAIRMAN SOULES: In this
5 proposal the official court reporter has the
6 responsibility to see that the substitute
7 court reporter gets the record.
8 MR. ORSINGER: But if it's the
9 previously employed court reporter who is now
10 freelancing or something like that, you don't
11 want to put the current employee in jail for
12 what the other is doing.
13 CHAIRMAN SOULES: I think what
14 we're saying is whoever, that the official
15 court reporter has the duty to get the
16 statement of facts filed and to get it done by
17 whoever took the record, and the person who
18 took the record also has the responsibility
19 for that.
20 HONORABLE C. A. GUITTARD: We
21 ought not to relieve the person that
22 transcribed it of his duties, but impose the
23 duty on the current court reporter.
24 MR. LOW: Luke, that is not a
25 problem, because if the court reporter that is

1 there can't get it done, he's going to go to
2 the judge, and the trial judge has the
3 powers. We had one in Beaumont that put the
4 guy in jail that was the reporter, wasn't the
5 official then. So he goes to the trial judge.
6 The trial judge has got a lot of powers. He
7 can get -- I mean, you know, and he's pretty
8 close to the court reporter. So the official
9 court reporter can get that done. That's not
10 a problem.
11 CHAIRMAN SOULES: Judge
12 Clinton can get it done too he told me today.
13 HONORABLE SAM H. CLINTON: The
14 only problem with that is that may be the way
15 the judges assert their responsibility, carry
16 out their responsibility in Beaumont, but our
17 experience shows that's not the way. Judges
18 in other jurisdictions neglect their
19 responsibility absolutely.
20 We've got a provision in the
21 Rules right now that makes the judges
22 responsible, the supervisors or overseers that
23 the court reporter gets the record done. And
24 except in Beaumont and maybe other similiar
25 jurisdictions we have not seen that in our

1 experience that judges are carrying out that
2 responsbility.
3 HONORABLE C. A. GUITTARD:
4 That's the reason that Rule 56 as proposed
5 would say that the appellate court has the
6 ultimate responsibility to determine what is
7 to be done if the record is not filed.
8 CHAIRMAN SOULES: Okay. We
9 may need to make some adjustments in the
10 language here to get those concepts that we've
11 just talked about clear, this language.
12 MS. LANGE: On Rule 46, the
13 trial clerk to see that its transcript is
14 sent, I don't believe any of the clerks will
15 have any problem in that. However in Rule 51
16 where we're sending copies, I think it's going
17 to add work on both the trial clerk and the
18 appellate court, expense to the appellate
19 clerk.
20 The clerks are going to have
21 to keep a copy of what was sent to begin
22 with. If the originals goes to the appellate
23 court, then the appellate court is going to
24 have to in the end send them back too, and
25 that's going to be an additional expense. In

1 the mean time the trial clerk has in other
2 matters to issue certified copies. If they
3 don't have the original, they can't do that;
4 and you're going to run into problems there.
5 When it was mentioned the
6 first time a couple of months ago I thought it
7 was a real good idea; but now that I think
8 about it and the workability of it, I don't
9 think it will, because once we get the
10 original back then we have to take the time to
11 figure out where it goes back into that
12 jacket. And like I said, I don't believe
13 you've saved anything, because we will be
14 making copies regardless, so it's easier to
15 make a copy, certify to it and send it to the
16 appeals.
17 MR. ORSINGER: Can I ask a
18 question?
19 CHAIRMAN SOULES: Yes.
20 MR. ORSINGER: Even if the law
21 doesn't require you to make a copy when you
22 send the original, you think from a
23 professional standpoint --
24 MS. LANGE: Right.
25 MR. ORSINGER: -- that all the

1 clerks are going to do it anyway?
2 MS. LANGE: Right. If it gets
3 lost, if any question comes up on a local
4 level, like I said, all the clerks will make
5 copies.
6 MS. DUNCAN: That's just a
7 question of who should bear the cost of making
8 that copy, the clerk in state or the appellate
9 clerk?
10 MS. LANGE: Well, the clerk on
11 the trial level is going to make the copy
12 anyway. Then if it goes to the appeals, I
13 don't know what they do with their final
14 ones. After a while I guess destroy them.
15 But if they have the originals, they will be
16 obligated to send it back and the cost of it,
17 and then the cost of putting back those papers
18 into. It's a lot easier to go through a file
19 and say, "Okay. I need this paper," copy it,
20 put it back and go through than to after a
21 while go in and figure out where does this
22 thing go?
23 MR. ORSINGER: Reintegrating
24 them.
25 MS. LANGE: Yes.

1 CHAIRMAN SOULES: This one
2 thing, and then we'll take a lunch break.
3 What would be wrong with just having the clerk
4 send all of the clerk's file to the appellate
5 court?
6 MR. LANGE: We get back to
7 your divorces and other problems.
8 HONORABLE SCOTT A. BRISTER:
9 What do I do with post judgment, post
10 garnishments, nunc pro tunc?
11 MS. LANGE: Let's come back to
12 this.
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CERTIFICATION OF THE HEARING OF
3 SUPREME COURT ADVISORY COMMITTEE

4

I, ANNA LOUISE RENKEN, Certified
5 Shorthand Reporter, State of Texas, hereby
certify that I reported the above hearing of
6 the Supreme Court Advisory Committe on March
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7 to computer transcription by me.
I further certify that the costs for
8 this hearing are $1090.00.

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10 CHARGED TO: Luther H. Soules, III

11

12

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14 Given under my hand and seal of office
on this the 1st day of April
15 1994.

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