BEFORE THE

SUPREME COURT ADVISORY COMMITTEE

AUSTIN, TEXAS

FEBRUARY 9, 1990

Austin, Texas

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HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 9, 1989

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B-E-F-O-R-E

LUTHER H. (LUKE) SOULES, III
CHAIRMAN

* *

SUPREME COURT:
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Justice Nathan Hecht

COURT OF CRIMINAL APPEALS:
Judge Sam Houston Clinton

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Justice David Peeples

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OTHER SPEAKERS:
Jim George
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SUPREME COURT ADVISORY COMMITTEE

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FEBRUARY 9, 1990

P R O C E E D I N G S

Friday, February 9, 1990

Morning Session

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CHAIRMAN SOULES: We are now on the record. I want to welcome everybody here today and tell you how much I appreciate your being here. Marty Swanger is here from Senator Glasgow's office. Marty is right here. Welcome to her. And she is going to be participating in this meeting and I think in future meetings as well.

I sent minutes of the August 12, 1989 meeting out with rules that we got to you after the last -- after that meeting. Does anyone have any corrections to those minutes?

Okay, all in favor of approving the minutes say "Aye". Opposed? They are approved.

Let's see, who is ready to start? We have got this situation: Justice Doggett wants to hear the discussion on the sealing of court records and on the cameras in the courtroom, those two agenda items. He is not going to be here until about 9:30. So we have got about 45 minutes here where we can take up something else. I don't want to start with the charge rules because they may take longer than that. But if somebody else has got a report that may fit into the 45 minutes we have got, why don't you volunteer. Let's see,

who is going to make David Beck's report? Steve McConnico, is he here?

MR. MORRIS: No, Steve is not here yet.

CHAIRMAN SOULES: Bill, why don't we just start with your report since you are here and go into it as much as we can, and we will stop when we have Justice Doggett here and then get back to it later. Bill's is a separate item. It is not in the agenda.

MR. DORSANEO: Does everyone have one of these then?

CHAIRMAN SOULES: These are the TRAP rules.

MR. McMAINS: Happily named.

MR. DAVIS: Luke, I have a document you sent out, the report of the advisory committee to the Supreme Court. Is this what we sent to the Court?

CHAIRMAN SOULES: Yes.

MR. DAVIS: But it doesn't include what they may have sent back.

CHAIRMAN SOULES: That is right. This went to the Court on August 25th after our August 21st meeting. This is what has happened since -- part of what has happened since.

Okay, and in the agenda, these -- let's see, a lot of these same materials start at Page 465, and I guess, go through 494. And then there is --

MR. DORSANEO: Does everybody have one of these now?

Shall I begin, Mr. Chairman?

CHAIRMAN SOULES: Yes, sir, please do. Bill Dorsaneo with a report on the TRAP rules.

TEXAS RULES OF APPELLATE PROCEDURE

Rule 100(g)

MR. DORSANEO: The little separate report dated February 6, 1990 deals with virtually all of the suggestions made principally by appellate judges concerning changes that should be considered for the Texas Rules of Appellate Procedure.

In the short period of time alotted this morning, I think we can probably take up Items Numbered 1 through 4. Basically, those are proposals that have come from the Texas Supreme Court with respect to particular problem areas in the TRAP rules. You will need to look at this little report as well as particular pages in the meeting agenda. I will identify the pages so that you can be looking at both things simultaneously.

In the agenda on Pages 777 and 778, there is a memorandum concerning Rule 100(g) or Rule 100. It may or may

not end up getting resolved by changing June. The basic problem is a simple one. At the time that Rule 21 -- 21(a), which appeared in the Texas Rules of Civil Procedure, was shifted out of Texas Rules of Civil Procedure and placed in the appellate rules, the decision was made to break that rule up such that every time there would be a need for an extension of time with respect to particular appellate action, there would be a particular subpart of the pertinent rule providing for the motion.

For example, there are particular parts of the appellate rules concerning the record that involve subparagraphs authorizing motions for extension of time. Old Rule 21(c) -- 21(a), pardon me, was a comprehensive rule which dealt with all of these problems in one wrong place in the Texas Rules of Civil Procedure.

As indicated in the memo on Page 777, 21(c) -- I guess it is 21(c), I am sorry. As indicated in the memo, there was some language in 21(c) that was deleted.

> "Any order of the Court of civil appeals granting or denying a motion for late filing of any such instruments shall be reviewable by the Supreme Court for arbitrary action or abuse of discretion."

To make a long story short, that particular

language was used by the Court in a case called Banales v. Jackson as, in part, a justification for authorizing a review by the Supreme Court before -- or different from writ of error review of a decision of court of appeals denying a motion for extension of time to file a motion for rehearing.

I guess recently -- last week was it -- a decision of the Supreme Court -- I forget the name of it -- came down and said basically the Banales v. Jackson's approach is still a viable approach, notwithstanding the nonincorporation of this particular sentence in the motion for rehearing rule.

I suppose there are two options here. My report, which unfortunately refers not to old Rule 21(c) but to 21(a), would suggest the addition of some language different from the language that used to be in 21(c), principally to try and codify, in part, Banales v. Jackson. We can either do that or something like that or just simply leave well enough alone given the last Supreme Court decision, I suppose.

CHAIRMAN SOULES: What is the recommendation?

MR. DORSANEO: Well, my recommendation would be to add this little sentence.

MR. EDGAR: Second.

CHAIRMAN SOULES: Moved and seconded. All in favor -- any discussion? All in favor say "Aye." Opposed?

Okay.

DISCUSSION

MR. McMAINS: May I ask one question? Is that dealing only with motions for rehearing?

MR. DORSANEO: Yes. The only time it would be a problem is when there is a denial of a motion of extension of time to file a motion for rehearing. Is that right, Justice Hecht?

JUSTICE HECHT: Yes, that is the specific problem.

MR. DORSANEO: And so I want advice on whether the sentence is right.

MR. EDGAR: Bill, I presume that the motion really is to add the language appearing at the bottom of this first page that you have given us as the last sentence in Rule 100(g).

MR. DORSANEO: That will work, that will be all right.

MR. EDGAR: But I mean we need to know where to put it. I presume that that is what you are doing is moving that that sentence be made the last sentence of 100(g).

MR. DORSANEO: Yes.

MR. EDGAR: That is what I thought. Okay.

CHAIRMAN SOULES: Okay, that is unanimously approved. Next?

Rule 130(c)

MR. DORSANEO: All right, the next problem -- I really want to take up Item 3, it is 130(c). It is an easier problem. Let me find that in the agenda. 569?

CHAIRMAN SOULES: Yes, 569 is 130(c).

MR. DORSANEO: Page 569, please. Thank you, gentlemen.

This is a relatively simple suggestion. Well, actually, it is on 570. A relatively simple suggestion is to let you look at what is said on 570. It speaks for itself. And I would move the adoption of the amendment proposed in the memorandum to Luke Soules from Justice Hecht.

CHAIRMAN SOULES: The motion is to change Rule 130(c) to delete the language that is stricken through on the agenda on Page 570 and add that -- that is with the gray marks over the top. Is that right?

MR. DORSANEO: Yes.

CHAIRMAN SOULES: Okay.

MR. DORSANEO: It also appears on the second page of my memo. It should be verbatim.

CHAIRMAN SOULES: Okay, second?

MR. DAVIS: Second.

CHAIRMAN SOULES: Discussion? All in favor say "Aye." Opposed? That is unanimously approved.

Rule 140

MR. DORSANEO: Let's do 140 next. 140 is on page -- I hope it is on 781 through 783. This is a proposal for a rewrite of the direct appeal rule.

As I understand it, to paraphrase the memo, the thrust of it is to make direct appeals discretionary, and also to provide a procedure for determining whether the Supreme Court has jurisdiction.

Another thing that happens along the way here in this proposal to amend Rule 140 is that the jurisdictional grounds are basically left to the statutes rather than being repeated in the rule, as they are now. I don't suppose that will cause any confusion to anyone, but it is just a thing that I wanted to mention. It doesn't look like this is intended to change the jurisdiction of the Supreme Court to consider direct appeals and appropriate cases as provided by

the Constitution and statutes. It just looks like it is meant to deal with the determination of the jurisdictional issue, except that at least there is clarification on this being a species of discretionary review like the writ of error practice rather than the way it is worded now, if I can just put it that way.

And I move the adoption of Rule 140 as proposed on Pages 782 and 783 in order to get the ball rolling, in lieu of the current Rule 140.

CHAIRMAN SOULES: Repeal the current 140 and replace it with this rule in its entirety. Is that correct?

MR. DORSANEO: Yes.

DISCUSSION

CHAIRMAN SOULES: All right. Anybody have a chance to look at that?

MR. EDGAR: Basically, what this does then, Bill, is simply eliminates reference back to the Constitution and the Legislature authorizing direct appeals and without any intended substantive changes in the rule?

MR. McMAINS: There are two changes.

JUSTICE HECHT: It makes two substantive changes. One is to make the jurisdiction discretionary so

that if the case is not important to the jurisprudence of the state or there is some other problem, then the case does not make it appropriate for the Supreme Court review, the Supreme Court would not have to take the case.

And the second is that the direct appeal practice has never been very well defined. And the way we do it, there are cases that say if you file a direct appeal in the Supreme Court and you lose on jurisdiction, you can't appeal to the Court of Appeals. You are out. You have had your bite at the apple. And that doesn't seem an appropriate disposition of the appellate issues in the case. And if the Supreme Court doesn't have jurisdiction, then surely the Court of Appeals has jurisdiction.

So what the practice is now, when you bring in a direct appeal, the clerk just receives it and gives it to one of the staff attorneys who looks it over to see if he or she thinks that you are likely to have jurisdiction, and if he or she thinks you are probably not going to have jurisdiction, they strongly suggest to you you may want to file that at the Court of Appeals. And then you sort of proceed at your own risk. But that is not a very kosher way of doing business.

Rule 140(e)

MR. DORSANEO: I didn't mention that last part. That is in (e), and that is a very significant and positive change for anyone who has had to make that choice.

DISCUSSION

MR. McMAINS: Judge, with regards to that, the only trouble I have is that it is not clear to me when you do that. The direct appeal, the last sentence says, "A direct appeal dismissed . . . shall not preclude appellant from pursuing any other appeal then available."

Now, the sentence before that says you can't do it while it is pending.

JUSTICE HECHT: Right.

MR. McMAINS: So it seems to me that that sentence should somehow be constructed in such a way where your times for pursuing another appellate remedy run from the date of the action of the Supreme Court.

CHAIRMAN SOULES: That was tolling during the (e) period?

MR. McMAINS: Right. I mean I think that is the intent, but it just says "then available." And that is

where the problems of the courts of appeals are confronted are because the interlocutory appeal rule is pretty quick. If you don't get any action within 20 days, then you are out anyway in the other area. So I mean what that really means -- is supposed to say, I think, is that it runs -- that they shall pursue it from the date of the dismissal.

Now, the next question is do you want to pursue it from the date -- you have got a problem of you say no probable jurisdiction. That means that you would then take the case. But suppose after you took it you decided that really you didn't. If your ultimate disposition were dismissal, is it the Court's inclination that they would still want you to have a right to go back even if it had already been taken, briefed, even argued, perhaps, and still send it back to the court of appeals?

JUSTICE HECHT: I don't know what the Court's feeling on it is, but I would think that is the fair way. It strikes me that it if the Supreme Court ultimately decides that they don't have jurisdiction over the appeal, particularly if there is an element of discretion in the jurisdiction, which has never been clear before. So if we are making that clear and we are saying the Supreme Court may turn you down -- and let me give you -- one example is because there are material unresolved fact questions in the appellate court that basically means all the Supreme Court is

going to do is write an advisory opinion. It can go back and be retried, the facts could all be different, and trial court could render a judgment that didn't have anything to do with the Supreme Court's opinion.

So rather than do that, we would just say no, you need to go back and try this, and then if you want a direct appeal, you can. But if along the way the Supreme Court decides that it is not going to exercise jurisdiction over this appeal, then it looks like to me that the parties ought to be able to pursue whatever rights they would otherwise have in the court of appeals, which they really don't have now.

MR. McMAINS: Now, there is another problem that I see too. Suppose that the reason it is dismissed for want of jurisdiction is because they blew the times for doing it, which means they would have blown it anyway in the court of appeals.

JUDGE HECHT: We don't want to resurrect. We don't want to resurrect --

MR. McMAINS: Because, I mean, that would be your action either way. You would dismiss it for want of jurisdiction if they tried to perfect the appeal in 30 days or 40 days or whatever, and it was late, you would still get a dismissal order. So if you revive the right of appeal based on the dismissal order that isn't really a merits type

dismissal order, that doesn't accomplish what you want here.

MR. BEARD: If you toll limitations during that time, if you haven't acted timely, you are going to be out anyway. So I think it is just phrased that limitations will be tolled during the period of time if the Supreme Court does not take jurisdiction.

MR. McMAINS: It is not limitations, you are just saying time.

CHAIRMAN SOULES: Pat Beard. Let me ask a question. There are alternatives then available whenever the direct appeal is taken. It would, of course, go to the court of appeals or go to the Supreme Court. Is it the Court's intention then that instead of having this informal process of review for jurisdiction that whenever somebody tendered a direct appeal, it is going to get filed by the clerk?

JUSTICE HECHT: It is going to be filed and the Court would proceed on it like any other case.

CHAIRMAN SOULES: What would happen if we just added these words to (e) after -- strike "then" and say "from pursuing any other appeal available at the time the direct appeal was filed.

JUDGE HECHT: It doesn't fix --

MR. McMAINS: Perfected?

JUSTICE HECHT: It doesn't fix your time.

CHAIRMAN SOULES: Well, you relate back when

you -- well, I guess does it or doesn't it? It may, but I see there is a question about it and we don't want any question.

MR. DORSANEO: It is pretty clear what we want to do. Why don't we just move the -- what we want to do is what Pat said. We want to stop the clock during the time that it is in the Supreme Court, and we could draft that. Why don't we just draft it up and take it up later.

CHAIRMAN SOULES: Okay, we will table this for the moment until we hear further from you. Bill, we will table this until we hear further from you with something in writing.

Rule 133(b)

MR. DORSANEO: Okay. The last one is on -- specific proposals on Page 584, 585. To me, this is a little more complicated.

CHAIRMAN SOULES: I am sorry, Bill, what is your page number?

MR. DORSANEO: 584, 585 really beginning in a memorandum that commenced on Page 583. And this is Item 2.

CHAIRMAN SOULES: All right. .

MR. DORSANEO: I think I will just let

Justice Hecht talk about it. It makes more sense.

JUSTICE HECHT: Well, if you noticed in the reports, I haven't counted up the last 10 years, but I sense there is an increasing number of per curiam decisions in our court, which means that case -- an application is granted and an opinion is written disposing of the merits of the case without oral argument.

We have had a Rule 133(b) in the TRAP rules in the past which basically limits the use of per curiam opinions to cases in which there is a direct conflict between the court of appeals' opinion and a Supreme Court opinion or U.S. Supreme Court opinion or a statute. And, otherwise, we grant their argument.

If you read the literature on the use of per curiam opinions by supreme courts, the primary function of them -- and I think that is probably true in our case -- is the correction of errors that seem so plain in the court of appeals' opinion that they just don't warrant hauling everybody to Austin and having 15 or 20 or 30 minutes of argument about it. Now, obviously, what seems clear to somebody may not seem so clear to somebody else, but that is the function.

Also, if we had to grant argument in all these cases which we dispose of by per curiam, then we would run out of time in the year to hear other cases that we think are

more meritorious. So it might come down to just not deciding these cases, just letting them go even though we are concerned about the results, particularly, or we are concerned about some statement and opinion. There is not a direct conflict, but it is just so plainly wrong that something ought to be said about it, but we just don't have time in the course of the year to devote to that. So that is the concern. And this is something that the Court has been thinking about for the last year and a half or so, should there be an expanded use of per curiam opinions. And I think the Court would benefit from the sense of the Committee about whether that is a good idea generally or a bad idea generally.

DISCUSSION

CHAIRMAN SOULES: Discussion.

MR. BEARD: You got any rules about dissents on per curiam?

JUSTICE HECHT: So far, the unwritten rule has been no dissents, but there have been per curiam opinions to which dissents were proposed that then got granted and just went plenary consideration.

MR. EDGAR: Somewhat cryptically, the Court

frequently says "the majority of the Court" in writing per curiam, which indicates it was not unanimous. But another concern I have had -- and I am really supporting this position -- is that it has been my understanding generally that perhaps some time per curiam opinions don't get the attention of the full Court that an opinion on application does, and consequently, statements were made in those per curiam opinions which later turned out to a create more problems than they solved. And I think this might serve to eliminate some of that problem.

JUSTICE HECHT: That is one of the problems. It takes six votes under our internal rules to grant -- to issue a per curiam opinion. So although the language says "the majority of the Court," it is not just a simple majority.

MR. ADAMS: Well, if it is such a plain error, why wouldn't it be unanimous? I mean it just seems like to me if it is something as clear as a bell, why is there going to be some problem on it?

JUSTICE HECHT: Well, as I say, hardly anything is that clear. It is just clear relative to cases that argument is granted in where there really are two very strong sides to the issue and resolution is not apparent and people haven't decided how they feel about it, as opposed to a case where the -- well, the case last week, per curiam, one

of the per curiams last week was the denial of -- the Fort Worth Court's denial of a motion for extension of time to file a motion for rehearing because the lawyer in the case was having a baby. Now, you know, that is a judgment call, but six members of the Court at least -- I don't remember how many -- but six or more members of the Court felt that it was such a clear judgement call that it should have gone in her favor rather than against. But I, you know, I suppose somebody could -- that motion was opposed in the court of appeals, and the court of appeals went the other way. So it is just a convenient way of resolving cases that the overwhelming feeling of members of the Court is that they ought to be resolved without oral arguments is what it boils down to.

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: Judge, it is on the increase that the Court has, over the years, been doing per curiam opinions with respect to denials of applications. Isn't that right?

JUSTICE HECHT: Yes.

MR. DORSANEO: It seems to me that is the initial policy choice as to whether that is a sensible way to behave because, in effect, what that means is that it will be something significant decided or written down without benefit of argument and without anybody putting their name on it.

And I suppose given the nature of review that we have now that I, on balance, would conclude that we are better off with per curiam opinions that provide guidance on the basis of six votes without benefit of oral argument than we are going the other way, and that is no guidance and no clarification of the problem. So I think this change over here to 133 is probably okay because we are talking about the denial of an application. It wouldn't even bother me if it said explicitly without argument. But I have some concern about the whole concept of determining causes without oral argument. It is kind of like whenever, and that is where I come down. I think that is a bigger question and that may -- involving other considerations, administrative costs, efficiency, and those are my thoughts on it.

MR. McMAINS: I guess what you are telling us is that it wouldn't happen, in any case, without six votes.

JUSTICE HECHT: Right, it takes six votes.

MR. SPIVEY: Can the Court get six votes on anything right now?

CHAIRMAN SOULES: Broadus Spivey.

MR. DORSANEO: I guess what I am asking, the internal operating procedure to create a nonargument docket for cases where the writ is granted.

JUSTICE HECHT: Well, I don't --

CHAIRMAN SOULES: Are we still on 133 or we

are on 170 now?

MR. DORSANEO: I am on 170, but I am wondering if the change in 170 is a larger change than the issue that involves denials of applications.

JUSTICE HECHT: Well, the Court does not generally favor the disposition of merits of any case that it is concerned about without oral argument. I mean there is no trend away from oral argument. And I think there will be a strong resistance to that, and I certainly wouldn't, because oral arguments are almost always helpful in some respects. But this is really a minor move, but because it is a sensitive area, I thought the Committee ought to express its views on it. And the minor moves are to codify what we are doing already, which is to explain the denial of an application sometimes. We are not going to take the case for whatever reason, but there is something about the court of appeals' opinion that ought not to mislead the state while we are waiting for another case to come up that says, well, we are not going to follow that.

And then the second thing is that should there be some relaxation of the direct conflict, we will, frankly, if you look in some of the per curiams, you are stretching it to find some direct conflict sometimes. But there is just a feeling that this is very plain and most -- I would say most per curiams, or seven or eight or nine votes, we just don't

ever say what the vote is in the opinion. We always say the majority.

CHAIRMAN SOULES: Let's look at 133. Now, have we had the discussion on that that everybody wanted to have? Hadley Edgar.

MR. EDGAR: I just have one question.

Justice Hecht, in view of the fact that the Government Code deals with this problem as reflected in Paragraph (b), which is to be stricken, if we strike that, is there now any conflict between its admission and the Government Code? Because I don't have the Government Code in front of me. I don't know what it says. Does the Government Code create some mandatory duty?

JUSTICE HECHT: No, this rule adds that. We have jurisdiction over cases where there is a conflict in the courts of appeals. All this really says is that we will decide those conflicts whenever they come up.

But sometimes when you have two very poor opinions unpublished in poor cases that are poorly argued and there is some kind of conflict in those two cases, there is just not -- those are not the kind of conflicts you want to resolve as opposed to direct conflicts, well written opinions and well argued cases.

MR. McMAINS: Is there a -- do you think the Court kind of -- I mean because I don't have as much problem

with it if you are talking about the fact that there are six judges that are willing to sign off on the deal, but as we note, that is nowhere casting stone. What --

JUSTICE HECHT: If we add that?

MR. McMAINS: I don't know that you need to add the section. Perhaps, if you say what some kind of a -- if there are two or more justices who want oral argument, then -- in the case -- then it would not be done. I mean have you confronted a situation where -- I mean I know you are saying that basically the Court doesn't do this if somebody wants to file a dissent or there is an agreement there won't be a dissent. I mean is that an agreement that a judge will keep quiet or --

JUSTICE HECHT: No, it is just a practice, and the only times that it has arisen, if people feel strong enough to dissent to a per curiam, then probably the case should be granted in the first place. And that is what has always happened. So the issue has never really been pressed. But there are no fault of keeping anybody silent, and I don't know even if you could.

MR. McMAINS: I don't have as much problem with the dissent notion because I think that even in a per curiam practice if you have got seven votes you ought to be able to write a per curiam, even witnesses.

CHAIRMAN SOULES: Let's get to -- we have got

to move our agenda.

MR. McMAINS: The point is it seems to me that if you just say that no cause shall be submitted without oral argument if there are two or more justices that support arguments.

JUSTICE HECHT: Could you say in Rule 170, "The Supreme Court may determine the causes should be submitted without oral argument upon vote of six members."

MR. McMAINS: That is fine.

JUSTICE HECHT: And that just establishes --

MR. DORSANEO: Let me move the adoption of the adjustment to 133 and as reflected in what Justice Hecht just said, the companion change to 170, by adding, "Without oral argument" -- what was it again?

MR. BISHOP: On vote of at least six members.

MR. DORSANEO: "On vote of at least six members."

CHAIRMAN SOULES: Any further discussion? All in favor say "Aye.

MR. TINDALL: On 133, I need to get more of an explanation again on why you are deleting (b).

JUSTICE HECHT: (b) says we shall resolve conflicts. And there are some conflicts that we don't resolve in unpublished opinions in court cases that don't amount to anything. You can imagine that there are cases

around the state, and when you are looking at all of them, sometimes you find minor conflicts that just are not the kind of thing that the Supreme Court needs to be spending its time on. And if it is a serious conflict, then we try to resolve it, but if it is just some inconsequential conflict, we don't. And this just is a rule that says we shall do it, and in practice, we are not. That is not what we are doing and probably not what we are going to do.

CHAIRMAN SOULES: Any further discussion? All in favor say "Aye." Opposed? 133 and 170, then, the Committee recommends the changes made.

MR. DORSANEO: Mr. Chairman, there is only one other matter that the Supreme Court asked about in at least the materials that I have reviewed. Let's see, it is on Page 769. I hope it is. It has to do with -- it is not. I don't know whether it is in the agenda anywhere. I can't find it.

CHAIRMAN SOULES: What is the rule number?

Rules 74 or 121

MR. DORSANEO: Well, it would be briefing Rules 74 or 121.

CHAIRMAN SOULES: 769, 779 -- about 777. No that is motion for rehearing.

MR. DORSANEO: I don't think we need to look at it. It really, basically, involves the idea of whether something more should be said in the briefing rules about the behavior of counsel attempting to avoid a page limitation by decreasing margins, putting things in appendices in order to avoid the page limitation.

No specific proposal was made, and I just put it out on the floor to advise the members of the Committee that certain members of the Court wanted advice as to whether or not something more should be done in order to tighten up the requirements.

I will speak for myself because I don't like the requirements to begin with. So I am not in favor of tightening them up.

DISCUSSION

CHAIRMAN SOULES: Why don't we just take a consensus on that? How many feel that there should be something written in the rules that puts constraints on or more --

MR. DORSANEO: Type size, margin size.

CHAIRMAN SOULES: -- guidelines on margins and page and lines and limitations or constraints on the use of appendices. How many feel that those kind of limitations should be somehow put in the rules?

MR. JONES: Mr. Chairman, could we, perhaps, get a little guidance on this from Justice Hecht before we -- my feeling is that the Court ought to do what they want to. If they get a brief up there that violates the spirit of that rule, they ought to hang, draw and quarter the fellow that filed it. They may not want to go that far.

CHAIRMAN SOULES: They have asked us what we think and that is what we are telling them.

JUSTICE HECHT: It came up in conference one day, as I recall, two judges who asked should there be some limitation. One judge was complaining that the brief filed was in such small type he couldn't read it. Of course, my answer to that is the lawyer has kind of defeated himself if he types it so small you can't read it, it is not going to get read. But clearly, should there be some kind of

mechanical font size, margin size, page size limitations.

MR. SPIVEY: I have got a problem with that, and it is personal experience. I remember many years ago when I was with Huff & Bowers, we tried and won a divorce case, Hooper v. Hooper, and it was on appeal to court of appeals. And the lawyer that prepared the appellate brief is now dead, so I can say this without fear of controversy. He filed the worst looking brief I have ever seen. It must have been typed on his own Underwood in his own hand, more misspellations, the grammar was terrible, the construction of the brief was just horrible. I read it and laughed at it. And I said, "Boy, we got this one, Forrest." He said, "Broadus, I am worried. That is a dangerous place." I said why, and he said, "Look at the last line," and it said, "The wife got 85 percent of the property and my client got 15 percent of the property and that just ain't fair," and damned if that Amarillo court didn't buy that argument and reversed us and rendered -- and it has been a lesson to me. But the lesson is more than just a disposal brief is sometimes winning is the appearance of the brief doesn't -- sometimes is deceptive of the content or the issues of justice at stake.

I am not against something of discretion where the Court can sanction a lawyer personally, but darn I hate to see a client suffer because the lawyer is guilty of poor

draftsmanship or has a new secretary who made a mistake. It seems to me that we are really invading the Supreme Court's province here, and the Supreme Court ought to be able to consider a brief, penalizing the lawyer somehow, but not the client.

MR. DAVIS: Luke, you asked for opinions, and I think the fewer rules the better. All these technical rules about how many pages or how wide the margin is, that just gets too much. We got enough to fool with now. And if we file a bad brief, I think the penalty --

CHAIRMAN SOULES: Let's take a consensus, Tom. I appreciate that. How many agree with Tom? Okay. Then the consensus is we ought to leave the briefing rules the way they are and let the Court handle it on an individual case by case basis.

CHAIRMAN SOULES: Tom Ragland.

MR. RAGLAND: If it is a concern to the Court -- and obviously it is or we wouldn't have brought it up -- perhaps some guidelines independent of the rules that would be published as recommended -- font size and all like that. With technology the way it is going now, that stuff changes so quick anyway you couldn't amend the rules quick enough to keep up.

CHAIRMAN SOULES: Okay, next item.

MR. DORSANEO: Mr. Chairman, the other items

that are dealt with in this report are proposals -- fairly numerous set of proposals made by, mainly, courts of appeals.

The subcommittee has not had the opportunity to meet and go over them. I would suggest if it is a -- it would be possible to take up one or two of the important ones if you wanted, but I would suggest that you would defer dealing with these until the members of the appellate subcommittee have had an opportunity to go through this report and evaluate what they think about the individual proposals that are organized in a way that they can be dealt with quickly. It might save the entire committee time if we did it like that and had a small subcommittee meeting to make specific recommendations on which ones deserve full Committee attention.

CHAIRMAN SOULES: When do you want me to schedule that? Sometime later in this meeting?

MR. DORSANEO: Sometime later today after we adjourn today. It probably wouldn't take us but an hour to go through this.

CHAIRMAN SOULES: Take it up first thing in the morning.

MR. DORSANEO: Yes.

CHAIRMAN SOULES: Okay, we will delay --

MR. DORSANEO: Any subcommittee members could be looking through this. What I tried to do is to identify

the recommendations, the existing rule in the rule book, and if there is one, a proposed amendment that came from our work product so far. Sometimes the proposed amendment isn't faithful to what is in the rule book. So it is necessary to look at all three of the items in order to get to the appropriate ending point.

CHAIRMAN SOULES: Let me ask you a question, Bill, before we leave the TRAP rules. Are there any other comments or criticisms from the public after the publication of our proposals that go to the proposals?

MR. DORSANEO: Yes.

CHAIRMAN SOULES: Okay, can you identify those and isolate those and take them now or do you want to wait on those as well?

MR. DORSANEO: I would prefer to wait. There is one that could be taken up and could be done quickly if we are filling time.

CHAIRMAN SOULES: I don't think it is necessary really to fill time. Steve is here. Steve, you probably could get going with yours. Okay.

MR. McCONNICO: You wanted to start on the discovery rules?

CHAIRMAN SOULES: Let's start on the discovery rules, and when Judge Doggett gets here, we will take up sealed record and cameras.

DISCOVERY RULES

Rule 166

MR. McCONNICO: Okay. Well, first, you-all excuse me, I have laryngitis a little bit. I am pretty much over it, but my voice breaks, that is it.

The first discovery rule we are looking at is 166 and that is on Page 214. Our comments on the subcommittee are on 217.

Basically, we are voting to -- we believe that 166 should be adopted the way that it is proposed except for one change, and that is in Paragraph 1. You look at Paragraph 1 on Page 214, we believe the words "or on request of any party" which are to be added now should be eliminated. If they are eliminated, this means that 166 in that paragraph will read exactly the way 166 presently reads.

The basis of why we think that should be eliminated is that it would be mandatory for the court to have a pretrial conference, and that would just add a conference to the discovery process. And there seems to be a consensus that we are having too many discovery hearings and conferences already, and it seems that the Court should only have such a conference at its own discretion and it shouldn't

be mandatory upon the request of any party. That is our first proposed change.

CHAIRMAN SOULES: Is there any opposition to that? I don't think the Committee intended for this to be mandatory when one party asks for it anyway.

Okay, there being no opposition to that, that will be unanimously recommended that those words "or on request of any party" underscored at the top part of 214 under Civil Rules 166, that be taken out, otherwise, the rule be passed as written.

MR. McCONNICO: Well, one other.

CHAIRMAN SOULES: All right.

MR. McCONNICO: That is if we turn to Paragraph (o) of the rule which appears on Page 215. And as it is written, one of the reasons to have the hearing under (o) is "The settlement of the case." And then "To aid such consideration, the court may encourage settlement."

The COAJ -- and we agree with this -- proposes that the words the Court "To aid such consideration, the court may encourage settlement," be eliminated. The basis of that is there was some written correspondence behind the COJ proposal which is included here that some people feel the trial courts have gone too far in the pretrial conferences to the point of coercion to force settlement, and we think that the trial court judges have enough discretion to encourage settlement

without having it just laid out in the rule because this could be an excuse for almost coercive forcing of settlement. So we agree that those words "To aid such consideration, the court may encourage settlement" should be eliminated.

CHAIRMAN SOULES: I don't know if you remember the discussion we had on this when it came up. David Beck and others worked on this somewhat off the record and then brought this back in. The words "To aid such consideration, the court may encourage settlement" was perceived to be a significant limitation on what the judge could do regarding settlement. And it came out of these cases where -- or opinions on the Code of Judicial Conduct that say that a Texas judge can't force a settlement, that is, a state court judge, and distinguish somewhat from the federal practice. And these words were actually put in there to indicate that all a judge could do was encourage settlement and not more.

Now, they have been perceived by the COAJ now, though, as being words that give the judge more power instead of limiting the judge's power, which was the purpose of putting them in there. They are perceived now to give broader power as we look at them -- as a COAJ looks at them after our work product is done. So I just wanted to recall our, for your benefit, our earlier meeting and why this was put there so that we don't lose that discussion. But if it didn't come up with the right result, we still need to make a

change.

Anybody else want to discuss this? Justice Hecht.

JUSTICE HECHT: Let me add to that, Luke, that we recently amended a Code of Judicial Conduct also to address this problem, and 5(e) which was the basis of these opinions that said "A trial judge cannot involve himself in settlement" has been amended to say "An active, full-time judge shall not act as an arbitrator or mediator for compensation outside the judicial system. But a judge may encourage settlement in the performance of official duties." So we hope that the problem has been taken care of there.

MR. BRANSON: I had an experience, Your Honor, six months ago where a trial court wanted the case settled and indicated the plaintiff wasn't going to get a trial setting if they didn't. Now, obviously, that is not, I guess, encouraging settlement. But from the plaintiff's standpoint, it is kind of hard to get anything done if you can't get a trial setting.

Do you perceive the Judicial Code of Conduct now to be broad enough to make that appropriate conduct by the trial court?

JUSTICE HECHT: No, we don't. I don't. And I assume that it seems like there are some cases that say if a trial judge won't set the matter for trial you can mandamus. Of course, the other side of that, who wants a mandamus

trial.

MR. O'QUINN: You may not like the trial you get.

JUSTICE HECHT: The problem that came up was, as Luke has recited, that there were two ethics committess that said judges can't do anything about settling, which the judges were saying we can't even ask them if they have settled, and that was just a misreading of the canons which were intended to say you cannot -- a full-time judge can't hire out on the side as an arbitrator. And so we try to clarify that in canvas. And I think, originally, because the Committee didn't consider it had any jurisdiction over the canon, it it tried to cure the problem in Rule 166.

CHAIRMAN SOULES: Rule 166 now says essentially the same thing that the Code of Judicial Conduct says.

JUSTICE HECHT: Yes.

CHAIRMAN SOULES: But we can delete it, that is no problem. Just raising that. Steve McConnico.

MR. McCONNICO: I think one way -- Bill suggested this. We can make even maybe the rule more consistent with the canon and the spirit of the canon is possibly to say "To aid such consideration, the court may encourage settlement but may not coerce settlement."

MR. DAVIS: Did I understand the present

language is pretty much the same as the language of the Code of Judicial Conduct?

CHAIRMAN SOULES: It is. The judge read the language. Read it again, if you will, please.

JUSTICE HECHT: "A judge may encourage settlement in the performance of official duties" is the phrase in the Code.

CHAIRMAN SOULES: This would say the same thing if we added "In the performance of official duties."

JUSTICE HECHT: That is not really appropriate in the rule because the point in the Code is you can't moonlight. The point in the rule is you ask them about settlement.

MR. DAVIS: I move we leave it like it is.

CHAIRMAN SOULES: We leave the words in here "To aid such consideration, the court may encourage settlement"?

MR. DAVIS: Right, just like it is.

MR. SPARKS (EL PASO): I second.

CHAIRMAN SOULES: Second. Further discussion? Those in favor of leaving in the recommendation of the Supreme Court, leaving in that recommendation, the words "To aid such consideration, the court may encourage settlement." Those in favor of leaving that in, show by hands -- 11. Opposed? Six. Eleven to six. We leave it in.

(At this time there was a brief discussion off the record, after which time the hearing continued as follows:)

CHAIRMAN SOULES: Okay, that fixes 166. And it is going to the Supreme Court with that one change in the very first of the rule and no others and next item.

MR. MORRIS: Could we, since Justice Doggett is here now, could we go ahead and get moving on that?

CHAIRMAN SOULES: I am sorry, I didn't see Your Honor when he came in.

MR. SPIVEY: That is all right, Luke, he will remember it the next case you have.

CHAIRMAN SOULES: Wait a minute. Okay, let's interrupt the the discovery report -- agenda report then and take up now the, in succession, two agenda items, one on sealing courts records and the other on cameras.

JUSTICE DOGGETT: I hope the camera one is shorter. Can we try and do it first?

CHAIRMAN SOULES: Sure. Justice Doggett would like to take the camera one first. Let me see where -- I have got Justice Doggett's report here, and I may not have copies.

(At this time there was a brief

discussion off the record, after which time the hearing continued as follows:)

CHAIRMAN SOULES: Has everyone now got one of these papers? It is just a three-page handout that was prepared by Justice Doggett or his staff and it is coming around. As soon as you have it, I want to ask Judge Doggett to make remarks. Okay, Justice Doggett.

CAMERAS

JUSTICE DOGGETT: Like the last item that you were considering, this comes to you as a result of some work that we have been doing on the Code of Judicial Conduct. The American Bar Association study committee recommended that the provisions concerning televising and photographing court proceedings be deleted from the Code of Judicial Conduct because it is really an administrative matter.

In December, at the same time that we made the changes that Judge Hecht was just referencing, we also voted to, in the Court, to adopt that ABA position and to delete that section from the Code, but we made the effective date for that effective at such time as the Court adopts new rules of procedure. And we are basically seeking to consult with

your Committee since this is our rules committee on this matter.

What is proposed here that I have discussed with Luke and with Judge Hecht, you have got three sheets, one the current language out of the Code of Conduct there in the middle, and on the last page, an attempt to compare that with the draft of a proposed Rule 21.

One of the questions that might be worthy of consideration in connection with this is the extent to which we govern proceedings in all courts by placing a rule solely in the Texas Rules of Appellate Procedure, whether that is the appropriate place to put it.

The proposed rule basically seeks to change to some extent the presumption of the rule that was in the canon and to outline the circumstance under which broadcasting and televising can be permitted, and does so in two different ways. One is to defer this whole issue to the Court of Criminal Appeals and the Supreme Court respectively. I think that is how most, if any, televising that results would occur is by our adopting some order, perhaps not unlike the orders that we have adopted for particular courts and particular counties for electronic recording of courts proceedings. We have no orders pending and no requests for orders, but that would be a mechanism for doing it. And the second approach is basically when everybody agrees.

We did experiment under the current rule with video recording thanks to the help of the State Bar at the arguments on the Edgewood case in our court, and I think that it is desirable to have the flexibility to have some expanded use of these devices, though I think we are far from being able to say what the specifics should be.

I also have a source witness here, Jim George with the Graves Dougherty firm here in Austin, who assisted in drafting this provision and who appeared along with other witnesses at the hearing that the Court had on your recommendations on the rules back in December. So we would invite comments and questions concerning this matter.

CHAIRMAN SOULES: Mr. George, would you like to make some remarks here to enlighten us on this from your perspective?

MR. GEORGE: Thank you. We have had some interest in this for some time. As all of you know, throughout the United States the general rule in 45 now of the 50 states, we, along with Mississippi, South Dakota and a couple of other places, are the only states in the Union that do not allow electronic or still-camera coverage of our judicial proceedings.

It has been my view, personally, that the quality of our judicial proceedings are of the highest order and that it would be helpful, not hurtful, in modern technology to

allow the public to have a little easier access to seeing what goes on in the courts rather important.

The step that we have proposed here is a modest one. It is simply to allow the Supreme Court and the Court of Criminal Appeals to come up with specific technology rules and requirements for particular courts in particular times, and to allow parties who believe that it would be appropriate, witnesses and everybody else to consent to that.

At this point, even if everybody in the case from the judge to the witnesses to the lawyers to the parties believes it is in the public interest to have a still camera in the courtroom, they can't do it. They believe they have a VCR, which we are all familiar at Christmastime, we are able to conduct our Christmas trees without serious disruption with our VCRs now, and the technology of live broadcasts on television is not any more significant than your home VCR in today's world.

So this is a modest effort to begin the process of bringing Texas in line with the vast majority of other jurisdictions that allow the public to have a greater access to the judicial process with some sort of electronic or photographic coverage.

CHAIRMAN SOULES: This, as I read it then, as I hear justice Doggett's remarks, as far as the trial is concerned, the cameras or videos would be there only when the

parties have consented and the witness who is being filmed?

MR. GEORGE: At this point, that would be allow people who -- all the participants to, if they so consent, to have it filmed or recorded electronically for reproduction or live or however they choose to do it.

JUSTICE DOGGETT: Which tracks under (b) pretty closely the provisions in the current Code of Conduct (c) taking out the requirement that nothing can be reproduced until all appeals are exhausted and the requirement would be reproduced only for instructional purposes. Under (a), the Supreme Court or Court of Criminal Appeals could take an alternate course where pursuant to some order that is adopted, those requirements would not be there. But that is all deferred to the discretion of the Court.

DISCUSSION

CHAIRMAN SOULES: Discussion. Frank Branson.

MR. BRANSON: When you leave in the requirement that you have a consent of both parties, aren't you really, for all practical purposes, making it such a rule that will never be used?

JUSTICE DOGGETT: I think that is what the current canon does, and we are really just reserving the

option. I think there are some cases where both parties would consent and desire to have, by agreement, something done. I do view (b) as being very restrictive, and I think that any major change that occurs would probably occur pursuant to some order of the Court that does not have that requirement.

These are disjunctive, and so I envision that the Court, at some future time on requests perhaps from the district judges of a particular county, might set up a demonstration project that didn't have that requirement in it.

MR. BRANSON: Would the Court like for us to take up the issue of whether that requirement should be injurious or is that something --

JUSTICE DOGGETT: Should be what?

MR. BRANSON: It should be the agreement of the parties.

JUSTICE DOGGETT: I am sure that we welcome any advice that you would have on what should go in future orders but it really is just trying to get a general framework at this time.

CHAIRMAN SOULES: Broadus Spivey.

MR. SPIVEY: I strongly suggest that Frank's suggestion be considered, and I have two specific instances in mind that I can think of where the reason for counsel or

their clients were most frivolous and the basic underlying justification was really paramount, and the judge simply refused to go along because one of the counsel didn't want it to be recorded because Edgewood example is an absolute classic case where I think the public has more interest in it than the judiciary or the bar. And the trial of a lawsuit, it just seems to me that lawyers and their clients shouldn't ex parte be allowed to turn thumbs down on the right to photograph or record proceedings, especially as Mr. George pointed out, the intervention of a video camera is practically unnoticeable today. And it seems to me if we are going to take a step, we ought to take a genuine step and take it out of the litigants' hands leaving some discretion in the Court.

JUSTICE DOGGETT: Let me just emphasize (b) is an alternative. If the Supreme Court does nothing, if the court of criminal appeals does nothing, then it would still be possible in those few cases where everyone agrees that they want to have this happen, to do it. It is an alternative until such time as the Court would take action. And it is a step forward from the current Code, though it is still very, very restricted. I don't disagree with the restrictive nature.

MR. GEORGE: Let me respond.

CHAIRMAN SOULES: Okay, Jim George.

MR. GEORGE: The judge is saying today the parties can't agree and the judge can't agree, nobody can do it world without end amen period because the Code of Judicial Conduct says you can't do it. I mean if the judge, the lawyers, the witnesses and everybody else agrees, you still can't do it today.

Now, obviously, the goal would be to bring us in line with Rhode Island and such enlightened jurisdictions as Tennessee so that we could have appropriate coverage of our judicial procedures. But, today, it seems to me the first step is to keep it from being an absolute bar to giving some control over the Court and the parties and the participants in it with the hope that soon the Supreme Court and the court of criminal appeals, or through other devices, the issue would be addressed in a way that gives it the kind of rule that virtually all other jurisdictions have.

CHAIRMAN SOULES: Sam Sparks, you had your hand up.

MR. SPARKS (EL PASO): I am going to take a immediate step, of course. I just think it is such a big distinction between the appellate process, and in the courts out in El Paso, we don't have many VCRs. We just have a bunch of people who will really disrupt.

I just got through with a circus case defending the lawyer where Tracey Scoggins is the plaintiff, and if we find

we didn't have some court orders, we would have never gotten through that lawsuit. So I still like the ability to agree, but I think there is a big, big difference, you know, on the appellate. I don't know of any reason why with the public's interest we don't have appellate arguments, but in the courtroom, I still think you have got to consider some limitations.

CHAIRMAN SOULES: Hadley Edgar.

MR. EDGAR: In principal, I certainly endorse the thrust of the proposed rule. I just have some questions, though, with one. It is placement in the rules of appellate procedure because, in part, this is directed to the trial judge, and the appellate rules do not pertain to the trial judge. And as worded then, this simply says that a trial judge may permit broadcasting in accordance with orders of the Supreme Court. And if the order of the Supreme Court sets out certain rules -- and I suppose a trial judge really doesn't have any discretion. So I question whether the rule, as worded, really carries into effect the intention of what it is intended to portray.

JUSTICE DOGGETT: That is why I want to star the question of placement at the very beginning of my remarks, and I am eager to get some comments on that.

We have a problem in that if we can't find a way to place it in the rules of appellate procedure, can we provide

any guidelines at all for criminal district courts if there is a desire to do anything in criminal district court because we don't have a procedure other than through the Legislature to amend the Code of Criminal Procedure. And that is one of the reasons Judge Hecht and I have discussed is there a place to put it that we discussed the possibility of putting it in the Rules of Appellate Procedure since there are also rules there about making a record and attempting to address it to both courts. But it still may not be appropriate. We would like a response.

MR. DORSANEO: Is that why --

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: That is why A is in here to deal with this peculiar problem that we have about rulemaking power?

JUSTICE DOGGETT: That is right. Well, it is why it is proposed as Rule 21 in the Rules of Appellate Procedure rather than as a rule to civil procedure.

MR. DORSANEO: That is why A is in there.

CHAIRMAN SOULES: John O'Quinn.

MR. O'QUINN: Good morning, Your Honor. I like the rule and favor the rule, and let me just say if somebody read it for the first time this morning, my reaction was a little bit of confusion that you may or may not want to deal with. When I read it, it sounded like the judge could

broadcast if he met (b) or if somehow Supreme Court passed orders allowing broadcasting, maybe even in trial courts.

My initial reading was that somehow the Supreme Court might issue orders of when trial judges could or could not allow broadcasting. If that is the intent, well then -- because I heard other people say that, well, this is going to be narrowly restricted only to cases in which people consent.

And so I am confused at whether it is going to be in the trial court level restricted only to cases where people consent and therefore at the appellate level that will be goverened by Supreme Court orders or whether Supreme Court orders will also broaden that in the trial court level. I don't know.

JUSTICE DOGGETT: The objective is to give the courts flexibility to set orders for trial court or appellate and different standards and perhaps even different orders for different counties depending on how the local trial judges want to handle this to deal with some of the very kind of problems that Sam was mentioning in El Paso that there are some dangers at the trial court level. And this restriction came into the Code of Conduct in the first place because of problems that had developed before current technology was available and before there was some sensitivity to disrupting the courtroom. And we want to be sure any order that we hand down that we protect against that kind of thing.

JUSTICE HECHT: Let me add to that that this has been debated for at least a decade rather seriously, and the trial judges, and probably the appellate judges, are fairly overwhelmingly against the wholesale broadcasting or allowance of cameras in the courtroom. But there is also a very substantial group who thinks that at least some allowance should be made for cameras in the courtroom, and I think at this point it is fairly clear that if the issue is all or nothing, it is going to be nothing for a long time. And so if we are going to make any inroads into allowing the camera in the courtroom, it is going to have to be done on a sort of a test basis here and there to see if all of these fears about people parading on camera and jurors going to sleep and the judge acting inappropriately are really founded. And the media editing the film for the day to make it look like something happened when it didn't are really founded fears, or if they are unfounded. And to either say, "Yes, this is just not going to work and we are going to have to go back to the old way," or "No, this works fine and let's go ahead and try it under these guidelines."

CHAIRMAN SOULES: Buddy Low.

MR. LOW: One of the problems when you put it up to the local district judge, trial judge, and he thinks we have got some people that are pretty disruptive -- we had a ceremony and the news media really interfered with the

ceremony. We allowed them in, and I mean they just kind of hogged it. Okay, all you got to do is deny a newspaper man -- I don't care what it is -- and man you are going to be written up for two weeks. Now, those local judges run. Newspapers and TVs run this country, and --

MR. O'QUINN: Amen.

MR. LOW: So they are going to continue to run it as much as we will let them run it. And you let one district judge deny them, they come in there with lights and everything like a dog and pony show and they say, "Oh, we are not disrupting anything, Judge." Let him deny it. Man, you will see editorials, you will see everything. So you got to face practicalities. If you place it on the shoulders of the trial judge, that is placing a pretty good burden.

MR. SPARKS (EL PASO): And the postscript to that is if one judge allows it, the others are under the gun daily.

CHAIRMAN SOULES: Broadus Spivey.

MR. SPIVEY: What about leaving it to the discretion of the judge, which I strongly prefer, with some guidelines, the guidelines being fairly objective because, you know, most cases it wouldn't make a darn if you transcribed the whole thing.

There are certain criminal cases where you have a undercover narcotics officer that is testifying that it is

not in the public interest to broadcast to the drug peddling community the identity of this fellow, or a child abuse case. On the other hand, it just seems to me that the public has as much right to know what is going on in that courtroom as we lawyers do.

MR. LOW: If the newspaper people would actually do something they usually don't do, and that is accurately report what is going on.

MR. SPIVEY: I can't argue with that.

CHAIRMAN SOULES: Judge Peeples.

JUSTICE PEEPLES: It needs to be stressed this is not a question of the public has a right to know because newspaper reporters and TV reporters can sit there from 8 until 6 if they want to and report it. They just can't under the present rule photograph what is happening in there during trials and recesses.

What I have seen, oh, a dozen times, you know, had media cases where they would come in in the morning, get their quote or their two-sentence story and leave. And it has been a rare reporter in my experience that has made an effort to summarize and give an accurate one minute or two minutes on TV of what really happened. They will check in at the end of the day -- "What happened, give me a quote," and that is it.

I don't know what would happen if they could take

some footage of the trial in progress, and I guess, show a witness on the six o'clock news. But, you know, we do need to remember that they are not excluded from the proceedings right now. We have got open court in every kind of case.

MR. SPIVEY: I fail to see the difference between letting them report what they want to report and letting them electronically record what they want to record.

JUSTICE PEEPLES: The difference is, I guess, showing a sentence or two of the witness' testimony. I am not sure what we gain by that.

CHAIRMAN SOULES: Doak. I am sorry, Judge, pardon me for interrupting you. I didn't mean to. Doak Bishop.

MR. BISHOP: I have a question. Has there been any serious studies in other states as to affect or impact of the camera on jurors?

MR. GEORGE: Yes, and there have been elaborate studies in California, Arizona, New York and Florida. Florida with a the pioneer jurisdiction.

In most of these states, all the states have specific rules, for example, there can be one court -- there has to be a pool camera if it is a video camera we are talking about as opposed to a still camera. The rules specify most jurisdictions the size of the camera that no increase in lighting can be done, that nobody can move the

camera except at recesses, that nobody can move in and out at the time, that mikes cannot be placed anywhere except on the counsel table and the witness stand and the podium. Those kinds of things in all of these jurisdictions.

There are rules, for example, in most jurisdictions about photographing the jury. You can't photograph the jury in most jurisdictions. It certainly, except coming in and out or a jury as a whole or as incident to filming or photographing the proceeding as a whole.

MR. BISHOP: Did any of these studies, though, look at whether this impacted on how the jurors were likely to vote on the thing?

MR. GEORGE: Yes, and the results have been universally that there is no discernible impact. The Supreme Court of the United States has had two cases which dealt with the question of deprivation of constitutional rights, and there is no evidence that it affects anything if it is done in the way that these jurisdictions have done it. And if you will turn on CNN if anybody has cable television and look on any given week, you will see that the last one I saw was -- the last two I have seen was there was a murder trial involving a police officer in Miami which CNN had hours worth of coverage of all across the country. There was a proceeding in New York involving William Hurt and his alleged marriage with some lady that was filmed in its entirety and

played throughout the country, great chuncks of it.

Those jurisdictions have the same kind of rules that I have talked about, and all the jurisdictions I have talked about have those kind of rules where there is nothing more than a camera that looks very much like the one you photograph your kids opening their Christmas presents with. It is at the back of the courtroom and it is hooked up and wired only to the mikes specified. If there are particular problems of privacy of the witness, sex crimes, other things, there are rules about you can't show the witness' face, you have got to obliterate it, that sort of thing. And the juries are so used to those kind of technology in today's world that California, Arizona, Florida and Illinois have all done two-year and one-year studies in, which they did it in separate courts, they went back and looked at the results of the trials, and they went back and interviewed witnesses and jurors and lawyers and judges and determined whether or not there is any adverse or positive impact on the quality of justice in those jurisdictions and to a jurisdiction. They have found that not only has it not been negative, it has been positive. And it seems -- I mean there is a lot of data -- there is a lot of data and a lot of evidence that that, in today's world, is no big deal and, in fact, has no adverse affects.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: Let me -- we are going to run up against our noon deadline tomorrow. This discussion is what we are not trying to put in the rules at this point, which is a detailed description of how and when. We are simply moving it out of Code because the ABA says it doesn't have anyplace in there and really, logically, it doesn't have anyplace in there. We are trying to make a way for the court of criminal appeals and the Supreme Court to experiment on a responsible basis with these kinds of problems and rules, and our principal concern is do we accomplish that if we put it in the TRAP Rule 21 because we do want it to apply to trial judges.

CHAIRMAN SOULES: Okay, Hadley and then Rusty.

MR. EDGAR: Again, coming back to that, I would recommend, Justice Hecht, that proposed Rule 21 that we have before us become Rule 21(b) of the Rules of Civil Procedure, 21(b), and that it be rephrased to read, or to simply delete "A judge may permit" and just say "broadcast televising recording so and so may be permitted under the following circumstances" and then list those and then have a rule, an additional rule, in the appellate rules authorizing the Court to issue orders concerning television broadcasting and recording.

JUSTICE HECHT: One problem with that, and that is if we take if out of the Code of Judicial Conduct and

do as you have said, then we have left out the criminal judges -- criminal trial judges. And they are no longer bound by any rule, and that is our concern.

MR. BRANSON: Could we put it both places, Your Honor?

MR. EDGAR: That still doesn't take care of the criminal judges.

MR. BRANSON: Well, if you put it in the Code of appellate conduct --

MR. McMAINS: No, no.

CHAIRMAN SOULES: Well, here, if we look at Rule 21(a), I mean this rule, what this rule does if you put it in the TRAP rules is suggest -- this Committee will be suggesting, which, of course it is the court's work product, and Justice Dogget, but in (a) that the Supreme Court or the Court of Criminal Appeals enters some orders, maybe after reading the studies that Jim George has talked about and having people study that up, and then we will work for awhile on orders directed to criminal district courts and civil district courts and other trial courts and see how they work, get some experience, and then we can write a trial rule and maybe get the Legislature to pass an amendment to the Code of Criminal Procedure. We really are not foreclosing by not putting anything in the Rules of Civil Procedure right now, and maybe we are giving both courts, I guess, equal

opportunity to experiment by collaborating between the two top appellate courts on some rules and then giving some experimentation. And that is not foreclosed, is it, by putting this in the TRAP rules? That is what we are trying to support, isn't it, judge?

JUSTICE HECHT: Yes, but we want it to be as broad as it is now which is nobody can do it, then free it up. That is what we are trying to accomplish.

CHAIRMAN SOULES: By, after some study, making an order that tells the trial judges, criminal and civil, what they can do. Is that correct?

JUSTICE HECHT: And eventually, when we figure out what all the parameters are, then we can codify all the parameters and the rules then we won't have this problem.

CHAIRMAN SOULES: We can put them in the trial rules then or trial code if it is a criminal Code.

JUSTICE HECHT: It has to bind appellate judges because it does now. The canons now bind appellate judges and trial judges at every level, and so if we move it into the appellate rules, then we covered the appellate judges. If we only move it into the civil rules, we have left out the criminal trial judges. So -- and we can't -- nobody has any jurisdiction over the Code of Criminal Procedure except the Legislature, we think. There is some little doubt been pressed about that. So clearly, do we

cover all if we put it in the appellate rules.

CHAIRMAN SOULES: It seems to me with (a) in there, you do, because then the Court would enter orders, and there have been several times over the years where practice rules have come out of the Court first in orders, for example, administrative rules were first in orders then they became administrative rules after they were worked with for awhile.

MR. LOW: If you put it in the TRAP rules, though, the trial judge is going to say it doesn't apply to him. The way it is written, it looks like it is written to apply on the others because it says "or in the case of oral argument" because the Court has -- that is about all you do in appellate court. You don't have anything else. So you just put it in the TRAP rule, a trial judge, he is going to say, "Well, I don't look to that to see what I am going to do."

CHAIRMAN SOULES: Well, let me say we have got a problem here and it is time. We are under a real tight time constraint because we have got a world of work to do. We don't have a proposed rule to go in the Rules of Civil Procedure. Let's vote today whether to put this in the TRAP rules. If somebody wants to bring a written proposal back later in this meeting, I will put it on the agenda to put it in anyplace else as well. But I don't have it in writing and

I really can't get there until I do have it in writing.

MR. EDGAR: It is redundant, admittedly, but why don't we simply put it in both places, have proposed TRAP Rule 21 and then have Rules of Civil Procedure 21(b)?

CHAIRMAN SOULES: We voted a 21(b) last time, so we already have a 21(b). It can be something else.

MR. EDGAR: 21(c) .

MR. SPARKS (SAN ANGELO): Pick another one.

CHAIRMAN SOULES: First let's have a show of hands. How many feel that we should put this in the TRAP Rules 21? Is there any opposition to that? There is no opposition to that, so that is unanimously approved or recommended.

MR. ADAMS: Let me make one suggestion, that is instead of "a judge," shouldn't it be "a court" or "all courts" or something like that, or are you going to -- you have got three judges on the court of appeals, you have got nine on the Supreme Court. Is this going to be a court decision or is it going to be one judge of a court?

CHAIRMAN SOULES: Let me get Judge Doggett's response to that.

JUSTICE DOGGETT: With reference to a trial court on appellate courts, no, the objective there subpart (2) is that it be approved by the court.

CHAIRMAN SOULES: Justice Doggett, I think he

is looking at the word "judge," the second word in the proposed rule. "A judge may permit" and wondering whether that should be changed to "A court may permit."

JUSTICE DOGGETT: Actually, we were thinking about changing it to any trial or appellate court to make it clear that we were trying to cover Judge Hecht's suggestion. That may be a good way to handle both problems.

CHAIRMAN SOULES: Any trial or appellate court. Any opposition to making that change? There is none. It will be made.

MR. BRANSON: Mr. Chairman, would it be appropriate now to consider Hadley's motion to also put it in Rule 21 with some other number on it?

MR. EDGAR: Just say "a trial court," 21(c).

CHAIRMAN SOULES: Then -- is that copier working now? Run a copy of that, if you will. Is there another copy of that handy? Hand me another one so I can mark it up maybe -- okay, here we go. All right, let me read with you on this to try to make this a new Rule 21 something.

MR. EDGAR: 21(c).

CHAIRMAN SOULES: That really doesn't fit there. That has to do with services.

MR. EDGAR: Well, 21, though, that group of rules, though, refers to proceeding rules of practice in district and county courts. In Section 1 of the general

rules, Rules 15 through 21(a), and now we have 21(b). We can't use 22 because it is already being used. So we will have to call it 21(c).

JUSTICE HECHT: What about 18?

MR. EDGAR: 18(c), 18(c).

CHAIRMAN SOULES: Okay, we are proposing a new Rule 18 small (c) to the Texas Rules of Civil Procedure, and we are going to say,

"A trial court may permit broadcasting, televising, recording or photographing of proceedings in the courtroom in the following circumstances in accordance with the orders of the Supreme Court or the Court of Criminal Appeals, or (b) when broadcasting, televising, recording or photographing and so forth."

And we will take out the little (i), just the parenthesis small (i) close parenthesis and put a period after "photographed." Because that is not concerned with oral arguments in appellate courts any longer there.

MR. SPARKS (EL PASO): You need to take the court of criminal appeals out of (a), too.

CHAIRMAN SOULES: No, not necessarily so because there used to be -- and I don't know whether it still is and I don't know how limited it is -- but there used to be in the Code of Criminal Procedure that Rules of Civil Procedure applied where they weren't inconsistent with the

Code of Criminal Procedure. It may still be there, and if it is, then the criminal courts could reach over and pick this up. If not, they can't, we haven't hurt anything, if that is all right. Rusty.

MR. McMAINS: Two comments. One, as I understand it, the current rule is that you can't do it.

JUSTICE DOGGETT: Right.

MR. McMAINS: I understand you are trying to broaden that, but you are still trying to keep can't in there, and this rule only says that you may do it. It doesn't say that he may only do it under these circumstances. Don't you want the word "only"?

JUSTICE DOGGETT: I think the word "only" would be fine. It enumerates the circumstances --

MR. McMAINS: I understand. I mean, otherwise, you would have an implication and the argument would be made.

CHAIRMAN SOULES: Okay, after the word courtroom, we will insert the word "only" in the following circumstances.

MR. McMAINS: Number two, (a), while I think I understand what the thrust of yours and the court of criminal appeals concerns are in terms of wanting to be able to promulgate collective orders for classes of cases or whatever, whenever we say in accordance with orders of the

Supreme Court or court of criminal appeals, it sounds like that somebody in a particular case can petition for that relief in some manner. I don't get the impression that that is what you want to do. I mean you don't want people -- you don't want Mr. George or anybody else filing motions with you with regard to particular cases, right? Well, I was going to say if you say orders --

JUSTICE DOGGETT: Actually, we might envision that in terms of when we would record in our own courts, but that probably would be pursuant to an order generally specifying the circumstances under which --

MR. McMAINS: I am just wondering if this rule, if it said -- I don't know if this fixes it or not -- if it is said "with orders promulgated by the Supreme Court." Would that -- because nobody moves you to promulgate anything. But if you just have a naked order, I can envision --

JUSTICE DOGGETT: I think that would be fine.

MR. McMAINS: -- ingenious people moving the court to do this just showing up with a motion.

CHAIRMAN SOULES: "Orders promulgated" or "guidelines promulgated"?

MR. McMAINS: I don't care if it says "orders" or "guidelines."

CHAIRMAN SOULES: It did occur to me when I

read this that the Court might be open to a petition from someone to order a trial judge to open the trial to cameras and --

MR. McMAINS: And I don't think that --

CHAIRMAN SOULES: -- they may get a lot of motions.

MR. McMAINS: You don't want that, though, do you, at this juncture?

JUSTICE DOGGETT: Not at this juncture. If we promulgated the guidelines and then they were ignored by a judge, then I think it would be appropriate.

MR. McMAINS: Guidelines would still be --

CHAIRMAN SOULES: We would change "in accordance with guidelines promulgated by the Supreme Court or the court of criminal appeals or by agreement or ceremonial proceedings." Now, that is 18(c). Do we need to make any of the -- any similar changes to TRAP 21? Do we want to say "in accordance with guidelines promulated by" in that rule as well? Okay, and otherwise, leave that as we voted before.

All right, all in favor of these -- I am sorry, Hadley.

MR. EDGAR: Another question arose a moment ago. Somebody called to my attention that with respect to 18(c) literally the way that would be worded is that with the

disjunctive "or" between (a) and (b), the trial court could enter orders or circumstances that might vary from any guideline promulgated by the Supreme Court or the court of criminal appeals.

CHAIRMAN SOULES: When everybody consents.

MR. EDGAR: And I certainly don't think that is the intention. So you would have to come back and amend the rule. Perhaps some thought should be given to giving the trial court or the appellate court some control over this until guidelines are promulgated by the Supreme Court of so and so. That is really what you are intending to do, I think, isn't it, Justice Doggett?

JUSTICE DOGGETT: Except there may be circumstances where we promulgate guidelines at the request of the judges of Bexar County, and there are no guidelines in Dallas County. And a given trial just with the consent of all the witnesses and all the parties wants to permit television in that circumstance, and that is what (b) is designed to do. It is an alternative.

CHAIRMAN SOULES: And it requires the consent of all the parties and the witnesses.

JUSTICE DOGGETT: So if all the parties and all the witnesses and judge does not think it is unruly or distracting, they can adopt the procedure that is different from the guidelines set down, and as I indicated, the

guidelines may not be the same for every court initially because there will be, I think, some experimentation. Actually, the guidelines Jim drafted to me originally to present to you went so far to specify the kind of camera that you could use in a courtroom in an effort to not have disruptions. So I think we would have variety across the state.

CHAIRMAN SOULES: Those in favor of new civil rule 18(c) say "Aye." Opposed? That is unanimously recommended. And we took a vote on 21 earlier and that was unanimously recommended.

Now we will take the sealing of court records up, and Lefty Morris --

MR. EDGAR: 21, as well?

CHAIRMAN SOULES: Yes, we did.

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

********** END OF TEXT **********

CHAIRMAN SOULES: We are in session, and I call on Lefty Morris to make his report on sealing court records. Lefty, you have the floor.

SEALING COURT RECORDS

MR. MORRIS: This is a pleasure I yield to Chuck Herring.

CHAIRMAN SOULES: Chuck Herring, you have the floor. It is an important report.

MR. HERRING: If everybody will come in and sit down, we will get underway. We have enjoyed working on this. Lefty and I, who is the co-chair, have enjoyed working on this. He made a mistake, though. When we got appointed as co-chairs, he said this would be an interesting little project. And it has been very interesting, but it hasn't been little at all.

The issue is the sealing of the court records, and the materials that you have before you, I think we sent out a report to each member of the Committee which I hope some of you at least brought with you. But in the packet you have today, if you will look at Page 792 and following, you will find a little memo from me and Lefty, and then there is a draft rule just to talk about on Page 797. So 792 and then

797.

I want to explain a little bit about the process and why we are here on this particular rule and then explain the draft a little bit. And then we have Tom Leatherbury here from Locke Purnell who has done a lot of the preliminary work, and we are going to let him make a few remarks as well and talk about some of the drafts.

The reason we are here is that the Legislature passed a statute which is now Section 22.010 of the Government Code which appears in the materials there, I think, on Page 792 and is one sentence long. And that is why we are dealing with this rule. The Section 22.010 says,

> "The Supreme Court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed -- whether in the interest of justice the records in a civil case, including settlements, should be sealed."

Luke appointed a subcommittee with Lefty and me as co-chairs and four other members, Justice Peeples and a couple of others. And when we had two public hearings, we had about forty people show up total at those two public hearings on November 15th and December 18th, and then the Supreme Court had its public hearing on November 30th, and we

had a couple of hours testimony. And we have received hundreds of pages of drafts and letters and law review articles and cases on this. And it has been an interesting project. It has been an evolutionary project, the draft rule that we have got, and the draft rule is the product of consensus. And probably neither evolution nor concensus leads to either literary elegance or intellectual precision, and you will see that in the rule. The rule that you have before you, the draft, it is long and it is difficult, but we will try to take you through it. It is something to talk about. Neither Lefty nor I like parts of it, but it is something to consider, and we want to key you in on some of the big issues, and I think Tom can do that as well.

The basic structure of the rule, the notion is that there is certainly a presumption that the public should have access to court records. And the rule is designed to allow procedure to put that into effect. The basic procedure is that if someone wanted to seal a court record, a motion must be filed, a written motion, notice must be given -- public notice given. There is a procedure outlining that. The public is allowed to participate to intervene for the limited purpose of participating on that motion to seal.

There is a standard set out for compelling need that must be shown if records are to be sealed. There are requirements for the order, for the duration of the order,

the contents of the order and the findings that the trial court needs to make. There is also a provision dealing with temporary emergency orders more or less tracking Rule 680, the TRO procedure. And then there are provisions dealing with continuing jurisdiction and appeal because one of the problems -- and Tom can speak to this -- one of the problems that the press has had in the past, they have not found out about sealings until after plenary jurisdiction of the trial court has expired. And that has been a major problem because we don't yet have a ruling on the merits out of Texas appellate court dealing with exactly the standard that should be applied because it has been hard to have reviewed.

We have had input from, certainly, plaintiffs lawyers, defense bar, the intellectual property bar, the family lawyers, public interest groups. All kinds of people have come before us and some of them even come out of the woodwork before us. But it has been a real interesting, interesting process.

The three cases I would like you to keep in mind as you think about the rule, the mechanics, the three kind of tough cases or paradine cases. One of them is the trade secrets case. What do you do in a case where somebody files suit to protect a trade secret or to enforce a Tort remedy for misappropriation of a trade secret? How do you handle that under this rule? Intellectual property lawyers are very

interested in this rule because of that question.

Another case is the family lawyer -- family bar has repeatedly emphasized the case of small children who perhaps have been sexually abused and who are below the age where they are aware of that, and those records, they contend, should certainly be sealed and that child should not be inflicted to perpetual exposure of public records of that in their background.

The third case is a products liability case. What do you do if you have a products liability case and a public hazard surfaces in the course of discovery in that case? How do you deal with that?

Keep these three examples in mind as you think about the mechanics of this rule and how we deal with it.

The issues we will get into, I want you to think about whether discovery materials should be included within the definition of court records and go into detail whether the rules should apply to settlements that are not filed, the definition of compelling need, and then trade secrets.

Let me just run through very quickly the rule itself and the burden of proof also. Let me run through the rule. If you have got it, if you will turn to Page 797, I will take you through it very quickly.

The first section has definitions, and it has three subsections. Compelling need is the first one. Protectible

interests is the second one. Court records is the third one.

The compelling need, that is the standard that is going to have to be shown if you want to seal court records, and compelling need, as you see there, the first sentence says it is "the existence of a specific protectible interest overriding the presumption that all court records are open to the general public," and the then the four things that must be shown to establish that compelling need.

The first one is a specific interest that clearly outweighs the interest in open court records and that the specific interest would suffer immediate and irreparable harm if the court records are not sealed. That is the first requirement under that. Specific interest clearly outweighing the interest in the open records.

The second one is basically that there is no less restrictive alternative. Sealing is necessary because there is no less restrictive alternative to protect that interest.

The third one, Item (c) there is the sealing will effectively protect the specific interest without being over broad.

And the fourth one is the sealing will not restrict public access to information that is detrimental to public health or safety, or if the information concerning the administration of justice, basically, that information that would show a violation of any law or involved the misuse of

public funds.

So those are the four requirements under compelling need. Now, compelling need references protectible interests in that next Section No. 2, itemizes some protectible interests. And what this is is an attempt to deal with some of the hard cases, some of the interests the people have said, well, in these circumstances, some form of sealing should be justifiable. And here are four of the categories. Many were suggested, and these aren't perfect, and as I say, neither Lefty or I vouch for or probably will defend hardly any part of this rule. But in any event, the four interests, the first one is basically a right of privacy or privilege under the rules -- under the rules of evidence. The second one is a constitutional right. The third one is trade secrets. And, again, we will come back to that because the trade secret lawyers and the intellectual property bar have a problem with the way we have done that or the way it appears in this draft. And the fourth one is the sexual assault-type of situation, the protection of the identity or privacy of an individual who has been the subject of a sexually-related assault or injury. Those are the four. These are not exhaustive, but the four protective interests of the rule or this draft at least sets out.

Next, Item 3 under Paragraph A on the next page is court records. And this particular draft, you will notice,

basically defines court records as to what is filed in court and specifically excludes discovery materials. And that has been a big point of discussion. We will discuss that with you in a moment, the pros and cons of discovery materials as being a part of the court records.

Then we go into Paragraph B, and that sets out basically the procedures for the notice and the hearings and the orders. Subpart A there, Subparagraph A under B talks about the hearing and basically provides for an open court hearing would allow this draft -- would allow an in camera hearing if, otherwise, the matters that are sought to be protected would be revealed or disclosed if you had a public hearing in that limited circumstance. But basically, an open court hearing.

At the hearing, the court can consider affidavit evidence if the affiant is present and available for cross-examination, and then any person not a party can intervene in the proceeding at the hearing stage -- or really at other stages, as well, the way the rule is written -- for the limited purpose of participating on that issue, the sealing issue. And that is where the press, at times, after the fact, has been excluded. They said you didn't intervene timely, you didn't have an opportunity, you didn't participate in a timely fashion. So the goal is to let the press or public participate on that limited issue of sealing.

Now, the second part deals with notice. There must be a written notice filed. The moving party is to post a public notice at the place where you post public records dealing with county government, notices for meetings of county government. That notice is to be posted 14 days before the hearing. Now, if we get into the rule later and we have an emergency ex parte exception to that, but in general, 14 days public notice. That notice, the rule -- provision there sets out the contents of the notice, provides that the parties shall file a copy with the clerk and forward a copy to the clerk of the Texas Supreme Court so that there will be a central location where the press can check to find out what sealing is going on around the state. That was a big issue that the press was very, very interested in, and we discussed a lot of procedures, but that is the one in this draft.

The third provision there is the temporary sealing order. And as I said before, that basically tracks Rule 680, the TRO procedure. And the idea is that in a case where sealing is necessary immediately and there is not time for the public notice and the public hearing that there can be an an application with affidavits and that the immediate need can be established. A 14-day order time period is allowed with up to one extension unless there is agreement for subsequent extensions, just as we do under Rule 680 for TROs,

and then a motion to dissolve that kind of temporary emergency order can be filed in two days notice on a motion to dissolve, again, just as we have under Rule 680. So that is the emergency temporary order procedure.

A Subpart 4 there that Paragraph B sets out or just makes reference to is the findings and specifically requires the trial court to make a finding demonstrating the compelling need as that term was defined in the first section of the rule.

Subparagraph 5 deals with the sealing order and the contents of the sealing order. It provides what shall be in there, the cause number, the style, et cetera, the time period for which the order shall continue for which those records shall be sealed, and identifying those parts of the file that will be sealed and those parts that will remain open. And it provides that the order, while it needs to be specific, shall not reveal the information sought to be protected.

And then Paragraph C deals with continuing jurisdiction, and this is, again, the attempt to make sure that the press, if they find out after the fact after judgment has been entered, where otherwise plenary jurisdiction has expired in several cases in Texas, they have an opportunity to come in. The court has continuing jurisdiction over the sealing order. And then the appeal

right, it provides for an appeal, except as to those temporary emergency orders, except as to the 14-day orders, it would allow an appeal.

That, in very brief fashion, is the outline of that particular draft. There are, as I say, several issues. One of them is discovery. I don't think Tom really wants to speak to the discovery issue. We can come back to that in a minute. Settlement agreements, we want to talk about that, but I don't think you are interested in that either. And trade secrets, I don't think you are involved with that one.

The standard of proof is a question, if you will go back and look at -- if you will look at the compelling need, that is the very first sentence, the second sentence, really. It says "The moving party must establish the following:" And then it lists those four factors.

Well, one question is whether that should be by a preponderance of the evidence or by clear and convincing evidence. I think that is one of the points probably you wanted to talk on, Tom. So why don't you take it there and then Tom Leatherbury and John McElhaney to represent the Dallas Morning News really drafted the very initial version of this rule that went through many different forms and did just a whole lot of work for the committee, and we were very, very appreciative of that.

There is a current version that -- I think his most

current version we are going to pass out, and it will also have some of the other current versions, David Perry's version and David Chamberlain's version, in this packet we will pass out now. But why don't you draw some of the differences between this draft and the one -- the most recent version that you have.

MR. LEATHERBURY: Sure. In the packet that I got from Chuck earlier in the week, our most recent draft says draft 12/26/89 up at the top and it was Attachment C. Chuck, is that the same as in --

MR. HERRING: That is what is going out right now.

MR. LEATHERBURY: Okay.

MR. MORRIS: Did any of you get this bound book? Okay, well, I thought you had it.

JUSTICE DOGGETT: It is under Tab C.

MR. HERRING: If you have the bound book that we sent out to everybody, and you may or may not have gotten it, it will be under Tab C. We are going to pass out a copy of Tab C and the other versions right now.

MR. LEATHERBURY: I can go ahead and get started because I know time is short. I tried to compare our most recent draft, which is Attachment C, with the draft that Chuck circulated as the co-chairs' draft. And I will just walk through it and show you the points of agreement and

disagreement and be happy to answer any questions you have.

Under the definition of compelling need, in our draft, Attachment C, one of the first things we get up front is the clear and convincing evidence standard that we think is the appropriate standard given the fundamental nature of this right to access to information that is on file at the courthouse. It is a standard that the courts are familiar with. Clear and convincing evidence is used in civil commitment cases, in termination of parental rights cases, in libel cases to assess certain issues of fact such as the existence of actual malice. And we believe very strongly that that rather than the preponderance of the evidence standard that others have advocated is appropriate to seal court records that are actually on file at the courthouse.

Our draft, as well as Chuck's draft, incorporates a balancing test in this definition of compelling need. We believe that the co-chairs' draft dilutes the balancing test a little bit and unacceptably.

In the definition of compelling need in the co-chairs' draft, we would enter a line after "specific protectible interests," which we would add "is substantial enough to override the presumption that all court records are open to the general public." So we would suggest that innerlineation in the co-chairs' draft to jive more closely to what we have in our draft, which is Attachment C.

Our fear there is that with the enumeration of certain protectible interests, the definition of certain protectible interests, that the definition of compelling need in the co-chairs' draft is not explicit enough about the balancing test, and courts may forget that all -- that there are other parts of the balancing test in addition to the establishment of a protectible interest.

There is some language in our draft C which drew a lot of heat and not much light about mere sensitivity, embarrassment or desire to conceal the details of litigation is not in and of itself a compelling need. That has been deleted from the co-chairs' draft. And while we think that is still an accurate statement of the law, I think it draws more controversy than it deserves and so are not really insisting and advocating that, although it is a correct statement of the law.

B and C are identical between the co-chairs' drafts and our draft talking about less restrictive alternative and a finding that sealing will actually protect the interest of the person that sought to be protected without being over broad.

D in the co-chairs' draft adds that final phrase "that violates any law or involves misuse of public funds or public office." We take a broader approach that any information about the administration of public office or the

operation of government should not be sealed and would be more absolute test on that than the co-chairs' draft currently provides for by deleting that language.

We did not enumerate protectible interests -- specific protectible interests that would be covered by this rule. I guess our preference is for no specific categories and to remain general and just talk about specific protectible interests, although we can see some benefit to spelling out specific categories. Again, the fear is that in the trial court you come in and you say "trade secret," the judge looks at protectible interests and you have trade secret. And that may be the end of the discussion without going through the balancing test that is necessary.

In addition, I try to think of some constitutional right that would warrant sealing, and I really couldn't come up with one unless you accept that there is a constitutional right to privacy, and I am not sure that is the case. So I have questions about 2(c), I mean, 2(b), protectible interests, and that would cover 2.

As Chuck said, the definition of court records is the same. We did not want to bite off the discovery fight, whether discovery is subject to the same standards of sealing as documents that are actually on file at the courthouse. We think it is very important to get a rule in place about the documents that are actually filed at the courthouse and

certainly would encourage any further study about discovery and sealing of discovery and protective orders and so forth, but thought that was a study best left to another day and not for this rule. So our rule, similarly, would not affect discovery.

Our rule, as well as Chuck's draft, would affect settlement agreements that are actually filed at the court, but would not reach beyond that, and try to make public settlement agreements which were not required to be filed and which were not filed with the court.

There is a very crucial sentence in B of our draft that is omitted, an introductory sentence which states,

> "All orders of any nature and all opinions made in the adjudication of cases are specifically made public information and shall never be sealed."

It is that first sentence in B. That language tracks exactly the Open Records Act language in Section 612. We think, if anything, should be public. It is all orders and opinions that are made by the court which actually explain the reasoning and the rulings of the court. And this language was included in our draft to respond to particular -- at least one particular situation where an order was sealed and the party seeking to unseal the records could not even be told the basis for the order by their lawyer. That was the Tuttle Jones case. So we think that

that is a very critical --

MR. MORRIS: Do you mind clarifying for me what you just said? I mean why is this particular Open Records Acts phraseology important to you?

MR. HERRING: I think the reason we left it out, it is in the Open Records Act.

MR. LEATHERBURY: Well, I think it belongs in the rules too, and I will tell you why, because there is a very fundamental debate about whether the Open Records Act applies in any fashion to the judiciary or to court clerk files. And so we thought in an abundance of caution, since we were doing this and there really didn't seem to be much dispute at the committee level, that that language should be left in here to cover any possible loopholes in the application of the Open Records Act.

We have one great concern about the co-chairs' draft, and that is the provision for in camera hearing. We certainly are sensitive to the problem of bringing and having to file trade secret information or other types of protectible information with the court and recognize that a potential -- an open hearing always has the potential to reveal the information that is sought to be disclosed. But in camera hearings, in my view and experience, really have a great potential for abuse. I think you would find an almost indiscriminate use of the in camera hearings because of --

because in every situation an open hearing might reveal the information sought to be protected. And we would urge that that be handled through instructions from the judge to the lawyers not to reveal it in their questioning as was done in the oral arguments at Tuttle Jones -- in the Tuttle Jones case, which some of you may be familiar with, involving a file that was sealed involving sexual abuse of a patient by a psychologist, and really would urge no in camera hearing provision or certainly not the one that is included with a fairly weak showing in the co-chairs' draft.

There is a real minor differentiation in the notice provision. Our notice provision would require the party giving notice to describe the type of records which are sought to be sealed in the notice. So actually just list them, whether it is plaintiff's original petition or answers to interrogatories or exhibits to summary judgment motion, some brief description like that. And I think that is a very good and useful thing to have in the notice to allow the public to decide whether or not they want to come and spend the time and the effort to attend the hearing on the motion to seal.

The notice provision in Chuck's draft, I am sure it is implicit, but it omits the specific reference that the notice itself can never be sealed. And we think that is an important addition that may be implicit, but we think we need

to be explicit about it.

Our temporary sealing order provision is quite different from Chuck's in that -- or from the co-chairs' -- in that it does not provide for any extensions of the temporary sealing order, and certainly doesn't provide for any extensions by agreement. And there is a good reason, I think, why there should be no extension to the temporary sealing orders in this case and why TRO practice is not directly applicable in this point. And that is once you get your temporary sealing order, you have to go ahead and post your notice, your public notice. You have to mail notice to the clerk of the Supreme Court so that it can be posted down here as well.

In the notice, you have to specify the time for the hearing, and presumably, people will look at these notices and either come to the hearings at the scheduled time or decide not to come to the hearings at the scheduled time.

If you get into a situation where there can be extensions and extensions by agreement and so forth, I think it is going to -- it is not going to allow the public to appear and contest sealing orders. I think there will be confusion about settings. There is a real question in my mind in the co-chairs' draft about whether you have to go back and post a new notice if you obtain an extension. Do you have have to wait again 15 days after that notice is

posted or 15 days before you have the hearings. So I think that it is not complete. And because the public's rights on sealed records are involved, as well as the private litigant's rights, I would urge the Committee not to include any extensions and to adopt our temporary sealing order provision as it is written in our draft, which is Attachment C.

There is a minor discrepancy in the section on findings, which is No. 4. We included that the Court must explain the reason for the findings, and we believe that is important or else you are going to get laundry list findings and no explanation, no reasoning, no rationale. And we think that is very important that the court set forth its reasons for sealing the records as well as just making the findings that are required by the rule. Chuck had included a provision that the findings should not reveal the information sought to be protected. I think that, of course, is understood, and we don't have any problem with that. I think good lawyers can draft around that and good judges can draft around that and that won't be a problem. But if that language helps out, that is fine.

The sealing order provision, we made explicit for the clerk's benefit that in cases were sealing orders are granted, there would be two files, an open one and a closed one. This may be more of a semantic difference than a

substantive difference because, in substance, Chuck's, or the co-chairs' draft, is substantially identical to ours. But there is that one minor wording change about two files being kept by the clerk's office.

The continuing jurisdiction provision of ours is virtually identical to Chuck's, and that is very important from our past lawsuits where the press or other parties have been held to intervene too late to challenge a sealing order because the trial court's jurisdiction over the sealing order has expired. So that is very important.

The appeal provisions -- I want to direct your attention to the last two sentences of our draft Attachment C, the sentences which begin "Upon any such appeal, the trial court's failure to make the specific findings required in Paragraph (B)(4) shall never be harmless error and shall be reversible error." And then the second sentence says, "The trial court's failure to comply with the notice of hearing requirements in Paragraphs (B)(1) through (B)(3) shall render any sealing order void and of no force and effect."

That is an accurate statement of the law. We think the importance of it is such that it deserves a place in the rule. I can anticipate that there would be a lot of harmless error cases if we did not have that, and you are never going to have adequate appellate review unless you require the

trial courts to explain the reasons for the sealing and make their findings.

The second sentence there about compliance with the notice and hearing requirements is equally important in terms of contempt, possible contempt of sealing orders. If there hasn't been public notice, how can someone be in contempt of an order? And that sentence is designed to accomplish that.

C of our draft, Attachment C, is not found in the co-chairs' draft. It prohibits counsel from withdrawing records except as expressly permitted by other rule or statute. In the evolutionary process of drafting this rule, we foresaw a big loophole if we had these pretty specific order -- requirements about what you had up there to get records sealed or unsealed, but left the rule silent as to whether or not records could be withdrawn once a case is settled or disposed of. And this is intended to close that loophole.

I can't give you a specific example of a case in which that has happened, but I think that we all agree that withdrawal is not a good concept. And so E belongs in the rule. And I would be happy to answer any questions. That summarizes what I perceive to be the differences between the co-chairs' draft and our latest draft.

MR. HERRING: What we might, because I know you have got to get out of here. I want to lay these

specific issues out for the Committee to just kind of go back and have an exchange on those points so that at least the Committee is clear on those. I do want to get to discovery and I do want to get to settlement later, but I know you are not concerned about those.

The first one on clear and convincing evidence. And again, on the draft, that is the question of whether a compelling need is a standard the moving party ought to have to establish the four factors by clear and convincing evidence or by a preponderance of the evidence.

The biggest objection we got to a clear and convincing standard was trade secret lawyers. And again, do we include trade secrets or not in the rule? That is an issue we will come back to. But this is what they said. They said, look, if I have got a trade secret I need to file suit to protect because somebody just left our company, I have got to show under Hyde v. Huffines under Section 757, the restatement courts, I have got to show that there is a trade secret. I have got to put on expert testimony of that. I have got to show it has competitive value, so I have got to analyze the industry and the competition. I have to show that I have kept it secret, the protective security devices I have used, noncompetition agreements, physical security and the like. That can be shown. And we do it at trial on the merits, but it is a lot to show, and it is difficult in a

real trade secrets case to show that. If you make me, right away, when I file suit, have to meet a clear and convincing evidence standard on a motion to seal, you impose a standard on me I would never have to meet at trial on the merits. I would never, to protect my right -- my property right -- and the Supreme Court has held it is a property right -- I could get relief at trial on the merits under a lesser standard than I could seal the records. Why don't I file my case? But if I can't seal my records, you have abolished my trade secret right because I can't pursue that right in court. If I put that evidence in, I lose it. I give public notice of what my trade secret is, so I can't sue to protect my trade secret without revealing my trade secret. And if you have a clear and convincing evidence standard, that is a higher standard then I would ever have to meet on merits, and I can't do it, and I can't do it right away, perhaps. That is the concern that the intellectual property bar has given us, and that is why Lefty and I took the courageous stand of not putting any standards of proof in here and letting you all decide that, whether it should be preponderance of the evidence or clear and convincing evidence. That is the other side on that one. We can talk about each one of these as we go through, or we can go through -- whatever you want to do, Frank.

MR. MORRIS: The thing is Tom is going to

leave at noon, and I really would like, before we start our debate, for us to be sure we understand because I think there is a tremendous amount of merit in this proposal. And I would like, if you don't mind, for Chuck to go ahead and let them have their dialogue and then let's come back and make our decision.

MR. HERRING: Tom, why don't we go through these one by one. Do you want to add anything on clear and convincing?

MR. LEATHERBURY: Well, I guess my response to that specific hypothetical or example that you gave is that I am not sure at the outset of a case why the trade secret is actually being filed with the court as part of the petition. I would think that, you know, you can draft around that if that is a problem. Now -- and that is one reason why our proposal doesn't speak to discovery because that is where most of the trade secret fights come up -- is it a trade secret or is not.

MR. HERRING: You are exactly right. The big problem for the trade secret, folks, is if discovery is included in this rule, and then all of it is going to be out in depositions and all that. They would say, well, you may have motions for summary judgment, you may have other issues we need to resolve and you would have matters filed of record and it is all out on the table and you make us have a

standard that is tougher than what we would have to meet otherwise.

MR. LEATHERBURY: But if it is a legitimate trade secret, they can meet the clear and convincing standard. I mean I guess it is just --

MR. HERRING: They may or may not be able to.

MR. LEATHERBURY: The problem has come up in the past where things that really aren't legitimate trade secrets have been claimed to be trade secrets, and then they have been sealed. And when looked at, the judge or appellate court has held, well, that is not a legitimate trade secret, open up the files.

So I don't know how to get above that specific other than to say the right to open court records is a fundamental right that has been recognized in the common law and in some cases in the constitution. And so it deserves that heightened burden of proof.

MR. HERRING: Okay, I think that is a fair presentation of both sides. The trade secret lawyers have one view and the media lawyers have another, and I think we have pretty well set it out as well as we can on that issue.

On the mere sensitivity language -- now, this would go under Section (a)(1)(a), I think is where you have it in yours, don't you?

MR. LEATHERBURY: Yes, but I don't think that

really merits a lot of discussion now.

MR. HERRING: You want to forget that? All right.

MR. BRANSON: Can we hear discussion on this?

MR. HERRING: Yes, let me go ahead and make discussion on that. On his draft, if you will look at this Item C that we passed around, he has got his language added under (a)(1)(a),

> "Mere sensitivity, embarrassment or desire to conceal the detail of litigation is not in and of itself a compelling need."

Okay, the reason it was left out, there are two reasons in the draft that we submitted to you. Number one, we felt that was kind of obvious anyway that we set out what the four standards are, and if all you could show is mere sensitivity and embarrassment, you didn't meet the four standards.

But the bigger reason that is not in there is the family lawyers appeared at the Committee, and they objected because they said, look, we have divorce cases where we have -- we expose to all the world if we can't seal the records our assets. We disclose things that we did to each other that we prefer that nobody ever knew because we didn't want to do them, and some of them are pretty embarrassing. And it really -- that is a factor for at least sometimes

embarrassment and sensitivity is a legitimate factor. If you look at the child abuse case where a patient has abused a young child, part of that is sensitivity. We are worried about sensitivity and embarrassment that that child will be caused when they are a young adult and find out that their parent abused them sexually as an infant. So they say -- and the family lawyers are really the reason that is not in there. They said you just shouldn't take that, you shouldn't have that completely because some of that element, sensitivity and embarrassment, is something you could look at when you look at the other interests. I think Tom came up with that language, is not concerned about it. I don't think it adds greatly to the standards we have got anyway, the four substantive standards of compelling need.

MR. LEATHERBURY: I think other people are concerned about it because it is a correct statement of the law, and we tried to qualify it by saying mere sensitivity and in and of itself. So we tried to answer some of those concerns, but I think that the political realities are that it probably needs to come out to please some people who are interested and they think that is all they may be able to show and, in fact, I think they could show more. I think that in all those cases more than mere sensitivity, embarassment and so forth is involved, such as sexual interest or other things that qualify as a legitimate

protective interest.

MR. HERRING: Mere sensitivity or embarassment would never be enough to meet the standard anyway. So we have got the four criteria.

MR. BRANSON: I don't want to interrupt, but couldn't you handle the two problems you are having with the two sections by merely accepting trade secrets in the first section and accepting family laws under (a)(1)(a)?

MR. HERRING: We tried, and we have proposals and I have got another draft that we will circulate probably after lunch that does that as to trade secrets. And we had discussion, and Ken is not here today, Ken Fuller, who participated pretty actively. But that was discussed, and it was -- it is a legitimate way to approach it, and we just ultimately ended up with we don't want to have different rules for everybody. We ought to try to do everything we can in one rule. When you do that, you have a compromise process that doesn't draw it exactly. But you are right. I mean that is one way to go at it. The trade secrets, though, you are going to hear later when we get to the discussion, some of the plaintiffs lawyers have had the view that, hey, trade secrets have been abused. People come in and say "trade secret," and ipso facto, everything gets sealed, and that shouldn't be allowed. And you have to distinguish between cases where people are suing specifically to protect a trade

secret to cases where you have discovery and somebody says, hey, Rule 507 privilege. Let's not get into my trade secrets in the discovery process. But we can talk about that probably a little more after lunch if you want. That is -- you are right, that is a way to go about it. It just got too cumbersome when we started drawing three separate rules.

Anyway, the next point I think that Tom mentioned deals with the language of (A)(1)(d), and that is one of the requirements to show compelling need would be that sealing will not restrict public access to information that is detrimental to public health or safety or -- and Lefty and I have already changed this rule so it doesn't read the way you have got it, but let me read it the way it does read, the rest of it, "or to information that concerns the administration of public office or the operation of government and that shows violation of any law or involves misuse of public funds for public office."

In essense, Tom's version would not have the requirement that that information concerning public offices relates to a violation of the law. Here is the rationale for having that requirement. If we simply say that if the information concerns public office or public administration, and we don't say that the information has to be negative, just as we say if the information concerns public health it has to be detrimental to public health, then anytime you have

got any case that in any way deals with a public office, you can't seal a record. And our view was that if the information is somehow negative about a public office and therefore the public ought to know about it, then certainly sealing should not be allowed.

But what we are trying to do is simply say that if a case tangentially involves a public office, that shouldn't automatically mean you can't ever seal anything. And that is the reason for that difference. I have not articulated that as clearly as I should have, but the idea is under our draft that there ought to be some showing that that information reflects negatively on the office -- a violation of the law, misuse of funds versus simply concerns the office. I don't know if there is much to add on that, but that is the issue and we can talk about that one more later.

MR. LEATHERBURY: As a practical matter, I think that puts the trial court who is trying to make the determination to seal or not to seal in a tough position. Is he going to say that that is a violation of law up front when a motion to seal is filed? I think that is a hard test for a trial court, and it is really -- it is almost a censorship mode. I mean we are talking about that anyway. But it is too much, in my view. Access to information about government should be broader.

MR. HERRING: That takes a little more talking

around. Maybe if we can do that after lunch. I think the general issue is clear.

On protectible interests -- now, this is the subsection under Part A, Paragraph A, and we had a lot of discussion in the subcommittee, lots of different approaches about whether we try to articulate any protectible interests or not, whether we just have a general standard. But the family law bar, the intellectual property bar, some of these other concerns were suppressed. And we tried to put these in just as examples of when you might find a protectible interest. You have still got to show all four things up in Paragraph A. But this was an attempt to list some of them.

Tom's specific comment went to (A)(2)(b) which refers to constitutional rights and does not refer more specifically to anything other than that. And his question was well is -- I think he said he is not sure if the right of privacy is a consitutional right or not. In any event, we have taken care of right of privacy in Subsection (a), which refers to right of privacy. So if there is another constitutional right that somebody can identify that ought to be protected is really the question.

Somebody this morning -- we were kicking around and somebody said what about religious right? And there is a Seattle Times v. Rhinehart case where there is a case in which there was a discussion of religious rights in the

context of a suit by a religious organization or occult against the media and the media wanted to get the contributions to the religious organization, get discovery of that. And there was some discussion maybe that indicates in addition to the right of privacy, maybe that implicates the first amendment right to freedom of religion. I don't know if it does or not, but there is some concern that if somebody can really someday articulate a legitimate constitutional right, realizing that that is a moving target and always has been with our Supreme Court, that we ought to allow for its protection. And I guess part of the response to Tom would be if there aren't any, we don't need to worry about it. It doesn't hurt to have it in the rule. If there are some that people can articulate, we will allow them to be protected. That is the reason we have it in there and he does not.

JUSTICE DOGGETT: Chuck, beyond that on that particular section, did you enumerate protectible interests and he does not? You also have in the Committee chair draft deleted the reference to "substantial enough to override." It is not enough even under your draft, is it, to just prove one of those protectible interests. There is still a balancing test that the court has to engage in to determine whether that protectible interest is sufficient and significant enough to override the presumption of openness.

MR. HERRING: Right in (A)(1) in Tom's draft,

he had "substantial enough to override" where we have "override." And I think that really was just an editorial decision that "subsantial enough to override" didn't add much meaning to the word override. How do you override if it is not substantial enough to override? But there still is balancing, and it is still required, and you have still got to consider all four of those factors.

He has language -- Tom had language in his draft "concerning all orders of any nature and all opinions made, and the adjudication cases are specifically made public information and shall never be sealed." And we left that out because we forgot what he said.

Basically, he said that, yes, it is in the Open Meetings Act. There is some question about the application of that, and we thought it was in there and that would take care of it. I think we can add that back in there and I think we probably should just to -- if that has been a problem, and he apparently has encountered a case where it has been.

Next we have got a provision in a draft that would allow for in camera hearings. As I mentioned before, you give notice the public can appear, the media can appear. We will have a notice that is posted. The clerk of the Supreme Court will have a bulletin board or something where they post these notices of motions to seal that have been filed around

the state. And the idea is that the public or the press can come in if they want to oppose a motion to seal.

We have taken the position in this draft that there are times at the motion to seal hearing where it is imaginable that you can't prevail on your motion, you can't show what you need to show, what you need to protect without revealing it, and that there ought to be an allowance for in camera hearings in those situations, and those situations only, where if you presented the evidence the chicken has flown. I mean the cat is out of bag. And that is the idea of having and an in camera proceeding. And there probably shouldn't be many of those. Tom is concerned that that might lead to abuse and we will have all in camera hearings.

Again, that is something where the trade secret lawyers were concerned -- how do I have my hearing and prove up my Rule 507 privilege or my trade secret if I can't put on the evidence of what my trade secret is without my competitor or whoever I am concerned about sitting in there and hearing what it is. And effectively, if I can't have an in camera examination, if I can't have an in camera presentation, I have lost it, my trade secret is gone. I am not sure we drew that line right, but that was the idea behind, at least in some instances, allowing an in camera presentation.

Anything else to add on that, Tom?

MR. LEATHERBURY: No, I think I said

everything I could on that.

MR. HERRING: All right. Tom had a provision in Paragraph (B)(2) dealing with notice. And I think, if my notes are right, you had a provision requiring specification of the type of records to be sealed, that is, the notice would say the type of records to be sealed.

Our notice provision simply says you describe the cause number of the case, the general type of case, because in most cases where you have a sealing, say a trade secrets case, most of those cases, the press isn't going to care, most family law cases, the press isn't going to care. But we want some general description. What we were concerned about is that somebody might validly get a sealing order and then be overturned on a technicality because we were concerned about the ambiguity of what you had to describe by the type of records to be sealed. And again, part of this goes to whether we include discovery or not within the rule. And Tom's version doesn't include discovery. Go ahead, Tom.

MR. LEATHERBURY: Well, our draft is a little bit more specific than that. It doesn't say the type of records, it says the specific court records ought to be sealed, which I think eliminates a little of that problem of the potential ambiguity because you just list the pleadings or exhibits that you are seeking to seal.

MR. HERRING: We were concerned that if you

list all the pleadings, do you have to list all the pleadings in your motion if you are down the line in a case? What do you do if you have the trade secrets where you have got documents and memos? What specificity need you have in the notice? And again, the answer to this issue you have raised depends, in part, on whether we have trade secrets -- or whether we have discovery in there or not. I think it is easier if discovery is not in and it is not such a problem. I think those are the positions on that.

Tom said also under (B)(2), the notice provision, that we should have an explicit statement that the notice should not be sealed, and we can certainly add that. We thought since the notice has to be posted publicly, it has to be filed with the clerk, it has to be served on the clerk of the Texas Supreme Court and posted publicly there. We didn't say it shouldn't be sealed because we thought that pretty well gave several public access points to the notice, and that is why that is not in there.

MR. LEATHERBURY: I guess I was more worried about a retrospective sealing of the notice after the proceedings had already been had.

MR. HERRING: Right. Next, the temporary sealing order, and this is the procedure if you don't have time to go through the public notice and the public hearing that would allow more or less a TRO procedure.

Tom's version does not allow for an extension of the 14-day order. Rule 680, the TRO order, basically allows for an extension, additional extension of 14 days, and we simply followed that. The reason I think that is in Rule 680 is kind of the pragmatic reason, I suppose, we have encountered here in Travis County where you get TRO and then you are on the docket and the court doesn't reach you and sometimes you need an extension, and we just thought there ought to be the possibility of one extension if you run up against a docket crunch. With respect to -- we also allow further extensions if everybody agrees. And Tom said, well, that is too broad.

I guess our notion was that we built protection in here. If anybody disagrees with a temporary order of sealing, you can file a motion to dissolve what we allow you to file on two days notice. So there is always that protection to come in and undo the temporary order seal if somebody wants to. But it is just kind of a different way to approach it.

MR. LEATHERBURY: Well, I really do fear confusion. If you change the hearing date that is posted through the extension process, I think you are going to possibly confuse people and shut out people who want to be heard if they can't -- if they can't find the hearing or if it has been put off. I also have the question about whether

or not you have to go back and repost notice if you get an extension and change your hearing day.

MR. HERRING: Our position on that was that you shouldn't for either one of those situations, the reason being given notice, we posted a public notice at the courthouse, we posted public notice with the Supreme Court. If anybody has seen it and cared about it at all, they are going to know about the case. And you shouldn't have to repost a notice every time the hearing on the motion to seal gets reset because sometimes those resettings are out of your control. They may be within the control of the court or the court coordinator or reasons that you can't really have any influence over, so shouldn't have to keep giving notice, and that if we gave that one wave of notices, publicly, locally, filing with the clerk, filing with the Supreme Court, that would be adequate notice. If somebody cared about the case, they could get into it and find out when the hearing was. That was the rationale.

MR. LEATHERBURY: The other thing is, the way I read the co-chairs' draft, the extensions could be indefinite. And, Chuck, you said one extension, and that is not the way I read this draft. I could be misinterpreting it. But I had a real concern about no definite maximum time period for a temporary sealing order.

MR. HERRING: I think you are right. I think

we ought to add "the order is extended for a like period" probably if we are going to have an extension provision at all.

MR. LEATHERBURY: One thing that -- are you finished with that temporary sealing order?

MR. HERRING: Yes.

MR. LEATHERBURY: One thing that I neglected to mention that was omitted from the co-chairs' draft the first time I went through was the very tailend of Paragraph (B)(3) dealing with temporary sealing orders in our Attchment C. And basically what this part of our proposal does is to reinforce that. If a party has obtained a temporary sealing order, he still bears the burden of proof at any hearing on the merits of establishing everything, of establishing all prongs of a four-part test, and it is to attempt to work around some of the equitable arguments that have been raised in the past that parties relied on the entry of a temporary sealing order and so somehow the burden of proof should be lessened. That was an argument that was raised quite effectively in the Tuttle Jones case where, of course, in that case, the file had been sealed for 18 months and the parties had entered into a settlement agreement. We won't have that specific problem in this case, but it is a compelling argument. I think on the grounds of equity the court should give more credence to the temporary sealing

order and somehow lower the burden of proof as a practical matter or in his consideration because of the entry of the temporary sealing rule.

MR. HERRING: I think our position on that was that the rule clearly states that if there is a temporary sealing order, a motion has to be filed and then you have to have an actual hearing, and the same standard should apply and it would be a clear voilation of the rule if the court somehow said, well, because there was effectively a TRO entered, it is a different standard than temporary injunction. That is the analogy. But that is just not having that specific bad experience, I suppose, is the reason we use that literal approach.

MR. LEATHERBURY: Yes, I think it was just our effort to be more explicit and to anticipate some of the problems that might come up.

MR. HERRING: All right, next, turning to Subparagraph (B)(4), the findings provision. Tom has a provision, I think, that requires -- you have to help me there, Tom.

MR. LEATHERBURY: The reason for such findings, it would require the court to explain its reasons, in addition to just making the findings required by the four-part test.

MR. HERRING: The difference is in our

Provision 4 there it says "in order to seal records, the court shall make specific findings demonstrating that a compelling need has been shown." And he adds the language and the reasons for such findings. We thought that was taken care of in the next Subdivision 5 which has the sealing order, and the sealing order says, in part, the sealing provision says there that the order would have to include the specific findings, the conclusions of law, the time period, et cetera. And if you have to have in the order the specific findings and conclusions of law, I don't know how you could do that without having the reasons stated. And we just thought it was redundant with 5, I think, is why that is not in there.

And then Tom has two provisions dealing with appeal, one of them stating essentially that if the court doesn't make the findings, the specific findings, that will always be reversible error. And that is just kind of, I guess, a judgment call as to whether you want to leave -- whether you want to tie the hands of the appellate court like that or not. And I think that is the difference on that.

MR. MORRIS: And, Tom, why do you say that is important?

MR. LEATHERBURY: It is important for the trial courts to get in the habit with this rule of articulating the findings and the reasons for the findings.

I think, otherwise, you would see a lot of harmless error cases. I think it is important for procedural and substantive reasons.

MR. HERRING: Yes, and I guess the view of the alternative was that the rule is fairly clear and fairly mandatory in its language, and if the trial court didn't, the appellate court would have to have a pretty good reason not to find that was reversible error. But I can see your side of it.

You also have language that the trial court's failure to comply with the notice of hearing requirements shall render any sealing order void and no force and effect, and that is basically the same issue. The rule is mandatory, the language is mandatory. Do you need to go on and add that additional language saying it is void if they don't do it?

MR. LEATHERBURY: I think you do because it is void, not just voidable.

MR. HERRING: And then the last point I think you had was about the withdrawal of records, and there is a provision in -- he has an extra Provision E that says "No court record shall be withdrawn from the public file except as expressly permitted by specific statute or rule." And I am not sure why that is not in ours. I think somebody had the view that you couldn't do it anyway. But I don't know that it shouldn't be explicit.

I think those are main issues that Tom wants to address and speak to. We can either do those or I can go on into the other -- draw the issues on discovery.

MR. MORRIS: Why don't we do these. And my sense is while we are on this topic or these new series of topics, let's move through them and then go to the next problem.

MR. HERRING: Okay, that is fine. The issue is we want to kind of hold back then our discovery and settlement and trade secrets, realizing the trade secrets, whether you put it in our out, has some impact, perhaps, on how you decide some of these other issues.

MR. LEATHERBURY: I want to make clear for everybody that trade secrets we think would be covered in our rule. It is not a question of either or.

MR. HERRING: Well, yes.

MR. LEATHERBURY: It is just not specified.

MR. MORRIS: Tell us then how you think trade secrets would be handled under the Locke Purnell draft here, C.

MR. LEATHERBURY: Well, a trade secret would be a specific interest which is substantial enough to override the presumption of open court records if A, B, C and D were met. So trades secrets, privacy right, all sorts of protectible interests that have been recognized are subsumed

in our definition of compelling need where we say specific interest.

MR. HERRING: Why don't, however anybody wants to do it, we can go back and talk maybe about the clear and convincing if anybody wants to talk about that. Should the standard, assuming that you-all decide to adopt some rule that remotely resembles this, should the standard for showing those four factors as compelling need be preponderance of the evidence or by clear and convincing evidence. And again, the main objectors to clear and convincing evidence were the trade secret lawyers who said we don't ever have to show that, we can't show it right away, and that is too much of a burden and, in fact, argued that it would be unconstitutional because you will take away from us by your rule our right to protect our property interest.

CHAIRMAN SOULES: We can take that in two steps. First of all, should we have a standard articulated in the rule at all, and then if we are going to have one, preponderance of the evidence or clear and convincing or what have you.

Is there anyone who feels that there should be no standard articulated here?

MR. SPIVEY: That is a good starting point. Let's talk about this.

MR. BRANSON: Let me ask this: Maybe we could

put this in perspective and get a feel for the Committee. I, for one, would vote to substitute the Locke Purnell proposal for the joint co-chair proposal in toto, and you might get enough votes in the beginning that we could safely pull back some time that we were going to use that we could use in some areas if there is a majority of votes for that proposal.

So I would move that if it would be appropriate at this time, perhaps as a time-saving method.

MR. MORRIS: Are you talking about to work off of?

MR. BRANSON: Yes.

MR. MORRIS: Because we are going to have some more work to do, Frank.

MR. BRANSON: I understand we have got to deal with settlements, we have got to deal with trade secrets and those other areas, but I move we use the Locke Purnell proposal as the base as opposed to the co-chairs' proposal.

MR. MORRIS: I second that.

CHAIRMAN SOULES: Okay, that has been moved and seconded. Any discussion.

JUSTICE HECHT: Seconded by the co-chair?

MR. MORRIS: We both gave each other the right to crawfish.

MR. HERRING: I think we both did crawfish on a lot of it. I don't think it makes a whole lot of

difference, this discussion, because I think we are going to have to come back and confront all of these issues anyway, but we are still going to have to talk about the burden of proof, whether you want clear and convincing or whether you want by a preponderance of the evidence.

MR. BRANSON: Would you be acceptable to that, Chuck, then, if we just substituted the Locke Purnell as the base?

MR. HERRING: For discussion purposes, it doesn't make any difference because they are awfully close. But I think we still need to address and at least vote or not vote on the individual provisions. There are a few changes I would make in the Locke Purnell just as a matter of consistency, but I really don't care which one we have for discussion purposes. I don't think it makes any difference.

JUSTICE PEEPLES: Could I ask Lefty why he signed off on a proposal he is willing to withdraw.

MR. MORRIS: Chuck and I had the specific understanding we wanted to put something out before the Committee but that we could then -- we are not in concrete on any of it, and I think after hearing this this morning that there will be fewer changes made in Locke Purnell than there will in the co-chair draft, and it will simplify what we are trying to do. That is my whole reason in doing it because we are going to get to the same place probably anyway, but I

think Frank may be right that that will get us there without as many amendments.

MR. HERRING: I don't have any problem with that. The idea of the co-chair's draft was that we took David Perry's draft and David Chamberlain's draft and the Locke Purnell draft and tried to put them all together and get as much concensus as we could and deal with some of those issues we are going to have to deal with anyway to go back to that draft.

CHAIRMAN SOULES: Anymore discussion on whether we start with the Locke Purnell draft? How many in favor of starting with Locke Purnell draft? Hold your hands up, please. Okay, those opposed? Okay. Let me -- I better count, I think. I think it is for the Locke Purnell draft, but let me just see them again. Those to start with the Locke Purnell draft please show your hands. That is Tab C. One, two, three, four, five, six, seven, eight, nine, 10.

Okay, those who want to start with the Committee draft. One, two, three, four, five, six, seven, eight, nine. Okay. How many didn't vote?

Okay, well, we will start with -- I guess, we will start with Locke Purnell draft. That is 10 to nine.

JUSTICE HECHT: Following in the fine tradition of the court itself.

CHAIRMAN SOULES: It is almost a five/four

ratio, isn't it. Okay, we are starting with the materials behind Tab C. And the book, if you have the book, and if not, I think that that was also passed out. Right?

MR. HERRING: It is labeled C on the bottom in the little handout that we sent out.

CHAIRMAN SOULES: Sent by Locke Purnell 12/26/89, 4:12 p.m. Draft 12/26/89. Is that it, Tom?

MR. DAVIS: Yes.

CHAIRMAN SOULES: Okay, starting with that question, is clear and convincing the proper standard. First -- I guess first should we have a standard articulated. How many feel that we should have a standard articulated?

MR. SPIVEY: I didn't vote because I haven't -- I have got -- I think we ought to discuss first of all whether we want either of these programs. I have got some real serious concern about that.

CHAIRMAN SOULES: Well, I think we are -- Broadus, that is going -- I think that is going to put a lot of baggage on the time.

MR. HERRING: I think it is a legitimate question. You know, we spent a long time listening to a lot of different views and the Code is clear we have got to do something and, really, our goal -- that would be my goal -- is just to get something before you so you could start working with it and if you want to --

MR. MORRIS: The Legislature directed the Supreme Court.

MR. HERRING: Yes, the Legislature directed the Supreme Court in that Section 32.010 on Page 792 of the materials, it is said "The Supreme Court shall adopt rules establishing guidelines for courts to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed." The Supreme Court --

CHAIRMAN SOULES: That is why Senator Glasgow sent Marty over here today to be sure we do our job.

Okay, let's get on with it. We have got to do this and so let's go on with it. How many just as a test --

MR. MORRIS: May I make a statement?

CHAIRMAN SOULES: Yes, sir.

MR. MORRIS: When Chuck and I did our discussions, it doesn't matter which draft you are on, I mean I think it is very, very strongly we need to tell these trial courts out around the state whether or not the burden on the litigant is preponderance of the evidence or clear and convincing.

CHAIRMAN SOULES: I think a strong vote is going to sustain that.

MR. MORRIS: No matter how we go. I mean I am not taking a position which one right now. I think that if

the Supreme Court is going to come down to rule, we must set a burden of proof.

CHAIRMAN SOULES: How many agree? Show by hands. All right, you won that without opposition. All right, which is it, clear and convincing or preponderance of the evidence? I guess who wants to speak to that?

MR. DORSANEO: Does clear and convincing mean that you have to establish a particular fact by showing that it is highly probable rather than just probable? Is that the difference between preponderance and clear and convincing? I think that is the difference.

MR. HERRING: Tom is still here. Why don't you speak to that? That is your language.

MR. LEATHERBURY: I can't remember the exact definition. It started as a mental health case --

JUSTICE PEEPLES: It is a strong belief in the --

MR. DORSANEO: I am opposed to it for that reason because that is what it is.

MR. O'QUINN: What? You are opposed for what reason?

MR. DORSANEO: I am opposed to having the burden on somebody to show that the existence or nonexistence of something is highly probable rather than just probable because I don't know whether it ends up being particularly

meaningful on one hand, and on the other hand, it is something that is so at variance with our standard procedures that it is procedurally difficult to handle it.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, in addition, the -- where clear and convincing has materialized in the law before, you are dealing with a specific thing. This attempts to put the burden on all of the factors and all kinds of things, each of them having to be established by clear and convincing as opposed -- which really being done is a weighing process anyway. And it doesn't even put clear and convincing on the weighing factor, which is really, I think, what he was trying to accomplish, but it actually puts it on proof of elements, which is I don't think that there really is any aspect of our law that requires each of the elements at that level. It is the ultimate issue that you are talking about must be clear and convincing. And that bothers me in terms of multiplying the burden manyfold.

Secondly, the court has held previously that clear and convincing is merely a legal species of factual sufficiency complaints anyway with regards to when you are talking about at an appellate level.

MR. SPIVEY: If you don't have clear and convincing, how are you ever going to have reversible error in every case? If you will just put that clear and

convincing in there, I guarantee you we will reverse every case.

MR. DORSANEO: Well, that is a point.

MR. SPIVEY: Isn't that right?

MR. McMAINS: Who knows? Now, the other, from a procedural standpoint.

MR. O'QUINN: Broadus, Rusty doesn't want to take a position until he sees who hires him.

MR. McMAINS: It depends on who has got the money.

MR. O'QUINN: Pardon me, Luke, I shouldn't have interrupted. I couldn't restrain myself.

CHAIRMAN SOULES: All right, other discussion? John O'Quinn.

MR. O'QUINN: Okay, I guess my concern is just kind of a fundamental one. I don't get involved in these very much, but I just think the preponderance of the evidence rule works, and it seems like to me just reading this, I am also impressed by the apparent argument of trade secrets there is that somehow it seems like they are put in the procedural backwards, it is unfair to them. I haven't heard a solution to that problem yet. While I have not got any personal interest in the outcome of that because I don't handle those kind of cases, they seem to make a legitimate point to me.

Secondly, the guy trying to get an order sees me, has to jump through about 14 different hoops here. It is really hard to get one. Everything has to outweigh everything else, and then you stack on top of that that he has got to do it in a clear and convincing manner. And maybe this is more of a visceral reaction than a logical reaction. It seems like to me you are just building a wall this guy can't get over very often. And is that good public policy? Is that what we want here? Are we making it too tough to get one and we are writing this rule such that it is telling trial judges you shouldn't give one of those things ever almost. And maybe that is what we want, maybe that is what the law should be. I don't practice in there. I don't understand it.

MR. LEATHERBURY: That is the law.

MR. O'QUINN: I am just telling you the way I read this thing, if I were a trial judge looking at this rule, I would say it is going to be real tough for anybody to get a sealing order. He is going to have to do a lot -- his burden of proof sounds to me almost like a criminal case. Everything has to outweigh everything and has to be done in a clear and convincing manner.

CHAIRMAN SOULES: John Collins.

MR. COLLINS: Under the current rule, 166(b)(5) on protective orders, results of discovery can be

sealed now only for good cause shown. That is the standard that exists now. And it seems to me if we don't have clear and convincing in there, then we are eliminating good cause requirement, in essence, and saying you can just come in and by preponderance of the evidence overcome the public's right to know what is in a court file. And we are protecting a heightened public interest, it seems to me, and I think that that is the necessity for the clear and convincing standard here. I don't think we ought to have just mere preponderance. That is my own opinion.

CHAIRMAN SOULES: Frank Branson.

MR. BRANSON: Would it be appropriate for the trade secret lawyers now to add the exception for the trade secret lawyers on clear and convincing?

CHAIRMAN SOULES: I don't know. That is a very complicated question.

MR. BRANSON: Pardon?

CHAIRMAN SOULES: That question has a lot of -- that is a very complex question.

MR. BRANSON: Well, I understood Chuck to say earlier the major problem with using clear and convincing in the initial paragraph were the trade secret problems. Now, I see trade secrets misused in attempts to get sealing orders on a regular basis where anything that the manufacturer doesn't like in a product is a trade secret. And so I don't

have any problem putting it in clear and convincing. I do think if we are going to treat the trade secrets specifically as you all do in your draft, we need to put a definition of what a trade secret would be so that we could cut out --

MR. HERRING: Well, you raised two or three points there. The trade secrets come up in two contexts in the stuff we saw before the Committee. One is the products case. You sue somebody, you want their engineering drawings, and they say "trade secret," and it ends up being confidential and sealed.

The other is where trade secret forms a basis for an affirmative claim for relief and it is really a trade secrets case and somebody is trying to protect it. We do have a version that I don't even want to take out because it is so cumbersome that tries to identify that category of cases and treat it completely differently, and we can do that. And that is a way to handle the intellectual property lawyers.

If you will look, if you still have your notebook, if you will look under Tab I you will see some very bocipherous objections by intellectual property bar who I promise you will just come out of their seats if we have clear and convincing for trade secrets. They think it is unconstitutional because we have got right now under the law to protect it and we can do it trial on merits but we can't

do it --

CHAIRMAN SOULES: Let me try and handle it this way: If we decide preponderance of the evidence is the right test, we don't have to deal with the question that you raised. So let's go ahead and maybe first get to that point whether the concensus is preponderance of the evidence or clear and convincing.

Any further discussion on those standards? Anyone have anything else to say about that? Okay, how many feel that clear and convincing is the proper standard? All right, that is one, two, three, four, five, six, seven. Let me count them again. I saw hands go up again. Is your hand up, Lefty? One, two, three, four, five, six, seven, eight.

Those who feel a preponderance of the evidence is the proper standard show by hands, please. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12. Okay, preponderance of the evidence will be the standard. What is the next question, next objection?

MR. MORRIS: Then you are in (a)(1)(a) down there, the wording on mere sensitivity, embarrassment, or desire to conceal the details of litigation. Isn't that where we are now?

MR. HERRING: We can go there if you want. That is fine. I don't think there is any problem really with taking that out, is there, though maybe Frank had a different

view on it.

MR. BRANSON: Yes, I have a problem. Most of the time when I see records attempting to be sealed, if I understand right, the Locke Purnell proposal in that regard is, in fact, the law now. And most of the timeS, those are the only reasons that I see proposed to the court to seal records. So if the law is they shouldn't be sealed for those reasons, then I think it is time we told the trial courts.

MR. HERRING: I don't think it makes a whole lot of difference having that language in or out. The reasons that we articulated to have it out were the family law bar who said those are elements that we do consider. You still, if you show mere sensitivity or embarrassment, you don't get a sealing order. You have got to meet all four prongs, and I don't think it is important, probably, one way or the other, and I think that was Tom's feeling as well when he put it in. I just don't think that is a big one.

MR. BRANSON: Could we solve their problem by putting sensitivity alone or embarassment alone?

MR. HERRING: I think we say that. Mere sensitivity, embarrassment or desire to conceal the details is not in and of itself a compelling need. So I think that is done.

MR. BRANSON: Unless there is some compelling argument for taking it out, when you put that in, you really

solve a lot of problems the courts are dealing, at least the cases I am down arguing against sealing orders.

CHAIRMAN SOULES: Does anyone want to advocate the omission of the words after the semicolon in (a)(1)(a)? All right, it is unanimous then that stay in.

JUSTICE PEEPLES: What protects the child abuse victim if that language --

MR. BRANSON: It says that that standing alone is not a reason.

JUSTICE PEEPLES: What is the harm to him other than embarrassment, et cetera?

MR. LOW: Physical, emotional harm, not just embarassment.

MR. SPIVEY: Damage to reputation.

MR. BRANSON: Damage to the person of that individual which is more than mere embarrassment.

MR. HERRING: Well, the family law board also looked at -- and I don't say you ought to do it or not do it -- would also look at the divorce cases where you have the right of privacy, they would claim, implicated with respect to their financial dealings that come out in the course of the case and they, I guess, sometimes seal that. And they would say that is all that is is really embarrassment and sensitivity on our part. You know, you get into, I guess, semantic arguments of whether it is bad or whether it is the

right of privacy. This version has deleted the right of privacy protection, so we will have to address that.

MR. BRANSON: Chuck, aren't you saying that embarrassment can be enough if it is coupled with (b), (c) and (d) anyway?

MR. HERRING: No.

CHAIRMAN SOULES: I don't understand the sensitivity, that word being used. Sensitivity to what? I mean isn't that really what we are all talking about sensitivity to trade secrets, sensitivity to child abuse. Can't we say -- I guess where I am getting at is a suggestion that we consider dropping the word sensitivity and say "mere embarrassment or desire to conceal the details of litigation" is not enough. But sensitivity to a problem that requires protection is what this is all about, and I think sensitivity is a bad word to have.

MR. TINDALL: Mere desire to conceal is not enough.

CHAIRMAN SOULES: Pardon?

MR. TINDALL: Mere desire to conceal the details of litigation is not enough, but there could certainly be a reason that you would not want to be embarrassed in divorce work. I mean peoples' tax returns are in the file, any instances of spousal fighting.

MR. BRANSON: Let me ask this: Could we

handle the problem if we said "except in matters involving -- in juvenile courts or domestic relations matters" and just add that?

MR. SPIVEY: That is not enough because you have civil rape cases of a lot of areas where you do have embarrassment, but it rises to the point that it ought to be protected.

MR. BRANSON: What if you said domestic relation matters, juvenile matters or sexual -- allegations of sexual misconduct.

CHAIRMAN SOULES: Frank, it runs on and on. If we did that in a lot of these public hearings then somebody comes up with another one and somebody comes up with another one and sooner or later all you have got is a general rule that has got so many patches on it that it really doesn't speak very well any longer. Isn't that what came up in the hearings, Lefty? Over three days you just couldn't make an exception. Once you started making exceptions, they were --

MR. MORRIS: That is why we didn't put in that other draft.

MR. BRANSON: Leave it in and just that is the way to go.

CHAIRMAN SOULES: Anyone have anything else to say about those words "mere sensitivity, embarrassment, or

desire to conceal details of litigation is not in and of itself a compelling need"? John O'Quinn.

MR. O'QUINN: This may be more of a question than a comment. I sounds to me like what I am hearing -- I kind of direct this towards lawyers like Harry Tindall. This extra sentence that has been put in this one versus the draft that our subcommittee came up with runs the risk of preventing needed sealing orders in family law cases, and if that is so, I think we ought to be sensitive to that problem. And I want to vote against that sentence if that is true. What do you say, Harry?

MR. TINDALL: There will be many, many times members of this room, this Committee, will be through a painful divorce and want their records sealed. You are not hurting the public by sealing those records. There is no compelling reason. But if you put that in there and say, "Judge, it is very embarrassing to my client to have all these public records open for inspection," I would urge us to take it out and go with Lefty's draft on that issue.

MR. MORRIS: Well, let me speak to that, Frank. You know, I joined with you on going with this Locke Purnell thing while ago because I really, maybe wrongly, thought it was going to save us some time today. But I think that in the interest of family law and little kids and things of that nature, this wording should be taken out. The judges

can then balance what they want to.

MR. BRANSON: Lefty, well, here is what bothers me. It is also embarrassing to Ford Motor Company that they produced a dangererous gas tank. And it is very sensitive to them. And merely because it embarrasses them and is sensitive to them doesn't mean that that should be sealed or that anything dealing with that case should be sealed. Everyone in the room is sensitive to the family lawyers' problem. But why not exclude them and the juveniles lawyers from that and let everyone else prove what they are required to under the remainder of the Act before they can have something sealed?

MR. MORRIS: Well, let me make plain that my intent in removing that word would not be for some sensitivity that is not a personal sensitivity.

MR. BRANSON: I hear time after time manufacturers and people who are representing physicians in medical negligence suits attempting to get orders sealed merely because what has come out in discovery is sensitive or embarrassment in the manner in which they killed, injured or maimed the victim. And I don't think that should be appropriate. If that is the only reason they are asking to have it sealed, I think the court needs to be told that is inadequate.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: One other area I have had problems in, I have been in some law partnerships that -- and maybe I can do some tricky things there which I don't think would serve, you know, where the parties have maybe done something that would be more than embarrassment, contributions and things like that. I just have personal feelings about it. I don't know that they ought to be protected. But having been involved in them, it could get real personal. I could see a lot of those things.

CHAIRMAN SOULES: Steve McConnico.

MR. McCONNICO: Doesn't Section (d) of (a)(1)(d) take care of Frank's concern, though, because we are not going to seal it if in any way it is detrimental to public health or safety, and if it is a Ford Pinto case, it is not going to be sealed because it deals with safety.

CHAIRMAN SOULES: Join O'Quinn.

MR. O'QUINN: I like Steve's comment, but the problem I have got, Steve, and I had already circled that to discuss when we got to it, the phraseology "information detrimental." I don't understand what that means. It sounds to me awkward and subject to a misunderstanding. The court cannot restrict the public's access to information that is detrimental.

MR. HERRING: If we propose the change below in that rule, it probably should say something like

"information concerning matters detrimental."

MR. O'QUINN: That would help improve that.

MR. SPARKS (SAN ANGELO): In other words, if we have got some good, advantageous information from the public, we hide that from them.

MR. HERRING: We sure can't hide the other.

CHAIRMAN SOULES: Well, let's -- okay, are we ready to vote in or out on this language? Okay, those who feel that this last material after the semicolon in (1)(a) should be in, please raise your hands. One, two, three, four, five, six, seven. Out? How many feel it should be out? One, two, three, four, five, six, seven, eight, nine, 10, 11, 12. 12 to seven. It is out.

Okay, let's go now to (d). What if you inserted after information "concerning matters related to public health or safety" instead of detrimental.

MR. O'QUINN: That is better.

MR. EDGAR: Repeat that, please.

CHAIRMAN SOULES: All right, in (d) it would say "sealing will not restrict public access to information" -- insert this -- "concerning matters related" and strike detrimental so it would read "concerning matters related to public health or safety or to the administration of public office or the operation of government."

MR. McMAINS: Well, arguably, I suppose, any

products case would be related, wouldn't it?

CHAIRMAN SOULES: Could be.

MR. SPARKS: (EL PASO): Any medical malpractice.

CHAIRMAN SOULES: All right.

MR. HERRING: And that was the reason why before they had the detrimental and they -- the proposal this morning to include detrimental relative to administration of public office. And it is just a question of which way you go on that.

CHAIRMAN SOULES: How many feel -- I guess I am going to say one is neutral. If it is related to public safety, it is neutral or detrimental.

MR. BRANSON: Say related to or detrimenal. What is wrong with making it both?

MR. O'QUINN: It is awkward. It is confusing.

CHAIRMAN SOULES: Don't need it. It is redundant.

Okay, how many think only detrimental information should be restricted from sealing and how many think should be just any information, okay? How many detrimental only?

MR. O'QUINN: That the information in and of the has to be detrimental?

MR. HERRING: You mean information concerning matters --

CHAIRMAN SOULES: The way it is right know is what we are voting for. Those in favor of (d) the way it is written right now.

MR. HERRING: No, what we talked about was information concerning matters that are detrimental. If you are going to do detrimental, I think John's point is well taken. It would have to be phrased like that.

The first alternative would be to have detrimental in there, and the language would be to information concerning matters that are detrimental.

CHAIRMAN SOULES: All right, how many want it limited to that right there what Chuck just said? Hold your hands up, please. One, two, three, four, five, six. And how many think it should be information concerning matters related to public health or safety or to the administration of public office? One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13. Okay, by a vote of 13 to six, (d) would read "sealing will not restrict public access to information concerning matters related to public health or safety or to the administration of public office or the operation of government."

Next objective then in this is what?

MR. MORRIS: The next thing would be whether or not to add -- we are going to go with Tom's issues while he is still here so that if something comes up he can answer

them.

CHAIRMAN SOULES: Was there something about the balancing tests that he differed with you about?

MR. HERRING: Maybe we ought to wait and come back to that later, but the version that we had had the protectible interests specified, identifying some of those. That was adopting David Perry's draft and David Chamberlain's draft in trying to come up with the list of some items to address the concerns in the child abuse case and the trade secrets case and then the other constitutional right case.

CHAIRMAN SOULES: Tom, tell us what you would like to have us address next to the issue since you are on a short string here travel-wise.

MR. LEATHERBURY: I really think one of the most important things is temporary sealing orders and the appeal provision.

CHAIRMAN SOULES: Okay, and the temporary sealing, Tom, if we gave the court the latitude of one extra -- I understand your concerns about the notice. But just as a matter of timing, if we followed 680 and said 14 days plus another 14 days but no more, and we amended that rule back in '84 to say that, specifically, that no more than one extension may be granted unless subsequent extensions are unopposed. That, to me, would mean opposed by anyone who is permitted to attend one of these hearings, not just the

parties. 680, of course, is limited to the parties. But if we had that, is that, time-wise, something that you feel could be worked with?

MR. LEATHERBURY: I think it is. I think that the addition of the two-day dissolution provision, dissolution on two days is really important to keep in there if any extensions are granted. And you might want to talk about whether you repost notice or that sort of thing on a shortened time frame. But one of my major concerns was the indefiniteness of it rather than just one extension and then a subsidiary agreement which continues with agreement. But one extension would be preferable to the way the co-chairs' draft is and it might solve some objections made by the trial court.

JUSTICE DOGGETT: Was your language one extension only.

CHAIRMAN SOULES: Yes, just like we have in 680, Judge.

MR. MORRIS: Since this is your draft we are working off on now, what would you make of that paragraph?

JUSTICE DOGGETT: Unless successive extensions are opposed, that is a problem of concern.

CHAIRMAN SOULES: I just asked him about that, and he indicated, of course, the persons who could oppose could be any person who has an interest in the hearing,

including the newspaper or anybody who showed up for that hearing, but not limited just to parties. Of course, 680 is limited to parties. But we broaden this rule so that the public, in general, has standing. And we might even say by the parties or any other participants.

Would you like to have the unopposed aspect of that "unless further extensions are unopposed by a party or any other participant"?

MR. LEATHERBURY: That would be preferable. I hear some discussion and you might want to ask for other views about the logistical problem of having a hearing posted for a certain time when nonparties are going to attend, and the parties really might not know who is going it attend so they can't give them effective notice, I foresee that as a real problem. You have got reporters going from Austin to Dallas or citizens going from Austin to Dallas. They get up there, the hearing has been postponed and knocked off 14 days and you are adding to citizens' costs of -- for the convenience of parties.

JUSTICE DOGGETT: This whole temporary sealing section was added as a compromise. It was not in the original Locke Purnell draft to try to meet this.

MR. LEATHERBURY: That is right. So I guess I am going back. I am not sure that any extension when you have got public rights involved and when there is no

practical way to give notice to those members of the public who might receive the original notice. Any extension would be very cumbersome and burdensome and really unacceptable.

CHAIRMAN SOULES: I don't have any position to advocate on this. I do have some sensitivity to how we are writing these rules because of being involved in the process like so many of us have for so long. We got judges -- we got judges down in DeWitt County. They are not even there all the time. We get a judge in DeWitt County, a criminal judge one or two weeks a month, a civil judge, what those criminal judges don't take care of and dispose of if the criminal docket breaks down and they want to stay around and hang around a couple of days. It gets looked at about once a month. There won't even be a judge in DeWitt County, probably may not be in 14 days. There are just logistical problems in some areas of actually having a contested hearing on a 14-day fuse. It is just virtually impossible without, I mean, really shaking a lot of trees with district judges to get over here and do this, and that judge may, on that 14th day, have a crucial criminal trial underway and he is the only judge. So to have no flex in a 14-day fuse, I am not sure that will work out in the country. And again, we are writing these rules for every county in Texas, okay.

MR. SPARKS (SAN ANGELO): Call before you show up.

CHAIRMAN SOULES: The second point is once a case has been set, once a matter has been set, everybody who is going to participate in that hearing has got to watch the docket. It can get reset on the judge's motion or on a party's motion. We live with that in every context of the trial practice, and I don't know why we -- I mean explain to me why -- I realize that the public is being invited more to participate here than maybe ever before, but why accommodate them like no one has ever been accommodated before not to have to keep up with the setting and know whether to come or not because that is what -- that is the way the thing works now. Do we need an exception?

MR. LEATHERBURY: Yes, I guess it really is -- the good argument I can think of is that it is the public and they may be unsophisticated, and that is the whole purpose of this rule is to open things up and allow citizens and their representative, the media, to find out more about what goes on at the courthouse. And I just foresee a lot of logistical problems and some abuse, really, getting right up to a hearing time and you see there is some opposition to the sealing there from out in the general public, and just getting an extension or bumping the hearing. So that is the counterveiling abuse that I see.

CHAIRMAN SOULES: Broadus.

MR. SPIVEY: The reporters have all the ink

and all the paper anyhow, and if a judge abuses him, he is going see it in the newspaper.

MR. DORSANEO: Forget who the public really is.

MR. SPIVEY: I am not saying that the public isn't entitled to more consideration perhaps than lawyers, but this is a practical reality we have to deal with. We can't forecast what a judge's problems are going to be. As I pointed out to Sam, you know, what if I get sick? This doesn't provide for that.

CHAIRMAN SOULES: Tom says what if she has a baby.

MR. SPARKS (SAN ANGELO): She better have it in 14 days.

MR. SPIVEY: We might be getting a little bit altruistic to try to remedy all the ills of society rather than addressing very specific problems that we are mandated, and I understand were mandated to address. But I think we ought to be a little bit hesitant to take on more than meets common sense. That just doesn't meet the common sense test to me.

CHAIRMAN SOULES: Any other discussion? All right. Is the concensus that we stay rigid 14 days? How many say rigid 14 days? No hands up. How many 14 days plus one extension, no more, unless they are unopposed by the

parties or any participant?

MR. RAGLAND: I have a question about that.

CHAIRMAN SOULES: Okay, Tom Ragland.

MR. RAGLAND: We skipped over here, and this is causing me some concern here. When you are talking about in one place where they are a participant and then the other place where they are an intervenor, I guess the problem is someone participating in my hearing, and I can't get a grip on them, you know, the court can't get a grip on them other than holding them in contempt.

CHAIRMAN SOULES: The intervenors would be parties, wouldn't they, so we only just say unless they are unopposed.

MR. RAGLAND: Come in at the last minute and say, "Judge, we wan't a continuance. We are a participant in this hearing and we want a continuance. We are not prepared for this hearing."

MR. BRANSON: You are talking interlopers now not --

CHAIRMAN SOULES: All right, let me restate it. How many would approve 14 days plus one extension only for up to an additional 14 days, no further extensions unless they are unopposed. See hands on that. One, two, three, four, five, six, seven, eight, 10, 11, 12, 13, 13, 15, 16, 17. That is a majority. Those who feel otherwise? All

right, it is unanimous then.

MR. SPARKS (SAN ANGELO): Luke, are you saying there that you are going to track the TRO Rule 680.

CHAIRMAN SOULES: Exactly. Can you-all write that in?

MR. HERRING: Do we want to go 14 days. Locke Purnell has 15.

CHAIRMAN SOULES: Fourteen.

MR. HERRING: All right.

CHAIRMAN SOULES: Because that way they usually fall on weekends.

MR. SPARKS (SAN ANGELO): TRO, same rule.

MR. HERRING: I will do some language on that.

CHAIRMAN SOULES: What else, Tom? We want to take your concerns while you are here.

MR. LEATHERBURY: We probably want to discuss the in camera hearing provisions and the appeal provisions.

CHAIRMAN SOULES: Which first?

MR. LEATHERBURY: It doesn't matter to me. The appeal standards may be easier to talk about than the in camera hearing.

CHAIRMAN SOULES: Okay, let's take those.

MR. LEATHERBURY: And I am referring to the last two sentences of our (b) on Page 4 of the draft of the 26th which starts "Upon any such appeal."

JUSTICE DOGGETT: That is just a question as to whether that should be deleted?

MR. LEATHERBURY: Right.

MR. MORRIS: That was not in the co-chairs' draft. The last two sentences over on Page 4 beginning with "Upon."

CHAIRMAN SOULES: Has anyone done any research to see if -- the jurisdiction for interlocutory appeals is statutory, isn't it.

MS. CARLSON: Doesn't the constitution say only final judgment except as permitted by law?

CHAIRMAN SOULES: Yes. Rusty, the (d) provides for interlocutory appeal. Can that be done other than by statute? I mean the jurisdiction of the appellate courts --

MR. DORSANEO: We just did it this morning.

MR. McMAINS: What they have attempted to do is define this order as a final judgment and thereby just kind of moving right through the legislative participation in deciding that interlocutory appeal. That is the mechanism. Now, whether that works, I don't know. I mean I --

MR. HERRING: Well, somebody -- Tom, it is your language -- but somebody in here outfitted changes a couple of times. I don't know where it came from.

MR. LEATHERBURY: Yes, it was changed to this

to address that problem that we are talking about and to include that definition in the rule because that was the best way and possibly the only way we could provide for the appellate rights that need to be in here.

MR. EDGAR: I don't see see how we can say that this is a final judgement when it is not a final judgment. It doesn't dispose of all the issues on all the parties. I don't care what it says, it doesn't do it. And it seems to me that the only appropriate remedy would be one of mandamus. And we have got a mandamus remedy, and then we have a further question about whether or not we could state that this shall be prima facie abuse of discretion or something like that in order to give the court mandamus jurisdiction. But I don't think that we can just say this is a final appeal of judgment. It is not.

MR. SPARKS: (EL PASO): Actually, you are saying it is a separate and independent final judgment to the final judgment.

MR. EDGAR: Yes, that is just wrong.

MR. BRANSON: And at the same time giving continuing jurisdiction.

MR. HERRING: Yes, the idea there came from the -- if you will look at the Texas cases, the media gets clobbered and beat up against the head every time because they find out about it afterwards. And that is part of what

they are trying to address there.

MR. EDGAR: I don't have any problem with them trying to address it. I think it is a good point.

MR. HERRING: I am not sure you can do it here.

MR. EDGAR: Couldn't you consider a mandamus proceeding rather than trying to go the final judgment route? I am directing my question to the script --

MR.LETHERBURY: I mean we sure could. That was not the path that we chose to take because of the desire for, possibly, for appellate review. And we were not insensitive to the concerns you are talking about, and I think they are good concerns to talk about.

MR. EDGAR: The Court certainly gives sufficient review to discovery orders. I don't know what would prevent them from giving that same review to these orders.

CHAIRMAN SOULES: Apparently, once the order is rendered, rather than take the discretionary mandamus -- I think it is discretionary mandamus -- to get into court, they want an interlocutory appeal. But they want it on appeal standards rather than mandamus standards so there is a mandatory jurisdiction in the appellate court so the appellate court has to review it. And that is really -- I am sorry.

JUSTICE HECHT: But, you know, as long as we

are dealing with fiction, all you have really done is required that the sealing order be severed from the main action so that it comes, so then it can be appealed. It is sort of a constructive mandatory severance. So we are not really running up against the statute of the constitution.

MR. McMAINS: Well, the problem is, though, it doesn't do any good to severe it because they have continuing jurisdiction over it. I mean the whole thrust of the rule is to give continuing jurisdiction to go back to the trial court.

MR. LOW: But the timeliness are mandatory, and if he doesn't do them or something, I mean so mandamus is not just a discretionary-type thing, it is not drawn to be discretionary with a trial judge. These things say must. And so even under the mandamus rules you are looking at the same thing.

CHAIRMAN SOULES: Do you have a comment Justice Hecht or Justice Doggett?

JUSTICE HECHT: Well, it sounds like to me you have fewer problems if you do it by mandamus. But I don't see the standard is any different because the fact that the rule is phrased in mandatory language, this can be handled by mandamus. The clear abuse of discretion is only one element of mandamus. The other element is refusal to execute a mandatory duty. So it looks like to me you are there either

way. The only procedural nicety is you have got a motion to leave the file, but I don't know that that makes a whole lot of difference. That allows the trial judge to have continuing jurisdiction in the event of appeal.

MR. EDGAR: If the appellate court doesn't abide by that, you can rest assured the media will call that to the public's attention.

CHAIRMAN SOULES: Justice Doggett, how do you feel on that point? Do you have any feeling about it?

JUSTICE DOGGETT: It just ends up at the same place either way.

MR. LEATHERBURY: Well, certainly, as to nonparties, a sealing order would be fine. And I am not sure you want to get into drawing those distinctions. At least I can see that possibility. You also have -- you have two different situations usually. You have a sealing order that is entered while the case is ongoing. People find out about it. They get into it. I think that is what you are trying to address, you know, provide the mandamus remedy for. How about afterwards? If you have a continuing jurisdiction after judgment, do you want people to go mandamus then or do you want them to go by appeal?.

MR. DORSANEO: Mr. Chairman.

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: Frankly, I think it would be

best if there was a way to do the appeal because I think in the mandamus context we have other difficulties with mandamus jurisdiction if they are contested issues of fact, and there has just been a whole bunch of extra baggage there that doesn't really fit well here. This might be one of those things to send back to the Legislature kind of as a return favor and authorize the review of these orders. It would be possible to fit these into like probate code or receivorship or innerpleader final judgment packages if you really wanted to. I mean you could characterize this as a final judgement because it disposes of the particular issue that is the issue that would be the subject of the appeal, which is basically the probate code receivership standard. I don't think I would use deemed language. I just would perhaps have reference to that standard and articulate it.

CHAIRMAN SOULES: Let me ask you, of course, we have got to spend enough time to get this as right as we can. Suppose we have no special appeal provision in this one and leave that study in the biennium upcoming. If we feel like there is a way to deal with it more effectively, do it then rather than try to write it here with another big agenda. I mean I want to do what all you want done as far as this agenda is concerned. Buddy Low.

MR. LOW: Let me ask Rusty a question.

CHAIRMAN SOULES: Excuse me just a second,

Buddy. We have got conversation going on off the record and the court reporter can't hear your talk, and if you will restate your --

MR. LOW: What I am asking Rusty, in federal courts, you know, you can't appeal things that aren't final and so forth. Frederick v. Press holds that qualified immunity, for some reason, you can appeal that, just that alone. Would this be something similar to that? How did they get around that in federal court.

MR. McMAINS: The Feds also have -- you can appeal any interlocutory order of a judge, and they have kind of created --

MR. LOW: Well, that is what I am saying.

MR. McMAINS: -- federal rights much like the Supreme Court created jurisdiction.

CHAIRMAN SOULES: We don't have that. How many feel that there should be special appellate -- how many feel that we should have a special appellate rule in this -- special appellate remedy in this rule?

MR. EDGAR: In this draft.

CHAIRMAN SOULES: At this time without deciding whether we are going to try to fix that later, but at the time.

MR. SPARKS (SAN ANGELO): The alternative for trial lawyers is you try your case, they seal your order.

You don't get the evidence. Let's talk about that. You try your case to the conclusion, then you appeal the point like any other type, and then they unseal it and you go try your case again, if the sealing was harmful -- have I have got it right?

CHAIRMAN SOULES: It is either that or mandamus.

MR. SPARKS (SAN ANGELO): Trying a lawsuit is fun, same one twice.

JUSTICE HECHT: We are talking about having a better issue standard because we want to give as much guidance as we could to trial courts. The big issue in Tuttle v. Jones and some other cases is how do you appeal this. I think it would be helpful to have some guidance on it.

MR. COLLINS: What is wrong with leaving it like it is now and drafting it.

MR. EDGAR: Frankly, I would just question whether or not it is valid and why sit here and do something that will create more problems perhaps for them to solve.

MR. COLLINS: Well, if it is not valid, let's talk about that.

MR. BRANSON: We have got two members of the court here that don't seem to -- fixings don't seem to bother them.

MR. SPARKS (SAN ANGELO): It seems like to me we passed a rule of criminal procedure. I don't know.

MR. DORSANEO: What I would do is I would perfect an appeal, and I would also do a companion mandamus. I mean you are making just extra paper. I would never rely on this language until somebody said it was.

MR. SPIVEY: That worries me that he sat here and creates something that we have got doubt about at the time of creating it, and we have already got a remedy that is adequate. We have got a mandate in the rule that says he shall, then if he does not -- why create special rules? Why not just use the rules we have now? We are making it complex instead of simplifying it.

CHAIRMAN SOULES: Okay, how many feel -- how many agree with Broadus, use the appellate remedies now available rather than write something new? I ask you that, and in a second I want to ask how many feel that we should write something new.

How many feel we should leave this procedure to appellate remedies now available and not write something new for them? Please show by hands. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15. How many feel we should write something new? One, two, three, four, five -- 15 to five, then I suppose we would just delete (d). That is the consensus.

MR. COLLINS: That means we go up on mandamus, right? I don't like that at all, I really don't.

IN CAMERA

CHAIRMAN SOULES: Okay, now then we want to go to the in camera -- the point on in camera hearings. Tom feels that there should be no in camera proceedings in connection with hearing whether or not to seal records. Is that right, Tom?

MR. LEATHERBURY: There is no appealable provision in our rules as drafted in Attachment C.

CHAIRMAN SOULES: And our draftsman put in a provision that in certain circumstances, I gather --

MR. HERRING: The provision -- and this came from the trade secret lawyers -- would allow in camera "the hearing may be conducted in camera upon request by any party if the court finds from affidavits submitted or other evidence that an open hearing would reveal the information which is sought to be protected." The idea was only if there could be established that if you had the open hearing, that information that you were trying to protect would be disclosed, in that limited circumstance there would be a possibility of an in camera hearing.

CHAIRMAN SOULES: The language that Chuck is reading is on Page 798 of the materials, the big materials, and it is in ((B)(1) hearing and starts from the third line. "The hearing may be conducted in camera upon request" and so forth to the end of that sentence.

MR. TINDALL: Chuck, if we constituted your (B)(1), does it fit well with the Locke Purnell draft.

MR. HERRING: I don't know, I didn't go back and compare them.

MR. ADAMS: If it is open to the public, what do you do by walking back in chambers and doing this?

MR. HERRING: I am sorry?

MR. ADAMS: I mean if it is going to be open to the public for public participants and others to participate in it, what do you do by going back in chambers?

MR. HERRING: How do you keep the public out or the people who show up to participate? I don't know the answer to that is any short answer, I guess. I suppose, in part, it would be the way you handle in camera proceedings now with the presentation of documents when you have an adverse party. At times, you present matters to the court, at least I have had courts where the other party didn't see the documents, certainly, and I have had courts take evidence in camera when nobody else was present but the witness or the witness and both sides.

MR. ADAMS: They are all going to intervene. Anybody that has got an interest that is there if they are going to do it.

MR. HERRING: What I am saying, Gilbert, is that if you submit a document in camera now for inspection, the other side, even though they are a party and participating, doesn't see it. What I have also experienced is when a judge wants to hear some evidence in camera, and I don't know if it is proper or not, but I have had judges take the testimony back in chambers with neither attorney present or with the attorney for one side present taking it in camera because it, in theory, is privileged testimony or privileged evidence that is in issue, and I assume, assuming that is proper --

MR. DORSANEO: Ex parte.

MR. HERRING: Yes, I kind of thought so too, but in any event, that is the only way mechanically I know that it could be done. So I don't have an answer to your question or a solution to the inquiry.

CHAIRMAN SOULES: Bill Dorsaneo on this in camera point.

MR. DORSANEO: I hope this is responsive, but I think the first hearing needs, whether you are going to decide whether to permit this secret hearing, your ex parte proceeding, clearly needs to be an open adversary hearing. I

am not finding that that is completely clear from this, and I don't like using affidavits and I don't like the suggestion that the whole thing can be ex parte such that the person who is on the other side is not there.

MR. HERRING: I understand.

MR. DORSANEO: That is my point about it. I think that Barnes vs. Whittington, Supreme Court opinion, says we are not supposed to do ex parte things and the Code and canons of ethics say that, and the canons of judicial ethics say it, and they say unless there is some really good reason -- and presumably, that reason would have to be litigated and determined at an open hearing.

MR. HERRING: I think that is right.

MR. DORSANEO: And I don't find that is exactly clear here.

MR. HERRING: I don't think it is explicit there.

MR. McMAINS: In fact, there is not but part of it here on the in camera issue.

MR. HERRING: The way it is set up here is on affidavit or other evidence, which I don't think is adequately specific to really describe how it ought to be taken, if you are going to allow in camera. So I think we would have to rework that anyway.

MR. DORSANEO: Just imagine how this would go.

The hearing that is ex parte is --

MR. HERRING: It is scarey.

CHAIRMAN SOULES: Well, is this something that that we need a lot of debate on? I don't know. How many feel that the hearing to seal records should prohibit any in camera activity?

MR. HERRING: Before you vote on that, I would suggest that you can probably address it with in camera inspection of documents and the like without having the need for an in camera hearing. I mean there is certainly a procedure for in camera examination of documents and --

MR. JONES: I am thoroughly confused. I never heard of an in camera hearing. A hearing is when you get into the courtroom and talk, and in camera, I have always understood, was when the judge took the information furnished privately by a party and went and looked at it and decided whether somebody else ought to see it. Am I wrong about that?

MR. HERRING: The context that it came up, Franklin, was what if we have the press filling the courtroom and the parties agreed that, well, before we have the complete hearing, we ought to have some material presented to the court on the record but without the entire public present. That is one scenario. I am not saying we ought to do it. I am just saying that that is what was suggested.

MR. JONES: You are talking about the ones that are at war with each other. You are talking about a hearing.

MR. HERRING: I am not trying to make peace, I am trying to recite what was suggested. The other and more extreme example is the so-called purely ex parte where one side walks into the chambers, and maybe it is on the record, but you are not present. And I think that is even arguably much more objectionable, if it ever is objectionable. But the way it came up was the trade secret lawyer had said, look, if we have got to protect our trade secret but you are going to make us tell everybody what it is, ipso facto at the end of the hearing, we just lost our trade secret.

MR. DORSANEO: Or even tell the other lawyer, tell the other party representative lawyer, we have lost our trade secret.

MR. HERRING: That is the concern that provision was trying to address.

MR. JONES: I guess the concept of an in camera hearing is more a public trial.

MR. ADAMS: What you are trying to do is have a hearing that is conducted outside the presence of the public, aren't you? Instead of saying the hearing may be conducted in camera, just say it can be conducted outside the presence -- out of the public. That is what you are really

talking about, because the parties, if you are going to have a hearing, you have got to have parties. If you are going to conduct it where you don't want to just distribute it to the whole world, then you are going to have to have a hearing in private.

MR. HERRING: If we allow anybody to intervene --

MR. ADAMS: Well, an intervenor is going to be a party. I am like Franklin. I am really confused about having a hearing in camera.

MR. HERRING: I don't have an easy solution to that one. I can tell you that it is a trade lawyers' concern.

MR. McMAINS: Basically, as a practical matter, if you have the wherewithal to intervene, then you are always going to be able to go --

MR. HERRING: I am sorry.

MR. McMAINS: The rule provides standing for any member of the public to intervene, and thus, the hearing itself, which is in camera with the parties, well, the intervenors are parties. I mean, if they have a right to intervene, and they do intervene, they are parties. They have a right to be there anyway. But I don't think that you have much protection is what I am saying by putting this stuff in there.

MR. HERRING: The only way I can visualize in my own mind -- the protection, again, is by submission of affidavits or documents that the judge inspects without others looking at them, which we do all the time in the discovery context to see if a privilege is established.

MR. DORSANEO: Shouldn't do affidavits.

MR. SPIVEY: How about substituting the words documents may be inspected -- "documents which are claimed to be sensitive may be inspected in camera." That clears up your English and that really attacks the problem.

MR. JONES: Why don't we just leave it alone.

MR. EDGAR: It seems to me that the problem evolves around that first portion of the first sentence beginning affidavit semicolon on the word records, and I think everybody is saying perhaps there should be some provision for some in camera inspections of documents but the hearing should not be in camera, and that clause -- those clauses are the ones that are giving us the problem.

CHAIRMAN SOULES: What if the the secret is not a document?

MR. EDGAR: Or just say or all the matters.

CHAIRMAN SOULES: Okay, matters. Let me see -- let me try to do this -- I am sorry.

JUDGE HECHT: It is only a document. All we are talking about is documents, and if you don't include

discovery, then you don't need an in camera inspection because everything is in the court's file anyway. What is there to --

MR. EDGAR: Could it perhaps concern the identity of someone? I mean that may not be a document.

JUSTICE HECHT: For purposes of this rule, the term court records includes documents and records filed in connection with any matter before any civil court. How can you seal something that is not a record?

MR. McCONNICO: Luke, can I add something to that?

MR. BRANSON: The draft we are working with doesn't have that provision in it.

CHAIRMAN SOULES: Yes, Steve McConnico. Excuse me.

MR. McCONNICO: The problem is, I think we are going to get into the same problem we got into in discovery because we are talking about documents that are privileged, but to understand the documents, it is necessary that you have testimony and some explanation.

The only experience I have ever had in this has been in oil and gas cases where you have geology that is privileged or you are saying this is our special property, and these other people have taken it, but to understand the geology, you have to have a petroleum engineer or a geologist

in there explaining it, and by having them explain it, you give away the farm. Then the other side knows what has happened. So I don't really think we have solved our problem by just by having someone look at the documents. That is probably true also in trade secrets.

CHAIRMAN SOULES: Well, except we are only sealing records. We are not sealing testimony. We are only sealing --

MR. HERRING: But you have to explain the document. What is your trade secret, Mr. Witness? Well, let me tell you what it is, here are the documents that support it, but let me explain it because you can't tell it if you are a court just by looking at the documents, and I want to present this testimony. But if I present it, then the cat is out of the bag. That is the concern that there may be things that need to be communicated other than simply in the documents that if you communicate them the ballgame is over.

JUSTICE DOGGETT: What procedure is there now under the current rules to seal anybody out of a courtroom in that situation?

MR. HERRING: I don't know.

JUSTICIE DOGGETT: I wouldn't want to take a step backwards and close people out of the courtroom.

MR. DORSANEO: That has been done.

MR. SPARKS (SAN ANGELO): Now, if we have our

hearing and this point comes up, you file a motion for in camera inspection that is part of the hearing itself. So I don't think you need the in camera language in there. You still have the right to file the motion even during this sealing period.

MR. COLLINS: It is covered now under Rule 166(b)(4) on presentation of objections. A party has got to object concerning discoverability, and if the trial court determines an in camera inspection is necessary, he can have it. That is already provided for in the current rule.

MR. HERRING: But that is discovery as opposed to sealing, which deals with nondiscovery context.

MR. COLLINS: Well, it is the same principal. The party that is objecting to discovery says this is work product or this is privileged, and the judge says well why is it. And he says, well, under this rule, and he says, well, let me look at it or I am --

MR. JONES: What is the law involved where the judge -- produce the documents. It is relevant and we are going to use it in this case, and the document is produced and maybe even used as an exhibit to trial. And now we talk about an in camera hearing to decide the public cases. Is that what we are talking about?

CHAIRMAN SOULES: Okay, let's break for lunch. Let's give it 30 minutes. You can bring your sandwich back

in here if you are not done so we can get on with it.

(At this time there was a lunch recess at 12:45, after which time the hearing continued as follows:)