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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

May 7, 2005

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 7th day of May, 2005, between the hours of 8:59 a.m. and 11:27 a.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

Documents referenced in this session

05-12	11-8-04 Letter from Justice Wainwright, Exhibits in court reporter's records, includes proposals
05-3	3-2-05 Proposed changes to TRAP 28
05-13	Proposed change to Rule 10

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VICE-CHAIRMAN LOW: There are certain statutes and certain oaths that a court reporter has to take. There is -- they use the language "exhibits offered," "exhibits tendered," "exhibits admitted," and apparently David says there is some question about whether the court reporter is to keep that.

The Supreme Court order just talks about offered or admitted. Well, it's very difficult to have something admitted that's not offered. It's very difficult to have something rejected that's not offered, so I really have a lot of difficulty. I'm waiting for those to educate me on why offered doesn't cover it, because if it's offered then under the cases, if they've used some terminology like bill of review --

MR. ORSINGER: Bill of exceptions.

VICE-CHAIRMAN LOW: Yeah. Bill of exceptions, I'm sorry. Under the cases, if the document speaks for itself, you don't have to have one. It's only the testimony. So I don't necessarily know why we need that, so I've told you everything I don't know, and now let's see what Richard can tell you.

MR. ORSINGER: Okay. I'm going to call upon our official court reporter representative, David Jackson, to comment on this.

MR. JACKSON: Well, I'm a freelance court reporter representative, but I'll give you the official court reporter representative take on this. The Court Reporter Certification Board addressed this back in August of 2002. Apparently a lot of court reporters, acting on instructions from their judges, have been taking the view that if an exhibit is offered into evidence and there's an objection to it, the judge sustains the objection, the exhibit is no longer part of the record. They have taken the position that those exhibits go back to the attorney who offered the exhibits --

PROFESSOR DORSANEO: What?

MR. JACKSON: -- unless they offered them on tender of proof.

MR. ORSINGER: No wonder it's so hard to get a reversal for evidence.

MR. JACKSON: And I have been in courts where they've said that, "That's just what we do in this court, you give them back to the lawyer." That way they don't get back in the jury room by accident, or it's taken care of and you don't have to worry about, you know, that exhibit getting in front of the jury because it's back with the lawyers who offered it.

Other courts take the other position that, you know, as long as there's a chance to use this on

appeal for any reason, we've always kind of had the feeling that the trial lawyer gets in trouble with the appellate lawyer if he doesn't offer the -- doesn't tender it. So we've just kind of thought, well, that's why the trial lawyers are kind of upset with us giving them back to them, but the Court Reporter Certification Board debated this, and it was a split vote on that board as to how to handle it. They came up with a -- Judge Montalvo came up with the results of that, and it's kind of addressed in the letter.

We just want you guys to tell us what to do with them. There is an ambiguity, and if you'll tell us what to do with them, we'll handle it any way you want to do it. I just kind of thought I would address some of the things that -- you know, we have been debating this issue of public access. You're going to now have exhibits that are going to be subject to public access that have been, you know, ruled inadmissible. You're also going to be adding exhibits to the clerk's office that have been ruled inadmissible. So you might want to look at those issues, too.

MR. ORSINGER: Okay.

VICE-CHAIRMAN LOW: Richard, did you look at -- there's one case out of Corpus, the Winn case back in 5-89 764 where that situation arose; and they didn't

make a bill of exceptions for some, so the court reporter didn't put those in; and there was a mix-up of what was offered and what was admitted; and the court held that, you know, if the document is offered and rejected, then it's a part of the record and, you know, the court reporter or somebody to keep up with what is admitted and not. Bill.

PROFESSOR DORSANEO: I think that's certainly right, but there are also a number of cases where the document isn't really formally offered, but everybody acts as if it was, and it's made part of the proceedings kind of by consent, and that ought to be in the record. I really think it ought to be if it's marked and tendered to the court reporter or something shorter than offered. Maybe offered will do because we can interpret offered to mean treated as offered.

VICE-CHAIRMAN LOW: Well, sometimes people will refer to something and they'll -- I mean, just something that a lawyer created, and they'll talk about it and so forth, but I just consider that as a guide just like when you get up and argue to the jury, and that that document -- I say, "This is offered into evidence. Is it accepted or not?" I never even thought of it that way. Maybe I'm wrong. But how do the rest of you feel?

MR. ORSINGER: Well, I don't think we should

let it turn on marking, because I think sometimes stuff is offered into evidence unmarked accidentally, and the issue is whether, first of all, does the jury see it or did the court consider it; and, secondly, if it was offered, did the court reject it, but was it so the appellate court can evaluate whether it was reversal error to exclude it.

So I don't think that the technicality of marking should count, and it's hard for me to imagine those people that are taking exhibits that have been marked and offered and excluded and giving them back to the offering lawyer, and they're not in the record, and when it goes up on appeal they may or may not have it. They may or may not provide the original. It may be some alteration. It seems to me like it should be considered an official document if you try to get it into evidence or to admit it into evidence, and we ought to clarify the language in such a way to make it clear that if someone attempts to admit it and it's rejected, it's just as much a part of the appellate record as when it's admitted.

PROFESSOR DORSANEO: I think it should be offered or treated by the parties as if it had been offered if marking won't do it. I agree that some sort of technicality is not the way to go. It's what you just said a moment ago. It's whether it's really part of the proceedings.

MR. ORSINGER: You know, in family law cases you'll sometimes find that the parties have inventories of their assets and liabilities, and the judge will -- it's a bench trial, and the judge will take them out of the file or they'll be tendered, they won't be marked, and yet everybody is working off of them, testifying off of them. The decree is sometimes even written off of them, and they're never technically admitted, but I don't know that we ought to try to cover that in the rule. There is case law that kind of patches over that situation.

HONORABLE NATHAN HECHT: Well, but, I mean, if there is this much disagreement over what I should think is fairly simple and fundamental --

PROFESSOR DORSANEO: The court reporters need to be told that what they're doing is crazy.

HONORABLE NATHAN HECHT: -- we should spell it out.

MR. ORSINGER: I think we should eliminate this -- there's three different versions of language.

VICE-CHAIRMAN LOW: Well, no, there are more than that.

MR. ORSINGER: There are?

VICE-CHAIRMAN LOW: Yeah. The Supreme Court order, under 14b; there is the 103, Rule of Evidence; there is Appellate Rule 33.2; there is the Government Code

and 75a that says "admitted or tendered." I mean, you're talking about amending, if you're going to get the language together, you better look up and see everything that needs to be amended because there are a number of things that need to be amended if it's all going to be consistent, not just one rule.

MR. ORSINGER: Well, is that too much for the Court to do, Justice Hecht, to amend about four or five different rules?

VICE-CHAIRMAN LOW: No, not rules. Statutes.

MR. ORSINGER: Well, we can't amend the statutes unless we want to do an express repealer.

HONORABLE NATHAN HECHT: Well, I don't know that we need to do that, but, no, I mean, it's not, but I should think -- I just would have thought that something like this would be fairly established in the 21st century, but if it isn't, we ought to spell it out, and if we've got to change the rules then I think we should do it.

VICE-CHAIRMAN LOW: Justice Gaultney.

HONORABLE DAVID GAULTNEY: Maybe I'm looking at an old -- I thought there was a proposed -- a set of proposed amendments to accomplish this, that had some language.

VICE-CHAIRMAN LOW: There is and we're going

to get to that. We wanted to go into kind of what the problems are and the facts that -- I mean, we can have a rule that says what we want, but the Government Code is going to say what it says. The Supreme Court's order under 14b, I guess the Supreme Court could amend that and maybe be clarified, but I just wanted to point out it wasn't a simple matter of looking to one rule that we could put this in and the magic wand is waved and it's clear. Jeff.

MR. BOYD: Yeah. I wanted to back up and try and get a better picture. Procedurally if I'm in court and I offer into evidence Exhibit 1, Defense Exhibit 1, the other side objects and the judge sustains the objection and I don't then make a bill of exception, or whatever terminology applies in that circumstance, haven't I waived my right to have an appeal based on the failure to admit that document?

VICE-CHAIRMAN LOW: You haven't unless that -- there's testimony necessary in a bill to prove the document up, to authenticate the document if the document speaks, you know, for itself.

HONORABLE NATHAN HECHT: Ordinarily, your bill, you would have made your bill in the predicate to offering the exhibit. Now, that may not be the case, but if you don't, if you then take the exhibit away and you

don't leave it with the reporter to be made a part of the record, then I think you've got a -- I don't see how you can appeal it.

MR. BOYD: My questions are demonstrating my ignorance, I guess, and I guess I have been doing it wrong all along. So a bill or an offer is related solely to testimonial evidence or whether it's documentary evidence?

MR. ORSINGER: Let me restate it. The bill is necessary when the record doesn't otherwise reflect the content of the evidence excluded. So if you're authenticating an exhibit with the witness, you go through a series of questions while he's under oath there in front of the jury and then you say, "So, your Honor, I offer exhibit so-and-so," and it's excluded. The record already reflects everything that's necessary. The predicate is in the record, the exhibit is in the record; but if there is something like they sustain your expert witness's -- the objection against your expert witness at the start and he's never allowed to testify to all of those exhibits and charts and everything else, that's not in the record, so you're going to have to take him on an offer of proof, they call it now, and go through the elaborate process of authenticating all of those exhibits.

PROFESSOR ALBRIGHT: But you do have to have your exhibit marked.

MR. ORSINGER: Well, I do not necessarily agree. I've tried a lot of jury trials where sometimes, you know, somebody has done a -- a witness has done a chart on the board or something like that and they forget to mark to it, but it's been testified to, read to the jury, seen to the jury, commented on by four or five witnesses; and in my opinion that's in evidence 15 different ways.

VICE-CHAIRMAN LOW: The only case -- go ahead, Judge.

HONORABLE DAVID GAULTNEY: I was just going to say I agree with Richard. I mean, I don't think you want to have a technical requirement of being marked, because really what you're trying to decide is whether that evidence which was excluded, whether that was reversible error. If you can identify that document without it being marked I don't think you want to have a technical error in failing to mark it keep you from addressing the fundamental issue, if you can identify the document.

Obviously the best way to do it is have the document marked so that it can be clearly identified, but let's say it's the only document that's in the bill or that's been offered and excluded, so the court of appeals can clearly -- and there's no dispute between the parties,

the court of appeals can clearly identify the document that's been excluded. I don't think we want to have a technical rule that it has to be marked before the court can consider it. I think I like the language in the proposed rule.

VICE-CHAIRMAN LOW: Judge, and they did exactly that in the Corpus Christi bank cases. Some things weren't admitted, and the court reporter didn't put those together, and the court says, "We think the admissibility of every document which is shown by the statement of facts to have been offered and excluded may be considered." In other words, if it's identified in the statement of facts. It doesn't say "marked."

"We recognize the bill of exception must in the case of excluded testimony be developed, and formally a bill of exception may be necessary to prove up the document," but if the statement of facts shows what the documents are, I don't -- this is not a Supreme Court case. It's out of Corpus in 1979 and has not been overruled, so I think marking is not one of the things.

Richard, what's your answer, and let's see how that answers, and we'll amend what we can amend.

MR. ORSINGER: Yeah, my view is, although, like Justice Hecht, it's a challenge to me to understand why this is difficult, I think that the proposal is a

little redundant but perfectly fine; and if the committee of people that examined this, including input from judges and court reporters, feel like this definitively resolves all confusion then I'm totally in favor of it.

VICE-CHAIRMAN LOW: In other words, like the will, the guy didn't leave anything to old John, and we conclude I didn't want old John to get anything. If we put it all in here, you think the language includes that so it will be clear.

MR. ORSINGER: You know, maybe, I don't know if it's possible, we could put a comment in there that the intent of this is to make it clear that all these rules in the Government Code all mean the same thing, even though maybe the Government Code is still a little bit different; and that means, you know, that if it's tendered in an offer of proof, offered or admitted, then it goes into the possession of the reporter and then eventually to the clerk to go up on appeal.

VICE-CHAIRMAN LOW: So basically you gave us several things we can do, but you're recommending we use the word "admitted, tendered," and then "offer of proof or offered into evidence." Is that --

MR. ORSINGER: I'm accepting the -- basically this independent committee's proposal.

VICE-CHAIRMAN LOW: All right. Richard.

MR. MUNZINGER: What's the difference between tendered and offered, and why would you use tendered? It makes no sense to me that the -- we've all tried cases, "I offer this into evidence." The appellate courts say it wasn't offered, so it's not before us. The use of the word "tendered" it seems to me is unnecessary and confusing and suggests something different than an offer. The offer is the formal way of bringing it to the attention of the trial court and requiring a ruling, and "tendered" just screws things up.

VICE-CHAIRMAN LOW: Well, my first sermon was that offered ought to be enough, but then apparently there is some -- David.

MR. JACKSON: Well, I think you cover both bases because you have people that feel like you have to have a special tender to get something before the appeals court and offer by itself just doesn't cover it. You can offer it, and it's going to get in. You can tender it on a special exception, and you'll cover it.

VICE-CHAIRMAN LOW: All right. Sarah.

HONORABLE SARAH DUNCAN: Well, let's clear that up, because I'm not a trial lawyer, but maybe I'll be corrected, but my understanding is if I offer it into evidence and I have fulfilled the predicate, that's all I need to do, and so let's not put that language in there

because I think it confuses things.

PROFESSOR DORSANEO: Yes.

VICE-CHAIRMAN LOW: Bill.

PROFESSOR DORSANEO: I think "tendered it in an offer of proof" adds confusion, and I think it's actually technically wrong. If you didn't offer it, the fact that you tendered it in an offer of proof, unless that amounts to an offer, is not enough. An offer of proof without -- without an offer, like in the context of a conventional, old-style question and answer bill of exception, I mean, you have to offer that; and some people think that that is reoffering it; but what's elicited on the bill, what's in the offer of proof, needs to be offered in a way that you get a ruling.

So tendered, just simply making it part of your -- what we used to call a bill of exception and then looking at the judge like "Are we through" is not technically enough. It would be just better to say "offered," as Buddy says.

VICE-CHAIRMAN LOW: As I remember, 75a -- and I would have to go back -- is the only place I see the word "tendered" in our rules. I think it's 75a. Did you look at that?

MS. HOBBS: It is the -- it's 75a.

MR. ORSINGER: It is. It's right here,

Buddy. 75a.

VICE-CHAIRMAN LOW: And I can find nothing else where that is used, so it is something maybe that's confusing, but tendered is used in some cases. Some people say, "I tendered that into evidence, I offered it." Judge Gaultney.

HONORABLE DAVID GAULTNEY: Well, I agree with Sarah and Bill. The emphasis on the word "tendered" does perhaps create ambiguity, but there's a difference when there isn't. As I understand it, we're dealing with apparently two applications of the same rule of what does offer mean; is that right?

MR. JACKSON: Well, it actually goes to what's actually admitted.

HONORABLE DAVID GAULTNEY: So why can't we instead of using "tender" or "offer" maybe just use "offer" and then qualify "offer of proof" as whether admitted into evidence or not or whether tendered and excluded, whatever language we need to do to make it clear to those -- to that camp that thinks they don't have to preserve the record for the lawyer or get the evidence in the record.

VICE-CHAIRMAN LOW: Judge Gray.

HONORABLE TOM GRAY: Buddy, I think Professor Dorsaneo hit precisely on why the word

"tendered" is in there, and it has some historical and procedural consequences, and it is because of the methodology of doing the bill of exceptions.

VICE-CHAIRMAN LOW: Bill of exceptions.

HONORABLE TOM GRAY: Because it is not offered into evidence when you tender it during the making of the bill. It is not offered into evidence unless and until the bill is offered into evidence, and that's why there's the distinction. Now, whether or not that's a distinction we want to preserve is another issue, but there is a very real difference in the context in which it's used in Rule 75b between offering it into evidence and tendering it during the course of a bill of exceptions.

Both should result in that document remaining with the court reporter, but whether or not you want to, you know, eliminate the need for the distinction or the reasoning for the distinction is going to go to the preparation and offer of a formal bill of exceptions.

VICE-CHAIRMAN LOW: In other words, the -- that's what I was saying, that 75a is the only place, and tendered is used only in connection with you tender a bill of exceptions. Lamont.

MR. LAMONT JEFFERSON: If I'm trying a case and I've got a document I try to get into evidence and the

court excludes it, maybe I don't want it as part of the appellate record. What if I just put it back in my briefcase? And then by this rule is this saying that I've got to now turn it over to the court reporter?

MR. ORSINGER: Did you offer it?

MR. LAMONT JEFFERSON: Isn't it my -- well, no, isn't it my choice, though? If it's tendered in an offer of proof, or whatever terminology we want to use, then it becomes the custody of the court reporter or the record. It then goes in the record, but a litigant ought to have the option when a document is excluded from not presenting it to the court reporter or the record.

VICE-CHAIRMAN LOW: You can't alter the record, and that's the record. I mean --

MR. LAMONT JEFFERSON: No. Once you --

VICE-CHAIRMAN LOW: I a lot of times wish I could have altered it.

MR. LAMONT JEFFERSON: I'm not saying you offer it. It's excluded, and you ought to have the option of not making it then a part of the record.

VICE-CHAIRMAN LOW: But the record -- and the court reporter takes down that you have this document and you've offered it and so forth, and I don't know.

MR. LAMONT JEFFERSON: What happens now in most cases is if I don't care, if I don't think it's

reversible error, if I don't think it's going to make a difference on appeal, I'm just not -- I'm going to put it back in my briefcase, and that's going to be the end of it.

VICE-CHAIRMAN LOW: Well, the answer to that is just don't use it in the brief.

MR. MUNZINGER: How can that be the law? What goes to the jury is what's admitted into evidence. What transpires during the trial of the case is a matter of record. The fact that Lamont offered an exhibit that was excluded may very well bear on a point that I want to make on appeal or some other point that I want to make to the court. If his exhibit is gone, I'm robbed of a portion of the record that allows me to make that argument. A lawyer who offers an exhibit in trial has done an act which has occurred in the midst of a judicial proceeding. There is a record of it, and for the record to be complete you have to see the document that was offered.

MR. LAMONT JEFFERSON: But I don't understand how it can be to anybody else's detriment. If I offer an exhibit, the other side objects and says it shouldn't be in the record or it shouldn't be seen by the jury, shouldn't be considered, it's not admissible. Now, if there's some other procedure in which the opponent

thinks it ought to be used, and maybe not for purposes of jury trial, then the opponent is entitled to it and he can get it in the record and say, "Okay, well, mark it. I want it marked."

VICE-CHAIRMAN LOW: Jan and then Sarah.

HONORABLE JAN PATTERSON: Well, I agree with that last point. I think some extra act has to occur. Either the adversary or the lawyer says, "Your Honor, I want it part of the record." There is something extra that has to happen besides an offer and an exclusion, and at that point something else has to happen before it becomes a part of the record.

MR. LAMONT JEFFERSON: I don't know. I don't think it ought to automatically be part of the record because the judge says it's excluded, just because it's offered.

VICE-CHAIRMAN LOW: Sarah.

HONORABLE SARAH DUNCAN: In my view it's part of the record because it's part of what happened at trial. As a for-instance, you go up on appeal, and that excluded document is not part of your argument on appeal, but it is part of my counter-argument that, "You see, I was consistent in objecting to every document that had this type of information in it."

It's part of what happened, but my comment

really is related -- was earlier, that if we're going to try to clean this up, it seems to me like we ought to write a clear, concise, direct rule, and cleaning up -- trying to clear up any confusion about this needs to go in a comment. It shouldn't muck up the language of the rule to clear up confusion.

VICE-CHAIRMAN LOW: Right. We shouldn't have to write just a rule for the court reporter. I mean, they are going to be able to see the note. That's a good suggestion. Bill.

PROFESSOR DORSANEO: Well, I think 75b is -- which was put in here in 1966, is badly worded.

VICE-CHAIRMAN LOW: Okay.

PROFESSOR DORSANEO: And really, trying to fix it by modernizing the language doesn't really fix it, and I think that's what this proposal does. Instead of referring to a bill of exception it refers to an offer of proof; and, frankly, it seems to me that if the exhibit -- 75b begins by saying "all filed exhibits." Now, I suppose the filing context here is a little bit puzzling as to what that means. To me all things that can be identified as exhibits because they've been filed or marked and that have been tendered officially ought to be part of the record, not the part of the record that goes to the jury under Rule 281, which itself needs a little work because

it doesn't say anything about admitted, but it does talk about evidence, written evidence, going to the jury.

So I think, you know, 75b would be better off if it said, you know, "all filed exhibits" or "all exhibits," and I hate to get back to the word "tendered," but maybe that would be the word, "tendered to the court reporter or to the court, whether admitted or excluded." Okay. There ought to be -- you know, ought to be part of the court reporter's record, and 281 would need some work to make it plain that they have to be admitted written evidence before it goes to the jury.

And really, I think what we're talking about is Appellate Rule 13 in part, duties of court reporters and recorders. It says, "The official reporter must take all exhibits offered in evidence during the proceeding and ensure that they are marked, file all exhibits with the trial court clerk after the proceeding ends, perform the duties prescribed by 34.6," and I don't know how the court reporters' conclusion that you give them back to the lawyer is consistent with anything at all. Maybe they need a special letter response somehow if they made an inquiry about whether this is the right interpretation of the rules because it -- you know, it clearly is not.

Frankly, the thing ought to be part of the trial record whether it's admitted or excluded, but it

ought not to be anything more than part of the underlying record for the appeal. And, Lamont, I think if you just want to put it back in your briefcase that that's not the right way to run the system, because once you give it -- once you give it to the court --

VICE-CHAIRMAN LOW: Bill, we're going to get off that point.

PROFESSOR DORSANEO: -- you can't take it back.

VICE-CHAIRMAN LOW: Let me tell you what. Today if we need to go back and look at other rules that need to be amended, you know, we'll -- that's the way we'll head, but today what we really have -- and it's good to bring all these things that we're talking about, but we have today presented the conflict they say that's created the problem, the conflict between 14b and the rule the Supreme Court passed and 75a. That apparently -- isn't that right, David?

MR. JACKSON: Yes, sir.

VICE-CHAIRMAN LOW: That is the thing, and we're getting off into a number of things, and maybe this whole area needs to be cleaned up, maybe we need some directive to the court reporters in a note or a rule, one of those. There are different ways to handle it, but today we're going to see if there's language that we can

cure this problem with or if we need to take a closer look at all the rules, the oath the court reporter takes where she keeps things that are offered and swear in as court reporter. There are a number of other rules. Where is Levi? He has been raising his hand.

HONORABLE TRACY CHRISTOPHER: He stepped out.

VICE-CHAIRMAN LOW: Go ahead.

HONORABLE TRACY CHRISTOPHER: Well, I understand. I'll just make one real quick. A lot of lawyers feel the same way Lamont does. My court reporter tries to comply with the Supreme Court directive, and she's always running after them trying to get the exhibits that they've stuffed back in their briefcase, and they're like, "Well, what for? You know, the objection was sustained. It doesn't need to be part of the record," but that's the practice. And she tries to get them back from them, and sometimes we can't find them so we have to withdraw them at that point.

VICE-CHAIRMAN LOW: Okay.

MS. BARON: I just wanted to add a footnote, and that is that my subcommittee is looking at problems with oversized exhibits and requiring parties to tender a 8 1/2 by 11 photograph or version of them, and so we have that on our plate. So that may tie --

HONORABLE TOM GRAY: Are you suggesting a motion to delegate this responsibility to revise these rules to your committee?

MR. LAMONT JEFFERSON: That's what I heard.

MS. BARON: Well, I'm just saying we're going to touch on this. I'm not sure we're going to touch on which exhibits the court reporter walks away with and which ones the court reporter doesn't walk away with, but we're kind of a little bit overlapping, so we need to work with Bill on that.

VICE-CHAIRMAN LOW: Just for guidance, I mean, Lamont has -- raises a good point. You either agree or you disagree. Should we, when looking into that, include the fact that, you know, if somebody just takes it or they can't put it back, I don't -- I don't see how -- I'm strongly against that, but does anybody else support his view? Or are if there enough people do then we need to consider that.

MR. LAMONT JEFFERSON: And let me say that I'm not advocating that, but I do think it's the practice, as Judge Christopher said, and it's often -- I mean, I've done it a lot, and people generally don't complain about it.

MR. MEADOWS: Buddy, just for the record because you asked, I mean, I agree with Lamont. That's

not only the practice, but it seems to me to be -- if it's not a best practice, it's a harmless practice.

VICE-CHAIRMAN LOW: Then what should we do about that?

MR. LAMONT JEFFERSON: Well, the reason I raised it is this "tendered in an offer of proof." To me that's what gets it in the record because you've now made it an official part of the record, and I don't know if that's the right phrase and I don't know if that's the right context, but some party marks it and says, "Okay, I'm offering it for the record." It's not in evidence, but it's being offered by one side or the other, whoever thinks they need it in the record, whether it's the offering party or --

VICE-CHAIRMAN LOW: But what are you going to do if Richard is on the other side? He says, "Wait a minute. Don't put that in your briefcase. I want" --

MR. LAMONT JEFFERSON: He'll say, "I want that marked, your Honor. I'd like that marked and offered for the record."

VICE-CHAIRMAN LOW: Okay.

HONORABLE LEVI BENTON: But, no, Richard has no rights to use it on appeal if it's not in evidence. Now, Richard has objected and been successful in getting it excluded. If the proponent of the evidence doesn't

wish to make it a part of the -- an offer of proof, that's his right to withdraw it. If Richard wants to use it on appeal, he can stand down his objection.

VICE-CHAIRMAN LOW: I know, but what if it is so inflammatory, it's something in blood red that says, you know, it's just --

HONORABLE LEVI BENTON: Well, if it's been offered outside the presence of the jury and excluded, it's no big deal. If it's been offered in the presence of the jury and excluded but then not made a part of an offer of proof, then outside the presence of the jury Richard has the right to make his own offer of proof of something that's been screened to the jury but not admitted that was prejudicial, inflammatory, or otherwise to preserve his argument on appeal.

MR. ORSINGER: If we memorialize this view it's going to create a nightmare, because what I am interpreting you-all to say is if I have the witness on the witness stand, I mark an exhibit, I try to do my proof of it, I try to authenticate it, and then I offer it and the judge -- it's objected to and the judge sustains it, then I have to do something else called an offer of proof in order to show the trial court and the appellate court that I really, really do want that in evidence. That means that the routine practice of marking and offering,

exclusion, marking, offering, exclusion, now has to be followed up with another procedure at some point in the trial. I don't know when because the trial judges frequently make you wait on your offers of proof until the end, and then by that time you've got 30 exhibits and your people are gone, so the implication of what you're saying is for me to preserve error I not only have to mark it, authenticate it, and offer it, but I have to go through another thing.

VICE-CHAIRMAN LOW: Wait just a minute. Judge Gray had his hand up next.

HONORABLE TOM GRAY: In the old days it was called an exception, one word and it was done. That was the historical context in which that whole procedure went.

MR. ORSINGER: That procedure is not required anymore.

HONORABLE TOM GRAY: Right.

VICE-CHAIRMAN LOW: Judge Jennings, is -- I am having difficulty following and I really can't keep up with who raised his hand first, so Judge Jennings, go ahead.

HONORABLE TERRY JENNINGS: I just wanted to point out that in Rule 13, the comments to the 1997 change where they talk about rule -- TRAP Rule 13.1(b) where the the court reporter must take all exhibits offered in

evidence during a proceeding, ensure that they are marked, the comment says "Paragraph 13.1(b) is new but codifies current practice." But it sounds like from what Lamont is saying that it is not and never was the current practice. But I just wanted to point out that comment.

VICE-CHAIRMAN LOW: Bill.

PROFESSOR DORSANEO: Well, this is a big state, and I think common practice is variable, highly variable, but I would recommend instead of tendered -- instead of "which were admitted, tendered in an offer of proof, or offered," I would recommend saying something like this: "Formally offered," and I'm not really strong on "formal." "Formally offered or tendered into evidence, whether admitted or excluded."

Now, the "whether admitted or excluded" is meant to deal with the court reporters and to tell them that they shouldn't give it back to the lawyers and tell them to figure out what to do with it in order to get it made part of the appellate record. I think "offered" is the primary kind of thing, but I don't like saying just "offered" because that suggests formally offered. Maybe "offered" without "formally" would be good enough, but because there are a number of cases where things are not offered but it's treated as if it's in evidence because everybody knows this case is about this promissory note

that everybody talks about during the course of the proceedings.

Basically the idea ought to be that the court reporter ought to get a hold of these things, these written things that are made part of the proceedings and that obviously were the subject matter of the proceedings or were attempted to be made part of the record, and not make any kind of a decision about whether they should have been admitted, whether they were admitted, or any of that. That's not the court reporter's job.

VICE-CHAIRMAN LOW: Alex, and then Levi.

PROFESSOR ALBRIGHT: Well, I have a recollection that when you are trying to admit a document you've marked it, asked that it be admitted, and it is excluded, that you don't have to do anything else to have it be part of the record. I can't find it in the rules. I know I have it in my office somewhere.

What makes me nervous is that we're talking about writing a rule and none of us can agree as to what the process is, so it seems to me that we should -- this is something that somebody could do an hour's worth of research and maybe find out what has to be done to make sure it's in the record, because it would be awful for us to make a new rule without knowing what the underlying requirements are.

VICE-CHAIRMAN LOW: That's what we're going to decide today. We're going to decide whether we change the language in 14b and 75a to try to cure the problem or whether we go to a wider scope and look at all the other things and further research and see if further work is needed. David.

MR. JACKSON: Yeah. And that -- you know, we're happy to do whatever you decide. The only thing that's bothering me with this discussion is all this talk about things that haven't been marked. Court reporters are very technical people, and we're required to index all that stuff, and I see this thing out there now that is this document that might have been mentioned that we're going to be responsible for somehow getting to the appeals court when it hasn't been marked, offered, admitted, objected to, or anything, and we're taking on a responsibility that I never envisioned.

VICE-CHAIRMAN LOW: Yeah. Join the crowd, because, I mean, I have tried many, many lawsuits and lost most of them, but I have -- every time I have something I want in evidence, the first thing I do, I say -- I have the court reporter -- say, "Would you mark this for identification purposes?" I learned that the first case I lost.

So, I mean, and that's a lawyer's function

to know. That's what a lawyer does, and I mean, so I personally think that we need -- if there is confusion with the court reporters, we need to consider how to handle all of these things, and maybe just amending this rule might not necessarily be the fix. Levi.

HONORABLE LEVI BENTON: You know, Buddy and Richard and Dorsaneo said a couple of things I just want to respond to. During the course of the trial lots of paper gets thrown at a court reporter, just tons of paper, and until the trial court says it's admitted, you know, it doesn't matter that -- the court reporter has no interest in that paper until the court says the document is admitted for purposes of the trial record or for purposes of an offer of proof. Otherwise, the court reporter sometimes gets offended that you've cluttered up his or her desk with something.

And, you know, sometimes Richard, it happens realtime. If a document is excluded, the proponent will say, "Judge, can I have it admitted for purposes of an offer of proof or a bill?" If it's something that's going to take a lot of time on argument, the court will invite them to do it outside the presence of the jury. It's really not that big of a deal, but there's no reason to keep these excluded items in the court reporter's record unless there's an offer of proof.

VICE-CHAIRMAN LOW: You're the doctor to fix this thing. How do we fix this? What do we do? Tell me that.

HONORABLE LEVI BENTON: You know, I'm happy to serve on a subcommittee. I don't know how to fix it, but it needs to have a -- you know.

PROFESSOR DORSANEO: I'm going to say one last thing. These rules read together are not even really about what we're talking about. These are about exhibits filed with the clerk and the court reporter's dealing with the clerk, and they have been misinterpreted as providing some sort of a broad directive, and the problem may be just exactly with these three rules and what it is they're meant to be about. As I read 75b, (a) and (b) now, we're talking about exhibits, first, filed with the clerk.

VICE-CHAIRMAN LOW: That's in (a).

PROFESSOR DORSANEO: Yeah, that's in (a), but (b) is also about that, and 14b is about that, and how the court reporter gets them from the clerk in order to make them part of the reporter's record and the relationship of the clerk and the court reporter. That's what this is meant to be about, but it's said so badly it's hard to tell really what it's about altogether, and I remember when we did the recodification draft we worked on this to try to make some better sense out of it. And, of

course, we have the same problem on what we were talking about yesterday because it relates to these exact same rules, 75a and b.

VICE-CHAIRMAN LOW: Do you think we can fix this, and again, (a) uses the word "tendered," but they use it only in connection with as a bill of exception. Do you think we can fix this by some language in 75a and language in 14b, plus maybe Supreme Court amend their order?

Should the Supreme Court order -- it's the duty of the Supreme Court to draw an order. They drew an order that's at the bottom of 14b, and should that order clarify what court reporters really keep? Should we -- how do we fix the problem, or do we just go back to the drawing board?

PROFESSOR DORSANEO: The simple fix would be to say instead of "admitted" in these rules "offered" and to take out "admitted" in the opening sentence of 75b and say "all filed exhibits offered in evidence or tendered," and you could say -- you could still say "on bill of exception." We still use that terminology.

VICE-CHAIRMAN LOW: Right.

PROFESSOR DORSANEO: And to make sure that it deals with the concept of offered, regardless of whether it also talks about admitted, because I agree with

you a hundred percent. The operative thing ought to be -- ought to be offered, but that doesn't straighten out the problem of the court reporters as to --

VICE-CHAIRMAN LOW: But would we then amend or ask the Supreme Court to amend their order at the bottom of 14b to clarify 14b? I don't have a rule, but 14b is -- I mean, the order is at the bottom of 14b. Look down. It's on the lefthand side there.

MR. ORSINGER: Well, it's in the proposed amendments that are in the package on everybody's desk.

VICE-CHAIRMAN LOW: The whole order is there. But any rate --

PROFESSOR DORSANEO: The order says "offered or admitted." I don't think "admitted" is necessary. I think "offered" is good enough.

VICE-CHAIRMAN LOW: But should the Court go further to take care of the court reporter having custody of the things that were referred to or something?

HONORABLE TRACY CHRISTOPHER: No. You can't do that.

VICE-CHAIRMAN LOW: All right. Richard.

MR. ORSINGER: The current Rule 75b says "in which exhibits are admitted or offered in evidence." The current TRAP 13.1(b) says "take all exhibits offered in evidence." The current practice does not require an

additional offer of proof or bill of exceptions above and beyond offering the exhibit during the trial. All of this debate about practice around the state, which is not my personal experience and I do practice around the state, our appellate rules and our rules of trial procedure do not require a second offer after the first offer, and I think that if we eliminate the "admitted" and if we just use the word "offered" then that includes the offers that are accepted and the offers that are rejected and it eliminates all possible misconstruing of the difference between them.

If we memorialize some distinction or remove the concept of offered and supplant it or substitute only offered on a bill of exceptions, which in the appellate rules we call them an offer of proof, so it would be an offer of an offer of proof, I think we're going to -- some court of appeals somewhere is going to say, "Hey, you should have come back and made an offer of proof on the exhibit that you offered in order to preserve error," and I think that would be horrifying.

VICE-CHAIRMAN LOW: The court reporter has to certify and swear, "I further certify that this transcript" -- "the record of proceedings truly and correctly reflects the exhibits, if any, offered by the respective party." That is the way it reads, so what I'm

telling you is it doesn't say "admitted," it doesn't say -- and that's in the certification of shorthand reporters. Every court reporter has to sign that, certify that, not say everything that was referred to or something, "offered"; and once we get beyond what's offered then we need to train the lawyers and not the court reporters. I mean -- Judge Gray.

HONORABLE TOM GRAY: And this may be a gross oversimplification of the fix, but it seems like if we took 13.1 from the TRAPs, (a), (b), and (c), and substituted that in place of Rule 75a, it's at least about a 90 percent fix of the problem. Because then your language between the two rules is consistent with what the court reporter's duties are, what documents they have the duty to maintain control of and file with the court reporter.

VICE-CHAIRMAN LOW: All right. Are you suggesting some language? I want to hear the language so we can put it in there.

HONORABLE TOM GRAY: 13.1, as it reads. I mean, down to subsections (a), (b), and (c), it says, "The official court reporter or court recorder must, (a), unless excused by agreement of the parties attend the court sessions and make a full record of the proceedings; (b), take all exhibits offered into evidence during a

proceeding and ensure that they are marked; (c), file all exhibits with the trial court clerk after a proceeding ends."

VICE-CHAIRMAN LOW: 13.1 of the appellate rules?

HONORABLE TOM GRAY: Yes, sir.

PROFESSOR DORSANEO: Really there is a big overlap between the appellate rules and the civil procedure rules, and the appellate rules would --

HONORABLE TOM GRAY: Are much more clear.

MR. ORSINGER: What about the Rules of Evidence, Bill, because offer of proof is covered in the Rules of Evidence. There is a triple overlap there.

PROFESSOR CARLSON: But these rules are about custody.

MR. ORSINGER: I know, but the discussion around here is to define custody in such a way as to perhaps require an extra step to preserve error when your exhibit is denied.

PROFESSOR DORSANEO: That's right. And nobody accepts that view.

MR. ORSINGER: Well, there's four or five people around here, including the Honorable Benton at the end of the table, that feel strongly that that should be the case.

VICE-CHAIRMAN LOW: Sarah. Let's go to that end of the table. Sarah.

HONORABLE SARAH DUNCAN: It seems to me, given -- forget about the confusion of the court reporters. Obviously we've got confusion amongst the lawyers. If we're going to get to, you know, make a recommendation to the Court about what the practice should be, it seems to me that the first thing we have to decide is whether Lamont's view should prevail or the contrary view. If it's simply offered into evidence, is that enough? That's got to be the first thing we vote on, it seems to me.

MR. LAMONT JEFFERSON: I think the answer to that is easy. I'd say, yeah, if it's offered and excluded you preserved it, but I think --

HONORABLE SARAH DUNCAN: But you're going to put it in your briefcase.

MR. LAMONT JEFFERSON: Well, then I've waived it. Then I've waived it. If it's not a part of the record obviously I can't complain about it. But here is my concern. I think that the rule as amended, the proper amendment that describes what a court reporter has to keep custody of is good enough. It doesn't offend me that it says "tendered in an offer of proof." What I don't want to encompass is the trend that judges say, "I

want your exhibit list in advance" or "I want to talk about motions in limine before we even start the evidence."

So now you've got a list of 50 documents, and sometimes the judge says, "I want them premarked." So now you've got marked documents that you've never tendered to the court reporter. They're all marked, they're all sitting on your briefcase or sitting on the table. You're going through motions on limine. They're on an exhibit list somewhere, but they're never offered because of the judge's preliminary rulings and motions in limine. Now I've got to tender all of that stuff to the court reporter?

HONORABLE KENT SULLIVAN: Not unless you're going to offer it.

MR. LAMONT JEFFERSON: But because of the preliminary rulings of the judge I know what's going to come into evidence and what's not. So at that point, according to what I'm hearing around the table, because it's marked, because it's discussed in a court proceeding relating to a trial, it is now the custody of the court reporter, and for no good reason.

VICE-CHAIRMAN LOW: That's not exactly what they're saying. If it's during the trial and out there in the courtroom, it's not like in motion in limine and so

forth, and it's never identified.

MR. LAMONT JEFFERSON: Often judges preadmit exhibits. That's the judge's preference, is to not have to argue about admitted exhibits during a trial, and so the question then becomes when the judge has made his rulings, his or her rulings on preadmitted exhibits, is everything marked -- does it all have to go to the court reporter?

MR. LOPEZ: It is if you want to preserve error.

MR. LAMONT JEFFERSON: Well, yeah, and then I would have to offer it as an offer of proof. Then it would be tendered as an offer of proof, and it would satisfy the court reporter's concern about what it is they have to keep custody of.

VICE-CHAIRMAN LOW: Okay. Richard.

MR. MUNZINGER: Anything that goes beyond offer is going to be confusing, but I still want to address Lamont's point that if he has offered an exhibit and it is excluded by the trial court from the jury it's his to take home with him and it doesn't become a part of the record until or unless he wants to make it a part of the record. So on Monday the judge excludes the exhibit, the trial concludes on Thursday, and Lamont says, "Oh, my god, I took that exhibit back to my office. I want it

part of the record." He comes in now and he hands the exhibit to the judge, and I say, "Wait a second, Judge, that's not the exhibit he offered. He's playing games with the court now."

Now, who is going to resolve that argument and how is that argument resolved? It's a swearing match between two lawyers. There's only one way to resolve that argument, and that's for the clerks, or the court reporters rather, to do their job, which is to accept and account for exhibits that have been offered into evidence; and if Lamont takes it with him, I mean, if it were Lamont I'm not going to argue with him, but there are a whole heck of a lot of guys I've tried lawsuits with that I wouldn't trust for two seconds.

VICE-CHAIRMAN LOW: Carl.

MR. LOPEZ: I think that's a real problem. It's sad, but I can count a million times that lawyers have -- I can only talk about Dallas and my court, but if it gets excluded and it's not important enough for them to argue about later, they stick it in their briefcase and take it home; and now the problem is going to be how does your -- if the rule is very specific then a conscientious court reporter won't be able to certify that record until they grab that lawyer that he doesn't trust very well two days later to then argue about is that the exhibit that we

were talking about two days earlier.

MR. MUNZINGER: And if they certify, it's a false certification by the court reporter, because they haven't had custody of the exhibit from the time it was offered into the judicial record. It's a false certification by the court reporter, who may commit a crime by doing so.

VICE-CHAIRMAN LOW: David, did you-all look at 13.1, 13.1, duties of the court reporter? That seems to be a guideline of what the court reporters must do. You don't refer to that particular rule. Is that -- I mean, that doesn't help clear up the situation what the court reporter has to do?

MR. JACKSON: Well, it helps me a lot. I made a note of that, and I plan on writing an article in our *Texas Record*, our court reporter publication; but, you know, you've got court reporters that are sitting here trying to get documents from Lamont and find out where documents are for Richard; and, you know, it's an issue that everyone has a different view on what happens to exhibits; and now if we're going to have to go to jail for certifying the stuff, I quit.

MR. TIPPS: I knew that would get your attention.

VICE-CHAIRMAN LOW: All right.

HONORABLE KENT SULLIVAN: For the record, I agree with Richard Munzinger in terms of what the bright line is. When it's marked and it's offered it's the court reporter's. That I think is absolutely clear. Let's talk about this issue of practice for just a second. It is a practical issue that in a case of any complexity where there are dozens, if not hundreds, of exhibits and the lawyers are using them because they are examining the witnesses about them that they get located at various places around the courtroom; and at the end of the day a hardworking and perhaps worn out court reporter may have difficulty in locating each one of these dozens, if not hundreds, of exhibits and keeping custody of them day-to-day-to-day. I mean, that is practically how this situation can arise where something ends up in someone's briefcase.

But in terms of theory, I think that we all ought to try and get on the same page because -- I mean, for me it really is clear. Theory not always being practice or even practical, but the theory is when it's marked and it's offered, it's the court reporter's. End of discussion in my view.

VICE-CHAIRMAN LOW: The practice appears to be getting away from the rule, and I don't know that you can make the rule comply with every practice, because

practice in Houston may be a little different than they do it someplace else, but we need a general rule to go by. Wait just a minute. Tracy, do you have your hand up?

HONORABLE TRACY CHRISTOPHER: No, I think Kent pretty much covered it. I understand Richard's view, but, you know, court reporters don't keep up with the exhibits on an hourly, minute-by-minute basis, and they just can't. We have to trust lawyers a little bit.

HONORABLE SARAH DUNCAN: How is your view different from Richard's and Kent's, because that's what I heard Richard saying?

HONORABLE TRACY CHRISTOPHER: No, no, no.

HONORABLE SARAH DUNCAN: Munzinger.

HONORABLE TRACY CHRISTOPHER: Richard Munzinger.

VICE-CHAIRMAN LOW: All right. Jeff.

MR. BOYD: What may clear this up for me is the authority that we're talking about here that's unclear. To me, we go to trial, you offer an exhibit, I object to it, my objection is sustained, the exhibit doesn't go in. We go up on appeal, and one of your points of appeal is that you failed -- or that the judge failed to admit this exhibit, and then I respond in my brief by saying "Too bad, you waived that because you didn't tender or offer that exhibit as a bill of proof or an order to

preserve error." I don't want -- the answer to that question, I want to know what are you going to cite in support of your answer to my argument?

HONORABLE SARAH DUNCAN: 13.1.

MR. BOYD: 13.1, is that it? That's our only authority?

HONORABLE KENT SULLIVAN: What about Rule 103?

HONORABLE TERRY JENNINGS: 103.

MR. BOYD: 103?

(Multiple speakers.)

VICE-CHAIRMAN LOW: Wait just a minute. Whoa. Court reporter can only take down -- and she can't take down the end of the table conversations, and I know we all want to respond, and we are going to talk about this probably another five minutes. So what we're going to do is going to make the decision here whether we can use language and correct the problem that we were sent here to correct, those rules, or whether we now think the problem is greater, that it -- that there are other problems out there and it's greater and we need them to go back and take a look at 13.1, all these rules, to come up with something that meets all the problems of practice or what they think.

So we're going to make a decision here in

about five minutes whether or not we think that we can cure this by changing the language of the rules that David and Richard asked be changed. Now, who wants to speak next? Levi.

HONORABLE LEVI BENTON: The answer that Kent gave that the opponent of the evidence coming in would cite 103 I think is consistent with my view. There is no offer -- there was no offer of proof, it's not in the record, and I think we're unnecessarily -- we would be unnecessarily burdening court reporters, clerks, trial clerks and appellate clerks, if we require them to keep everything offered.

VICE-CHAIRMAN LOW: Okay. Steve.

MR. TIPPS: I strongly disagree with that. I think the whole concept of an offer of proof involves presenting something for the record out of the presence of the jury, typically testimony, and exhibits are not like that. Once you have -- once you have had an exhibit marked and you have offered it and the judge either actually or is deemed to have looked at it and determined for whatever reason it's not admissible under the Rules of Evidence and he sustains the objection to the exhibit, then that ought to be enough to preserve your error, and at that point in time I think you have introduced an exhibit into the judicial proceeding, and the court

reporter ought to be responsible for taking custody of it.

VICE-CHAIRMAN LOW: All right. How many people here believe that the rules should read the court reporter is responsible for only those exhibits that are offered, whether they are admitted or whether they are rejected? If they are offered, the court reporter should keep custody of those; and if the lawyer wants to say, well, I put this back because it wasn't offered, then go to the judge, and I'm going to bet you the judge has got the power to make that lawyer take it out of his briefcase. But so how many people believe that, raise your hand?

All right. How many of you do not believe that? All right.

MR. ORSINGER: Let's let the record reflect there was like 20 to 1 or something like that.

VICE-CHAIRMAN LOW: Two.

MR. ORSINGER: 20 to 2 in favor of letting offer be the controlling event.

VICE-CHAIRMAN LOW: Right.

HONORABLE TERRY JENNINGS: Well, it is.

VICE-CHAIRMAN LOW: As to what the court reporters -- all right. That's off the board. We're not going to discuss it any more about something that just was talked about or something. That's gone.

MR. ORSINGER: Let's get back to the fix.

VICE-CHAIRMAN LOW: Let's get back to the fix.

MR. ORSINGER: I think we just said the fix is to forget tender, forget bill of exception, forget offer of proof, and just use the word "offer." If it's offered, it's the court reporter's responsibility.

VICE-CHAIRMAN LOW: And, David, is there some communication that the court reporters have where -- I mean, they are told that if it's offered, I mean, or should we put that --

MR. JACKSON: Yeah, I think we can get the word out to them and hopefully they will get the word on up the ladder.

VICE-CHAIRMAN LOW: All right. Carl.

MR. LOPEZ: Well, the best -- I mean, the quickest way to get word to the court reporters is to get word to the judges who then will tell their court reporters. I mean, yeah, court reporters have a duty. This thing establishes duties on them, but their first duty is -- they will tell you practically is to do whatever the judge tells them probably, and so I think we probably ought to try to deal with the practical reality of the lawyer who sticks it in his briefcase and doesn't -- and makes it impossible for the court reporter to

follow that rule.

VICE-CHAIRMAN LOW: Well, but we're going to take care of this first.

MR. LOPEZ: I thought we did already.

VICE-CHAIRMAN LOW: Well, no, because we used the word "offered," but I mean, I don't know whether he says "offered, whether admitted or not" or --

MR. ORSINGER: Let me be crystal clear.

VICE-CHAIRMAN LOW: All right.

MR. ORSINGER: On proposed change to Rule 75a, those of you who have the piece of paper in front of you, we would disregard the proposal, and it would read, "The court reporter or stenographer shall file with the clerk of the court all exhibits which were offered," scratch everything up to "in evidence," scratch "or tendered on bill of exception." "During the course of any hearing, proceeding, or trial."

VICE-CHAIRMAN LOW: Right. That was my understanding of the vote. All right.

MR. ORSINGER: 75b would be changed then to "all filed exhibits," kill "offered," kill "tendered in an offer of proof," and kill "offered in evidence." You just say "all filed exhibits." We don't need -- the "all filed exhibits" is all we need. We don't need the word "offered" there.

HONORABLE TRACY CHRISTOPHER: Right.

MR. ORSINGER: Are we okay with that?

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. ORSINGER: "All filed exhibits shall." Then under TRAP 13.1, "Official court reporter or court recorder must," subdivision (b), "take all exhibits," scratch the proposed addition, "offered in evidence during a proceeding and ensure that they are marked."

HONORABLE DAVID GAULTNEY: That's the current rule.

MS. HOBBS: That's the current rule.

MR. ORSINGER: That is the current rule. Okay. Thank you for clarifying that. And then on the Supreme Court order relating to retention and disposition of exhibits, "In compliance with the provisions of Rule 14b, the Supreme Court hereby directs that exhibits offered into" --

VICE-CHAIRMAN LOW: Strike out "or admitted."

MR. ORSINGER: Strike out "admitted," so it's "offered into evidence."

VICE-CHAIRMAN LOW: Okay.

MR. ORSINGER: Now, those are the proposed changes that -- and then we have the uniform manual, Uniform Format Manual, which we should also go ahead and

fix, too; and the second paragraph says -- this is the certificate of court reporter. "I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered into evidence." Is everybody okay on that?

VICE-CHAIRMAN LOW: All right.

PROFESSOR DORSANEO: I have one --

VICE-CHAIRMAN LOW: Go ahead, but --

PROFESSOR DORSANEO: I have one comment, and this is not meant to put a monkey wrench in anything at all. You took out the words "or admitted." It's conceivable to me that something could be admitted even though it wasn't offered.

VICE-CHAIRMAN LOW: All right. We're not going to cover that.

PROFESSOR DORSANEO: I think that does happen.

VICE-CHAIRMAN LOW: Tracy.

HONORABLE TRACY CHRISTOPHER: Could I ask a question?

PROFESSOR DORSANEO: And I'll bet that's why it says that.

HONORABLE TRACY CHRISTOPHER: In terms of withdrawing an offered exhibit and not after their filed, not 75b, but during the course of a trial or hearing. So,

for example, in Lamont's case he offers a document, it's rejected. He says, "I withdraw that offer." The court reporter doesn't have to keep track of that exhibit, do they?

MR. ORSINGER: If the court permits it, no. If the court does not permit it, yes.

HONORABLE TRACY CHRISTOPHER: Okay. Do we need to put that somewhere?

MR. DUGGINS: Comment. Comment.

VICE-CHAIRMAN LOW: Let me tell you, we fix the problem today. What we're going to do is have them go back and study some of these problems we talked about that are, quote, in practice, and that may be one of them and any other thing you want them to look at. Levi.

HONORABLE LEVI BENTON: I just want to understand. Let's say I have Buddy and Bobby in one of your 100 million-dollar cases, and because I want to be efficient I have you in for pretrial a week before we pick a jury.

VICE-CHAIRMAN LOW: Okay.

HONORABLE LEVI BENTON: And we put all of the -- we go through and some exhibits are admitted, some aren't, but anyway, it's going to be another week before we pick a jury, a week and a half before we start evidence. Can the lawyers take the exhibits back to their

office after that?

VICE-CHAIRMAN LOW: Generally not. I mean, once the judge -- I mean, you know, the judge wants to keep up with those, he's getting ready to go. Now, I guess each judge does it differently. I don't know. Judge Gaultney.

HONORABLE DAVID GAULTNEY: Just a very minor point, but it's curious to me that the appellate rule deals with the duties of the court reporter on (a) and (b). These are appellate rules rather than the rules that govern the procedure at trial, and (b) says that they're to take all exhibits offered into evidence during a proceeding and ensure that they are marked. So I was wondering if in 75a it would be helpful to add the words at the end of Richard's proposal "and ensure that they are marked."

VICE-CHAIRMAN LOW: What do you think about that?

MR. ORSINGER: I'm totally okay with that, as long as it's not a condition to the rules applying.

HONORABLE DAVID GAULTNEY: So it's a court reporter's duty.

MR. ORSINGER: It's a duty of the court reporter, but I don't like it when it's a condition to it being treated --

HONORABLE DAVID GAULTNEY: To the offer.

MR. ORSINGER: -- as if it's admitted.

VICE-CHAIRMAN LOW: So accepted.

MR. ORSINGER: Buddy, one last thing. I didn't get to finish the certification page for exhibits, which is also part of the manual, would be changed to read in the fourth, "constitute true and complete duplicates of the original exhibits, excluding physical evidence, offered into evidence." And I have been using the word "offered into" rather than "in" but I don't know if anyone feels --

VICE-CHAIRMAN LOW: Well, no, that's correct because you walk in or inside a house, you come into the house. Something is in evidence, it's already been admitted. Admitted is in and out is into.

MR. ORSINGER: Okay. Whatever that was I'll accept that.

VICE-CHAIRMAN LOW: So you are absolutely right. Webster agrees with you. All right. Richard.

MR. MUNZINGER: I don't know if it makes a difference to the language of the rules, and I don't think it does, but I do disagree with the conversation and the results of the conversation between Buddy and Levi where Levi said, well, I have 50 exhibits in a pretrial hearing in which I rule they are admissible. There is a

distinction between something that is admissible and something that is admitted, and so the court reporter in my judgment would not be taking the exhibits that happen at a pretrial conference. The court would have saved the jury's time by saying, "All right. We're not going to argue over these 36 exhibits, fellows. If they're offered, they come in."

VICE-CHAIRMAN LOW: You are probably right.

MR. MUNZINGER: But I don't know if that makes any difference to the language of the rule, but I don't think it would be correct that they have been admitted into evidence unless offered in the presence of the jury.

VICE-CHAIRMAN LOW: You're probably right. Now, what other --

MR. ORSINGER: What was that?

VICE-CHAIRMAN LOW: We're through with that one. Now, what other things do you want the committee to look at, you know, the practice that we're talking about and things? Carlos.

MR. LOPEZ: I just have a question. Whether I have an issue or not will depend on if someone can answer this question. Offered, is there any doubt in anybody's mind that that means on the record?

VICE-CHAIRMAN LOW: No.

HONORABLE TOM GRAY: Yes.

MR. ORSINGER: It could be offered off the record and later on it's in an offer of proof or a bill of exceptions that you discussed it in chambers, you made the offer, and it was denied.

MR. LOPEZ: Okay.

HONORABLE TOM GRAY: We gave you an answer, one "yes," one "no."

MR. LOPEZ: Your limine is going to have to be off the record, because if it's on the record we just established that the court reporter is going to have to keep a copy of that exhibit.

VICE-CHAIRMAN LOW: Does anybody else have anything they want the committee to look at to cure these problems with the practice? David.

MR. JACKSON: Maybe we could address through the withdrawing the exhibits that wind up getting in somebody's briefcase somewhere, because that could be an issue. I mean, you're going to have lawyers all over the state still feel like they can put them in their briefcase.

VICE-CHAIRMAN LOW: You and Richard, you've heard kind of the concerns.

MR. JACKSON: Right.

VICE-CHAIRMAN LOW: You-all get together and

try to see how those things could be solved.

Ma'am, do you need a few minutes break?

THE REPORTER: I'm fine.

VICE-CHAIRMAN LOW: All right. Let's go on then. Next thing is I think Bill. Bill, you're up.

PROFESSOR DORSANEO: Okay. Where we are, the proposed amendments to Appellate Rule 28, if everybody can find that; and by way of introduction, we started talking about permissive appeals and the fact that the Rules of Appellate Procedure don't have a procedural mechanism for appeals of interlocutory orders pursuant to section 51.014(d) through (f) of the Civil Practice & Remedies Code.

I think back in August of last year I proposed a provision that would not -- or that was not included in Appellate Rule 28. The committee voted that the permissive appeal provision ought to be in the accelerated appeal rule, which is Appellate Rule 28. At the same time the appellate rules committee was studying a larger problem involving so-called accelerated appeals that has to do with the fact that the Legislature has been providing for more accelerated appeals, expedited appeals, appeals operating on a fast track, and that the Rules of Appellate Procedure didn't deal with those developments either. What we have done as a result of those two

developments is to rewrite Appellate Rule 28 first to deal with accelerated appeals.

VICE-CHAIRMAN LOW: Bill, let me ask you a question. Really what gave rise to these changes is the change to 51.014, the Code of Civil Remedies, and also House Bill 4, which made us revise our rules for these kind of appeals. So rules that we need to revise are 12.1, 25, and possibly 29.5, right?

PROFESSOR DORSANEO: No. I think you're behind schedule on the memos, Buddy.

VICE-CHAIRMAN LOW: Well, I'm probably behind in a lot of other things, but catch me up on that.

PROFESSOR DORSANEO: Well, do you have the March -- do you have this March 2nd, 2005, memo? That's what I'm working from. Does everybody have that? I didn't make copies.

VICE-CHAIRMAN LOW: Well, yeah. I apparently read it. I underlined a bunch of stuff in red.

PROFESSOR DORSANEO: Okay. Well, that 12.1 and the rest of it may be still involved a little bit because 12.1 probably needs to be amended in a corresponding way.

VICE-CHAIRMAN LOW: All right. I'm just getting at what rules are we going to consider amending now, so if we could focus in on the particular rules.

PROFESSOR DORSANEO: Well, what I want to talk about is 28.

VICE-CHAIRMAN LOW: 28?

PROFESSOR DORSANEO: Because that's the main rule.

VICE-CHAIRMAN LOW: All right.

PROFESSOR DORSANEO: And adjustments in like 12.1 would just be to add in the fact that 28 provides for a petition for permissive appeal, but the chronology is -- we've done this over six months, and the chronology I think is important for everybody to understand and remember. The first thing we dealt with was this permissive appeal business, and that has now migrated into 28.2 of the committee draft, which begins on page six of the March 2 memorandum. Now, we haven't talked about that for awhile because at our August meeting, and maybe it was the November meeting, I don't remember the exact dates, we went through and approved all of that.

VICE-CHAIRMAN LOW: Okay.

PROFESSOR DORSANEO: And I don't propose to talk again about 28.2 from beginning to end except to say, and I might as well say it now, that there's a bill, House Bill 1294, that is being considered by the Legislature to amend again 51.014(d) through (f); and if that passes, what we decided to do in September or November with

respect to permissive appeals will need some adjustment; and all I propose to say is that the committee, you know, needs to be aware of that; and there really isn't anything to do about that right now, except that I would say to the committee that if that bill passes the changes in what this committee has already gone through will not be difficult to make.

VICE-CHAIRMAN LOW: Okay. All right. Go ahead. I'm sorry I interrupted. I wanted to be sure that I was focusing in on exactly, and you're right, my memory sometimes needs jogging.

PROFESSOR DORSANEO: Well, mine certainly does, too.

VICE-CHAIRMAN LOW: And part of it is coming back to me, so go ahead.

PROFESSOR DORSANEO: Mr. Chairman, I don't propose to talk about 28.2 because I think it's either premature or we've done that.

VICE-CHAIRMAN LOW: Right.

PROFESSOR DORSANEO: It's 28.1 --

VICE-CHAIRMAN LOW: One.

PROFESSOR DORSANEO: -- that is the main subject of my report today, and the main reasons for changing 28.1 involve the fact that there are a number of different kinds of accelerated appeals or expedited

appeals or fast track appeals provided by statute that aren't provided for in the appellate rules really, and 28, current Appellate Rule 28, as a result of the last round of changes, is very abbreviated and doesn't provide much information about accelerated appeals.

The first paragraph, 28.1, deals with interlocutory orders, and many accelerated appeals involve interlocutory orders, but some significant ones do not. So 28.1 dealing only with interlocutory orders doesn't cover everything that needs to be covered. 28.2 deals with quo warranto, and probably not very much needs to be said about that other than it deals with quo warranto, and maybe you could deal with it better.

The statutes, let me talk about them to kind of tune you in. The statutes, as I see it, fall into several categories. Some of the statutes try to accommodate themselves to the Rules of Appellate Procedure by saying that the procedures established by the appellate rules for accelerated appeals or in some other language apply, and some of those are interlocutory orders. Other statutes provide for accelerated appeals of final orders, and if you look in Appellate Rule 28, you would say there is nothing in here about final orders except quo warranto cases. So it's a surprise to people when they find out that the accelerated timetables are applicable to those

final orders.

Other statutes, other statutes provide for expedited appeals, and they look like they're meant to be accelerated appeals, too, but that's not so clear on the face of the statute. And finally, some statutes just bypass the appellate rules and say that the time for appeal is not later than the tenth day after the date the order is signed. Okay. And those are specialized fast track things.

So three kinds of statutes, ones that say these things will be dealt with under the accelerated appeal rules. When they're interlocutory orders, that kind of meshes; when they're final orders, it doesn't. Things that are on separate tracks altogether that are fast track appeals but are not accelerated appeals in the way that the appellate rules talk about them. So I guess what I'm saying is that this is a huge mess by the time you look at the statutes, the number of statutes, the cross-references to the appellate rules, and other statutes that just simply aren't mentioned at all; and the committee tried to deal with this in 28.1. Now, it dealt with it in two ways.

VICE-CHAIRMAN LOW: Is that on page four?

PROFESSOR DORSANEO: Page six.

VICE-CHAIRMAN LOW: Six?

PROFESSOR DORSANEO: Yeah. One or two of the subcommittee meetings involved what I would call a relatively aggressive approach to this problem that would say that everything that's faster than normal is going to be classified as an accelerated appeal, and the language is "Appeals from interlocutory orders, when allowed as of right by statute, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and all appeals required by law to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals." That tries to put all of these statutes under the coverage of this rule. Right. Everything -- it says everything is under the coverage of the rule and governed by the rule.

Then it says, "Unless a statute expressly prohibits modification or extension of any statutory appellate deadlines, an accelerated appeal is perfected by filing a notice of appeal in compliance with Rule 25 as to form and within the time allowed by Rule 26.1(b)," which is 20 days after the order, "or as extended by Rule 26.3," providing that the time can be extended by 26.3 in the normal manner. And then also saying, "Filing a motion for new trial, any other post-trial motion or request for findings will not extend the time to perfect an accelerated appeal."

What's being done here in addition to putting everything under this one roof is to provide more explicit information about how you prosecute this appeal and making that information clearer, by the addition to the last sentence particularly, and also by explicit cross-references to the other rules that are pertinent, cross-references that were taken out of Appellate Rule 28 in the last series of amendments, and it seemed to the committee not to be helpful for those to have been removed when somebody is going and looking to try to figure out what to do.

HONORABLE SARAH DUNCAN: And specifically bringing under the same roof the motion for extension of time. That was the issue we talked about with one of our past meetings.

HONORABLE JAN PATTERSON: Except as deferring to those statutes that expressly forbid it. So it's also a deference to that or an acknowledgement of those statutes.

PROFESSOR DORSANEO: Well, what this says is we're not going to give deference unless a statute insists upon it.

HONORABLE JAN PATTERSON: Right. Right. So it's this rule unless there is an express reference.

MS. BARON: And, Bill, my understanding is

right now there aren't any statutes that say "and this time cannot be extended" in any portion.

PROFESSOR DORSANEO: Well, there may be an ambiguity about whether fast track statutes that say "this needs to be perfected within 10 days" explicitly prohibit doing it within 20 days.

MS. BARON: Well, I would say -- well, it prohibits doing it within 20 days, but I don't think it prohibits an extension under the appellate rules. Would that be your understanding? Or not?

HONORABLE JANE BLAND: An extension to perfect the appeal or just some sort of extension of time?

MS. BARON: An extension to file your notice of appeal.

HONORABLE JANE BLAND: I think the concern --

VICE-CHAIRMAN LOW: Wait just a minute. The conversations just like that are hard at least for me to hear, so let's kind of address the remarks not to each other, but to the whole group. Somebody, who had the first question to Bill?

PROFESSOR DORSANEO: Pam, start that over. I think I can answer it if you rephrase it to me or state it again.

MS. BARON: Okay. My question is or I guess

my understanding is there aren't statutes currently that prohibit an extension but that the courts have grafted that on there, that if it says you have to file your notice of appeal within 20 days some courts are saying that cannot be extended under the appellate rules, but those don't explicitly prohibit an extension, and under this language extensions would be permitted.

PROFESSOR DORSANEO: Well, yes, I see what you're saying and admit that when I drafted this I was thinking about within the time allowed by Rule 21.6(b) as being extended.

MS. BARON: Okay.

PROFESSOR DORSANEO: But I think the language probably does literally mean "or as extended by 26.3," whether it's 10 days or 20 days.

VICE-CHAIRMAN LOW: Bill, some of your changes changes like some statutory deadlines. That was one alternative, wasn't it?

PROFESSOR DORSANEO: Yes.

VICE-CHAIRMAN LOW: And the authority for that would be 22.004 of the Government Code, which says the rules -- you know, we can make rules that are inconsistent with a statute and if the Legislature doesn't change it, as long as it doesn't change the substance. So we have authority, do we not, to do that? The Legislature

could alter that, but they probably wouldn't. Is that the authority?

PROFESSOR DORSANEO: I would answer that yes, but what Pam is saying and what I think the committee directed me to try to do is to try to avoid trumping the statutory language by saying what we're going to do is just extend it.

VICE-CHAIRMAN LOW: Well, one of the things you said at the end, one suggestion, "regardless of any statutory deadlines." That would be an alternative that you put. That's in the body of your memo on page five, and I assumed from that that this would come within 22.004 of the Government Code. All right, go ahead.

PROFESSOR DORSANEO: When I drafted this I wasn't contemplating what Pam suggested as to the fix. I was contemplating a more aggressive fix to just say we're going by 26.1(b), and that can be extendeded.

MS. BARON: So what you're saying is the way it's written now, all deadlines would be 20 days?

PROFESSOR DORSANEO: Yes.

MS. BARON: Okay.

PROFESSOR DORSANEO: But I'm willing to recognize that your point is an excellent one. We might instead of saying that, say "or as extended by" -- "or as extended in accordance with 26.3," but that changes my

mechanics a little bit. This draft basically says we're going to go by the Rules of Appellate Procedure regardless of what the statute says.

VICE-CHAIRMAN LOW: Sarah.

HONORABLE SARAH DUNCAN: Well, as cochair of the committee, my understanding was exactly as Pam's and that's what you were going to go off to write, and that may be one reason that what I just heard you say I thought said that, that it's not just the extension from, for instance, 10 days to 20 days, but it's everything is an accelerated appeal as we have known that term, and the extension of time rule applies.

MS. BARON: And Verbert would apply also.

HONORABLE SARAH DUNCAN: Sure.

VICE-CHAIRMAN LOW: All right. Judge Gaultney.

HONORABLE DAVID GAULTNEY: I think there are two issues, if I understand the comments. One is whether -- let's say a statute says ten days and doesn't say anything about whether that can be extended. One question is, can you file a motion for extension of time on that, and I think this -- under either reading of this rule I think that clearly this rule would clearly permit that.

The other issue is let's say it says ten days. Does this mean that this rule says unless it says

that 10 days can't be modified it's now 20?

HONORABLE SARAH DUNCAN: Yes.

HONORABLE DAVID GAULTNEY: I think that's a more difficult question.

PROFESSOR DORSANEO: Uh-huh. That is the more difficult question, but that's what I thought the committee directed me to have this say, that we're going to go not by ten. Even though the statute says 10, we're going to go 20, and then we're going to even permit 20 to be extended, a permitted extension.

MR. ORSINGER: Bill, do have you the authority to say that; and if you say that in the rules and you don't, aren't a lot of people going to rely on the rule and lose their rights under the statute and then get poured out? Do we have the authority to say 10 days means 20 just because the Legislature said --

PROFESSOR DORSANEO: I think that's -- I think the Court certainly has the authority to say that, but it's a question of whether they want to, and that's why there's an alternative one and an alternative two.

VICE-CHAIRMAN LOW: The Government Code says it repeals all laws and statutes governing practices in civil cases, not, you know, substantive, so I mean, that, if we put that in a rule, I mean, and it's not considered substantive then it changes any statute.

MR. ORSINGER: Are we required to specify the statutes that we're overriding in that matter? Is that the procedure?

VICE-CHAIRMAN LOW: Well, you do that carte blanche when you do it.

MR. ORSINGER: Well, I mean, this is serious. If the rule says 20 days and the statute says 10 and we don't do it right, a lot of people are going to fall in a hole that we dig for them.

VICE-CHAIRMAN LOW: Well, it's been --

HONORABLE NATHAN HECHT: I think we're preventing outs. Are we creating any?

MR. ORSINGER: Well, all I'm saying is I'm a little unclear on what the rule-making authority is when a statute says you've got to do something within 10 days and the rule says, well, you really can do it within 20 days, and then it's going to go up to a court of appeals and they're going to say does the statute prevail or does the rule prevail? I'm unclear, so Buddy just said the rule prevails, but it's my understanding --

VICE-CHAIRMAN LOW: Well, that's what the Code says.

MR. ORSINGER: If a rule was going to override a statute you had to specifically specify the statute, but I'm not an expert in the area.

VICE-CHAIRMAN LOW: It says it repeals all conflict in statutes.

PROFESSOR DORSANEO: And that might refer to rules made now or only the original rules.

VICE-CHAIRMAN LOW: Now, it has to be something that's done after the statute was in existence. It's not going to repeal a future statute.

PROFESSOR DORSANEO: Mr. Chairman, I've got -- there is a 1(a) that David Gaultney talked about, that's the way it's drafted, but there is a 1(b) that could be done that's a little cagier.

VICE-CHAIRMAN LOW: All right. Let's go to those, because we're not going to look at all the in's and into's and everything.

PROFESSOR DORSANEO: Let me just identify, because I think Pam was talking about it, and that's what I understood that she was talking about, and that's just simply to say that the statutory appellate deadline can be extended. "Unless the statute expressly prohibits modification or extension of any statutory appellate deadlines the statutory appellate deadline may be extended in accordance with Rule 26.3."

MS. BARON: Right.

PROFESSOR DORSANEO: And that's a distinct thing from saying whatever number of days in the statute

means the number of days in the rule. That just simply says, okay, if it's 10 days then you can use 26.3 to make it longer. Now, that's, I don't think, going to be that big of a help to people because they're not going to file their 26.3 motion within time. 26.3 motions need to be filed within 15 days after the deadline, so somebody would have to catch onto the fact that they had a 10-day deadline within 15 days after that in order to try to take advantage of 26.3.

VICE-CHAIRMAN LOW: Don't we want to make it as less complicated as we can?

PROFESSOR DORSANEO: Yes. But it's not easy to make it less complicated. It wants to be very complicated. But that -- everybody understands the 1(b)? 1(b) is less aggressive and probably more justifiable, but less useful because it only would give people -- unless we do something to 26.3 to make it longer.

VICE-CHAIRMAN LOW: The language you're talking about, is that the bottom of page five? Is that what you're talking about, "unless otherwise hereto provided by statute"?

PROFESSOR DORSANEO: No, the language that I just now talked about is language that I just made up.

VICE-CHAIRMAN LOW: Oh.

PROFESSOR DORSANEO: And the language, the

first fix that says unless the statute says you can't change it, we're going by the appellate rules.

VICE-CHAIRMAN LOW: Okay.

PROFESSOR DORSANEO: Including extensions. The next one would say unless a statute says you can't extend it, it can be extended in accordance with the appellate rules, and most of these statutes don't say that. They don't provide for extensions, and I think it would be much easier to argue that that's not messing with the statute.

VICE-CHAIRMAN LOW: Okay. Judge Hecht.

HONORABLE NATHAN HECHT: No, I was just -- but the only other thing I wanted to raise, as Richard said earlier, we may be creating problems in the practice, but I don't -- are we? I mean, it seems like we're eliminating problems.

MR. ORSINGER: We have -- I would like for someone knowledgeable to answer the question. Can we --

HONORABLE NATHAN HECHT: We can trump the statute if we want to.

MR. ORSINGER: Do you have to say you're doing that or can you do it by just kind of edging into it?

HONORABLE NATHAN HECHT: Well, I don't know the answer to that, but assuming that it trumps, then are

we creating any problems?

MR. ORSINGER: No. If we can trump, clearly it's better to have an extended deadline than to rely on people that don't know the rules to know the rule to extend the rules they don't know about.

VICE-CHAIRMAN LOW: But one rule we did cite the Government Code, I think. It was a deadline or something, and we put it in a footnote, I believe.

HONORABLE NATHAN HECHT: Yeah, we have.

VICE-CHAIRMAN LOW: And so we can do that. We've done that before, and generally the procedure is the Legislature is advised of it, and they're not unhappy. We don't just do it and let the Legislature read about it in the newspaper, and so that can be done. You think that is a clearer -- what about --

MR. ORSINGER: Yeah, clearly.

VICE-CHAIRMAN LOW: -- you, Bill?

PROFESSOR DORSANEO: I think that it certainly could be done. The Rules Enabling Act is susceptible to that interpretation. I don't know whether it would be advisable to do that during a legislative session or without consultation or--

MR. ORSINGER: It could happen after the session.

VICE-CHAIRMAN LOW: We don't do it without

consultation. We -- man, no.

HONORABLE JAN PATTERSON: The committee, as I recall, discussed that we were not trumping anything the Legislature did, that we were specifically speaking to something that the Legislature had not spoken to, that is, the availability of extensions; and so barring some expression by the Legislature of an intent otherwise, we wanted the rule generally applicable to all appeals to apply; and perhaps it might be easier to flesh it out to talk about what the cases are, because I think it may be termination of parental rights --

PROFESSOR DORSANEO: Right.

HONORABLE JAN PATTERSON: -- where they have the short fuse, the 10 days; and so the concern was it's so short and it's so important that there is an expression that we want to have accelerated appeals and very accelerated but that these people should not lose out -- it's to be protective of them to make available the normal rules absent some express intent otherwise.

VICE-CHAIRMAN LOW: So you're saying that your interpretation is we're not really -- we're addressing something the Legislature has not addressed and we're not changing it?

HONORABLE JAN PATTERSON: Well, we had specific discussions about that to defer to the

Legislature so that we were not trumping them.

VICE-CHAIRMAN LOW: Right.

PROFESSOR DORSANEO: So what I call 1(b) trumps them less.

VICE-CHAIRMAN LOW: Sarah.

HONORABLE SARAH DUNCAN: I was going to say, the first alternative does trump certain statutory deadlines for perfecting an appeal because there are statutory deadlines for perfecting an appeal that are less than 20 and less than 30 days.

The second alternative doesn't trump any statute. It simply says we can read the statutes, the deadlines for perfecting an appeal in the statutes, in tandem with the appellate rules that provide for an extension of time to perfect the appeal; but we've got to be straight on those, because option one does trump statutes. Can I say one other thing, Buddy?

VICE-CHAIRMAN LOW: Yeah.

HONORABLE SARAH DUNCAN: My understanding of the -- and I'm sure the Court has this and the Court rules attorney has this, but my understanding is the Court does have to give the Legislature notice if it's passing a rule that will trump the statute.

VICE-CHAIRMAN LOW: If the Government Code provides certain procedures, they be given copies and so

forth, but the Court does more than that. The Court talks to leaders, you know, and we get approval. We haven't repealed anything like we did once and say it was unconstitutional. Judge.

HONORABLE DAVID GAULTNEY: I agree with Sarah. That's exactly the distinction, and I would have been -- I would prefer (a) if the Court has the authority to trump these statutes and a way to do it, because it does make a more meaningful change. I think perhaps there ought to be some comment or something so that a court faced with, faced with, a statute and a rule understands the rule is intended to trump.

VICE-CHAIRMAN LOW: Judge.

HONORABLE NATHAN HECHT: Okay. Now, Bill, what's your take on another policy concern, which is that not only do we not want in a parental termination case, for example, the parent to fall into this trap of thinking they have 20 days to notice of appeal and they really only have 10 and now it's too late? And so we're trying to prevent that from happening, but if the -- assuming the Legislature has thought that time is of the essence and days matter, we don't want the government dragging their feet if they want to appeal.

And so I don't know that this is the case, but assuming that legislative policymakers would say,

well, it's fine to give the parent the benefit of the doubt and more time because this is an important matter, and if they want to take more time that's their problem, to some extent, but we're not sympathetic at all with the state, and the state should get in there in 10 days or else.

I guess under alternative one the state would have 20 days no matter what, and under alternative two they could -- or (b), as you call it, the state could move for an extension, and maybe the judge would give it to them or maybe the court would give it to them and maybe they wouldn't.

PROFESSOR DORSANEO: Let me talk about -- one more thing about alternative (a) and then talk about (b) for a second. The committee didn't want me to draft (a), or really any alternative, to mention specific statutes.

VICE-CHAIRMAN LOW: Right.

PROFESSOR DORSANEO: Now, I think that's a terrible mistake myself. But that doesn't mention anything, so somebody who has had parental rights terminated, going and reading this, you know, might get something out of it or they might not. Huh? Because what they would have to understand is that all appeals required by law to be filed or perfected -- all appeals required by

statute to be accelerated or expedited, they would have to know that that means the case they have. Huh? So they would have to understand the law in order to try to even get the benefit of this. So I don't know if this really helps anybody if it doesn't make it plain to them that they could use it. Okay.

Since I wasn't controlled by the committee in alternative two, I put in the cases that I think are the main problem, which are these termination of parental rights cases, and these are cases that are accelerated not because they go from 20 days to 10 days, right, David?

HONORABLE DAVID GAULTNEY: They're generally 20 days.

PROFESSOR DORSANEO: Yeah, it's 20 days, but it's 20 days from the signing of a final order, which is what gets people off the track, because they don't know that those are accelerated because they haven't read the statute and the rule doesn't say anything about it.

So people file motions for new trial and then they happily go along and then they find out that they missed the boat a long time ago.

Now, this draft No. 2 identifies specifically things that are problems that are accelerated or expedited, but it doesn't try to solve all of the problems or to trump any statute at all. It just says if

you have -- or at least not in a way that I would call a trump. If you have one of these kind of fast track appeals that have accelerated or expedited, putting aside ones that say you have to file them within 10 days and do this and do that on some shorter explicit timetable, ones that in the statute are accelerated or expedited, which these termination of parental rights ones are under 109.002 of the Family Code and Chapter 203 of the Family Code, and there are more than just termination cases. There are other cases that relate to that overall subject, that if you're in one of those cases, that's accelerated, and if it's -- and basically that tells somebody if they read this that it's accelerated, and maybe they don't read anything at all, but at least it gives them a shot at looking in the appellate rule book and to see that it's an accelerated appeal because it's talked about in the rule book.

VICE-CHAIRMAN LOW: Let Judge Gaultney, before you go further, he's got a question about that.

HONORABLE DAVID GAULTNEY: No, it wasn't a question. Let him proceed.

VICE-CHAIRMAN LOW: I'm sorry.

PROFESSOR DORSANEO: And then instead of doing what's done in the first part, which says -- basically it says in general terms, regardless of what the

statute says, it says "unless otherwise provided by statute, accelerated appeals are perfected by the filing of a notice of appeal in compliance with Rule 25 within the time allowed by Rule 21.6(b) or as extended as provided in Rule 26.3."

Now, that picks up for me what Pam and Sarah were talking about. It says this time can be extended under 26.3, and it is the 20 days, and it does deal with these termination cases, but it doesn't have anything to do with those few cases that are on 10 days or some special track. It just says those cases are cases you need to go read the statutes, and the appellate rules are taking the Fifth on that. And that's this alternative.

I like alternative two better for several reasons. It's more informative with respect to the main problem area, it screws with the statutes less in terms of what the statutes say, and it's informative to appellate lawyers to know how the entire process works from the standpoint of what's accelerated and how the procedures work.

VICE-CHAIRMAN LOW: Let me ask you one question. What's wrong with alternative two? What's the downside of it? I mean, everything we do has ups and downs. What is the downside?

PROFESSOR DORSANEO: It doesn't cover

everything.

VICE-CHAIRMAN LOW: Well, does the first one cover everything?

PROFESSOR DORSANEO: Yes, but less clearly.

MR. ORSINGER: Well, it doesn't purport to be a listing is the difference.

VICE-CHAIRMAN LOW: One doesn't purport to be a listing.

MR. ORSINGER: If you start the list people think, well, this must be a comprehensive list and then they therefore --

PROFESSOR DORSANEO: I would write a comment to say this is not -- the text is not a comprehensive list, there are other statutes, and there will soon be more. Good luck.

VICE-CHAIRMAN LOW: Wait. Judge Gaultney and Sarah and then Jan.

HONORABLE DAVID GAULTNEY: Okay. One difference is, Richard, is that the 10-day statute provision is not covered by (a). In other words, it's not extended to 20 days.

MR. ORSINGER: Right.

HONORABLE DAVID GAULTNEY: My question is, why couldn't we improve alternative one and provide the notice that you provide in two by including the

"including" clause in one? That is, you've got accelerated or expedited, "including appeals" and you've got a good list of, you know, termination cases and everything like that if you add that "including" clause into your sentence one.

VICE-CHAIRMAN LOW: But would you say but not -- that's all-inclusive, or would you say "among other things"?

HONORABLE DAVID GAULTNEY: Well, I think by saying you've got a list, a general list, and then you're giving notice of specific things, and I think the notice, I would agree with. The notice -- the problem, I think the way this thing arises is a final order, as Bill said, gets entered terminating. You look, 28.1 doesn't deal with final orders. It talks about interlocutory orders.

VICE-CHAIRMAN LOW: Right.

HONORABLE DAVID GAULTNEY: And I think that is the problem, so if we're going to do this, I think alternative one is good. I think it's improved by the "including" clause.

PROFESSOR DORSANEO: So do I.

VICE-CHAIRMAN LOW: So what we're going to have now before us, we're going to have alternative one, alternative two, and the Gaultney revised alternative one. I mean, I say that for identification.

PROFESSOR DORSANEO: Everybody is clear on that, right?

MS. BARON: Yes.

VICE-CHAIRMAN LOW: All right. Wait. I'm sorry. Sarah.

HONORABLE SARAH DUNCAN: There are two problems. One problem is that there are shortened times for perfecting appeal, and too many people are unaware of those shortened times for perfecting appeal in too important a case and they lose their right to appeal. That's problem one.

VICE-CHAIRMAN LOW: With which?

HONORABLE SARAH DUNCAN: I want to solve problem one, because I don't want some people to lose their children because their lawyer didn't know that it was less than a 20-day --

PROFESSOR DORSANEO: It's never less than 20 days for losing children.

HONORABLE SARAH DUNCAN: Okay.

PROFESSOR DORSANEO: Okay. Those are Election Code statutes, other problems.

HONORABLE SARAH DUNCAN: I'm sorry, less than 30 days. There are -- there are other cases in which it's less than 20 days, the 10-day cases. But that's one problem, is that it's unfair, I think, to have different

times for perfecting appeal in different kinds of cases because too many people are caught unaware.

The second problem is that some courts have held that when there is a statutory deadline for perfecting an appeal, the court of appeals doesn't have jurisdiction if the notice of appeal isn't filed within that time period, that statutory time period; and since it didn't have jurisdiction, it can't extend the time for filing; and I want to fix that problem.

Speaking for myself, I want people to be as aware of this as possible, but I have not seen a draft of the rule that includes a list that's remotely comprehensible. That's the function of a comment in my view. I'm not opposed to -- I'm in favor of such a comment. I want people to know that this is a big change and here are the types of cases. The problem is nobody on the subcommittee, including -- well, including all of us, nobody has any confidence that even if we sit down at the computer for days that we will find all of the shortened deadlines in all of the codes and the statutes.

PROFESSOR DORSANEO: I'm confident that I found them all, but I'm not confident that I found all of the bills that are pending that are creating more.

HONORABLE SARAH DUNCAN: That is my point, is this has become a favorite legislative tool, and they

are created in every session. So if we put a list in, my concern is that somebody is going to read "including" to mean "and excluding anything that was created in the last legislative session or two sessions ago," so let's put it in a comment.

VICE-CHAIRMAN LOW: Jan.

HONORABLE JAN PATTERSON: My comment is along the same lines. I don't recall that there was any expression that you be barred from listing. The concern was that I think Frank Gilstrap came up with a long list or maybe --

HONORABLE SARAH DUNCAN: He found more during our telephone conversation.

HONORABLE JAN PATTERSON: Pardon?

HONORABLE SARAH DUNCAN: Frank found more during our telephone conversation.

HONORABLE JAN PATTERSON: Yes. And it added to that and so there was a long list. I mean, it was a good page full and then he found some additional ones. So I think that was the concern, is that we're not confident we can have a comprehensive list, but that was the only reason why there was some thought that perhaps it should have a more general expression, but that was the only reason, is our lack of confidence.

PROFESSOR DORSANEO: It's possible to find a

list, and it's possible to write it all down. It's better to put it in a comment, but David and I still think that the primary problem is the termination of parental rights issue, and putting that in the rule is not going to make any big problems.

VICE-CHAIRMAN LOW: Judge Gaultney, will you accept your altered to be where you include a list in a comment?

HONORABLE DAVID GAULTNEY: I think that's good.

VICE-CHAIRMAN LOW: Rather than a rule so we don't have -- excuse me.

HONORABLE DAVID GAULTNEY: I agree. The principal problem is parental termination, but if we can take care of it in a comment --

VICE-CHAIRMAN LOW: In a comment. Okay. So we still have three. I'm trying to keep three propositions instead of four. All right. Richard.

MR. ORSINGER: I would like to elaborate on Sarah's problem. It's not just the 20-day deadline in the Family Code on termination. It's also -- is there not a provision that the motion for new trial does not extend that?

MS. BARON: Yes.

MR. ORSINGER: And that's the trap that the

lawyers fall in. They don't fall in failing to perfect within 20 days. They just think that they've got 90 days to perfect when they file a motion for new trial.

PROFESSOR DORSANEO: Both of these alternatives say, "Filing a motion for new trial will not extend the time to perfect an accelerated appeal."

MR. ORSINGER: But what my point is, is that the problem here is not the fact that you have to perfect within 20 days instead of 30 days. The problem here is you have to perfect within 20 days instead of 90 days when a timely motion for new trial is filed after the final judgment is signed; and I'm going to suggest a possible different approach; and the approach is to, in these trouble situations, allow the period of time to file an extension to perfect appeal, elongate that, and then say that the filing of a late notice of appeal impliedly is a motion to extend, if we need to.

Maybe we don't under that Supreme Court case, but perhaps we can fix the total misconception here by in these trouble areas allowing a longer period for a deemed motion for extension, which doesn't violate any statutes and would rope in even the people who are confused about the difference between the motion for new trial at 90 days versus the real deadline of 20. That's just a possibility.

VICE-CHAIRMAN LOW: But which one of the alternatives are you talking about rolling that into?

MR. ORSINGER: I am not talking about -- there are things about these rules that need to be changed apart from what I just said, but Bill's choices are limited to either extending the deadline for perfecting the appeal from 10 or 20 days to 30 days or having an -- recognizing explicitly the right to extend in these accelerated appeals with the tacit assumption that that extension must be requested within 15 days. All I'm saying is if we want to go the extension route, maybe we ought to expand that out to capture what we know the practitioners are doing.

VICE-CHAIRMAN LOW: Wait, Bill. Sarah is next.

HONORABLE SARAH DUNCAN: The problem is both, Richard. The problem is that people don't know they have got a 20-day window to perfect and they don't know that their motion for new trial isn't going to get them an extended timetable. But I think we all need to be cognizant here. We are talking about parental rights, and certainly they are important, but the reason for fast-tracking these cases to begin with is because we're also talking about children, and I am not going to vote in favor of a 90-day window to perfect these appeals, because

these children have -- many times they have already been placed with their foster parents, and they are waiting to have an adoption finalized, and a 90-day -- three months of, you know, a two-year-old's life is a long time.

VICE-CHAIRMAN LOW: And don't you think some of this -- the rules and statutes were drawn, so, I mean, that's what they want.

HONORABLE SARAH DUNCAN: To compress it.

VICE-CHAIRMAN LOW: They wanted a closer time. That's the whole philosophy. We extend it, I mean, the lawyer might mess up, but they're really looking at the interest of the child, and I had the same question.

HONORABLE SARAH DUNCAN: But both are important.

VICE-CHAIRMAN LOW: Right.

HONORABLE SARAH DUNCAN: The children's interest and the parent's interest.

VICE-CHAIRMAN LOW: All right. Jane.

HONORABLE JANE BLAND: Okay. I have two comments. One, we have this list of things that we're not so worried about people missing the deadline, like interlocutory orders and quo warranto proceedings.

(Sirens.)

VICE-CHAIRMAN LOW: Wait. Could you speak up? The police are after me now.

HONORABLE JANE BLAND: Well, anyway, at the end of this kind of list in alternative one we say, "and all appeals required to be filed or perfected within less than 30 days after the date of the order or judgment being appealed are accelerated appeals," and I think that's the import of this alternative, that all appeals that are required by law to be perfected within less than 30 days are accelerated appeals, and we should put that at the top of the -- right after "Perfection of appeal."

VICE-CHAIRMAN LOW: After which alternative?

HONORABLE JANE BLAND: I'm just talking about alternative one because that's the one that we seem to be focused on, and instead of this listing and then at the end of it saying a catchall, "and all appeals," because I think that would highlight that any appeal that has to be perfected within less than 30 days is an accelerated appeal.

And I think that the other important provision in this rule is this last sentence that lets lawyers know that filing post-trial motions in accelerated appeals will not extend the timetable, so that should go second. So you should say, "All appeals that have to be perfected within less than 30 days are accelerated appeals. Filing a motion for new trial in an accelerated appeal will not extend the timeline."

Then you say all this other stuff about "unless a statute expressly prohibits modification or extension of any statutory deadlines, an accelerated appeal is perfected by filing a notice of appeal." Because the two things we want to get across is that if you have an appeal that has to be perfected within less than 30 days it's accelerated. No matter what it is, whether it's interlocutory order, allowed as of right by statute, or quo warranto proceedings.

VICE-CHAIRMAN LOW: So your suggestion -- I'm sorry. You're not through?

HONORABLE JANE BLAND: No, I'm through.

VICE-CHAIRMAN LOW: Okay. So it's alternative one, but you have, as I understood it, not suggesting putting something else. You just changed the order for importance.

PROFESSOR DORSANEO: Yeah. And the simplification of the first sentence will not work, because the statutes many times say that these are accelerated appeals and don't say what that means. So you have to know that the -- what the Legislature first did was to kind of play ball with these rules, say, "Okay, these are accelerated appeals. Go read about how you do that." Then they started making more elaborate statutes that say how you do that. So you don't really know that

an appeal from an interlocutory order has to be filed or perfected within less than 30 days until you read this rule.

VICE-CHAIRMAN LOW: All right. Bill --

PROFESSOR DORSANEO: Okay?

HONORABLE JANE BLAND: Okay. But it's also -- okay. I see what you're saying. You're saying we don't know that that's an appeal required by law to be filed or perfected within less than 30 days because the statute doesn't require it?

PROFESSOR DORSANEO: Statute doesn't say anything about that. Only the rules say it.

HONORABLE JANE BLAND: Okay. I see what you're saying.

VICE-CHAIRMAN LOW: We're going to vote on alternative one, which includes the -- I mean, and then if it wins we'll vote on the two versions of alternative one. Alternative one is as-is or altered to have the list in a footnote, as Judge Gaultney says, and alternative two. Sarah.

HONORABLE SARAH DUNCAN: Does the alternative one that we're voting on, does it include the ability to extend the time for perfecting appeal even if that's not provided by statute? Because you said --

PROFESSOR DORSANEO: Yes.

HONORABLE SARAH DUNCAN: -- you didn't write it with that intention.

PROFESSOR DORSANEO: Yes, it does. It does with a vengeance.

HONORABLE SARAH DUNCAN: But you just said -- you just told Pam that you didn't write alternative one to incorporate extensions of time.

PROFESSOR DORSANEO: I did, but it's a two-step extension. You go from -- in termination cases there is no extension at all, because it is 20 days. Right, but it would take any 10-day thing and make that 20 and then say it could be extended further under 26.3.

HONORABLE SARAH DUNCAN: So now you're saying alternative one does provide for extensions of time.

PROFESSOR DORSANEO: Yes, but what Pam was talking about was extension of time being the mechanism to get around the statutory deadline.

HONORABLE SARAH DUNCAN: She was talking about both.

VICE-CHAIRMAN LOW: You've answered the question. All right. All in favor of -- we'll go to -- if alternative one wins then we'll determine which version and how it will be, but now it's between alternative one, those two versions, and alternative two. Who is in favor

of alternative one?

15. All right. Alternative two? Three. All right.

Alternative one. Who is in favor of alternative one as written? And the other vote will be as amended so that the list goes in a -- goes in a footnote. All right. Who is in favor of alternative one as amended with the list in the footnote?

HONORABLE DAVID GAULTNEY: With the list in the footnote?

VICE-CHAIRMAN LOW: Right.

PROFESSOR DORSANEO: As distinguished from no list?

VICE-CHAIRMAN LOW: Comment, I'm sorry.

17. Who is for alternative one just as written?

All right. So it's unanimous for alternative one as amended with footnote. Judge Gaultney.

HONORABLE DAVID GAULTNEY: If I'm not too late, Richard's point is well-taken. We discussed it at length in the committee on, you know, we're not solving -- we're providing notice to most of the cases, we're extending the deadline in some cases, we're providing for the possibility of an extension of time unless prohibited by statute, but we are not dealing with the situation

where someone feels like they need -- they thought they were relying on a motion for a new trial.

Now, where that might come up is you have a termination, final order, must be appealed in 20 days. Appellate lawyer wants to raise ineffective assistance of counsel, files his motion, doesn't file it -- and wants to prove up in his motion for new trial hearing or whatever his ineffective assistance and get that ruled on, but he doesn't get his notice filed. Now he may have ineffective assistance of appellate counsel.

PROFESSOR DORSANEO: How many days do you need?

HONORABLE DAVID GAULTNEY: So one -- and when we raised this issue of should we go with notice or motion of extension of time, my recollection was Justice Hecht -- and I can be corrected easily -- said, well, instead of putting it in the rule or something they haven't read in the Family Code anyway, why don't you give the appellate courts authority to extend the time? We're not really doing that by this rule other than giving them that very limited 15-day extension.

VICE-CHAIRMAN LOW: All right. Do you have then an addition you want to put in the rule that we voted in, or do you want to put something further in a comment, or how do we handle this problem?

HONORABLE DAVID GAULTNEY: I had --

PROFESSOR DORSANEO: What he wants to do is to change "or as extended by Rule 26.3" to something else, "or as extended in some manner." He's saying the same thing as Richard about instead of filed within 10 days, filed within how many days? It's going to take a lot of days.

HONORABLE DAVID GAULTNEY: See, that's --

PROFESSOR DORSANEO: And that's what Sarah doesn't like, it takes too many days.

VICE-CHAIRMAN LOW: Sarah makes a good point that when something is accelerated they don't want me dragging my feet.

HONORABLE DAVID GAULTNEY: There's a good reason that -- I mean, I think the best interest of the child, as she says, is to get these things moved. On the other hand, you don't want to create a situation which through a procedural default you lose a constitutional --

VICE-CHAIRMAN LOW: All right. How many people are in favor of some extension -- I'm not saying a day or a hundred days, but some extension period in what we voted on, rule one, I mean alternative one, and then the others who are against that? Who is in favor of that?

HONORABLE TOM GRAY: Can we have a comment on that first? Can I comment on that?

VICE-CHAIRMAN LOW: Yeah. Sure. I'm sorry.

HONORABLE TOM GRAY: I would counsel against any effort to create a special exception to extend the time period for ineffective assistance of counsel, because if that's all it takes is an allegation to move you into an extended period of time, that will in effect be a grant of an extension of time to all of them because they'll make the assertion and try to prove it up in a motion for new trial, and it's one of those things that it's just going to be another procedural device used to delay the process.

VICE-CHAIRMAN LOW: It's always bothered me that ineffective counsel is a way for somebody to get something that they didn't get otherwise.

HONORABLE DAVID GAULTNEY: Buddy, I did not mean to suggest that that -- I did not mean to suggest that that was necessarily the reason for it.

VICE-CHAIRMAN LOW: I know. You're using that as an example.

HONORABLE DAVID GAULTNEY: In fact, that's rarely raised in these cases. Maybe in the future it might be, but you're just dealing with situations where motions for new trial are filed overall with the concept that it might extend the time. This rule will help with that. I just wonder if there might be a need for another

extension.

VICE-CHAIRMAN LOW: All right. We've talked about the pros and cons of an extension and the purposes of the statute and so forth, and I think just about everybody's view has been expressed. Who is in favor of some extension, and if we are in favor of it, we have to get -- you know, it has to be drawn.

PROFESSOR DORSANEO: It was drafted, and the committee decided not to bring it to this committee.

VICE-CHAIRMAN LOW: Well, but now we're at the full committee and we're going to vote to see who favors that concept. All who favor that concept raise their hand.

All against it?

Six to nine. All right. Don't deal with that. What else you got, Bill?

HONORABLE NATHAN HECHT: Let me ask you a question. Did the committee consider whether to treat accelerated appeals from final judgments differently from accelerated appeals of interlocutory judgments?

HONORABLE DAVID GAULTNEY: No.

PROFESSOR DORSANEO: No, not in terms of making those procedures more liberalized. We could certainly do that.

VICE-CHAIRMAN LOW: Do you want the

committee to consider that?

HONORABLE NATHAN HECHT: Well, I want to think about it.

PROFESSOR DORSANEO: My initial proposal did that because it dealt with these termination cases, which as I understand, still are the only ones other than quo warranto. There may be some others that --

HONORABLE NATHAN HECHT: It seems to me -- this is just thinking here, that it's less justifiable to extend the time for an accelerated appeal from an interlocutory order than from the final judgment, because -- and maybe this is just my jurisprudential prejudice, but it seems to me that interlocutory appeals are exceptions to the rule, and if you want to take one you should touch all the bases, but that's harder to justify when it's a final judgment.

VICE-CHAIRMAN LOW: All right. Judge, if you want to -- I mean, I guess Bill is chairman of the committee, if you want to have communication.

PROFESSOR DORSANEO: I do have some other things to mention in this rule.

VICE-CHAIRMAN LOW: That's what I'm asking. Go ahead.

PROFESSOR DORSANEO: Well, while I was at it I did some other adjustments to Rule 28, and I'm not

completely wedded to those. The heading "Further trial court proceedings" bears some resemblance to the quo warranto paragraph in the current appellate rule, but it actually is an amalgamation of 28.1 and 28.2. It carries forward where it says in 28.1, "The trial court need not, but may within 30 days after the order is signed file findings of fact and conclusions of law," and I put "in nonjury proceedings," because I contemplated that that's really what's meant, not that the trial court need not, but may within 30 days file findings of fact and conclusions of law. It doesn't say "in nonjury proceedings for interlocutory orders," probably because that's obvious.

I made a special adjustment to the quo warranto proceeding provision by adding in a reference, which needs to be to 329b, which is just absent from the current rule. It says in 28.2, "but the trial court may grant a timely filed motion for new trial," not saying timely filed under what. So I said "timely filed under Texas Rule of Civil Procedure 329b(a) and (b) until 50 days" and added "by operation of law and the expiration of that period." I'm not thinking that changes anything in the 28 rule, but it's meant to make it easier to understand.

VICE-CHAIRMAN LOW: Well, we don't want to

get down to the language so much except as it changes or, you know --

PROFESSOR DORSANEO: The only other change that I would think is significant is the addition to the last sentence to (c) where there's a cross-reference not in the comment but in the rule to Rules 35 and 38, telling somebody that if they want to know how all this works they not only need to look at the front end at 25 and 26, but on the back end at 35 and 38.

VICE-CHAIRMAN LOW: Don't you usually put that in a comment?

PROFESSOR DORSANEO: I think that we mess up Rule 28 by taking everything out of it, and now when somebody goes and reads accelerated appeals they're unlikely to read the comment and go and find the rest of the information, or less likely than if it was in the rule. I think it was a mistake the way we redrafted it, frankly.

VICE-CHAIRMAN LOW: All right, Richard.

MR. ORSINGER: Bill, the problem with the first change to (b) in nonjury proceedings is that we're now writing a rule that covers final judgments as well as interlocutory orders; and when this rule, that in the first part covers final judgments, has a proviso that in nonjury proceedings the trial court need not but may,

you're going to create an inherent conflict with the Rule 296 post-judgment timetable.

Admittedly it's only as to those cases where you have an accelerated appeal; i.e., like a termination; but if you have a nonjury termination case, Rule 296 gives you 20 days to request findings, 20 days for them to be filed, 10 days for a reminder, et cetera; and because we're now including final nonjury terminations in the same rule, this sets up a conflict in those nonjury final judgments. So this concept needs to be fixed in a way that doesn't create a conflict between the orderly post-judgment Rule 296 findings and findings issuing after an interlocutory order, which are not covered by Rule 296.

PROFESSOR DORSANEO: I think this would clearly override.

MR. ORSINGER: We do not want to clearly override Rule 296.

PROFESSOR DORSANEO: Maybe you don't like the sentence.

VICE-CHAIRMAN LOW: Wait.

MR. ORSINGER: You don't have anything in here about extensions of time, about motions for additional or amended findings. I mean, are you saying that you want to eliminate Rule 296 through 299 for nonjury termination cases simply because they're

accelerated and replace them all with a 30-day deadline to request it and no right to follow up or request amended anything?

PROFESSOR DORSANEO: I think you're making an excellent point, pointing out the consequence of carrying this language forward and making it cover more than -- cover more than interlocutory orders.

MR. ORSINGER: In my view the concept about 30 days and the discretionary nature of giving findings is appropriate for interlocutory orders. It's not appropriate for final judgments after trial when your fact finder is the judge.

PROFESSOR DORSANEO: So what you would say is that in an appeal from an interlocutory order --

MR. ORSINGER: Exactly.

PROFESSOR DORSANEO: -- the trial court may not. If that's your proposal, that would be fine.

VICE-CHAIRMAN LOW: Okay. If that's fine, consider that done. All right. Jane.

HONORABLE JANE BLAND: I agree with Richard, but also just calling -- adding this heading "Further trial court proceedings" and then basically describing those proceedings as the possibility of a trial court filing findings of fact and conclusions of law and what to do in quo warranto proceedings, it almost seems to limit

what the trial court can do.

PROFESSOR DORSANEO: What do you want to call it?

HONORABLE JANE BLAND: You know, I liked it better when it just dealt with quo warranto and we left the nonjury proceedings be dealt with under 296.

PROFESSOR DORSANEO: But, see, it didn't. If you look at 28.1, 28.1 says "interlocutory orders" and then it has a couple of sentences about procedure.

HONORABLE JANE BLAND: Right. And I like that --

PROFESSOR DORSANEO: And in 28.2 it says "quo warranto" and it's got a couple more sentences about procedure. It's goofy.

HONORABLE JANE BLAND: Okay. But in any event, there are a lot of other trial court proceedings that can take place besides entering findings of fact and conclusions of law. Like in temporary injunction cases, for example, there is no stay of proceedings. The trial court goes on its merry way and may even try the case before the appellate court handles the interlocutory appeal, and this seems to limit further trial court proceedings, and some interlocutory appeals don't stay trial court proceedings.

PROFESSOR DORSANEO: Uh-huh.

VICE-CHAIRMAN LOW: So it's the heading that concerns you, or what about some of the language in it or is it just the heading that is misleading?

HONORABLE JANE BLAND: It's the heading.

VICE-CHAIRMAN LOW: All right.

PROFESSOR DORSANEO: I'm willing to call it whatever you like.

HONORABLE SARAH DUNCAN: What if --

VICE-CHAIRMAN LOW: Sarah.

HONORABLE SARAH DUNCAN: What if you divided it into two subsections and one was called "Findings and conclusions" and the other was called "quo warranto"? Would that -- because I see your concern. Would that solve the problem?

VICE-CHAIRMAN LOW: Would that answer your problem?

HONORABLE JANE BLAND: I mean, I thought "Interlocutory orders" as it existed -- exists under current Rule 28 is probably a better way of handling it. You know, you can have an order, and the parties can request findings of fact and conclusions of law. The trial court may, but need not, file those within 30 days.

VICE-CHAIRMAN LOW: All right. Bill, what about that?

PROFESSOR DORSANEO: I agree with Justice

Bland that this "Further trial court proceedings" heading is not a good heading. I didn't know what to do about it, and I'll go back and try to split it up some way or do something to --

VICE-CHAIRMAN LOW: Go back and either change the heading or split it up like Sarah says and then that might solve --

PROFESSOR DORSANEO: I think if I look at the original appellate rule that will help me.

VICE-CHAIRMAN LOW: Right. Well, sometimes it does. And since everybody -- I don't even know that that needs a vote. I've heard not that much expression on it, so it looks like --

HONORABLE JANE BLAND: Can we just say "Interlocutory orders," because then that wouldn't apply to final judgments that Richard is concerned about that are governed by Rule 296?

PROFESSOR DORSANEO: Quo warranto are final judgments.

HONORABLE SARAH DUNCAN: Yeah.

MR. ORSINGER: Are they covered by Rule 296 as well? Shouldn't they be?

PROFESSOR DORSANEO: I think they are, but we only get some of the information here.

HONORABLE JANE BLAND: Well, it seems to me

that we only need a separate rule for findings for interlocutory orders.

MR. ORSINGER: Agreed.

VICE-CHAIRMAN LOW: So what do we need to do?

HONORABLE JANE BLAND: So call it "Interlocutory orders."

VICE-CHAIRMAN LOW: Change the heading or have two headings divided, and that needs -- unless somebody has got an answer now, we're going to go to the real thing here, whether the telephone number needs to be listed.

Oh, the court reporter needs a break.

(Recess from 11:16 a.m. to 11:25 a.m.)

VICE-CHAIRMAN LOW: All right. We have Item No. 9, the trial judges, I believe, Tracy, I'm going to let -- I don't know who presented this, but didn't you want the telephone --

HONORABLE TRACY CHRISTOPHER: Yeah. It's a very simple thing. On motions to withdraw when the party will be pro se, all we would like is a requirement that a phone number be added so that we have a way to get in touch with the pro ses to notify them about, you know, whatever they need to be notified about, and I don't -- you know, why that has not been in the rule.

VICE-CHAIRMAN LOW: Okay. So that would be -- I have two things. One is just to add that telephone number. Two is version two of recodified draft, but that gets into some argument because the rule now provides for good cause. Version two, as I read it, didn't include good cause, so I don't want to get into that. If we need to further modify Rule 10 and go to a codified version then we're going to get into arguments about -- I don't know what else is left out. What else, Lisa, is left out? Good cause is not included. What else?

MS. HOBBS: That's all I recognize.

VICE-CHAIRMAN LOW: Well, that's all, but --

HONORABLE TRACY CHRISTOPHER: All we want is the telephone number.

VICE-CHAIRMAN LOW: All right. So you are for -- do you propose we take version one, amend Rule 10, leave it as it is, and include the telephone number?

HONORABLE TRACY CHRISTOPHER: Yes.

VICE-CHAIRMAN LOW: All in favor of that raise your hand.

Nobody is against. All right. We're adjourned.

HONORABLE TRACY CHRISTOPHER: Wait. Judge Gray had his hand up.

VICE-CHAIRMAN LOW: Don't do that.

HONORABLE TOM GRAY: Why don't we add their e-mail number at the same time?

PROFESSOR CARLSON: Because that means you accept filings.

HONORABLE TOM GRAY: Not in a withdrawal order. It's in a pleading.

VICE-CHAIRMAN LOW: All right. That's on the agenda for next time.

MR. MEADOWS: Thank you, Buddy.

VICE-CHAIRMAN LOW: Thank you-all for putting up with me.

(Applause.)

(Adjourned at 11:27 a.m.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 7th day of May, 2005, Saturday Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 890.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 18th day of May, 2005.

D'Lois L. Jones

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