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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 10, 2016

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 10th day of June, 2016, between the hours of 8:58 a.m. and 4:46 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

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

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Documents referenced in this session

16-10 Memo on Ex Parte and Non-Litigant Communications. (6-6-16)

16-11 Memo on Time Standards for Criminal Cases (6-9-16)

16-12 Letter from Judge Alcala Speedy Trial (5-26-16)

16-13 E-Mail from R. Meadows (6-8-16)

16-14 Full Text Comparison, TRCP and FRCP

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CHAIRMAN BABCOCK: Welcome, everybody. We have a heavy load to lift today, and I probably should have scheduled a Saturday session, but let's see how far we get with everything, and we'll start with the report from Justice Hecht. Chief Justice Hecht.

CHIEF JUSTICE HECHT: The Supreme Court issued an order changing Rule of Civil Procedure 145 and appellate Rule 20 regarding -- excuse me, regarding indigency; and as the committee discussed when it took up the rules, they take a new approach, which is to not be so demanding on proof of indigency at the outset of a case when all that's at stake are filing fees, but then allowing more review of the claim of indigency as the stakes go up. For example, if a reporter's record is requested for an appeal or otherwise in the proceeding or other appointments are made that are going to cost a lot more money, and so far we think the counties are basically -- or at least most of the counties are in favor of that approach, and so those rules will be commented on this summer and then will become final in the fall.

We're about to put out some changes to the State Bar rules that will require every lawyer in Texas to send the State Bar an e-mail address for service of process; and the bar will give those to the Office of

Court Administration, which will in turn give them to Tyler Technologies, which runs the e-filing system; and so there will be an e-mail address for all lawyers for service purposes. It can be the same as your work address or it can be any address you want, but it will be the address that if something is sent to you through the e-filing system it will be presumed that it was delivered to you, and the bar is going to be publicizing that all through the summer. I think it takes effect when, Martha?

MS. NEWTON: October 1st.

CHIEF JUSTICE HECHT: October 1st. In other changes in those -- in that package, the bar is going to waive membership dues for active military in combat zones for the year -- if they're there any part of the bar year then they won't have membership fees, and also will provide for a one-time expunction of administrative suspension for nonpayment of membership fees. So it quite often happens that young lawyers who are not used to the drill and they don't see the bill, or they don't want to see the bill, and they forget to pay their bar dues, and then they're administratively suspended. This will be a way to expunge that and make it as if it never happened, because if you want to run for bar office later these suspensions count against you, so those are the basic changes. There will be some more details in those rules,

which will be out quickly.

MS. NEWTON: Next week.

CHIEF JUSTICE HECHT: Next week. And then the only other thing is the Court has 20 pending cases or it did have as of 8:59, and hopefully we have a few less than that now, and we have two scheduled conferences this month left, and we expect to issue opinions in all argued cases by the end of June as we did last year, so if Jeff and I nod off during the meeting you'll understand why. That's our report.

CHAIRMAN BABCOCK: All right. Great, Chief Justice Hecht. Justice Boyd, do you have anything to add to that?

HONORABLE JEFF BOYD: No, but I'm going for more coffee.

CHAIRMAN BABCOCK: All right. Well, the first item on our agenda is ex parte communications, and Nina is up to bat and thinks that the third time is the charm on this one.

MS. CORTELL: Yes, siree. Your subcommittee has been hard at work. We reviewed closely the comments made at the December meeting and the prior meeting and we are proposing a rule that we dare call elegant. You may not agree with it substantively, but I think we've wordsmithed it well. To give you -- hopefully you have

our memorandum which was dated I think on Monday. Right behind it is the proposed rule, and behind that are several reference materials that hopefully you've had a chance to review, including Chief Justice Hecht's referral letter, canon, the latest judicial canon on ex parte communications, and various other documents and opinion and ABA model code and code of conduct for United States judges, all of which really deal really with ex parte communications, which you'll recall are distinct from what we're trying to deal with here. Ex parte really speaks to litigant communications with the court outside the presence of all parties. This rule is intended to deal with nonlitigant communications to the court and how should the court handle those.

There are several key issues I think that are really identified by the footnotes we've given you to the proposed rule, which have been discussed by this committee. I can go through them, or we can just open the rule for discussion. I'll just say generally we've confined it to written communications, and we've provided a very simple one-two step for how to respond, retain the communication, send a copy to the parties, and then everything else is at the court's discretion. The comment provides a sort of suggested language. If the court wants to it can send a letter to the nonlitigant who sent the

communication that the court is in receipt of it and has provided it to the parties, or any other action is left to the court.

So I don't know that it's worth -- it's a very short rule. So otherwise I will open it up for discussion. I guess first, any other comments from the subcommittee?

CHAIRMAN BABCOCK: Subcommittee have anything else to say? So Nina fairly represented your views on those?

I'll start out with a question. I know the practice of the Supreme Court when they were hit with this kind of out of the blue was to post the communication publicly, and I noticed this rule doesn't -- doesn't do that. Did y'all consider that, and what was the reason for not doing that?

MS. CORTELL: We did. That -- it's still within the discretion of the court to do it. There's nothing that prohibits that.

CHAIRMAN BABCOCK: Right.

MS. CORTELL: You will recall at prior meetings, including our subcommittee meeting, there was concern that, first of all, not all courts post filings. Secondly, there was a concern about incentivizing other such communications by making them more public than you

need to, providing a broader audience than maybe it deserves. So those were the kinds of considerations that mitigated against it, but this rule does not preclude it. The other governing principle we had in fashioning this rule was to not create a system that is overly burdensome on courts or could open opportunities for complaints against judges for misconduct. So, again, this is very broad, really left to the discretion of the court.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Brown.

HONORABLE HARVEY BROWN: Well, a question about that. So in part (a) it says the court's required to send a copy to all parties. If you were trying to grant discretion to the court, couldn't you say "either send a copy or post it"? In other words, sending a copy, to me that suggests hard copy. That suggests somebody is going to have to, you know, put it in the mail, paper mail, and at least in our courts in Houston we do everything electronically, and we think it's easier and faster for the court just to post it.

MS. CORTELL: I guess one could say "provide notice to all parties."

HONORABLE HARVEY BROWN: Yeah.

MS. CORTELL: And then that would allow the means of that to be at the discretion of the court.

HONORABLE HARVEY BROWN: Right.

MS. CORTELL: I don't know how the subcommittee feels on that.

PROFESSOR HOFFMAN: I don't think we had any objection to -- in other words, I don't think we thought it needed to be paper. So you may just be flagging a language issue in terms of sending a copy.

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: Yeah, the intent is not hard copy, and I would say that there are two very basic goals to be served; and one of them, Harvey, wouldn't have been served quite as well; and that's the goal that other people in the case who didn't get this ought to really know that it happened and, therefore, send it to them, not just post it; and I think posting it wouldn't be quite as good in that sense. So the notice and opportunity to be heard about it is very, very important, and then the second thing is given -- very important to me is for the court to give some sort of pushback to the sender. People need to know that this is wrong, and that's not really responsive to what you said, but that's the second goal here.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Does the judge -- when you say "post it" do you file it in the papers in the case?

If it's electronic and it's filed by the court in the papers of the case, it goes to everybody who has registered in that case as a party of record. Is that what you mean when you say "post it"? Because that to me is the most efficient way of doing it. Everybody in the case gets notice immediately.

MS. CORTELL: For some courts it might be the most efficient, but not for all courts.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: There were a number of highly publicized cases where I think the U.S. Supreme Court, maybe the Texas Supreme Court, was just bombarded with an enormous number of e-mails. Are we going to flip those out to all the parties?

MS. CORTELL: Well, as Judge Peeples said, one of the goals of our rule is transparency, and we believe the parties are entitled to know of all communications the court receives in connection with their case.

MR. GILSTRAP: You know, you could do that by simply saying, "Look, we're getting all of these e-mails. If you want them, we'll give them to you," but, you know, I am a little concerned about flipping out a thousand e-mails to everybody in the case. Maybe that's what we have to do.

CHAIRMAN BABCOCK: Justice Busby, and then Justice Boyce.

HONORABLE BRETT BUSBY: I was just going to second the alternative about providing notice rather than saying specifically that a copy has to be sent to all parties, because I do think that offers the court a little more discretion to respond to what Frank is suggesting, and also Justice Brown, because -- and you can also imagine the situation where the court receives a vulgar or threatening communication that they don't necessarily want to post on the website or also a situation where it's clear that the parties have already received a copy, so it would be an unnecessary expense to send it to the parties, so saying "provide notice to all parties" I think provides the court with a little more flexibility.

MS. CORTELL: I think it's a good change. Yeah.

HONORABLE BRETT BUSBY: I also wanted to ask if you-all had considered adding mass e-mails in the comment as an example of communications directed to a broad audience. That is something that we had talked about previously, and it's something that some of us have encountered where it's not specifically directed to the judge, but somebody may put the judge's e-mail in an e-mail that goes to thousands of people.

MS. CORTELL: I think that one is harder because what is a mass e-mail? It is an e-mail that's directed to the judge in connection with that case.

HONORABLE BRETT BUSBY: Well, it may not be in connection with that case.

MS. CORTELL: Then it doesn't fall in the rule because that was the change -- a very good change we made at the request of the committee. It has to be with regard to a pending case.

CHAIRMAN BABCOCK: Justice Boyce.

HONORABLE BILL BOYCE: To follow up on Justice Busby's comment, there was some discussion in the subcommittee deliberations about notice versus a copy, and I think certainly, you know, Frank's point is well-taken about potential burdensomeness of providing copies. I think there's also consideration, though, that if something general goes out to the parties of the case, "by the way, something got filed in your case," the natural reaction from 99 percent of the lawyers are going to be "Well, tell me what it is," and that's three or four more transactions going back and forth or communications. Can some of that be short-circuited by providing a copy instead of a more generic notice, somebody saying something about your case, but we're not telling you exactly what it is.

CHAIRMAN BABCOCK: Good point. Okay. Yeah, Robert.

MR. LEVY: Is it the -- one point, Nina, about the comment about it has to relate to the matters of a pending case. Is it possible to include a good faith provision on that, because you might get a -- a judge might get a letter or an e-mail about an issue that is broad. It doesn't talk about a case, but it talks about something that relates to maybe one or many cases before that judge. Normally if it's got the style of the case we know that under this language they might be required to go and look through and see all the cases that might be impacted.

CHAIRMAN BABCOCK: Frank, did you have your hand up?

MR. GILSTRAP: Yes. I have one on a different question. You've got all of these e-mails for paper copies. Where are they kept? Who keeps them? If it goes up on appeal, are they part of the reporter's record or the clerk's record?

MS. CORTELL: And we were trying to go broad on it. My own feeling is it would be part of the record of the case.

MR. GILSTRAP: If it's the clerk's record it's got to be filed. Is that what we're going to do?

MS. CORTELL: I don't know how the subcommittee feels about that.

MR. GILSTRAP: I don't know. I don't know.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: As written, it says, "If the judge receives" and then it goes and says, "The clerk or the judge." So when you read it, it says "the judge receives," and then it goes and says, "The clerk or the judge must retain a copy and send a copy to all parties." So does the clerk now have a duty to send copies to all parties if a judge receives an ex parte communication? I think this sentence that starts off, if it says "a judge receives a copy" then it should say, "The judge should direct the clerk to retain a copy or retain a copy himself, send a copy to all parties, may take any other action appropriate." As it's structured right now it's the duty of the clerk or the judge.

Now, I have a problem with the district judge being directed to retain a copy. We assign visiting judges. A visiting judge could get a copy. Does that visiting judge carry that in a portfolio file when he leaves or she leaves? When a judge leaves office, retires, does the judge carry it? With regard to cases, a judge only has two items in which they can place materials, the clerk's record, reporter's record. Other

communications are administrative records that are dealt with under Rule 12, and so I would suggest that these are case records of some sort, and as distasteful as it is, they have to go into the file. That's probably the only legitimate retention place that you could place them and then recover them.

We see -- I see -- have seen requests for information on assignment orders that go back 10 and 12 years and have to go locate them as a presiding judge in an administrative file. We're setting up a duty for a judge to retain a copy, but their staffing is low, they don't have set file systems for that, so I think the structure of the rule needs to be thought out. I accept the fact that we've got to respond to it, we've got to do it, but I would suggest to you the only place it can go is in the clerk's file. Now, maybe the clerk can set up a pro se -- I mean, an ex parte communication file as a separate sub file of the clerk's file, but that's where it's got to go.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: David said it all. I join his comments, and the rule just has got to be clear that these are case records and that I don't think anything needs to be said beyond what David said.

CHAIRMAN BABCOCK: Okay.

MS. CORTELL: The language -- we might want to look at the language that's in opinion number 154 which is attached as Item 3 to the memorandum, and it says, "Preserve the original letter by delivering it" -- may not be letter, but "preserve the original letter by delivering it to the court clerk to be file marked and kept in the clerk's file." Does that capture, Justice Evans?

HONORABLE DAVID EVANS: What I do, and I don't know what Judge Peeples -- I'm sure he gets the same proliferation of ex parte communications as a presiding judge. I get them in both capacities. I just send them to the -- direct the clerk to file them now. Now, I haven't gone to the extra -- I have at times gone to the extra step of sending them to the parties, but I get outside communications sent -- we've got -- we get groups called court watchers, so you'll sort of get some sort of information from third parties, and I'm starting to see them now as presiding judge, and so I have to send them to the courts below and say, "File them in the papers of the cause" because I don't have any retention location as presiding judge to place that material, and it's related directly to the case.

CHAIRMAN BABCOCK: Okay. Anybody else? Yeah. Justice Brown.

HONORABLE HARVEY BROWN: Two things. One, I

want to go back to something Brett said, Justice Busby said, about expanding it beyond just paper editorials, billboards, and social media. For one, it's not just editorials in the newspaper. It's newspaper articles that you see as a judge sometimes that talk about a case, and you don't realize it until you're halfway into it and now you've read the newspaper article, but it's also electronic communications. A lot of us follow certain blogs or tweets, and you don't initially know it's going to talk about the case and then it does. You quickly, you know, shut it down or whatever. Are you going to have to send those?

It just seems like to me we're kind of thinking a little bit there when we use newspapers and billboards the way we used to communicate rather than the way a lot of communications are done today. I would just encourage to have one or two more examples. If you're not trying to cover those and you want them to disclose every blog they read that talks about the case or mentions the case, I wouldn't know that as a judge, so at least we would want clarity one way or the other.

Second, I wanted to go to something Justice Peeples said about we want to discourage people from doing this, and as part of that I think you should change the last sentence of the comment. The last sentence is that

"The court could notify the sender the court has received the communication and has provided it to the parties in the case." I would add a third thing the court could do, and that is notify the sender of the provisions of section 36.04 of the Texas Penal Code. I don't think you have to threaten it, but I think that a lot of judges won't know about that, won't think to notify somebody of that; and if you are really trying to put teeth into stopping somebody from doing it a second time, you could in a nonthreatening way at least notify them of the provision.

CHAIRMAN BABCOCK: Okay. Yeah. Bill.

PROFESSOR DORSANEO: I couldn't quite hear everything that Harvey said, but what would be wrong of -- with the idea of assuming that these communications are, in fact, going to be made part of the clerk's record, just giving the parties notice of receipt of a communication and of filing of the communication as part of the clerk's record and let somebody go look if they want to.

CHAIRMAN BABCOCK: Uh-huh. Yeah.

MS. CORTELL: I'm sorry, Bill, I didn't quite understand. Are you speaking to (a) or the comment?

PROFESSOR DORSANEO: Well, I was speaking about (a), but it relates to the language in the comment, too. Is it a big problem to require people to go if they're curious to look at the clerk's record, which is

available?

MR. HATCHELL: This was a big debate. Not debate, but the problem is just one of transparency. "We've got something. You can't look at it even though you're a party to the case," and under the rule it has to do with the merits of the case, so this is what we opted for, but it was considered at great length.

CHAIRMAN BABCOCK: Yeah. Right.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: Concerning the location, Judge Evans, it seems to me that since by definition this applies only to communications about a case there ought to always be a case file to put it in, which is a pretty easy thing to do, it seems to me.

HONORABLE DAVID EVANS: You know, in an ideal world it would be, but since the rules dictate that everything that pertains to a case, in the Rules of Civil Procedure and with regard to the clerks do, that everything with regard to a case is filed in the case -- now, some of the wording of those rules and statutes are limited to party filings, but most trial judges, they may tell their clerk, their coordinator, if they have a coordinator, "We'll put this in a case file," but that's where you put your notes, your work product.

This is a record I would assume would be subject to Rule 12 or certainly to disclosure and recall, and if you didn't keep up with -- and then, David, as you know, we've discussed retention policies for the presiding judges on our records, and what retention policy would the district court fall under to retain these records if it weren't separate -- if it wasn't filed in the case file, in the clerk's file. It's very difficult for me. I'm not a fan of putting all of them in there, but it's a reality. If you want to locate them and pull them back up, that's going to be the location.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: In the rule governing amicus briefs it very clearly says, "Amicus briefs shall be received, not filed," so I guess they're not part of the official court record, but they are received by the court. I don't know exactly what that means, say going up from the court of appeals up to the Supreme Court, if there's an amicus brief filed in the court of appeals. Perhaps this rule could have that the court receives the communications or the clerk can then receive them and not necessarily file them as part of the court file.

HONORABLE DAVID EVANS: And I would just add, I think the level of staffing at the appellate level and support level at the appellate level is vastly

different from that at JP courts, county courts at law, constitutional county courts, district judges; and the ability to retain these records pursuant to a duty now being created, I would think in an educational process most people would favor to tell the judge just file them in the papers of the case if you want to protect yourself. You know, how the Texas Center for the Judiciary might handle the problem, and what advice you might give to your judges. Either that or you're going to have to start doing a retention file as a district judge and setting that up.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: With regard to the idea of some communication to the sender that might deter the sender from sending this material, I agree that I deplore the practice, too, of this type of communication with the judge, but it may well be constitutionally protected. Arguably it's a right to petition. If the Supreme Court is deciding gay marriage, it's arguable the citizens can petition the Supreme Court, and we look at 36.04 of the Penal Code, which makes that type conduct a criminal offense. I look, there's only one decision there, and I think it has -- it says the statute has constitutional problems; and, finally, the last sentence prohibits ex parte communication. That's not the right word, but this

kind of communication with school boards, planning and zoning commissions, city councils, where this type communication is the rule. If the city council is deciding a zoning case they're going to get a bunch of phone calls and e-mails. That's part of the process, and yet it's criminalized under this statute.

MS. CORTELL: The committee was very sensitive to that, and that's why we are not suggesting either a reference to the criminal code or even saying this is an improper communication, because it is not an improper communication.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Did the committee think about how broadly we're talking about when we say "merits of the case"? Because I have received communications that didn't really go -- it was a person's personal philosophy, right to life, same sex marriage, I mean, just, you know, that's what they believe. Now, does that go to the merits of the case or if somebody writes you a letter and says you're an idiot because of the way you decided this, does that go to the merits of the case? I seem to be -- I mean, most of what I have seen personally I would say didn't really go to the merits of the case. It was just someone expounding their personal philosophies and beliefs that they wanted you to take into

account, so maybe that goes to the merits.

MS. CORTELL: Well, Robert made a similar point, and I think it's a good one. Maybe it's a wording issue. Remember, we didn't have this in there before, and the very good insight from the committee was, you know, someone writes a letter, when is the next hearing or it's some procedural matter or it's a newspaper that has nothing to do with the merits of the case.

HONORABLE R. H. WALLACE: I'm not necessarily criticizing the wording. I just think that maybe the judge will have some discretion in deciding what goes to the merits of the case.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: I think we've moved on. I just wanted to say that I was a proponent of the most Draconian remedy. In order that it just deters -- I just really do not like this process of bombarding judges with this kind of material, and I wanted to advise that you're in violation of the law, but cooler heads, David and Bill and Lonny, convinced me that that was probably just going a little too far; and the point is that it was debated at great length by very mature and considered people.

CHAIRMAN BABCOCK: Present company. Professor Hoffman, and then Skip.

PROFESSOR HOFFMAN: So just going back to

the last comment on the language of relating to the merits of the case, so I just wanted to flag for others to see that the ABA model code and the code of conduct for Federal judges uses a different phrasing, and so we consciously chose a different one, but it's sort of the comparable one to thinking about. So if you were in your packet, I guess it's pages four and five. For example, under the ABA model code, (a), the language is "concerning a pending or impending matter," and that same language shows up in the code for Federal judges. So, again, we looked at that. We thought about standardizing it in the rule and decided the merits made a little more sense. I guess made it more clear.

CHAIRMAN BABCOCK: Justice Peeples.

HONORABLE DAVID PEEPLES: I'd like to make two or three points. We're talking about a lot more than just e-mails in appellate courts. I don't remember how many times I've had things like this happen. I can remember two, but there I'm sure have been more. One was a communication in a family law case, anonymous, you know, not signed, no return address; and it basically said "Do you realize that so-and-so in your court just said a lot of bad things about me."

That's one thing and then I found one just the other day from a couple of years ago where I had an

election type dispute, and I got an anonymous letter. It was postmarked 50 miles away, I guess to keep it even more anonymous, very cogent, just telling me why I ought to rule one way, and the word "shenanigans" was used, and that kind of thing. This happens in the trial court. I think it's rare, but I would make -- two points on that. One is there ought to be -- judges need some guidance, what do I do when I get this. This is not something you wake up in the morning knowing exactly what to do. You're not thinking it's going to happen, and it's just there on your desk, and if it's e-mail I think that's less anonymous than a hard copy letter might be, but I think it's important to let people know here's what you do, you should do, and this is right to do.

The second point is I think compliance is easy. I really do. This is not burdensome in the trial court. Admittedly if you get a thousand or something like that, yeah, that could be burdensome. I have not seen anything like that happen, but instructions to the actors is important, notice and opportunity to respond if they want to to the lawyers is important, and to let the sender know this is not right and I didn't get away with anything, that also is important, too. I'm for a simple rule that lays it out pretty easily.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: I was going to say if you were a trial court judge in California who just sentenced somebody on a terrible rape case, you probably are getting quite a few of these types of comments, and this rule might create some challenges for that type of situation. I'm not saying it's not a good rule, but it can happen. I think courts can get inundated.

CHAIRMAN BABCOCK: Skip. Sorry.

MR. WATSON: That's all right. I'm just curious. I'm not suggesting there should be comment on this, but David touched on what I was thinking about. What does the committee or did the committee explore what the other side of the spectrum, the bar, is supposed to do when we receive this notice from the court that I've received this? I can see situations, as I'm sure you can, where some clients will say, "Clearly this was important to the judge or he wouldn't have sent it to you. We need to respond." And I'm a little concerned about being put into the situation where we almost make it look like a response should happen as opposed to, no, that's nothing, trust me, you know, it's not influencing the court, and we don't want to increase the cost and delay of this litigation by going down a rabbit trail.

That's the last thing we want to do here, is actually make this part of an appellate record by us

attaching it to a filing. You know, it's not going to be part of the appellate record unless somebody makes it. It's not under the rule that says it's going to be part of the record, but if we file something, it's going to go up, it's going to be a distraction on the appeal. I'm just wondering if there was a consideration of whether there should be a comment in there kind of giving a little guidance to the bar of should you or shouldn't you, or do we just assume that the proper counsel will be given of ignore it?

MS. CORTELL: Well, I believe the last version of this rule that we provided to the committee included something in the communication to the parties that -- or we suggested in the comment you could tell them to respond or not respond, and we took it out because of -- I think similar concern was voiced.

MR. WATSON: Okay.

MS. CORTELL: Are we creating an incentive then for that kind of protocol to then occur, but this doesn't prohibit it either, Skip, to your point.

CHAIRMAN BABCOCK: Yeah, Cristina.

MS. RODRIGUEZ: To Skip's point, perhaps there could be a neutral statement when it's transmitted or posted or notice given, "Pursuant to Rule of Judicial Administration 17 we are providing this to the parties,"

period, to bring it within the ambit of something neutral and procedural.

CHAIRMAN BABCOCK: Okay. Any other comments about this? All right. Nina, thank you very much, and thanks to your subcommittee as well. The word "elegant" occurred to me when I looked at it. Obviously there's some other issues, but I'm sure that the Court, Martha, and her colleagues will sort it all out. So we're done with this rule.

Now, Justice Peeples will see what the criminal justice system gets by the way of deadlines.

HONORABLE DAVID PEEPLES: I hadn't thought about the word "elegant," but we have a one sentence proposal.

CHAIRMAN BABCOCK: It's got a subpart (a) but no subpart (b).

HONORABLE DAVID PEEPLES: If you didn't get the handout, I've got Cristina Rodriguez with copies she'll bring around to you. If you need one, just raise your hand and she'll get you one. Just to give you some background, all you really need to read is my three-page memo and the three-page letter from Judge Alcala of the Court of Criminal Appeals stating their position. We got this task last fall, and the committee talked about it and thought we don't have criminal expertise in this room, and

the Court of Criminal Appeals just as a matter of courtesy, if nothing more, ought to be consulted. I checked with Chief Justice Hecht. He said that's fine, and so we did that, and I set up a task force and had a little difficulty getting people on the same date, but finally I met with four members of the Court of Criminal Appeals and their general counsel on it, had a good discussion. We did some drafting, and finally the Court of Criminal Appeals itself and its rules committee -- they've got one -- talked about it, and they came back with the letter that Judge Alcala wrote for the Court saying basically they oppose time standards.

They're okay with the language which we've adapted and put at the bottom of my memo, and I want to say that the Court of Criminal Appeals made it very, very clear that they appreciated being consulted on this, which is in their domain, and I think it was a good thing that that happened, and I would say also that this is -- time standards and delay are not the same thing as bail, but the Texas Judicial Council does have a subcommittee that's studying the question of bail right now. I have no idea exactly what they're studying and when they're going to do something, but that is happening.

So if you'll look toward the end of this handout, on page three at the bottom of my memo is some

proposed language and Administrative Rule 6 has time standards for civil, family law, juvenile cases, and then it had something about criminal cases that referred to a statute that got held unconstitutional, and so we need to do something because right now in the books is a reference to a statute that's just not viable anymore. So we need to do something, and what we propose is at the bottom or the middle bottom of page three of the memo, drop that language and say -- well, you can just read it for yourself. "In timely compliance with the Federal and state, Constitutions and statutes."

CHAIRMAN BABCOCK: Okay. Any comments about this? Chief Justice Hecht, is there an appetite to butt heads with the Court of Criminal Appeals on this?

CHIEF JUSTICE HECHT: Well, I don't know. I doubt it, but I did think the -- obviously we need to fix the rule, and I thought the Court of Criminal Appeals should have the opportunity to think about the issue. Right now the functioning of the criminal justice system, particularly at the lower levels, is a national issue, and the imposition of fees and fines and costs is a problem. There's been lots written in the press about debtor prison courts that send people to jail for hundreds of dollars of speeding tickets that they can't pay.

The bail bond practices are being looked at

all through the country. The City of Houston or Harris County I guess has been sued for its bail bond practices. There's a movement in virtually every jurisdiction away from money bonds and replacing it with a system where the judge is given more background information about the defendant so that a decision about release or confinement can be made on a fuller record, so there are just a lot of issues, and this was an opportunity for the Court to see whether it thought that standards would be helpful, and they think not.

CHAIRMAN BABCOCK: Okay. Yeah, Justice Busby.

HONORABLE BRETT BUSBY: I just was curious as to the subcommittee's view on Judge Alcala's suggestion that there be a comment citing specific statutes, because it seems like just saying "In compliance with Federal Constitution" -- "In timely compliance with state and Federal constitutions and statutes" really provides no more guidance than if there wasn't anything in there at all, and so if we're going to -- I don't have an objection to that if that's in the rule, but I do think her suggestion is well-taken that there be something in the comment pointing to specific statutes that may be particularly relevant.

HONORABLE DAVID PEEPLES: Yeah, and I

appreciate that very much. My understanding is that people who practice criminal law know this area and understand, but I think it's a great idea, and frankly, if the Court wants to do that, it would be very easy. She's got language there that would take very little tweaking to do that, and the point would be to lay out, you know, the Federal Constitution says this, state Constitution, you've got this statute, this statute, this statute, and lay them out and maybe have a little parenthetical would be helpful because even though most people who do criminal law are familiar with this, not everybody is, and I think it would be helpful if the Court wants to do it. We just didn't put it there.

HONORABLE BRETT BUSBY: Well, and I would say you don't even necessarily need to be that detailed. You could just lift what's in her letter basically and put that in the comment, and it would be a -- it would be a definite improvement as far as notice for folks to -- here is some places you should go and look for what the relevant standards are.

CHAIRMAN BABCOCK: Great. Good comment. Thank you. All right. Anything else? See, we're speeding through this docket today. So now in the next 10 minutes we will revise the discovery rules. Bobby, it's up to you.

MR. MEADOWS: All right. We're going to start all over again. The discovery subcommittee was given three tasks under Justice Hecht's April 2016 letter. One was to examine proposed changes to Rule 192, two changes; to consider a new proposed spoliation rule, and I should point out that these proposals come to us from the State Bar committee on court rules and are not the work of the discovery subcommittee or any other committee of this group.

So I convened a meeting of the discovery subcommittee with the idea that perhaps we would take up at least the proposed changes to Rule 192. They seemed rather straightforward, something that could be discussed, and then figure out how we would proceed with dealing with the proposed spoliation rule, which is a little bit more complicated and I think will take some work, and I found that the discovery subcommittee felt unanimously that those two tasks were swallowed by the larger task that we were given to examine the entire body of our discovery rules to determine whether or not they need to be changed and modernized in light of the recent amendments to the Federal Rules of Civil Procedure in 2015 and with an eye on whether or not we could make changes that would increase the efficiency under which we handled matters and whether or not we could reduce costs.

So with that, it was the strong preference of the subcommittee members that we not take up the more particularized assignments of Rule 192 and the spoliation rule. I'm prepared to lead a discussion around those today if you want to do it in this committee, but the view of the subcommittee was that it would be better to use our time in this setting to hear from committee members in terms of what the views are around the table as to what is working, what is not working with our current discovery rules, which were -- as everyone will remember, were adopted in 1999 after about a year's worth of work by the same group.

So it's a little bit of a what do you want to do, Chip, and, Justice Hecht, in terms of proceeding with our assignments? I can certainly lead a discussion around the two points around 192 and spoliation, or maybe it would be better as the subcommittee felt to have a broader discussion that would subsume those two assignments and talk about the discovery rules as a group and what we ought to be focused on in terms of possible changes.

CHAIRMAN BABCOCK: Okay. Well, if that's what the subcommittee wants, that's what they'll get. Buddy, what do you think? Are the rules okay as they are, or should we fix them?

MR. LOW: Well, since I haven't dealt with that particular rule, I can express great knowledge on it.

CHAIRMAN BABCOCK: Speak up so they can hear you down there.

MR. LOW: No, I have no opinion really.

MR. MEADOWS: It probably wasn't enough time to really digest what we put together, but I want to thank Harvey in particular who assembled this matching chart of the -- the Federal rules looking against the Texas rules. I took his work and had an associate in my office help kind of assimilate everything that we're dealing with today, which is we've got a full text match up, which is one chart we circulated, and then we have another attempt to match the relevant portions or the corresponding portions of the Federal rule to the applicable state court, Texas rule; and in that chart -- well, actually, both charts, where there was proposed language, for example, Rule 192 and spoliation, we identified that in the chart so it's handy, it's right there; and in the Federal rules we indicated which of the rules were amended in 2015 so that particular attention could be paid to recent changes that are happening in the Federal system. So in those documents you have essentially everything you need to deal with the matters that were put to the discovery subcommittee, and again, they are lengthy, but

at least it's a handy reference, and it's available.

CHAIRMAN BABCOCK: Well, the reason I called on Buddy is because he tries, you know, lawsuits, wouldn't be here today but for a case getting --

MR. LOW: No, I have actually been involved. I represented a company that had an annual fire and a lot of records went up with it. We tried that case four and a half months, but --

PROFESSOR ALBRIGHT: Excuse me, Buddy, can you speak up? We can't hear you.

MR. LOW: Yeah, a lot of courts deal with that with their instructions, what you instruct the jury. Isn't that basically the way you deal with if there's an issue? That was what we had in that case.

CHAIRMAN BABCOCK: Yeah. Well, I think what I heard Bobby saying is that the subcommittee would enjoy hearing from us as to whether -- taking the discovery rules as a whole, what problems do we see.

MR. LOW: I mean, that's a broad question. Discovery costs, I mean, you know, discovery rules as a whole, there's been a big complaint about the cost and the volume and we've been dealt with that, and if I had an answer to that I would be very popular.

CHAIRMAN BABCOCK: Well, you're popular anyway, but even without an answer to that. Judge

Wallace.

HONORABLE R. H. WALLACE: All right. I'll lead it off.

CHAIRMAN BABCOCK: Thank you.

HONORABLE R. H. WALLACE: You know, we read articles about the vanishing jury trial, why we're not having jury trials, particularly complicated civil cases, and usually the -- one of the answers that I always hear come up is the discovery process and how expensive it can be, and I think I've mentioned before in this room that in criminal proceedings there's no such thing as an interrogatories or request for production or request for admissions when somebody's life and liberty is at stake, but here we do, and I think this would be a monumental task, I understand it, and we're talking hypothetical here, but if there could be some meaningful revisions of our discovery rules to cut down on some of the time that is basically I think largely wasted on discovery. When is the last time either as a trial lawyer or as a judge you stood up in the trial and read an answer to an interrogatory and said "Boy, I nailed them on that" or a request for admission. It doesn't happen.

You know, an associate sits down, drafts up a bunch of interrogatories, request for admissions, request for production, thinking of everything they can

think of. The other party does the same thing. They fight over it a while, and then by the time you go to trial, if it goes to trial, all of that is largely forgotten.

So I'm a strong believer that the idea that every single rabbit trail has to be run down or every possibly relevant bit of evidence needs to be explored, we have to rethink that or our jury system is going to continue I think to see fewer and fewer trials.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: Okay. So I'll keep my remarks general and brief, and I'll just make two. One, you-all will recall when the folks from Colorado gave that very interesting and provocative discussion here that -- it was the IAALS was the name of the group.

CHAIRMAN BABCOCK: And you smashed them, as I recall.

PROFESSOR HOFFMAN: We had a very productive and energetic --

CHAIRMAN BABCOCK: Frank.

PROFESSOR DORSANEO: Full and frank discussion.

PROFESSOR HOFFMAN: You'll remember when we talked about that. One of the points that was made was that while we all have -- and there clearly are stories of

discovery abuse and excessive discovery that happen, the best empirical evidence that has been done shows over and again that discovery excess and abuse tend to be limited to a very small sliver of the civil litigation practice. Now, it turns out that around this room many are involved in that sliver because they tend to be complex, high-dollar cases, multiple party cases, but when the empirical work has been done, and it's been done in lots of ways, and I know that Robert has a different view from the Lawyers for Civil Justice, you know, and I get that there are different views on this, but before we dive head in with continuing the -- the untested belief that discovery is generally excessive and generally abusive across the civil justice system, we really should take -- all of us should take a hard look at what that empirical evidence shows because the nonpartisan stuff that's been done by the Federal judicial center and Sedona, and a bunch of it suggests very much a different, different story.

So that's point number one, and then point number two, this one I will be very brief on, is there are some in the room -- and I'm certainly in this camp -- who have grave concerns about the recent changes to the Federal discovery rules. Lee Rosenthal, whom I count as both a dear friend and one of the great talented people I

know in this profession, and I have had a long running debate on this subject. So certainly people can disagree, but what we can't -- what I think you have to accept is, is that we literally -- those rules just went into effect. We have no data on how the experience is shaking out yet, and so I guess I would caution this state group that before we decide we want to go down that road, we have the virtue, the benefit of being able to sit on the sidelines and watch and then sort of assess how those very -- for some people, significant changes in the Federal side are going to play out. So those are the two points.

CHAIRMAN BABCOCK: Great. Judge Estevez, and then Robert.

HONORABLE ANA ESTEVEZ: Well, my understanding was that we would be open to also looking back at other revisions of the Federal rules and not just the most recent ones, so just to throw out something that could be controversial or everybody would just agree, I didn't particularly like it when I was in private practice, but I think it would actually be an improvement for our rules is to have something like Rule 26 where you have without a request you have to make some disclosures. And I don't know -- I mean, I think that's what we're -- what we're wanting, is what changes do we really need in the rules that --

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: -- you want us to focus on, and I don't know that anyone has really started yet.

CHAIRMAN BABCOCK: Robert, and then Tom.

MR. LEVY: Another perspective from Professor Hoffman, he and I have talked about this, but -- and I think Chief Justice Hecht has spoken about this. The challenge that we face in our courts where the job of the courts is a place to adjudicate disputes and to be there for the parties is changing because the cost of that process is so high that litigants are not able to get into court, pay the costs of the transaction costs, so they're either not bringing their cases to court or they're settling cases that have valid defenses because they know the cost of the proceeding is so overwhelming, and I think that's born out by the figures that show the number of trials are so far reduced that cases are not going to trial.

They're not being decided by a judge or jury because the cost of the system is so very high; and I think that's been impacted by the business side of it, that litigators are seeing a much smaller amount of cases than in past years; and I think in part it's because parties see that the cost of the process is so high; and I

think a significant factor of that is the discovery costs associated with bringing lawsuits; and the studies that Professor Hoffman points out have some serious problems in that they include debt collection cases and other cases that are cases that generally don't involve discovery. A lot of them involve default, so I don't think that's really representative, but even if you take that information at face value, the fact is that that those cases that are subject to these discovery issues represent a significant -- every one of those cases that do have discovery issues are ones that involve huge costs and barriers to entry; and I think it behooves us to take a look at those rules that impact that; and I think Texas actually was ahead of the Federal courts in many respects in the last round of amendments; and it's created a little bit of a better climate; but now I think it is an appropriate time for us to look at these rules in whole and try to see if there are ways that we can improve the process, make it less expensive for litigants, and to hopefully bring more cases to trial, the ones that should be tried.

And I will point out that to the extent that specific suggestions like the proposed suggestion on the spoliation rule that was sent to the Supreme Court, I would have some comments on and some concerns about, but

rather than addressing that I would defer to the concept of having a more holistic approach.

CHAIRMAN BABCOCK: Tom, and then Pete, and then Professor Dorsaneo.

MR. RINEY: I understand Lonny's point, and I have no empirical data to dispute that. I just think my personal experience is discovery abuse is not limited to huge cases. Oftentimes it depends more on who my opponent is and who the judge is and what the judge will allow me to get away with than the size of the case. So I think it is an issue, and I think it does discourage lawsuits.

Secondly, Judge Wallace mentioned young lawyers sitting around drafting discovery requests and the diminishing number of trials. I think there is a relationship, and I'm not sure this committee can solve it, but you've got a lot of young lawyers who don't have a clue how to try a case, and so all they do is know how to generate paper and instead of learning how to address the issues in the case.

With respect to the changes in the Federal rules, I think Lonny has a really good point. There's all kinds of articles about these changes to Rule 26 and what's intended; and if you look at it, a lot of this is they've been trying -- this is about the third time they've changed it trying to limit somehow the scope of

discovery, and it's all been unsuccessful. So I think at the very least we ought to wait kind of a few months, get a few decisions under it, see how that's working.

Finally, I really didn't have time to study this information that was sent out, and it's very good, and I would like to have that opportunity to study it, particularly in light of the issue of what needs to be changed. I think we also ought to identify what's working well and kind of move from there, and I don't think necessarily we need to say, well, if the Federal rules say so it must be a good way to do it, because I disagree with that. So I would like for us to take a little more time to study this fine work that's been done and consider it from the viewpoint of what do we need to change.

CHAIRMAN BABCOCK: It used to be on this committee that if you said, "This is the way the Federal courts do it," that was the kiss of death.

PROFESSOR HOFFMAN: The good ol' days.

CHAIRMAN BABCOCK: The good ol' days, yeah. Pete.

MR. KELLY: Something like this came up a few years ago when we were having a brainstorming session before the session, and -- the legislative session -- and I would like to reiterate a point. So we're looking for a rule-based solution to a problem that's based in law firm

economics. You want to cut the price of discovery, don't pay first year associates $180,000. You know, find another way to do it, and it's an economic problem due to the economic problems of the practice of law, not necessarily a problem with the rules.

The -- you know, there's been a decline. If you want to see a well-discovered case, have a contingency fee lawyer who really does not have much incentive to waste time or the court's resources or his own resources against the flat fee defense lawyer, who also does not have an incentive to churn the file. You're not going to see a lot of excess discovery in a case like that. So we seem to be -- and it comes up every once in a while. It comes up in the Federal rules and in the Legislature and in this committee, say we need to fix the rules to cut the cost of discovery.

Well, maybe the answer is more within the economics of the legal profession, and we are looking for a rule-based fix that just isn't there, and the idea that the decline of the jury trial is due solely to the cost of discovery, there are a lot of issues in Texas and nationally dealing with increased arbitration. It's just harder to win lawsuits on the plaintiff's side now. There are a lot of factors that can lead to the decrease of the jury trial. All of the discovery costs is the answer

looking for a rule-based solution to a problem that has very complex causation, so I would think we should go very carefully before we start limiting discovery and examine -- you know, it requires some case empirical study to figure out what the problems are and let the big firms try to find some way to, you know, outsource their discovery before they start complaining about how expensive it is.

CHAIRMAN BABCOCK: Professor Dorsaneo, and then Lamont, and then Buddy.

PROFESSOR DORSANEO: This relates as much to what we do here and what the Court does in the rule-making process as it does to the discovery rules. That's just a circumstance, but it's a good idea whenever we have rules that were based upon Federal rules, copied from Federal rules, to look at what the Federal courts, what the Supreme Court does or has done with those rules moving forward. Texas -- the Texas Supreme Court has rarely done that. The clearest examples involve the one group of rules or the main group of rules that we're -- that was taken from the -- from the 1937 Federal rules and put into the 1940 Texas rules, the rules about joinder of claims and parties.

Now, those rules underwent a number of changes to correct mistakes or perceived mistakes that were made in the Federal draft, and apparently nobody in

Texas ever considered whether the Texas rules based upon the Federal rules ought to undergo the same or some changes as a result, and that condition has persisted really from 1940 through, you know, most of time. You know, one example of how that works, we have a counterclaim rule that was based upon the 1937 version of the Federal counterclaim rule, but the Federal rule was changed in 1946, and ours has never been changed, and probably our rule ought to be changed, and it should have been changed in 1946.

Now, the Supreme Court, our Supreme Court, had a case on that, and at least it appears to me that no one knew about the 1946 Federal change or that that was --

CHAIRMAN BABCOCK: Except for yourself.

PROFESSOR DORSANEO: No, I'm not the only one, but I teach both rule books, so I know what they say vis-a-vis one another, so I'm just making the general point, not criticizing anybody really, that it's a smart thing to do if we have rules on, let's say, discovery relevance, to look at what's happening at the Federal level to the definition or the approach to discovery relevance and see whether we want to go that way or not. You know, adopt it or reject it, and I personally think our discovery relevance rules don't match even our own cases and are a little bit disjointed, but it's a simple

point. If the feds change something that we copied or based our rules on, we ought to consider whether we need to do something like that, too. Always we need to do that.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Yeah, when I originally when I spoke --

CHAIRMAN BABCOCK: Speak up, because Alex is --

MR. LOW: I was referring to the last memo I had on Rule 192.3, spoliation, so that's why I addressed that. I was not -- I didn't realize you were talking about the overall discovery; but you remember when we had our first discussion, Steve Susman was on the committee and a number of people that aren't here; and we started talking about depositions, how many hours for deposition and you can't limit it to this and I can't do that; and at that time we didn't have demand for disclosure even.

CHAIRMAN BABCOCK: Right.

MR. LOW: And so during the process people have come around. I remember I got a demand for every kind of stuff. I took them to Detroit and General Motors. We gave them a warehouse full of things, and they never even found the right documents. So lawyers have learned -- they're beginning to learn, and it's a learning

process, you have to key, and I don't think we can write a rule that will reference all answers to discovery. I don't think we can just totally revise and have people saying, well, discovery is not too expensive and so forth. We want to reach a fair result with a minimum amount of time and wasted time rather, and it's very difficult to draw one rule, so we have to -- as we amend these rules we have to see how the amendment will key in to our process of fairness and yet giving up the things that need to be given.

CHAIRMAN BABCOCK: Do you think that the limitation of hours on discovery on deposition is a good idea or bad idea?

MR. LOW: I really don't, because maybe it's just that I'm not smart enough to know how to ask a lot of questions. I usually go wanting certain things and not a fishing expedition, and if you give them eight hours, a lawyer feels like he hasn't done his job unless he spent eight hours or something. I don't know. I don't think you can limit deposition by hours.

CHAIRMAN BABCOCK: Okay. Well, okay. Judge Peeples.

HONORABLE DAVID PEEPLES: I want to ask a question of the whole group. Back at some point back in the Eighties the rules switched on document production.

You used to have to file a motion to produce and show I think good cause, and then it was changed to a request for production and the resisting party has to whittle it down. In other words, previously you had to show why you need this, and now you just ask for it, and the resistor has to show why it ought to be whittled down, and my question is is how much does that kind of shifting in emphasis and who's got the burden have results and consequences in the problems we're talking about?

CHAIRMAN BABCOCK: Well, I'll give you my own view on that, Judge. I think the request for production is at the core of our discovery problems right now, for a couple of reasons. Number one, with respect to depositions, at least we have a rule that says you can't take more than six hours --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: -- unless you get leave, and so that's a limit. Before that rule, I was in a deposition once that went for like seven days of somebody, and we asked midway to limit it, and the trial judge wouldn't do it, so at least you've got -- you've got that. With respect to interrogatories now we have a limit on the numbers. On production of documents we have no limits, and I was involved in a case recently where over time I think there were seven requests for production, and it was

like over 400 individual requests, and you pile on top of that the fact that we now have all of these computer records that cause both defendants and plaintiffs in that -- in the sliver cases anyway to go and spend enormous amount of time, and I wonder if that document production issue is not -- is not one of the key issues that we're facing right now.

This case I'm talking about, the lawyer on the other side said, you know, "Well, I'm going to get ready to take an important deposition. I haven't looked at 10 percent of what you've given me." Well, doesn't that -- doesn't that make a statement? Wait a minute, why did we have to give it to you then if you're not even going to look at it? And when you do, when you do do tit-for-tat, when they ask you 400 requests, you ask them for 400 requests; and if you're going to look at it, you've got to dedicate, you know, four or five people at -- I don't care, Pete, if it's 180,000 a year or 110,000 a year. It's expensive to do, and I think probably unnecessary. Not probably, definitely unnecessary. So Robert. Sorry, that's my rant, Judge.

MR. LEVY: And I agree with you, and one of the issues, Peter, that I think does become the problem is that the volume of information has exploded, and that's what drives a lot of this. So you mentioned an issue

about economics, and one thing we might want to look at is taking a fresh look at the economics of the way discovery works, because the incentive should be on the party requesting discovery to limit that discovery to what the party really needs and request or needs, but today there is no disincentive to ask those 400 requests. Obviously, yeah, the idea is you have to look at it, but the reality is you actually don't, and you can use it as a tactical weapon to force the other side to settle, and that's wrong. That's not the way the system should work, and so if we had some cost allocation associated with it so that if you need this information enough to pay for it then you're going to ask for what you really need and not what you can get to cause the other side burden. And particularly in asynchronous cases where you've got an individual on one side or a small entity on one side and a large entity on the other side. The small entity with very small document repositories has no disincentive to ask for the sun, the moon, and the stars because they know it will at the very least cause difficulty and improve their position in the case, and leverage should not be one of the outcomes of discovery.

CHAIRMAN BABCOCK: I think Lamont had his hand up before you did, Skip, sorry, so Lamont, then Skip.

MR. JEFFERSON: Couple of things. First of

all, I think these kind of discussions are really important, so, Bobby, thanks for the opportunity. I think it's great to kind of gauge where we are from a litigation standpoint, especially given the vanishing jury trial and at least all of the discussion about cost, which I'm not sure is a widespread problem either, but you asked what's working, what's not working. What's not working to me in the rules are the levels, the discovery levels. They're just -- they have no impact at all in my opinion or in my experience on the level of activity in the case, and I don't know about the expedited action rule, how broadly that gets used. I mean, I was involved in passing the rule and drafting it, but I have not seen it, but I wouldn't necessarily be in a position to see it, but the level two, level three idea is not -- I think has really not gone very far in my experience.

What is working I think is actually a nondiscovery rule, and that's Rule 91a, which I don't know how many hearings there actually are on Rule 91a, but I think the fact that it is there causes those who are bringing claims to assess their conviction in pursuing claims, and I think it has minimized or at least reduced the number of truly outlandish claims, that a party knows that they may get stuck with attorney's fees if they bring them. So I think that's an effective tool in at least

whittling down those claims that shouldn't be in court in the first place. They increase everybody's cost for no reason, and the final thing I will say is the one thing about the Federal rules that I think is beneficial, and I don't know how practical it is for state courts, but the clear -- the clear emphasis in the Federal rules is early court intervention. So you get a judge involved very early, have the parties there. The parties can't just agree and submit something. You have to have a conference with the judge where the judge kind of passes on what's reasonable for the case, and I think that kind of early court intervention is the best tool to try to control parties who otherwise would be out of control.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: Well, this comes off of what Lamont just said. Chip, you'll remember the 1990 Civil Justice Reform Act.

HONORABLE LEVI BENTON: Skip, will you speak up, please?

MR. WATSON: I'm referring to the 1990 Civil Justice Reform Act where Congress required every Federal district court to do a report on the reasons for cost and delay in Federal civil litigation, and the judges in every district had to appoint panels of both some magistrates but mostly practitioners to go through what are the

problems, interview clients, other lawyers from all spectrums of the Federal civil practice and then collaborate and write a report. The two things that I remember from that exercise was, number one, Congress assumed in 1990 that discovery was the driving force for the reason for cost and delay in civil litigation. Rightly or wrongly, that was the assumption.

Number two, Congress assumed and actually wrote in that it had to be a part of every report to do what Lamont just talked about, that in cases where it appeared that there was a high potential for complexity or cost or delay, which, again, frankly, many of the judges interpreted was what's the area code of the counsel involved, at least the West Texas judges did, just depending on the lawyers. The message was it's your house, it's your court. You get involved early and often. Sit down with the lawyers and have their client representatives present and go through with them what the nature of the case is, what the discovery needs are going to be, and that an Article III judge actually does it.

That was in the report. It was, frankly, not very well received by the judges, thinking I've already got too much to do. I don't know. I started shifting more into the appellate practice about that point. I don't know how it went in practice. I do know

anecdotally from the couple of younger Federal judges that contacted me after that meeting and said, "We've tried it," that those that tried it said it worked, that rather than increasing their workload, getting into it and saying, "This is what I think is really needed. Come back to me if this is not enough, but this is what you're going to be doing in terms of discovery after we talk through the issues and the logistics and the witnesses," et cetera, that they said it helped. I was just wondering if your experience if any of them actually followed through and did it, if it helped, or did that end up being a congressional wives tail.

CHAIRMAN BABCOCK: I think different districts did it. There wasn't uniformity in the state of Texas or nationally.

MR. WATSON: No, of course not.

CHAIRMAN BABCOCK: But I'll tell you that recently I've been exposed to two other Federal districts on the document side of it, and in the Southern District in New York you can't file a motion to compel for documents unless you first write a letter of no more than three pages to the judge complaining about what your -- the opponent has failed to do with respect to documents. Mostly documents. It can be other things, and then there can be a responsive letter, no more than three pages, and

then the judge almost always will within a short period of time write on the letter in handwriting "denied," "approved," "granted," whatever it may be, and then that -- you know, you go on your way.

In the Northern District of Illinois you also have to write a letter, but it can't be as lengthy as three pages. It's just "Hey, I want this stuff, and they won't give it to me," and you're into court immediately to talk to the judge about it, and you have a -- you have a relatively brief, maybe 15, 20-minute hearing, and the judge tells you what he thinks and looks sternly at everybody, and everybody goes away, and it seems to me like it's a very good idea, but anyway. That's -- Carlos, then Levi.

MR. SOLTERO: Chip, just very quick, as the sort of ad hoc or, you know, visiting member from the State Bar Rules Committee, and we were the ones who sent over the proposed changes to 192 and spoliation rule, I just wanted to give a few observations. The way we work is that we get input from the bar on projects that we work through; and we, like y'all, vet those out and ultimately come up with proposals; and these tend to be real problems that people are encountering; and that's why 192 rose to the point that we submitted it to the Court; and the philosophy that we have, which I think is correct, is

consistent with what I have seen in practice, is that generally the rules are not broken and so don't mess with things unless they can be materially improved. That was certainly the committee -- the rules committee's approach to these things.

I'll say that the problems we find, I agree with what Tom said earlier. A lot of this has to do with personalities, parties, lawyers, and perhaps judges, for whatever reason, not necessarily implementing all the rules the way that I think practitioners would think that they would be implemented. I think that -- contrary to what Lamont said, I think the levels one, two, and three I found do help. I think that is one of the things that have helped. For small cases, having that level one does move things quicker, and the expedited rule is a good procedure. For level three cases it gives you that flexibility in that it's got the default.

I would suggest perhaps a Rule 16 conference concept in our rules might be helpful. I think in Federal court, apart from going in front of the judges, which is always great and helpful, just having the lawyers to sit and talk to each other about what is this case really about, what's the level of discovery, and having them confer, I think that could go a certain way to making some of these things a little bit easier to deal with; and then

the last comment I'll make is that on the specific spoliation rule I'll just note that what we did there is we did not try to go exactly the route that the feds went when they did 37(e) and said "ESI," "ESI," "ESI," which because even though that's the vast majority of discovery documents, et cetera, we have so many different kinds of cases in state court, whether it's the big box store and the display and, you know, et cetera, that we tried to go a way that was more inclusive than just merely ESI. So those are my observations.

CHAIRMAN BABCOCK: Thank you, Carlos. Levi.

HONORABLE LEVI BENTON: I'm so glad we're having this discussion also. You can't talk about the economics of civil litigation without talking about civility amongst the bar. I'm involved in a case right now where there have been more motions for sanctions in this one case than I have filed in the entirety of my career. Almost as many as I saw in 10 years on the bench, and there are no disincentives in the rules to filing a motion for sanctions. What I'd like to see is the movant of a motion for sanctions be required to post a bond before filing the motion or contemporaneous with filing the motion and put their own money at risk, because, you know, if I've got this case, it does my -- it might do my heart good to make Exxon spend a lot of money responding

to these serial motions for sanctions.

I don't agree with Lamont about 91a. 91a really is not working. It's working if all you do is defense work and all you do is answer lawsuits and not necessarily file affirmative claims. We're not -- where I have seen 91a fail the bar is it doesn't have language that directs the trial court to deal with the frivolous motions to dismiss under 91a, and so there's every incentive to file a 91a motion, but there's not strong disincentive to file a 91a motion, and so that needs to be dealt with.

CHAIRMAN BABCOCK: Levi, just to stop you for one second.

HONORABLE LEVI BENTON: Sure.

CHAIRMAN BABCOCK: I think 91a says if you file a motion to dismiss and it's unsuccessful you've got to pay the other side's attorney's fees, which is why I think people aren't using the rule.

MR. LOW: Right.

HONORABLE LEVI BENTON: Well, I can tell you that the language isn't clear and express enough, and there are able judges in Harris County who believe they are not required to give the respondent fees. And -- oh, and here's the other thing. Then the issue is when are those fees due, is it enough to put them in the final

judgment or pay them contemporaneously, and so I think if this area is going to be visited and revised, it -- it needs to expressly say, you know, within 10 days of the denial of the motion those fees are due, and I'd like to move the Chair to be assigned to the discovery subcommittee.

CHAIRMAN BABCOCK: Anybody that wants that terrible task is automatically in it. Marcy. Marcy has had her hand up for a while, Judge, and then we'll get to you, Judge Evans.

MS. GREER: Okay. A few comments. I agree with the comment about the Rule 16 conference. I think that would be a big improvement in the more complex cases. Obviously the smaller cases, maybe not so much, but making the attorneys get together for a premeeting conference and then going before a judge just briefly to kind of talk through the issues does cut down a lot and bring the parties together, because it forces them to think about what they really want at the onset.

I do think it's worth looking at a Rule 26-like cost shifting and scope of discovery proportionality type amendment. It's already having effect. I'm dealing with it in Federal court in New York right now, Northern District, but they have a similar rule to what you described, and that's more of a local

practice, which I think is effective. Our judges would ask for brief letter writings and then they would hold a telephone conference to decide whether more briefing is necessary or they give a tentative of "I'm leaning this way," which generally fixed the problem without having to make a ruling. So it's a very effective process. They like that a lot. I don't think that's necessarily the rule, but it might be a best practice that could be recommended.

Third, one change that would be huge in Texas would be to eliminate draft expert reports from being discoverable. That's been, you know, taken care of in the Federal rule, and I think there's -- it's just you have to deal with it in every case whether it ends up in the fight or not and, you know, talk to your experts about "Well, I hope you don't retain" -- it just would be helpful because I don't think a draft expert report has ever turned a case in the world, but people fight about it a lot. So I think that would be a helpful one, and as to these rules on witness limits, I can tell you my experience in Federal court is they don't mean anything, because you do go in and you've already had your 10 witnesses and you ask for two more and you give some reason, the judges will say "okay." It's really not especially helpful. I think the parties -- it would be

better to have it built in and baked in in the front end kind of an understanding of how many witnesses they think they're going to need and have them try to agree to it, but trying to legislate that by rule I think is a waste of time, frankly.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: What isn't working is the conferencing system over objections or resistance to discovery. That's not working except at a very sophisticated level where the attorneys know each other and have worked with each other before or as indicated over here where you have -- indicated on the flat fee and contingency fee cases, being run in those fashion, and they've worked together at that time.

I don't know that there's a rule that can be passed and specified that would implement an effective conferencing system, but I can tell you that all the trial judges set discovery hearings with the knowledge that the parties have never sat down and really discussed the objections with any intention of resolving them before they get there. Hearing last week, the attorneys came from the same office building in Dallas to Fort Worth and had never met face-to-face before they got there, and I don't know what the economics of that is; but, of course, what happens is the trial judge says, "Go in the jury

room." My calendar is now shot for the morning, and that's the irritant voice of mine, which is prevalent that comes out, and you wait, and then it's down to three issues. So that's not working. Now, whether that would work if you said the conference has to specify when, where, and for how long you conferred, maybe that would make a difference, but that doesn't work.

Now, on the other hand, you can have a very sophisticated case. I tried a three-week case that resulted in a multimillion-dollar verdict. We were in trial everyday for the three-week period, and the jury deliberated for five days, and the only time I ever saw the lawyers in that litigation in a products case was when we got to the Daubert challenges. I never had a single discovery hearing. Lawyers from Birmingham, Austin, Dallas, Fort Worth. All the work went fine.

So how that works -- but where it's really breaking down for the trial judge is the conference system doesn't work. By the time the trial judge in a civil district court, in a civil court only jurisdiction like mine, dockets all the dispositive motions, challenge to jurisdiction, Rule 91a, and discovery hearings, you have two days left for trial next week. That's if you're going to get your hearings done within three weeks.

Now, that's -- it's hard to -- it's hard

then to say, well, how many cases do I try this week if I've got to get all of these motions resolved during the week? So, you know, a lot of us will -- it depends on what we start. If we start a case that's going to take several weeks then all the discovery is knocked off the docket, but then you try a couple of car wrecks and then you're into your hearing docket. So part of it is the conference system. The ability to resolve things is not working outside the courtroom.

CHAIRMAN BABCOCK: Judge Wallace, and then Professor Albright.

HONORABLE R. H. WALLACE: Well, the Rule 26a -- and we would probably be wise to confer with people who practice in Federal court a great deal. Years ago when I did, that to me was just another hoop that you had to jump through that nothing was ever really accomplished in doing a Rule 26a meeting and filing a report, and I don't think that would serve -- I don't think it would serve a real purpose. I think what -- in the vast majority of cases that we see, we don't need that kind of conference. We don't need a lot of conferences, but I think, you know, the judge has always got the discretion I think to sit down and have a status conference, or if there are people constantly fighting over discovery to do something of that nature. I would be more in favor of having that kind of

discretion than I would be saying, okay, they have got to do a Rule 26a type conference and that type stuff.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: I just wanted to say that it's specifics that would be really helpful to us, and some of you have gotten into specifics. Some things on my list are specifically we talked a little bit about the levels of discovery and whether those work or not. I'm also concerned about whether the limits make sense. When we passed the 1999 rules I felt like most of our level two limits were too high, and other states that limited discovery they would limit deposition hours and request for production and things like that to a very low limit with the idea that it would force lawyers to have to talk to each other to get more because you had to either agree to something that was realistic or you had to go to the court, which nobody really wanted to do, and if it was so low for everybody then agreement would make some sense. So that's one alternative to think about. I don't know if anybody in the room has dealt with that on -- in other states or other Federal courts, but that's an option and a question as to whether our limits are too high in level two.

Another question that we dealt with in 1999 that we rejected was mandatory disclosure that they have

in the Federal rules. We rejected it because we have so many cases in state court that have no discovery and we didn't want to force discovery on some cases, but we might want to consider imposing mandatory disclosure in some level two or level three cases.

Another issue is the one that Marcy brought up, was protect -- not protecting expert drafts like the Federal rules. I've heard many lawyers say they have a Rule 11 agreement to adopt the Federal rule to not let -- to make drafts -- to protect drafts.

Spoliation and proportionality, I think that's harder to talk about with specifics right now; but if anybody has any specific issues, experiences, of what works and what doesn't work, I think that is helpful; and anything else that you-all can think of that are part of the state rules right now that work or not work and be specific about it, I think that will be very helpful. I know I'm working on a case now where I got involved with it, and I saw my first privilege log for electronic discovery, and it was 4,000 pages long, and I was appalled, and it gave really no information, and they wouldn't even give it to us in Excel spreadsheet. They gave it to us in a PDF, and I thought I cannot believe how much time and energy was spent on making this log and then we can't even figure out what's in it. So I don't know if

there's anything we can do with that, but I was appalled.

CHAIRMAN BABCOCK: Pete.

MR. KELLY: Very broadly speaking, I just find it curious that the fact that litigation transaction costs, particularly discovery, that are -- the fact that it's being used for leverage is somehow anathema when as a matter of public policy the state of Texas, United States government, by enforcing arbitration clauses, especially for small claims, in those cases litigation transaction costs are being used for leverage to keep the suits from being filed; and the idea that the cost of doing business in litigation -- I mean, yes, the costs can go too high, but it is not a per se evil that demands rule changes to fix it, unless we want to fix the rule changes all around and not discourage -- or we should discourage arbitration and cut down the arbitration costs on these smaller claims. I mean, as a matter of public policy we don't regard the transaction costs as a per se evil, and so I just don't think that discovery costs should be necessarily on its own a public policy driver of rule changes.

CHAIRMAN BABCOCK: Okay. Cristina.

MS. RODRIGUEZ: I just wanted to follow up on a point that you made about the burden of request for production. I think numerical limits don't necessarily

get us there because four broad requests for production can be as devastating as 400 narrow ones, so I'm in favor of the proportionality debate that Marcy brought up, and those are all pretty much it.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: I tend to favor the Federal Rule 26 model. First, my experience is getting the judge acquainted with the case early is helpful in giving the parties direction as to what the real issues are. I was in one case where we represented a young man who died in police custody in Federal court, and we went down, and the Federal judge goes -- after he listened to like both sides four- or five-sentence description of the case he said, "Well, obviously then this witness is going to be very important," and he -- that judge was right. I mean, both sides deposed a whole bunch of other people, but basically the judge was right at the beginning. That witness was the witness that when the judge read that testimony, that witness' testimony made the whole case summary judgment for defense, and it's not like the judge had prejudged the case. It was just like that person obviously knows the critical information that will decide whether there is or isn't a case, and if the parties had listened a little more they could have saved themselves a whole bunch of deposition costs, gone after that witness, and the case

would have been over.

I have also seen the same thing happen when large construction cases end up in Federal court because what happens is the owner sues the general contractor and then just expects through, you know, tedious, lengthy discovery for the general contractor to tell them who is at fault, which of these many subs and materialmen are likely at fault, et cetera, et cetera. Well, once again, I got into a case, and the Federal judge goes, "Well, if those are your defects you're probably at some point going to want to bring in the following subcontractors, and we might as well just get to it, guys, so here's what I'm going to do. I'm going to set the deadlines for designating experts and joining third parties in such a way that basically you're going to know pretty quick who you need to get into the case and get them into the case and then we'll know how to proceed."

All too often I see in these larger construction cases in state court the decision of who to drag in the case as the third party defendants who are responsible is not made until after all the expert reports are produced, which I don't know what everyone else's experience is, but that doesn't happen until 60 days before the close of discovery and 90 days before trial, and that just blows everything wide open because all of

the sudden you have a whole bunch of new people. Again, getting the judge in early can help solve that, which leads into my second suggestion.

Perhaps in small cases not so, but in what we now call level two and level three, I don't think the parties ought to get to choose. I think they need to go down and persuade the judge why they need to be level three instead of level two. Where I am the judge doesn't want to get involved in what level this case is going to be tried at, and the parties kind of go, okay, well, I'll be a nice guy and we'll just go to level three so it will all be wide open. I think for -- to say that the judge has to get involved a little bit and say, okay, you persuaded me this is a level three case and not a level two. The other thing of it is, and this is probably going to make me unpleasant --

CHAIRMAN BABCOCK: To whom?

MR. HUGHES: Or I'm going to get some blow back. I think the Federal rule that you can't do any discovery without court permission until you've had your conference to plan out discovery before the initial conference with the judge is healthy. I think what it does is it allows people to actually sit down and say, okay, what do I really need, why are you saying this, who are you going to want to depose, because that's a part of

the plan; and right now all our discovery plans, our discovery begins the day the petition is filed; and I'm -- I'm just not sure, except in maybe cases where we've got a temporary injunction hearing coming up or, et cetera, maybe judges could make some allowance for that; but I think it would be healthy to consider the rule that formal discovery at least in the higher level cases could not begin until the conference with the judge or until so many days before the scheduled conference.

That would probably move the parties or at least one of them to see to it that you have the conference early on so that they can start discovery if they're all hot to do it, but otherwise it's discovery starts, you get the petition, and you get 60 requests for production and 30 interrogatories, and then if the parties would talk to each other maybe all of that could have been cut in half. I don't know. That's my thinking.

HONORABLE ANA ESTEVEZ: Can I ask him a question about his thing? Is that just for level three?

MR. HUGHES: I'm open for discussion, but I'm thinking, you know, except for -- I mean, maybe like for level one they get to start as soon as possible, but I would suggest for the upper levels they need to wait until they get a conference with the judge or maybe 15 days before that or something.

CHAIRMAN BABCOCK: Okay. Judge Wallace had something to say, and after he says it we're going to take a break.

HONORABLE R. H. WALLACE: Okay, I'll be brief then. In Federal Rules of Criminal Procedure, here's what -- this doesn't deal with expert reports and statements and all of that, but just in terms of documents and objects. Here's the discovery rule in Federal criminal, Rule 16(e), "Upon a defendant's request the government must permit the defendant to inspect and copy," all of these various things, "within the government's possession, custody, or control," and the items are -- "The item is material to preparing the defense"; (2), "the government intends to use the item in its case in chief at trial"; or (3), "the item was obtained from or belongs to the defendant." And that's it. That's the starting point.

Now, my suggestion would be to think about putting something in our request for disclosures that would require each side to produce the items that it intends to offer in its case in chief at trial and do that before you allow any request for production. Now, in some cases you say, well, that's going to be impossible in a big document case. Well, sooner or later you're going to have to do it. So that's just the thought, that maybe a

-- how can you object to something that you intend to offer in evidence at trial? So, I mean, maybe that's something to think about using some kind of language of something like that to add to our request for disclosures.

CHAIRMAN BABCOCK: Okay. Great. We're going to take a break, but when we come back we're going to talk about Canon 4a, and, Bobby, I don't know if this discussion has been helpful or not, but when we come back in September you'll be the first item on the agenda, and we'll spend a lot of time on this when we come back.

MR. MEADOWS: Very good. So I know you want to take a break, but it would help I think our work for just a little bit of direction here. So when we did the discovery rules in the 19 -- late 1990's it was we started with a blank slate, and we were looking at the very issues that Justice Hecht has put to us in his April letter, which is look at these rules, tell us what, if anything, needs to be done to make them more efficient and make litigation less costly, and we did that, and probably the signature piece of that work was the three different levels, which we're hearing comments on today in terms of their viability and whether or not -- their desirability.

So the subcommittee can definitely go through the discovery rules rule by rule and offer a view on whether or not they need to change, and if that's the

task then we're -- we'll go to work, but is it that we're expected to reach out to a broader audience, I mean beyond this room even, to other stakeholders in this process who may have views on what's working and what's not and get a greater canvas of that so we can report more fully? It's just the job can be about as big as we want to make it, but to report in September I think I'd like to have an understanding that what your tendering to the discovery subcommittee is for it to do its best effort in coming back from this committee, from this discussion, with a sense or a set of recommendations about changes, if any.

CHAIRMAN BABCOCK: Well, I'll let Justice Boyd weigh in on this, but my understanding of what the Court was asking us to do was to take our discovery rules, which were revised in a very, at the time, radical way and use that as the jumping off point, with no intent to just scrap them and start over, but to look at those rules, rule by rule, and see if there are ways that they could be improved or whether there are ways that they are not working, and if so, what would be the recommended change, and as with the last discovery task force you are not limited to your own little enclosed enclave of people, but you can reach out, and I think the Court would appreciate it if you did reach out to other stakeholders to get their views on these topics, and you don't have to have all of

the answers by September, but I think we should devote substantial time in September to this project as we move forward, and perhaps we can complete it by the end of the year. Maybe, maybe not. Probably not.

Now, Justice Boyd gets to sit in these conferences that I don't, so -- and you know how unreliable the Chief is, so maybe my understanding is different, but I'll -- in the Chief's absence I'll let Justice Boyd weigh in.

HONORABLE JEFF BOYD: I wouldn't add much to that. Chip is right. I think we -- so we're coming up on 20 years since the major changes were made to the discovery rules. Was that '99? '99. So part of it is just, look, it's been 17, 18 years. Are they working, where are they not working, but then the motivation or the added motivation for wanting to conduct that review is the comments that many of you have made today about the vanishing jury trial, the increasing expense, are there reasons why we ought to look at the rules in order to make the process more efficient. So I think we are looking for kind of a rule by rule analysis.

I don't think we're looking for a town hall meeting approach where, you know, you should feel compelled to reach out to every possible stakeholder at this step of the process. If there are those that you

think would be helpful, TTLA, TLR, whoever -- you know, whatever interest groups you think might give some -- feel free to do that, and that would be helpful. Once we do have any changes, they'll go out for public comment; and if the concern is, well, we don't want people feeling left out, that will get taken care of; but anybody that you feel could be helpful to the current process, feel free to reach out. Martha, would you add just from conversations with the Chief?

MS. NEWTON: Well, I don't have much to add except that the impetus for the Court's asking the committee to take a plenary review of the rules were the discovery proposals that we received from the court rules committee, and so when the Court discussed sending those to this committee for its review and recommendations, they said, well, while we're at it, and it's been 20 years, let's have them look at all the rules and see if there are ways that they can be improved. So those were the discussions that we had inside the Court. We never discussed the committee's, you know, starting from scratch and redoing the discovery rules. It was more of let's see what in the current rules is working and not working and whether we can improve them.

MR. MEADOWS: Okay. I think I've got it. So we're going to go about this in the most efficient,

cost effective way we can.

CHAIRMAN BABCOCK: All right. And if you need a hearing, just write us a three-page letter, and we'll set it. We're going to be in recess until a little after 11:00. Thanks.

(Recess from 10:49 a.m. to 11:12 a.m.)

CHAIRMAN BABCOCK: All right. We are moving on to Canon 4F of the Code of Judicial Conduct, and Jim Perdue, who is making his way to his seat right now, is going to report on where we are.

HONORABLE HARVEY BROWN: Chip?

CHAIRMAN BABCOCK: Or not. Oh, yeah, before we do that, Justice Brown wanted to ask the committee for some help on something.

HONORABLE HARVEY BROWN: Yeah, for the discovery rules, I know you just got those a day or two ago, so for everyone, but in particular the trial lawyers, if you would read those sometime in the next month and e-mail the subcommittee or Bobby Meadows your thoughts when you've had a little more time to reflect on it so we have an opportunity as a subcommittee to discuss them, I think that would give us a little bit more of a head start, so if you have time we would appreciate that.

CHAIRMAN BABCOCK: Yeah. I think that's a great idea, so if anybody has thoughts to consider, you

want the subcommittee to consider, let them know sooner than later. Jim.

MR. PERDUE: I'm hoping there's enough power on this device to get me through this. I think it blanked out.

CHAIRMAN BABCOCK: That could be misconstrued on a written record. He's talking about his computer.

MR. PERDUE: My computer. So a letter came in from a constitutional county court judge asking for the Court -- or for this committee to look at an amendment to Canon 4F of the Rules of Judicial Administration -- Code of Judicial Conduct. Right. The subcommittee looked at the issue, and you have a memo that we submitted back from October of last year. The judge who had sent this request in followed up on this, and it made it to the agenda this week. The subcommittee looked at the language, and in Canon 4F basically a judge is entitled to encourage settlement but cannot act as a compensated arbitrator or mediator. The canons do provide, though, for a county judge who does perform judicial functions to have a practice of law, something of a private practice of law under some restrictions, and that's laid out in Canon 6B.

Basically if you visit this request with detail the concept is to take the exemption that you find

in 6B regarding a practice of law and broaden that or remove, that is, the restriction on a judge getting -- serving as a compensated arbitrator or mediator that exists in Canon 4F; and so the committee looked at this a little bit; and we will admit to the committee as a whole that we don't have a full report from the supposed stakeholders in this, which would be constitutional county judges. Judge Pollard made the request. The rationale behind it, whether it be anecdotal or a broader policy question, wasn't really much given, so we tried to look at it.

There's two issues from the subcommittee's perspective that I think I can report on as a whole. The first is a potential for conflict, whether a constitutional county judge is in a judicial service or just an administrative capacity, and Lisa Hobbs was sharing with me this morning, according to OCA over 200 constitutional county judges do serve as a judicial -- in a judicial capacity. The number that are limited to kind of administrative, county administrative positions, is I think she told me in the forties across the total state. So Harris County or Dallas County, something like that, but that is -- generally as you get to smaller counties they still serve in judicial capacity.

It struck us that you have then a pretty

clear concern for a conflict. You've got a judge in a small county who across the border says, "I will appoint you as the paid mediator on my cases. You can appoint me as the paid mediator on your cases." You have the opportunity as a sitting judge to offer services as a mediator, even though it's not in cases before you or pending in your court. The committee felt that that is obviously an area of potential conflict concern if you amend this language and allow constitutional county judges to serve as paid mediators or arbitrators.

The second is -- and this is the policy that actually is more explicit in the ABA concepts -- is that it's a distraction from what you are supposed to be, which is a paid public servant, whether it be administrative or judicial capacity, to serve as the constitutional county court judge; and so while in self-interest it makes sense that somebody would like to have a secondary stream of income serving as a mediator or arbitrator, unavoidably you look at the potential of it distracting, taking time away from what is your service in the constitutional role as a constitutional county court judge, whether it be in the 210 counties where you're judicial or whether you're in the 40 plus where it's more administrative, either way.

So on the whole I think I speak for the committee in that we felt that those two kind of glaring

conflicts led us to not bring a recommendation to revise 4F and allow for this specific to constitutional county court judges, but with the caveat, and I think I speak specifically for Justice Pemberton, that we will admit to the committee as a whole that the stakeholders -- that is, the constitutional county judges who want this, and there are two of them at least who have reported in to the committee -- without a rationale, was never given, and so we don't -- we did not find logic behind it. We found concerns with it, and both from I think the constitutional perspective and a conflict perspective we felt that the concerns outweighed the interest of going forward with the change.

CHAIRMAN BABCOCK: Fair enough. Thank you. Buddy.

MR. LOW: Yeah, was there a question of whether there are other people in the area that could act as mediators or they could be better or know the county better or anything like that?

MR. PERDUE: Did not -- did not come up, did not get raised, although, Buddy, frankly, that goes back to a concern that I was most acute about, which is if you're in a situation where Starr County now says, "Well, you know what, Zapata, you'll be my mediator, my court-appointed mediator here because it's not a case in

front of me, but I'll cross the county lines, and I'll mediate across the line for you."

HONORABLE ANA ESTEVEZ: But the new law with the wheel, so they would have to be in the wheel.

CHAIRMAN BABCOCK: Yeah. Okay. Frank.

MR. GILSTRAP: Well, county judges, certain county judges can practice law, and it seems to me that these concerns would also address that. The problem, as I understand, is that you've got to -- you know, like Freddy Fender says, you've got to eat. You know, you've got to make money, and you don't get enough money as county judge, so you either sell insurance or -- and same way with like the mayor of Mansfield, Texas, pretty important job. He practices law. You know, I mean, are we really in contact with the real world here in saying that, well, you can practice -- you shouldn't be a mediator. Well, maybe you shouldn't practice law either, but, you know, this is how you make a living, and you don't make enough money as county judge.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, there's actually a difference between serving as a mediator or arbitrator and practicing law, and the difference is when you're serving as a mediator or arbitrator you are sort of lending your judicial role, like you're using your judicial role as a

means for advancing that part of your -- your, you know, as a mediator or arbitrator, which is a separate violation of the code, but I can actually see a meaningful distinction between allowing them to practice law, which doesn't use their office for influence, and being an arbitrator.

CHAIRMAN BABCOCK: Okay. Richard Munzinger, and then Robert.

MR. MUNZINGER: Just in response to Frank's point, if you want to make money --

CHAIRMAN BABCOCK: Speak up, Richard.

MR. MUNZINGER: If you want to make money, stay out of government. Don't be a government official. Don't be a government official and say to the private parties, "Come use me and let me -- and you pay me money to do what I could do as a private person." The opportunity for abuse is obvious. It's not proper. I don't want my government to be influenced by somebody because they hired me to arbitrate their case or mediate their case. That's what the whole thing is all about. Stay out of government if you want to make money. Be a public servant.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I think it should be noted that there is, at least in my view, sympathy for a county court

judge who is in a small county that's got in effect a part-time position that they do need to find other forms of employment, but the concern that serving as a mediator, including an appointed mediation position, would carry much greater weight and could put parties in a very difficult position if they objected to the mediator's appointment and then from another county court or another judge or otherwise they might feel compelled to use that mediator because of the fact that the person is also serving as the judge, and given the nature of the -- the importance of the position and propriety, I think that underscores why the subcommittee felt that it did not make sense to adopt a rule that permitted this practice.

CHAIRMAN BABCOCK: Okay. Yeah, Evan.

MR. YOUNG: I'm probably missing something, but I just don't really see how that pressure that we're describing that Lisa mentioned about mediation, arbitration, oh, because they've got this position wouldn't translate to ordinary practice of law when the same person is a judge, who is going to have the same position within the government regardless of whether they're acting as a lawyer or as the mediator or arbitrator. I would think that that same potential pressure is in both or in neither, so I would like just some clarification of what that -- why that's such a big

difference.

CHAIRMAN BABCOCK: Thanks, Evan. Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm just thinking about it as far as the Ethics Commission and what it requires for me as a district judge to disclose, and I think the pressure or the impropriety could occur when you are representing someone. There's a specific person you did, in fact, represent and then you're going to be recused from those cases because of that relationship you had if they came before you. If a lawyer decides that he wants to gain favor with you so he always agrees, hey, let's use Judge Estevez, then every time in his mind he comes before me in a case he may think, "Well, I'm giving you all of this business, so therefore, you know, listen a little harder to my case." I mean, I think there could be a different level of impropriety if you're on the other side thinking, "Well, he's a local guy, he's given him $10,000 in mediation fees this year, and I'm from this other place."

You know, I don't know how they disclose, if they even have to disclose anything as constitutional judges to have that relationship, but if the parties can agree to a mediator, we don't use that rotating wheel either, so I do see where it could potentially be a

problem. In addition, I believe these are the ones that don't even have to be lawyers, so we're talking about a whole different set that can't practice law as a side, but could be a mediator or arbitrator because they wouldn't necessarily practice law for that. So I guess it just depends on lawyers that are trying to gain favor by giving them another way of supporting their families. You know, if I didn't go for you the next time, all of the sudden are you not going to agree for me to be your mediator. I mean, not that that's how I think, but I think that that's how the public thinks, and those would create problems in appearances of impropriety.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, the way I look at it, you don't change something unless you have a reason to change, and the only reason I've heard is so they can make more money. I mean, that's just maybe a --

CHAIRMAN BABCOCK: Well, Frank thinks that's a pretty darn good reason.

MR. LOW: Well, I'm not involved, so I won't -- no, really, I don't see a reason to.

CHAIRMAN BABCOCK: Yeah, you make plenty of money.

MR. LOW: No. Okay, I've said enough.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Let me make several points. Number one, we -- I think we would want lawyers to be willing and able to take the job of county judge in small counties. I mean, they're doing probate work, and they're doing misdemeanor work, and, Jim, do they also have small dollar jurisdiction in civil cases?

MR. PERDUE: Yes.

HONORABLE DAVID PEEPLES: All right. So they're doing significant work; but it's not multi-million-dollar lawsuits; but to have a judge there doing -- excuse me, a lawyer is better than having a nonlawyer usually; and that's point one; and you're asking someone if they can't do this, if they can't practice law, and this is part of that, I mean, the pool of people willing to take those jobs is much less because you've got to give up your practice to go do it. So there's reason for that, and the question is I guess whether they can also mediate.

Second, there has been talk about being appointed as the mediator, but the idea of appointment doesn't square with my experience on this because usually -- I mean, in Bexar County at least we're very sensitive to whether the lawyers want the person to be the mediator. If you make someone go to a mediator they don't have confidence in, that's not going to work nearly as well as

allowing them to choose someone that they do have confidence in. So I'm just not sure as to whether other people have an experience where a mediator is appointed and rammed down the throat of the lawyers. I have not seen that, and if people want to go to someone as a mediator, that's a lot stronger case for mediation than if they've got to go there.

Now, who -- let's talk about the suggestion of currying favor. District courts care about keeping good relations with the whole commissioner's court, because they govern budget, a lot of it, and if you make them mad they can nickel and dime you on things you really want. If we allowed this, there might be some district courts that would be glad to try to steer cases to the county judge as mediator because that's going to help me at budget time. Now, that's that.

CHAIRMAN BABCOCK: Is that a good or a bad thing?

HONORABLE DAVID PEEPLES: Same thing as --

CHAIRMAN BABCOCK: Is that a good or a bad thing?

HONORABLE DAVID PEEPLES: Getting adequate funding is a good thing, but the same thing is true in an ordinary commissioner who doesn't have the judicial power but is there for the budget discussions on commissioner's

court, and so I've got the same incentive to curry favor with county commissioner for precinct two if that's a lawyer, so it's still there. This is a subtle and complex issue. There's just a lot involved here it seems to me.

CHAIRMAN BABCOCK: Thanks. Peter.

MR. KELLY: I think this is more of a legislative issue than something to be done really by rule making. You know, the same way the Legislature tolerates very low salaries, but they have unlimited and undisclosed consulting fees. You know, we have to have faith that the legislators -- we have to have faith that the legislators are going to act in good faith and not be unduly influenced. If the Legislature wants to impose further restrictions on the county judges then it should be a legislative choice, and they can fix it that way, not through rule making.

CHAIRMAN BABCOCK: Okay. Isn't the Supreme Court, though, responsible for canons?

MR. KELLY: It is, but I think it's more of a job definition in terms of creation of a job. It's setting the qualifications.

CHAIRMAN BABCOCK: I see what you're saying.

MR. KELLY: It could be incorporated into the enabling statute as a definition of qualification of the job.

MR. PERDUE: He wants it part of the court reorganization bill that's been up there for a couple of years. But to Judge Peeples' first point, so the canons do provide in 6F an exception such that a constitutional county court judge can maintain a law practice. So you can have an active law practice and serve as county judge. It is the question of being able to serve as a paid mediator or arbitrator in a judicial context, obviously with the exception of not in a case in front of you. So that's the request of the waiver.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: That's okay. I'll pass.

CHAIRMAN BABCOCK: He passes. Who else? Anybody else? All right.

MR. JEFFERSON: Just real quick, it seems to me like if you could have a private practice, it seems like if there's less of a threat of any kind of impropriety if you're serving as arbitrator or mediator, and we're trying to control as you -- I guess trying to steer business your way as an arbitrator or mediator, which is a neutral position anyway. I think it ought to be allowed. If you can have a private practice, there ought to be a way that you can serve as an arbitrator or mediator.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: Well, I mean, I really disagree. I think one exploits the office and one doesn't, because when you say, "Hire me as an arbitrator," you're going to tout your 25 years on the bench in a way -- you may do that as a practitioner, too, but that -- I definitely think there's exploitation of the office in being -- when the roles are identical as an arbitrator and a judicial officer in a way that is not there when you're talking about the practice of law.

MR. JEFFERSON: That just seems to me like it's magnified if it's -- I mean, if I'm a judge, if I'm going to go out and market myself, "Hey, I'm a judge, hire me for your case because I'm already a judge."

MS. HOBBS: But the lawyers aren't hiring you. The lawyers are hiring you as an arbitrator. They're not hiring you as a client.

MR. JEFFERSON: Which seems to me is once removed from being in the position of an advocate. All you're doing is being paid for your time to work on a case, so what you're -- if you're already going to exploit the office and use your influence to your client's advantage, at least you can't do that if you're neutral.

CHAIRMAN BABCOCK: Okay. Yeah, Robert.

MR. LEVY: I'm going to push back with you on that.

MR. JEFFERSON: Uh-oh.

MR. LEVY: If you are a judge of a county court and you ask your friend, the district court judge, to assign you and then the parties are told, "Here's your assigned mediator," you're stuck. You have no choice in that matter if you're a party, and is that -- and you don't want to object because you don't want to annoy the judge, who you also appear before, and you're put in a potentially impossible position. Yes, being a -- practicing law might influence whether maybe you should hire that judge as local counsel, maybe not, but at least you have a choice in that situation, but if you're assigned a mediator, you've got no choice.

MR. JEFFERSON: Just a quick response, and I will get off of this. I just don't see that it's a problem. Okay. I mean, it just doesn't seem to me like it's --

MR. LEVY: And I should point out that as Jim's note talks about, there are current ethics opinions on issues that are similar, like retired judges, and they -- those opinions make pretty clear that there has to be a real clear line between being -- you can't sit as a judge and -- as a retired judge, as I understand the opinions, and serve as a mediator also, so in those opinions they draw much clearer lines.

HONORABLE DAVID EVANS: I'm not aware of that.

HONORABLE ANA ESTEVEZ: I think they do. They do both.

CHAIRMAN BABCOCK: Levi, and then Tom.

HONORABLE LEVI BENTON: I'll pass.

CHAIRMAN BABCOCK: Tom.

MR. RINEY: Jim, was this a lawyer judge that requested this or a nonlawyer?

MR. PERDUE: I don't know the answer to that. It's Judge Pollard from Kerr, I believe.

CHAIRMAN BABCOCK: Kerr County, yeah. Justice Bland.

MR. PERDUE: Did you have a follow-up, Tom?

MR. RINEY: I was going to say it seems some people think that it's not a good idea to have an exception for lawyers, some think it's okay, but what we're talking about doing is expanding exception. So whether you're a lawyer or not, there's one other position that we're going to allow that I think is subject -- I just don't see the overwhelming need to change the rule.

CHAIRMAN BABCOCK: Yeah, we're going to take a vote on this in a minute. Justice Bland.

HONORABLE JANE BLAND: Just by way of some background data, in an OCA report there's a state

supplement that's paid to county judges that certify that they spend 40 percent or more of their time on judicial functions, and that amount is 15,000. I don't know what the county salary is, if that varies by county or if there's some minimum salary. In fiscal years 2014 and 2015, 216 of the 254 county judges of Texas received the state supplement. So it's a significant number of judges that are certifying that they spend 40 percent of their time on judicial functions, and just to clarify the jurisdiction, so these judges are judges that serve in a county that do not have a county court at law, and their jurisdiction then is Class A and Class B misdemeanors, all probate matters, all guardianship matters, and all matters of mental health, and then of course appeals from the justice courts. So there's sort of a trial de novo in the justice courts.

So these are pretty significant judicial functions that this person is undertaking, at least if they're doing what is required to get the 15,000-dollar state supplement.

CHAIRMAN BABCOCK: Thank you. Professor Hoffman.

PROFESSOR HOFFMAN: That was helpful. So I think the exception that the Code of Judicial Conduct includes is part 6D, D like David, and it's interesting,

but the second part of it says "shall not" -- "should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves," and it goes on a little bit more. So it seems like they're saying there's an exception, but you can practice, but you have to practice in a different area to avoid that potential conflict. Maybe we ought to sort of factor that into our thinking.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Two things. Jim, I assume the same rules apply to justices of the peace? Can they or can they not mediate cases?

MR. PERDUE: So I believe our research suggested that the same rules apply, and you've got -- pretty much got the same issue.

HONORABLE DAVID PEEPLES: They're handling much smaller cases.

MR. PERDUE: Yeah.

HONORABLE DAVID PEEPLES: They're handling probate. Probate is big. And the second thing, on salary, the county judge is the presiding officer of the body that decides his own salary. Now, they've got political limits, you know, so you lose an election if you give yourself a great big raise, but they do have some authority over their salary. I, frankly, don't know how I

feel about this, but I thought I would say that.

CHAIRMAN BABCOCK: Well, you're going to have to vote in a minute. Judge Evans.

HONORABLE DAVID EVANS: I think one thing is that I disagree that visiting judges, retired judges, can't serve as mediators.

MR. LEVY: I might have misstated that.

HONORABLE DAVID EVANS: The code only prohibits full-time judges from acting as arbitrators and mediator, and that's at this point.

MR. PERDUE: I think at one point --

HONORABLE DAVID EVANS: I would have to go look at --

MR. PERDUE: I think the history, Robert, was at one point there was an ethics opinion that said they couldn't and then they came back with a second ethics opinion that said they could.

MR. LEVY: I stand corrected.

HONORABLE DAVID EVANS: I believe that's correct, and, Justice Bland, the current constitutional county court judge's pay is pegged -- are linked to district judge salary, as is county court at law and appellate salaries. Raise the district judge and you raise the ship.

I don't see a -- this is a rural problem.

This is a small jurisdictional problem. I don't know that that changes the ethics of it. In response to the question that -- or the issue that lends prestige to -- use your judicial position to lend prestige to your private functions, that's in Canon 2, but I want to point out to you, this county judge who is a lawyer is already negotiating that problem right now because in order to serve as county judge and practice law in that same county -- and you assume he's right there in that county seat -- he's got to avoid using his position or her position as county judge, constitutional county court judge, to further his private law practice, and seemingly the code has authorized that.

The other issue is at one point there was some law about mediation being the practice of law, but it's not, so it's treated separately. I would not have a problem with approving these constitutional county court judges in these counties serving as mediators if they've got their law office on the square, and we've codified that. We've seen them. We've gotten past that issue, but and the final thing is on the issue of being appointed by a district judge. They would only be appointed by the district judge today, or a county court at law judge, if they're on the mediators wheel and their name is up next. Otherwise, they're chosen by the parties by agreement, and

if the parties agree that this is a good mediator and the right mediator then the parties are aware of the position of the judge.

So it's complex, but overall I would favor just going ahead and -- I don't know that I would amend the code here, but this is where we are. He has a way out of this anyway to go to the judicial section ethics committee and figure out if he's really a full-time judge or not, since he can practice law also. If he's not a full-time judge, by factual basis then he can be an arbitrator and a mediator. So I concur and dissent on my own opinion.

CHAIRMAN BABCOCK: Judge Evans and Jim, I may be reading this wrong, but the canon that we're looking at is 4F, and somebody asked the question about JPs and municipal court judges.

HONORABLE DAVID EVANS: Yes.

CHAIRMAN BABCOCK: And that is -- there is a provision relating to them in Canon 6C(1) that says, "A justice of the peace or municipal court judge shall comply with all provisions of this code except the judge is not required to comply with" -- and then it goes (a), (b), and then (c), "with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation."

PROFESSOR HOFFMAN: And then the next subsection about practicing law.

CHAIRMAN BABCOCK: And then (d), they don't have to comply if an attorney with Canon 4G, except practicing law in the court on which he or she serves or acting as a lawyer in a proceeding in which he or she has served as the judge or in any proceeding relating thereto, so that they can -- the JPs and -- the way I read this the JPs and municipal court judges can serve as mediators, and they can practice law with certain restrictions. Is that the way you read it, Lonny?

PROFESSOR HOFFMAN: Agreed.

CHAIRMAN BABCOCK: Apropos of nothing, perhaps, but Frank and then --

MR. GILSTRAP: I'm trying to think about the problem of the county court or the county judge who is a nonlawyer acting as an arbitrator or mediator. I think that the rule covers arbitrator, too, doesn't it?

MR. PERDUE: Yes, sir.

MR. GILSTRAP: Or just mediator? But when I think about it, isn't it true that the county court at law -- the county -- constitutional county judge, even though he's hearing probate cases and putting a committee of people who are, you know, to mental institutions, he doesn't have to be a lawyer, right?

HONORABLE DAVID PEEPLES: Right.

MR. GILSTRAP: Okay. Okay.

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE ANA ESTEVEZ: I was just going to point out that he's already doing mediations, so I mean, he's advertised in the blue book and also in the Texas bar that he does ADR, so he may just -- it may be like one of those moot points.

MR. PERDUE: It's better to ask forgiveness than permission.

HONORABLE ANA ESTEVEZ: And he does say that he's practicing law and alternative dispute resolution/mediation, so --

CHAIRMAN BABCOCK: Well, whatever. Lisa.

MS. HOBBS: So a couple of things have been raised here that I feel like we don't have the answer to that might be weighed into consideration of this proposal, and one of them is to Judge Evans' point that he's already able to practice law, but Professor Hoffman suggests that there's some pretty significant restrictions on whether he can really practice law in that -- like whether he's really on the town square, so to speak, right? So I don't know. Are these constitutional county judges really practicing law if Lonny is right about how restrictive that provision is; and then, two, when we're making

reference to municipal county -- municipal judges and justices of the peace, and particularly municipal judges, I don't think we should assume that just because the canon would allow them to do this that they are still allowed to do it because there might be some other thing that restricts what kind of outside employment they can have.

There might be a city -- you know, a municipal ordinance or something that restricts all municipal employees, what kind of outside work you can have, what kind of moonlighting you can do, so to speak, and the only reason I say that is because I remember at the State we were restricted in what kinds of outside employment we could take as State employees, and I believe the judges are as well. It comes up like if you want to teach as an adjunct. I think there's some question about whether you could take the money at the --

PROFESSOR ALBRIGHT: You can't have two State salaries.

MS. HOBBS: Yeah, there's something like that. So there are other restrictions out there that we don't really know about that are not just ethical considerations.

CHAIRMAN BABCOCK: So just for the Chief's edification, so where we are is that the canons prohibit a constitutional county judge from serving as an arbitrator

or mediator, but maybe not, and a constitutional county judge has asked us to amend it so it's clear that he can, but he's already doing it. So you want to vote on that?

PROFESSOR DORSANEO: Everybody else can.

MR. PERDUE: That was a lot more elegant than my presentation.

PROFESSOR HOFFMAN: This is billed as the "Judge Pollard full employment act."

CHAIRMAN BABCOCK: Well, without regard to what -- how Judge Pollard is advertising his services, do people think that the subcommittee recommendation that we leave the canon as-is is the way to go or not? If you believe we should leave the canon as-is, raise your hand.

Opposed? So the vote is 27 in favor of the subcommittee report to leave the canon as-is, and four are opposed to that. So fairly clear majority, although the issue is thorny.

So let's go to Rule of Appellate Procedure 49. Professor Dorsaneo, that's you.

PROFESSOR DORSANEO: Yes, well, I would regard -- I regard this as perhaps a type of remedial work.

CHAIRMAN BABCOCK: A type of remedial work?

PROFESSOR DORSANEO: Yes, a circumstance

where remedial work needs to be considered.

CHAIRMAN BABCOCK: Okay.

PROFESSOR DORSANEO: And I'm trying to find the referral letter, which, of course, I just had here handy; and we were asked in the second paragraph of the referral letter, which is Justice Hecht's April 18th, 2016, letter to Chip, to take a look at appellate Rule 49 and particularly Rule 49.7, which has caused confusion among practitioners and courts; and particularly 49.7 deals with filing a motion for en banc reconsideration, and it says as amended in 2008 that "Such a motion may be filed within 15 days after the court of appeals' judgment or order," and that's clear enough, and then it says, "or when permitted within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration." And there isn't guidance as to what the words "or when permitted" mean.

Okay. They could mean when permitted under another subdivision of appellate Rule 49, which is 49.5, and its heading is and has been, although the number might have been different, "Further Motion for Rehearing." Under the motion for rehearing rule you could file a motion for rehearing within 15 days after the court of appeals' judgment or order, and then you can file a further motion for rehearing under limited circumstances

within 15 days of the court's action if the court modifies its judgment in response to the first filed motion for rehearing, vacates its judgment, or issues a different opinion.

So the circumstances are quite limited in the ordinary case for filing of further motion for rehearing, so you could just get this one, and then we've had a provision in Rule 49 -- I think it's been in Rule 49 all along, but I didn't check and see when it got there -- for en banc reconsideration; and in 2008 that rule was changed to say, "A party may file a motion for en banc reconsideration as a separate motion, with or without filing a motion for rehearing, and the motion must be filed within 15 days after the court of appeals' judgment or order or when permitted within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration," and I realize I just repeated myself. Okay.

Now, how does all of this fit together, and do we need the words "when permitted"? Do they add anything? And those words were added in the second order in 2008 that revised 49.7 or its antecedent, and, you know, one way to eliminate the confusion about what those words mean is to take them out. Okay?

MR. LOW: But what if you added "when

permitted by what authority or rule"? In other words, you say "permitted by the original panel," "when permitted by Rule 44," or you could either clarify it or delete it.

PROFESSOR DORSANEO: Well, I don't know why those words "when permitted" were put in there.

MR. LOW: Yeah, I don't either.

PROFESSOR DORSANEO: Okay. So, you know, and I don't know whether that -- what you said would be a good idea, although it would seem like it's a candidate. Okay.

MR. LOW: Yeah, I don't know.

PROFESSOR DORSANEO: But this committee did not recommend the words "when permitted." I'm sure they came from the Court, but I'm not sure -- I'm not sure why they were in there or what they were meant to mean. You know, it could mean you write a letter and they'll permit you to file -- you know, give you an authorization, but I don't think it meant that, but let's just for the sake of argument take those words out. Then how does it work? The second sentence would then say, "The motion," which would be for en banc reconsideration, "must be filed within 15 days after the court of appeals' judgment or order or within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration." Why do we even need any

permission? Why shouldn't you be able to file a motion for en banc reconsideration within 15 days after the overruling of the motion for rehearing? Huh?

MR. LOW: It's really then two questions. One, whether it's gone and it's automatic or permitted by some authority.

PROFESSOR DORSANEO: Yeah.

MR. LOW: Yeah.

PROFESSOR DORSANEO: But I'm asking why would you need to have -- why can't that sentence without "when permitted" be the authority? Huh? Now, but let me digress for a tiny minute. A motion for rehearing is just to try to get to a better judgment or at least a better opinion, okay. Modification of the judgment vacates its judgment, issues a different opinion. That's what it's always for. Okay. And the motion for -- and that's going to always be or always was the case, was to the panel that handed down the opinion, okay, which might have been the whole court in predecessor days.

The motion for en banc reconsideration is a different kind of animal and is designed to be. Rule 41 of the appellate rules, an unfortunate location for this information, but Rule 41 says -- 41.2(c), "An en banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity

of the court's decisions or unless extraordinary circumstances require en banc consideration." And, you know, from the standpoint of an appellate court and appellate justices, if there's a motion for en banc reconsideration, everybody reads it and considers it. 15 people if you're in Dallas. Okay? And that's -- that's maybe not something that ought to be done all the time. Okay.

So maybe the en banc reconsideration should be after the panel motion for rehearing has been determined and then you go back to the entire court and say, "We have these extraordinary circumstances." Okay. "Circumstances necessary to secure or maintain uniformity or unless extraordinary circumstances require en banc reconsideration." And just one more sentence, when we -- from the committee's standpoint, the subcommittee's standpoint, when we suggested how the rule should be revised in 2008, we had in mind that process. Panel motion for rehearing, overruled, then en banc reconsideration if you can meet the standard; and then after that's determined, maybe something else happens, maybe you're through. Okay. And I, for one, am still of the view that that's the right way to handle it. So Justice Bland.

HONORABLE JANE BLAND: So just to -- here is

the -- here is the debate that the rule is causing among intermediate courts of appeals, intermediate appellate courts. The "when permitted" is in connection with 49.7 that says that you may file a motion for reconsideration "when permitted within 15 days after the court of appeals' denial of a timely motion for rehearing." And then if you go to 49.5, "A further motion for rehearing is permitted when the appellate court modifies its judgment, vacates its judgment, or issues a different opinion"; and the problem with 49.7 is that some appellate judges read the "when permitted" to say a motion for reconsideration en banc is a further motion for rehearing.

It is only permitted when the panel -- when the panel modifies its judgment, vacates its judgment, or issues a different opinion; but if the panel has denied the motion for rehearing, for panel rehearing, there is no permission for a further motion for rehearing; and they treat the motion for rehearing en banc as a further motion for rehearing. Now, that can be remedied by saying it's different than a motion for panel rehearing. The court of appeals has, you know, plenary power still and can sua sponte grant reconsideration en banc, but, you know, the fact that the process might -- might be such that -- we might want to encourage reconsideration en banc only in a small number of cases and only after the panel has denied

panel rehearing, and this rule has been interpreted by some to say that that process leaves the litigant without a meaningful opportunity to seek on en banc review if the panel denies their initial motion rehearing.

So some practitioners are, you know, just as a matter of course filing a motion for panel rehearing and/or reconsideration by the en banc court all in one motion and which requires then an en banc vote even in cases where, you know, potentially there is no, you know, need to submit it to the whole court, because the panel may remedy it, because the parties may ultimately not decide to seek en banc review.

So in my view I agree with Professor Dorsaneo that, you know, we should allow litigants the right to opt to seek en banc review once the panel has decided on the panel rehearing.

PROFESSOR DORSANEO: And that -- and, in fact, an appellate practitioner now would worry about the ability to file a motion for en banc reconsideration other than together with the motion for panel rehearing, because the first sentence does say -- first sentence of 49.6 does say that you can do those things together, okay, which is even more stupid, huh, doing a panel rehearing and an en banc reconsideration request simultaneously, but the only reason -- the only reason you would do them simultaneously

is if you had to. Okay. The standards are different, and, you know, I'm sure in my fairly long practice career I've combined, you know, motions for rehearing and motions for en banc reconsideration in the same instrument or filed them at the same time. It's not a good idea. It's not a good idea for the court; it's not a good idea for anybody, really. Can I talk about *City of San Antonio vs. Hartman* for a little bit?

MR. LOW: Yeah.

PROFESSOR DORSANEO: Okay. This is part of the problem. This is an opinion written by justice -- former Justice Brister, and like a lot of his opinions, it's very cleverly written. Right?

CHAIRMAN BABCOCK: Is that a compliment?

PROFESSOR DORSANEO: Yes, it is. Right? He's a very agile and clever lawyer. Right? So in *City of San Antonio vs. Hartman*, the City of San Antonio didn't file a motion for panel rehearing. It filed a motion for en banc consideration or reconsideration; and so the question is, well, are they through, okay, because they didn't touch first base. They didn't file a motion for panel rehearing. Okay. So reading various language in the rules, the Supreme Court said in this opinion authored by Justice Brister that the motion for en banc consideration is a kind of motion for rehearing. Okay.

Keep that thought in mind. That's a motion for rehearing. Right? And one would think that if it's a motion for rehearing it has to comply with the motion for rehearing rules, huh? Except it didn't. It was filed 26 days after the -- after the court of appeals' judgment, but being undaunted the decision was made that unlike other motions for rehearing, en banc reconsideration may be requested at any time while the court of appeals retains plenary power.

CHAIRMAN BABCOCK: Bill, can I just interrupt for a second?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: Is this going to be on the test?

PROFESSOR DORSANEO: Everything is always on the test.

CHAIRMAN BABCOCK: We're paying attention.

PROFESSOR DORSANEO: All right. Well, what -- the reason I say that is I think that led -- I think that led people to say that a motion for en banc reconsideration is a motion for rehearing, and I don't think it should be thought of as one. I think it should be thought of as a different thing. Okay. And it ought to come after the motions for rehearing are determined, if at all. And there's more to it than that, but I'll let --

CHAIRMAN BABCOCK: Roger had his hand up first. He beat everybody.

PROFESSOR DORSANEO: Yeah. Okay.

MR. HUGHES: Well, I'll provide a different perspective because -- and this comes from doing this in the U.S. Fifth Circuit, and under their rules you can file your petition for rehearing en banc separately from a motion for panel rehearing, but under the court's case law a motion -- a petition for reconsideration en banc may be treated as a motion for rehearing by the panel, and occasionally the panel actually does that, and they will issue their re-opinion on rehearing before the court en banc gets around to voting, and they have a very stratified, well set out basis for voting on petitions for rehearing en banc, and so the panel may nonetheless issue a new opinion in response to the petition for rehearing for reconsideration.

My thinking is, and this comes strictly from the point of view of practitioner, having done the one, put both of them in one document and then filing them in separate documents, you have clients screaming at you, "Why are you saying -- why are you filing two separate motions that say -- make essentially the same argument," which then comes back to the practitioner argument.

Generally speaking, if I even think that I

have a basis for a reconsideration en banc, that's going to be the same as the motion for rehearing. I rarely -- I mean, I -- it's hard to think of a case where it's worth the time to ask the panel to rehear if I don't have arguments to go to the entire court for reconsideration. So I bow to superior wisdom and people who actually pass on motion for rehearing as a living, but I think there is perhaps some economy in allowing them to be counted -- to be combined in one document, treating them as separate motions, allowing the panel to make a decision what they want to do with the motion for rehearing, while the entire court looks at the motion -- for the reconsideration en banc.

PROFESSOR DORSANEO: May I make one little response to that?

CHAIRMAN BABCOCK: Yeah, sure.

PROFESSOR DORSANEO: In our rule, though, if you're the practitioner, if you want to skip the panel, okay, you can.

MR. HUGHES: Yeah.

PROFESSOR DORSANEO: But you're going to go on the motion for en banc reconsideration standard.

MR. HUGHES: Yeah. Yeah.

PROFESSOR DORSANEO: Okay. So if you didn't want to talk to the panel you filed a motion for en banc

consideration, and it would be handled like that, and either one of those motions calls for the same timetable after the fact. Okay. It's -- petition for review is within 45 days after overruling motion for rehearing or motion for en banc reconsideration. So --

MR. HUGHES: Well, I leave it up to the -- like I said, the people who actually do this for a living, whether they wish to tolerate them to be done seriatim motion for rehearing, let's overrule that, and give you the option to file a reconsideration en banc, or whether it's just like file both of them together. All it is is we need a clean rule about if you do the seriatim, if you file one, get a ruling, and then file another, your deadline comes from the last one that's overruled. I mean, the appellate -- we don't want appellate practitioners --

PROFESSOR DORSANEO: That's not an issue. Okay. 53.7 says that.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: I actually find that the motion for -- the motion for rehearing is completely different from the en banc, because, for instance, my statement of facts is completely -- I used to do this about once a year or so. Statement of facts is completely different because

I have to educate all the other court members. The panel already knows the facts, and the other court members I'm trying to introduce it to them. I have to argue almost petition for review standards of why it's important for en banc reconsideration, so what I wind up doing as a matter of practice because of the vagueness in the rules is filing two motions on the same day, one for rehearing and one for en banc. I would appreciate the clarity, speaking purely as a practitioner, if it allowed me to go motion for rehearing to the panel and then after that is denied or granted or whatever, let the other side move for en banc consideration, but making it serial because they are different rhetorical approaches to what you're trying to do would make it easier and clearer for the practitioners.

CHAIRMAN BABCOCK: Okay. Justice Busby.

HONORABLE BRETT BUSBY: I think if -- there are good arguments on both sides about whether to have the panel and en banc motions filed at the same time or serially. In the Fifth Circuit they're filed -- they have to be filed at the same time, and that seems to work okay. I don't know that it would necessarily -- I mean, the argument for having them file -- having the en banc motion filed after a panel motion is denied seems to be that maybe you'll deter people from filing a lot more en banc motions. I don't know whether that's true or not, and the

argument for -- against -- anyway, I can see both sides of that.

I think the language "when permitted" is confusing, and it would be more easily understood to take that out, and also to take out the words "or en banc reconsideration" at the end of that same sentence.

PROFESSOR DORSANEO: Uh-huh, yes.

HONORABLE BRETT BUSBY: And instead have a rule that instead of relying by inference on 49.5 and saying that about motions for rehearing also applies to en banc reconsideration. Just have a separate subdivision of the rule that says when you can file for en banc reconsideration and then it would be clear, and we just need to make a decision about that, and then once we decide how we want it to work, it will be easy to figure out how to write it. I think the questions are do you always want somebody to be able to file a first motion for en banc reconsideration after a panel motion has been denied with no change, and if the answer is "yes" then take out "when permitted" in the rule, and then the other question is under what circumstances can a party file a second motion for en banc reconsideration.

Should you be allowed to move for en banc again if what happens -- and this happens in our court, too. Say that you file a motion for en banc

reconsideration, the panel changes its opinion, and so the motion for en banc is denied as moot, then should you be able to file a second motion; and if so, we just need a rule that explains, yes, you can file a second en banc motion when there's been a change to the opinion.

CHAIRMAN BABCOCK: Okay. Justice Bland, did you --

HONORABLE JANE BLAND: Yeah, with the -- I'm not advocating one way or the other, but simply leaving it to the practitioner to have the flexibility to file initially or to wait, if they would like, but what is happening now is at least in the debate is that some that are waiting are at substantial risk of at least some appellate courts taking the position that they've procedurally defaulted, even though the appellate court continues to have plenary power and could hear the motion sua sponte, and so they don't ever even address the merit of the en banc motion and just simply dismiss it, you know, for want of jurisdiction, for procedural default, whatever; and, you know, the reality is do we want -- do we want those motions being determined on that basis, or do we want them being determined on their merit, and that's why we need the clarification.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Justice Bland has put her

finger on the problem, and I certainly agree that we need to take out the words "when permitted," but that's not going to solve the problem. It's confusing. It prohibits a further motion for rehearing. It doesn't prohibit a further motion for en banc reconsideration. Well, the motion for rehearing is a species of en banc reconsideration, but we don't want to do that.

PROFESSOR DORSANEO: We don't want to think of it as a species.

MR. GILSTRAP: Well, okay, okay.

CHAIRMAN BABCOCK: Not even an endangered species?

MR. GILSTRAP: Then, you know, this gets to Justice Busby's comments. If we don't take out the reference to the last time they file a motion for rehearing or en banc reconsideration you can file successive motions for en banc reconsideration until the cows come home. There's no prohibition against it. There's another problem.

The extension of time, it says you can extend the time for filing and motion for rehearing or en banc reconsideration. Do you move in your motion for rehearing for more time to file your motion for rehearing or en banc reconsideration and the court grants it and gives you 15 more days?

PROFESSOR DORSANEO: I think the committee thinks what Brett said is right. We take out -- am I getting this right? We take out the words you're worrying about. We take out "or en banc reconsideration" in the same sentence --

MR. GILSTRAP: Out of 49.7.

PROFESSOR DORSANEO: -- where we want to take out "when permitted."

MR. GILSTRAP: Out of 49.7, but the problem is I'm looking at this, and I say, okay, I've got this opinion. Do I file a motion for rehearing or a motion for en banc consideration? Well, I don't know, so I'll move for more time to do both, and the court grants you more time to do both, and you file a motion for rehearing, but you don't file a motion for en banc consideration. Hey, you've missed your time to file a motion for en banc reconsideration. I think maybe we need to consider a motion -- an extension of time as applying to both kinds of motions, and it may seem -- you know, it may seem nitpicky, but people are getting caught up in this procedural trap, and the rule is not clear, and it's not going to be clear even when we take out "when permitted."

CHAIRMAN BABCOCK: Pete Schenkkan.

MR. SCHENKKAN: I'm wondering if we really have three categories that we need to be clear about in

49.7. One is a motion for en banc reconsideration of a panel ruling sought by the party; one is en banc reconsideration ordered by the court sua sponte; and a third is en banc reconsideration of an en banc consideration, a reconsideration ruling. We want that last one to be possible, but limited to one try unless there has been a further change in that one; and if we at least clarify that those are three different concepts and know what the goal is, I think we can get there. I don't think that -- I think that cutting these two words out is a helpful step in that direction but doesn't get us all the way there.

HONORABLE BRETT BUSBY: Right.

MR. SCHENKKAN: We need at least one more sentence that says -- maybe it's at the very end, that says, "A party may file a motion for en banc reconsideration of a ruling on a previous en banc reconsideration under the standards of" -- whatever the other one is that governs that.

CHAIRMAN BABCOCK: Justice Boyce.

HONORABLE BRETT BUSBY: I think that's exactly right or you could just take 49.5 --

CHAIRMAN BABCOCK: Or Busby.

HONORABLE BRETT BUSBY: -- and copy it to be -- or and have it in a separate section that says here's

when you can have another en banc reconsideration.

MR. SCHENKKAN: Yeah, just copy it back in. I think that's good.

CHAIRMAN BABCOCK: Justice Boyce.

HONORABLE BILL BOYCE: To say additionally what Brett probably just said, part of the confusion is that Rule 49.7 tries to do in one paragraph what is broken out in separate subsections for motions -- for regular motions for rehearing, first -- initial motion for rehearing, subsequent motions for rehearing. If we follow the same structure for motions for en banc reconsideration and take out the "when permitted" language and the reference to "15 days after the party's last timely filed motion for rehearing for en banc," take out the "or en banc reconsideration." We have a parallel structure, one for motions for rehearing panel, one for en banc, and then other tweaks could be addressed to decide do we want to require them to be separate, do we want to leave flexibility for filing them together or separate, whatever we want to do.

CHAIRMAN BABCOCK: Yeah, Chief Justice Hecht.

CHIEF JUSTICE HECHT: Isn't one of the reasons for the Federal rule that the motion for rehearing en banc will be circulated to the entire court and when a

majority of the judges indicate in an e-mail or something that they are troubled by the panel's decision, the panel then has a chance to -- they have a little more incentive to think about should they change that decision before the case goes to the whole court. If you make it seriatim, the panel may just say "denied" and then there's no choice but to go to the whole court, so sometimes you can avoid an en banc court by the panel changing its view.

MR. SCHENKKAN: I think that's right, and I think -- those who do more of this in the Fifth Circuit can correct me if I'm wrong, but I think it's also that interacts with the Fifth Circuit's understandable but perhaps overly rigorously enforced -- I'm shocked to hear those words in connection with the Fifth Circuit. A proposition that a panel of the Fifth Circuit is bound by a prior panel decision and because of that, if that's really true, you have no choice but to get to en banc, but of course, often whether it's truly bound by the prior panel decision is open for discussion. It may be distinguishable, and then that's where the opportunity of the panel to reassess whether it wishes to distinguish the other panel decision comes in play.

CHAIRMAN BABCOCK: Marcy, and then Justice Bland.

MS. GREER: Well, Chief Justice Hecht raises

a really good point. That's exactly the way that it works in the Fifth Circuit, and they also have an internal operating procedure that says -- that is called literally the title "the most abused prerogative" and indicates that less than one percent of cases are granted en banc review and suggests in fairly lightly veiled terms that sanctions can be applied. So that's how they kind of keep that number down.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think panel reconsideration happens both ways, happens with en banc input, you know, at the early stage if the en banc court has seen the motion and has concerns with it, and also, if it's filed serially, but my concern is that I think some judges take the position that if the serial motion is filed and it's out of time, it doesn't need to be circulated to the panel -- I mean to the en banc court. The en banc court might never see it, and so what we're seeing is if we want to have en banc motions filed in connection with the motion for panel rehearing, we should just say that and that there is no, you know, ability to go back and seek en banc review after the panel has ruled if you haven't invoked the jurisdiction of the en banc court, but the idea that we have now where the -- it's perhaps open to that, but there are judges that take the

position that it's not, means that there is no meaningful en banc review at all after the panel's ruled. Or could mean that, just depending on the court and judge.

CHAIRMAN BABCOCK: Okay. Any other comments?

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Buddy.

MR. LOW: As a practical matter, it -- it could make a difference. There is a difference in the Federal en banc and state because there is certain -- quite often we have one or two of the judges on the panel that won't be sitting en banc because they're senior status. They don't. So they may have more incentive to take a look at it and in state court I guess all the -- the whole court sits. You don't have -- but senior judges like Judge Reavley, Judge King, they don't sit en banc. So they might have, well, wait a minute, let me look at this, because I don't -- I won't get a chance to look at it a second time, so there's a slight difference, but not enough that makes a difference, but there is that difference.

CHAIRMAN BABCOCK: Yeah. Okay. Anybody else? Frank.

MR. GILSTRAP: I think we should consider having completely separate rules. The problem comes in

because you have layered in the en banc motion as part of the motion for rehearing. I mean, just completely separate them out completely. There's one rule for a motion for rehearing, one rule for motion for en banc reconsideration and that might remove some of the confusion that exists presently in the rule.

CHAIRMAN BABCOCK: Mike Hatchell.

MR. HATCHELL: I'm in favor of filing them at the same time because Peter Kelly is exactly right that the motions are different. My panel motion may have a realistic chance only, let's say, on an issue relating to post-judgment interest or prejudgment interest. My en banc motion may go to a much broader issue of the opinion being in conflict with the Supreme Court or other opinions of this court, so I think they should be filed at the same time, and I think you should always preserve the right to file a motion for reconsideration en banc after a reissued panel opinion because that may be the first time at which the broad issue comes up.

PROFESSOR DORSANEO: It will work that way. With these changes we've suggested it will work that way if you want to do it that way.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: One of the purposes of the rule is to give clarity to the bar and not all of the bar

is an appellate bar that is familiar with all of the nuances that Mike and Skip and others are familiar with, and it seems to me that one of the principles of the rule should be that for a dumbbell like me you go to the -- you're assigned to panel. The panel rules. That's the government telling you the answer to your question. Ask them to reconsider it. If they say "No, we're not going to reconsider it or we've reconsidered and we're correct, then ask for the panel to do so," and if the panel says "no," then go to the Supreme Court.

A person like me who doesn't spend his life with the appellate rules, who doesn't draw all of nuances -- and I'm not being critical at all. I respect you greatly, but most of the bar isn't made up of people who work this way. The bar can be confused and is confused by the language if permitted. Look at this room. The room is saying this language is causing confusion, and for god's sakes you've got the best appellate lawyers and appellate judges in the state sitting in here. So make it clear to simple people like me who do an appeal once every two years or once a year that you do this in steps. It makes sense to do it in steps. It's clear. It's final, no confusion, get it over with.

CHAIRMAN BABCOCK: I think -- I think maybe we ought to try to look at writing it both ways, both

where you've got to file the motion for rehearing and rehearing en banc at the same time, and then write it, as someone suggested, so you do it at a different stage seriatim.

PROFESSOR DORSANEO: Let me repeat. It is written that way. You can do it at the same time, or you can do it in sequence.

CHIEF JUSTICE HECHT: But should you require it?

PROFESSOR DORSANEO: But you need to take out "when permitted."

CHAIRMAN BABCOCK: But should it be required that that --

PROFESSOR DORSANEO: Yeah, required is the issue.

CHAIRMAN BABCOCK: Required is the issue. So can you guys go back to the drafting board and propose some language?

PROFESSOR DORSANEO: We live for this stuff.

MR. LOW: You live on the drafting board.

CHAIRMAN BABCOCK: Yeah, Pete.

MR. SCHENKKAN: Can we ask that -- I'm a little unclear. Are we asking the subcommittee to essentially draft one rule for motions for rehearing to the panel and another for en banc and in the course of

doing those two things grapple separately with these policy issues, including most importantly grapple in the new rule that would be for en banc only with the questions of whether it's required or permitted to do them seriatim or required or permitted to do them serial?

CHAIRMAN BABCOCK: What's the Court's view on that?

CHIEF JUSTICE HECHT: Well, whether it would be clearer to have them in separate rules I don't know.

MR. SCHENKKAN: I'm just thinking it would be clearer in terms of the disciplining it imposes on us to think about it to do it in two separate rules, and that's why I'm urging it be done that way.

PROFESSOR DORSANEO: And we do have two rules anyway. I mean, I always have to hunt for where is the standard for en banc motion reconsiderations.

CHAIRMAN BABCOCK: Right. Levi.

PROFESSOR DORSANEO: Putting that together would at least make sense.

HONORABLE LEVI BENTON: Yeah, I think the charge should be to write two versions. One version, the Munzinger/Benton common man's -- common man's lawyer, and the other version, the appellate specialist version. That's the charge.

CHAIRMAN BABCOCK: All righty. Well, on

that note we'll break for lunch. Thank you.

(Recess from 12:27 p.m. to 1:28 p.m.)

CHAIRMAN BABCOCK: All right. Bill Dorsaneo is once again on the hot seat, in the fish barrel, ready to go, talking about proposed appellate sealing rule and the trial court sealing rule, 76a. So Professor Dorsaneo.

PROFESSOR DORSANEO: All right. Just by way of introduction, in October of 2015, the referral rules issues letter from Chief Justice to our Chair says this: "A new TRAP rule when filing documents under seal" the heading, "except for Rule 9.2(c)(3) which states that documents filed under seal or subject to a pending motion to seal must not be filed electronically," which raises its own issue, "the Texas Rules of Appellate Procedure do not address under what circumstances a document may be filed under seal in an appellate court." So that's what we'll be talking about at some point relatively soon I hope. "Nor do they set forth any procedure for filing a document under seal." Same comment.

"The Court requests that the advisory committee draft a new rule addressing how and under what circumstances a document may be filed under seal in an appellate court" and then the last sentence, "The rule should address both documents that were filed under seal in the trial court and documents that were not filed under

seal or were not filed at all in the trial court." It took me a while to understand this assignment, and I think we've made sufficient progress to make a claim that the assignment has been understood, but that, of course, is merely the point of beginning.

So this set of materials that have been sent around includes a memorandum from me to you, dated May 27th, 2016, which attempts to be a document that fulfills the assignments. Itself, it's probably -- this May 27th document is probably draft, oh, 15 or 16, but more happened; and the alternative draft that's dated June 9, 2016, is the one that I'll really be planning to present to you, but one of the things that we all learned along the way is that in order to fulfill this assignment, it's probably beneficial and, in fact, necessary to understand civil procedure Rule 76a and what it requires with respect to filing documents under seal in the trial court, and rather than try to do all of this myself, let me ask Frank Gilstrap to talk about that rule and what it -- what it has to do with what we're doing or what we think we're doing in the draft rules that are in appellate Rule 9(d).

MR. GILSTRAP: Well, as Professor Dorsaneo correctly points out, we are not writing on a clean slate. In 1990, Rule 76a was adopted by the Supreme Court, and that came as a result of a very contentious debate,

following a very contentious debate in this committee; and it was shortly before I came on the committee, but I understand people even walked out, if you could imagine that; and so the result is Rule 76a, which is very clearly intended to deal with what people called the public's right to know and imposed a presumption of openness, and that applies across the board in 76a.

Now, in a 76a proceeding, there is two -- it can be and often is bifurcated. The people -- you present the documents, maybe you file them and get a temporary sealing order, and the court engages in a two-step process. The first, it decides whether they are, quote, "court records"; and we've got a copy of Rule 76a in the materials; and if you have it, you might need to look at it. In 76a(2)(a), (b), and (c) is a list of what court records consist of. They include a number of different things, filed and unfiled. One thing that's important for the later discussion is it includes documents filed in camera solely for purpose of obtaining a ruling on discoverability of documents. Okay.

The court can make -- the court first decides whether these are court records, and the court can do that without doing anything more than someone filing a motion and a hearing. If they're court records then the court -- if they're not court records the court can seal

them without further adieu, but if they qualified -- if they're not court records the court can seal them. If they qualify as court records, however, the process becomes much more involved. You have to have a public notice, and this is a paper notice that's posted in the courthouse on a bulletin board similar to a notice of foreclosure, and there's a place in every courthouse I've ever been in where they post those notices. You put a public notice, and after two weeks you have a public hearing, and any person may intervene and be heard concerning the sealing of court records. That includes Joe Blow off the street. More importantly, it includes the *Dallas Morning News* and the *Texas Lawyer*. They can and often do intervene in these proceedings.

The court then has a hearing and makes the court -- in which can -- which can include fact findings, and the court decides whether or not they should be sealed and issues an order. Then in another -- that order can be appealed. In fact, the earlier court determine -- court records determination can be appealed, Rule 76a(8) has a very unusual provision that says that "any order relating to a sealing or unsealing records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding the issuance of such order." It

permits interlocutory appeal, except, of course, the court cannot create jurisdiction for an interlocutory appeal. The Legislature has to do that, so it took the expedient of just saying, well, everything is severable and a final judgment, and it can be appealed, and I think the courts of appeal are split on whether that really means what it says.

Well, that's the background under which we had to go ahead and formulate a sealing rule for the appellate courts.

PROFESSOR DORSANEO: Frank, let me add --

MR. GILSTRAP: Please.

PROFESSOR DORSANEO: -- a couple of things. One of the things that I found difficult is that, you know, some -- there's a definition of "court records" in the rule, and it doesn't include all things that I would have thought of as court records, so it's a special definition, like documents filed on an action originally arising under the Family Code. Those are not -- those are not court records. Right?

MR. GILSTRAP: Right.

PROFESSOR DORSANEO: Documents filed with the court in camera are not court records, and then obviously documents in court files to which access is otherwise restricted by law. So when you're reading about

court records you have to say "court records as defined in Rule 76a." That's what 76a is about. And for sealing, 76a after it talks about the procedures, notice, and in (3), 76a(3) and appearing in 76a(4) calls for either making a temporary sealing order or what you might call is a permanent sealing order, and there are standards. Okay. Standards in 76a(5).

MR. GILSTRAP: Actually it's in (1), 76a(1).

PROFESSOR DORSANEO: In 76a(1) and 76a(5).

MR. GILSTRAP: Right.

PROFESSOR DORSANEO: So there are procedures and standards for sealing orders, to get a sealing order, for things that aren't court records as defined in the rule in the trial court, and one of the things we had to consider is do those standards have anything to do with getting a sealing order from an appellate court, does the appellate court have to abide by those standards or see that they're abided by.

MR. GILSTRAP: That was the approach we took. The concern was the obvious thing to do is kind of create a Rule 76a motion light, which doesn't have a lot of procedural safeguards, but given the background, given the contentiousness, given the clear presumption of openness, we were concerned about creating an -- a loophole or bypass or alternate route where you could seal

documents without going through the procedure, such as in a mandamus procedure, you know; and hey, we want them sealed, the court of appeals doesn't have to go through all of this rigamarole; and so they do it. So we attempted to build all of the procedural safeguards in 76a into the rule, and that's -- the result is the alternative draft; and if you've got it, it would be great to look at it; but if you don't, I can just kind of go over it in general.

PROFESSOR DORSANEO: I have extra copies if anybody wants me to walk to them and hand you one.

MR. GILSTRAP: And the most difficult problem is this: What do you do about the intervention? What do you do about the public notice? What do you do about the need for fact findings? And so the procedure we took, which is a procedure we would only come up with because we're trying to observe the kind of call that was made in enacting Rule 76a as this. You go in the court of appeals, and the court of appeals can make the initial court record determination just like the trial court can, but once it decides they are court records then in most cases it's got to remand the case to the trial court for the notice, the public hearing, the opportunity to intervene, and if not -- if not findings, findings of fact and maybe a recommendation.

There is a very good opinion by Justice McClure out of the El Paso court, *Ranchos Real Developer vs. County of El Paso,* 138 S.W.3d 441, where she does this. So that's the procedure that we have here, and, you know, I think -- I think at that point -- I don't know about you, Bill, but I think at that point we've got enough to talk about here.

PROFESSOR DORSANEO: Yeah.

MR. GILSTRAP: We could trudge through the specific provisions of the proposed rule, but if someone can come up with a way to do it all in the appellate court without emasculating Rule 76a, we would love to hear it, and let me say this finally. This is not a subcommittee recommendation. It's the draft we were able to come up with, with some very, very helpful comments from the members of the subcommittee, but nobody is -- nobody has pride of authorship, and you can shoot at this, but that's where we are, and I guess that's -- I think that would be a good place to stop and take comments.

PROFESSOR DORSANEO: All right. Well, I did the first draft before this year and circulated it to get comments, and I received some comments, but not too many, and this draft really is an original draft by me, a redraft by Frank, with a lot of participation and help from Justice Boyce and Justice Busby. So I would say it's

kind of our draft, okay, although it's probably not close to final.

MR. GILSTRAP: Judge Yelenosky, although he wasn't on the committee, he did participate in this, and it was helpful.

PROFESSOR DORSANEO: Yeah. I think we should work through the draft and just talk of what it says and so people will get an idea of what it might look like when it's finished.

HONORABLE STEPHEN YELENOSKY: Can I just -- I mentioned this to Bill, but it's not about the specific drafting, but the impression I think I get from what you said is that it's going to be onerous on the court of appeals, but it seems to me if it's a document that was filed at the trial court, it's not going to be onerous because it was either sealed or not at the trial court. If it was not sealed at the trial court, it's moot. If it was sealed at the trial court, the court of appeals, you could put in here could defer to that, so it would only be documents filed for the first time --

MR. GILSTRAP: Right.

HONORABLE STEPHEN YELENOSKY: -- not filed in the trial court.

MR. GILSTRAP: All in an original proceeding.

HONORABLE STEPHEN YELENOSKY: Right. Or if there's some ground for filing something else. Otherwise the trial court has already taken care of it if the court of appeals wants to just recognize a sealing from the trial court.

MR. GILSTRAP: But you also mentioned another important consideration that underlies all of this, and that is this: Once the documents are publicized the case is over. The case is moot. And that has happened; and so that's why we've been very concerned about, you know, things like temporary sealing orders because, you know, the *Dallas Morning News* is there beating on the door; and, you know, the documents get released at 3:00 a.m.; and they're on the *Dallas Morning News* website at 9:00 a.m. I mean, it happens that fast, so those are the considerations that we've been concerned with.

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Did I understand you to say that the information on court records which includes settlement agreements and discovery that are not filed, that there doesn't have to be any hearing on those, the court can just seal them?

MR. GILSTRAP: No, no. There has to be a hearing. There has to -- there may be a hearing, but it's

not a hearing that requires public notice, posting on the bulletin board, and an opportunity to intervene by the newspapers, although I think in the Koeppel case the court has pointed out that the newspapers can intervene at that point if they want to; and that's a problem; but in general you've got this bifurcated proceeding; and if they're not court records, you don't go through all of the rigamarole required by 76a for documents that are court records.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Does this have the same protections and yet availability as 176a, because we had quite a struggle with that? I was at that meeting, and it quite -- they accepted all of those, and that was good. So is this parallel to that with regard to safeguards and availability and sealing records?

PROFESSOR DORSANEO: Yeah. It attempts -- as you can see when we go through it, it attempts to say that the court of appeals will decide whether these things are court records; and that doesn't require all of those procedures, although it might not be the easiest thing to determine; but then if they're determined to be court records for a temporary sealing order out of the appellate court, you would have to -- somebody would have to determine, okay, that the standard for temporary sealing

is met; and then if it's a permanent sealing order or one that's not temporary, the same standards that are in 76a are by cross-reference or explicitly included in this motion; and then there are other circumstances where 76a doesn't have any pertinence, like maybe just a mandamus case that doesn't involve a 76a issue, but involves, you know, sealing of privileged documents or documents claimed to be privileged. Well, that's dealt with in here too, because this is not just about 76a. It's about sealing in the appellate court.

MR. LOW: So the same theory and what you're trying to accomplish is the same in both as it applies to appellate courts.

PROFESSOR DORSANEO: Yes.

MR. LOW: Okay.

HONORABLE STEPHEN YELENOSKY: Why did you say that settlements don't go through the procedure, because (3) defines them as court records?

MR. GILSTRAP: Because they are court records.

HONORABLE STEPHEN YELENOSKY: I thought you said they weren't.

MR. GILSTRAP: No. If I said that, I didn't mean to. The court records, as Bill points out, are the specific documents referred to in 76a(2)(a), (b), and (c).

HONORABLE STEPHEN YELENOSKY: Right. I'm sorry, I said (3). It's (b) and (c) that deems court records to be some things that aren't even filed in court.

MR. GILSTRAP: That's right.

HONORABLE STEPHEN YELENOSKY: And so you do have to go through the public hearing procedure.

MR. GILSTRAP: That's right. If they're court records, even though they're not filed, and that's another problem. You know, how do you get them before the court? You know, are you going to require them to be filed?

HONORABLE STEPHEN YELENOSKY: Well, it's the same issue with things that are court records because the parties -- the litigator comes in with his motion -- his or her motion for summary judgment and says, "I need to seal this before I file it." Well, technically it's not yet a court record because it hasn't been filed, but as a practical matter you can't send them down to file it, because then there's a waiver, and then seal it later. So you look at it before.

MR. GILSTRAP: But under the words of art in 76a.2 it is a court record, but it includes settlement agreements not filed of record.

HONORABLE STEPHEN YELENOSKY: No, I know. I understand that, but I just don't think that part is

different from when you have court records, because they're just brought into court and not even filed.

MR. GILSTRAP: There you're using court records in kind of the colloquial sense, the intuitive sense that we all do.

HONORABLE STEPHEN YELENOSKY: Yeah. Yeah, but court records here is just another word for stuff that 76a applies to.

PROFESSOR DORSANEO: Right. And probably "court records" is a bad term --

HONORABLE STEPHEN YELENOSKY: Yeah, it is.

PROFESSOR DORSANEO: -- to use.

MR. GILSTRAP: Now, let me add this before hopefully people start talking about this. There was real sentiment -- and Blake Hawthorne I think spoke on this, and it's an important point. There are a lot -- you know, there was a sentiment to try to carve out discovery mandamus proceedings where you have in camera documents and because there -- and when you start looking at that rule, it's got its own set of problems, but our attempt was to include everything in one omnibus rule, and in theory if it's a discovery mandamus proceeding, you know, they're not court records, you move to seal. You say they're not court records, and you don't have to go through the rigamarole of, you know, public notice and

everything, but there are a lot of problems with -- for example, it says that court records includes documents filed in a court in camera solely for purposes of obtaining a ruling.

Well, usually this is unfiled discovery which you can't file in court under, what is it, 190.4. You can't -- it says they shall not be filed. As Bill points out, there is a provision, I believe it was 9.2(3) which says that documents shall not be filed, and we've got this whole problem of, you know, documents that aren't supposed to be filed and how do you deal with them.

HONORABLE STEPHEN YELENOSKY: But that's read as filed with the court as given to the judge because that's the only way it works. It doesn't say "file with the clerk."

HONORABLE DAVID EVANS: That rule ought to say "tendered to the court for in camera inspection."

HONORABLE STEPHEN YELENOSKY: It should, but we didn't want to take apart the rule.

HONORABLE DAVID EVANS: Because they're tendered as part of the discovery hearing, and they're better treated as exhibits to a reporter's record than they are treated as something that's going into the court's file, and saying it's filed is a misnomer, because they come up in the context of a disputed discovery

hearing, and in the best of all possible worlds the party resisting discovery comes in with the in camera submission and hands it to the judge in a packet, and it goes in as Court Exhibit No. 1 and can go up from the court reporter directly to the court of appeals. Otherwise this 4,000 sheet, 40,000 pages of e-mails goes over to the court clerk, gets sealed, and the trial judge can never get it, and the trial judge who treats it as an exhibit to the reporter's record has it locked away in the exhibit closet, her locker or his locker, and it's accessible for review until the -- you know, you wait until the mushrooms are growing on it and then you look at it.

Seriously, start sealing this stuff when it comes in like that is not what trial judges do. It's handled another way, and this rule should have never said "filed in court." It should have said "tendered to the court." It's like an exhibit for admissibility. That would be my take on it, on the in camera document.

HONORABLE STEPHEN YELENOSKY: I think it points out the point I made to Frank in the e-mail. It differs jurisdiction to jurisdiction because I don't have any problem getting stuff that I've sealed, but it's a matter of what your technology is and that kind of stuff.

HONORABLE DAVID EVANS: Right.

HONORABLE STEPHEN YELENOSKY: And I was

saying to Bill I don't think those issues of variance between jurisdictions have any pertinence to the appellate rule, which is what we're dealing with now; and there are lots of ways 76a could be improved, including, for instance, the first sentence of 76a says you cannot seal a court order, right? There are some statutes that allow you to, but if there's no statute to, for instance, you cannot seal an order changing somebody's name to protect them from their abuser. It violates 76a, so there are a lot of things that can be fixed in 76a, but my concern is -- and I've heard this before from others, given what they went through, and I wasn't there, to create 76a, we don't really want to open it up again.

PROFESSOR DORSANEO: But we're more cohesive these days.

MR. GILSTRAP: Let me say this, there is --

HONORABLE DAVID EVANS: I just think if you're trying to get a record in and the trial judge rules on an in camera inspection, having it as an exhibit to a reporter's record is an excellent way to do it. We've got examples where it just goes up and is transmitted in that fashion and then it's sealed, and you have a lot more leeway as a trial judge on when can you seal these records.

Not everybody reads the rule the same way.

Many people believe you can't seal some of these things that are excepted from court records. We get all kinds of -- we get different interpretations of it, but I would just like for you to think about what an in camera submission really is. Is it in the clerk's record or should it be in the reporter's record as a matter of where it should, because it goes with a discovery hearing. Now, I guess it could go in the clerk's record. There's one attached to the motion and response, but then it would have to be under seal.

PROFESSOR DORSANEO: Well, we're not ready to talk about the in camera issues yet. If we do this in the --

HONORABLE DAVID EVANS: Good.

CHAIRMAN BABCOCK: In an orderly fashion.

PROFESSOR DORSANEO: -- order that I want to do it I think we'll make more progress.

CHAIRMAN BABCOCK: Sounds good to me. Roger.

MR. GILSTRAP: Let me just say, I think Professor Dorsaneo is correct, but that's a sample of the problems we're dealing with here. The in camera inspection proceeding has a lot of problems and needs work. Rule 76a has some problems and needs work, but, you know, we're not writing on a blank slate, and we've got to

come up with an appellate rule that kind of has to deal with the reality of both sets of problems, and that's what we're trying to do here, but I think both of those projects at some point need to be taken up.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, my recollection of the in camera inspection rule for discovery battles is that when you tender the documents for in camera inspection for the purpose of establishing your privilege, the rule finally provided that when the judge makes a decision on the documents, no matter what, they're returned to the party that tendered them in the first place, and I don't know how that happened, but I've actually had cases where the judge makes a decision, doesn't tell the party who tendered the documents that the judge has ruled, and then just has his court coordinator tell the other party to come and pick up the documents directly from the court.

I even had one case where after the judge looked at them on the bench and then put them on her bench and said, "I've determined that they're discoverable," the opposing party just walked up to the bench, reached over, grabbed them, and walked off. Well, that didn't last too long because by that time there was a rule, which then brings me to my next point, which is I think that proposed TRAP Rule 9, at least I'd have some provision that once

the court has decided, you know, the documents are privileged, they're not privileged, whatever, that they either be returned -- if a party tendered in court, they go back to the party, or if they were -- came up with the record then they go back to the trial clerk, because I kid you not, if you don't have a rule that says you can't give them to the other side, they go back to the party or go back to the court, some poor clerk is going to just hand them over.

PROFESSOR DORSANEO: We've had discussions about this, and we've had a lot of good advice from Judge Evans, and it's very consistent, and I'm glad you pointed out that unfortunate language in the discovery rules. If it does say that this stuff does just get given back, that's not good.

MR. HUGHES: Well, it gets back to the party that tendered it for in camera inspection to prevent -- and then, of course, it further provides that party then has to follow the court orders and I think gives them a grace period of so many days to then carry out the court's order to produce them, but no longer will the court just deliver them to the other party. That's up to the party who was ordered to produce them to actually accomplish it.

MR. GILSTRAP: Let's continue with that thought. Let's continue with your example. The court

says that these are not discoverable, but it doesn't give them back. They're sitting on the judge's floor where they've been for a month. Somebody files a discovery mandamus. These documents have got to go up to the court of appeals. It's been my experience that they go to the court of appeals without a sealing order, but the court of appeals treats them as if they're sealed. Maybe the other courts do it different, but you've got -- at that point if it goes to the court of appeals, it's got to be filed and you've got to have them sealed, and so that's the first place where you need an appellate sealing rule, which is what we're trying to do here.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: Well, I was just -- we had this discussion in the subcommittee, and I would be interested to get the broader committee's thoughts on this. It seems like the discovery mandamus issue with in camera documents could be done a couple of ways. One is you could have a -- for that subset of documents that are submitted for in camera, tendered for in camera submission in the trial court, you could have a rule that allows a similar tendering process to occur in the court of appeals, and so they wouldn't need to be sealed because they would be treated as if they were in camera to the court of appeals for review just like they are in the

trial court, or you could treat those as a subset of broader documents that need to be sealed in the court of appeals even if they're not sealed in the trial court.

It may be a little clearer for people, you know, speaking to the person who may not do this all the time to have a parallel in camera process for the court of appeals. If it was in camera in the trial court then just make it in camera in the court of appeals and then you don't have to worry about sealing it, but I think it can be done either way. In this draft it's been written in order that if you do have an in camera document in the trial court that it can come up to the court of appeals and be sealed because it's not a court record under 76a, so it doesn't have to go back for a hearing in the trial court about whether it should be sealed or not.

CHAIRMAN BABCOCK: Okay. Judge Evans, and then Justice Bland.

HONORABLE DAVID EVANS: One of the benefits that I found to treating it as a court reporter's exhibit as opposed to an exhibit to be put inside the clerk's record is that there are rules on the discretion -- on the destruction of exhibits, and so the court has a duty. If you have an exhibit tendered in court for admission, you have to mark it, and if you don't admit it for consideration of the exhibit it remains as part of the

reporter's record and gets reviewed at the court of appeals as to whether or not it should have been admitted or not admitted.

So if you think of these as exhibits that are being tendered to the court for the purpose of discoverability, a person, a professional who is in the business of keeping up with documents and who has -- who does not have a duty to disclose them to everybody in the public but has a duty to inform the parties if anybody has asked for them, which is what a reporter will do, and the court can enter an order and a court can also seal an exhibit on in camera to the reporter. You can get it upstairs up to the court of appeals through the reporter's record mechanism as well as you can through the court. Now, maybe you want to separately seal it and put it in the clerk's file; but what happens then is the documents go to the clerk; and it's permanently stored with these trade secrets, this confidential information, this attorney-client information is, of course, then in the clerk's file either in paper form or digitized form under seal forever; and you've got to get it -- and the parties will want to get it out.

Now, the discovery rules that we have been living with say that six months after all the case is over you can destroy the discovery. All the trial judge is

passing on is discovery, and so there is a tendency now to make all of our records go in the clerk record. All of our hearings are summarily decided. All of our hearings are attached to dispositive motion, but reporters have a valuable function, and they're easy to work for for trial judges, so I'm not sure that you shouldn't look at the in camera as an exhibit to that, and I would still maintain that position as appropriate and has the safeguards you want for retention of the records, always present, and doesn't go anywhere until the case is over. I just got rid of a set that the case went to the Supreme Court of the United States, and I waited until it was over, sent out a destruction order. I was going to destroy them or they could come pick them up, because it's not a mandamus problem. You can always take up discovery on appeal after a final judgment, and you've got to have some way to get it upstairs or down to Austin.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Does your rule, Frank, contemplate the presumption that if it's sealed in the trial court it's sealed in the appellate court? In other words, I know that you've got that documents may be filed under seal if they have been sealed by an order of the trial court, but there's no attempt in this rule to revisit that unless a party requests it; is that right?

Because when I read the rule, it makes it look as though you've got to file a new motion to seal those records and as proof you can say it was sealed in the trial court, and the reason I ask this is Rule 76a is honored in its breach. So we have lots and lots of trial court orders sealing lots and lots of things, not just in camera documents, but, you know, and I think things that legitimately meet the standard for -- of Rule 76a but nobody in the case, no party to the case wants to go through what you've described as the rigamarole, and so I want to be sure that we don't have to revisit that at the appellate court. If there's a trial court sealing order, people know how to attack it. People know how to challenge it for failing to comply with the requirements of 76a, but if it can be just, you know, presumptively good enough for the appellate court, I think it should be.

MR. GILSTRAP: Well, I think the intent -- at least my intent was that if it's sealed in the trial court and it goes up to the court of appeals, it's sealed.

HONORABLE JANE BLAND: Okay.

MR. GILSTRAP: But my --

HONORABLE JANE BLAND: If we can make that clear, because I think the way that I see it written here is it's evidence that the appellate court can rely on to seal.

PROFESSOR DORSANEO: It's not drafted -- it's not drafted that sealed below is sealed upstairs.

HONORABLE JANE BLAND: Sealed below absent any -- you know, absent a challenge by anyone.

PROFESSOR DORSANEO: It's not drafted that way, but you could certainly write that in, whether you call it a presumption or whatever. I don't know whether that's a good idea or not. That's why I'm here. I can see one person thinks -- two people think that that's a good idea.

HONORABLE JANE BLAND: Well, I mean, the reality is the parties aren't often moved to seal things that probably should be sealed, like, you know, photographs of children, and so we're constantly kind of -- you know, we'll send it back, get a sealing order. Well, do I know that they've gone through the process of Rule 76a? Can I verify that? No. But if a trial court seals them, I'm -- you know, I look at the records and say, oh, yeah, these -- you know, these should be sealed.

MR. GILSTRAP: Yeah, I think you can rely on the sealing order from the trial court. I mean, that's certainly my understanding the way the rule should be. My concern, I would like to just point out, though, that we've had the idea that, well, you know, they're tendered to the court, and they can be tendered to the court of

appeals. Well, now, Judge Evans says you can enter and make it part of the reporter's record, enter a sealing order there, but let's suppose that doesn't happen. Let's suppose the newspaper shows up at the court of appeals and says, "We want to see your documents," you know, and there's no sealing order. They're sitting in the clerk's office. I'm not sure that they can't get them. That's the problem here.

HONORABLE JANE BLAND: That's right.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, I would support the idea that if the trial court has sealed the order then the appellate court doesn't need to redo it, because appellate courts -- this isn't really what they do very well, but --

HONORABLE STEPHEN YELENOSKY: Trial judges don't either.

MS. HOBBS: But I would not -- I guess we're -- your comment made me a little bit nervous is I would only want that to happen if someone did the 76a analysis. So if -- and I hear what you're saying that there may be no way to verify that, but if the 76a analysis was never done then I think the court of appeals needs to do it or remand it back. I like the idea of remanding it back to comply with 76a.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, you've hit the nail on the head. Trial judges don't do it right. It's always been a pet project of mine because I think it's important, but most trial judges don't, frankly, and why -- you know, why stir things up if the parties are coming in with an agreement to seal. You know, judges will sign things that say if you want to label it "confidential," then the clerk is to seal it, just because you labeled it "confidential," which is absolutely forbidden by 76a.

MS. HOBBS: And that is what I worry about, an appellate rule that condones what we all know should not be happening.

HONORABLE STEPHEN YELENOSKY: Well, but I think it should stay a trial court problem for the following reason, because you're going to have to send it back to the trial court probably anyway, and we need to educate trial judges about this, if even if it's sealed in the trial court and honored at the court of appeals, the rule allows anybody to intervene at any time and say, "Hey, that wasn't done right. Unseal it."

MR. GILSTRAP: That is your safeguard.

MS. HOBBS: Okay.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Don't get me wrong.

I don't think that we should have a rule that condones any sort of noncompliance with Rule 76a. All I'm saying is I don't think we need to have one procedure for sealing records in the trial court and then that's subject to some sort of automatic review in connection with preparing the record for appeal. To me if the trial court issues a sealing order and that is subject to challenge by anybody at any time, then, you know, that ought to be presumptively good enough for the appellate record because ordinarily we don't got behind the trial court's orders unless somebody has filed a complaint that the trial court entered the order in error. So I don't -- the only thing I want to clarify for Rule 9, for appellate Rule 9, is that we don't require some procedure that would require the appellate court to go behind the order.

CHAIRMAN BABCOCK: Okay. Justice Busby.

HONORABLE BRETT BUSBY: I think that's an excellent point. I mean, we do have an adversary system of justice, and it makes me very nervous to require appellate courts to police trial court compliance with 76a by themselves without the parties. If nobody is challenging whether Rule 76a is complied with, I don't think that that's something the courts of appeals are well suited to do. If there's a problem with how 76a is being applied in the trial courts then we probably need to fix

76a rather than trying to make the appellate courts police it.

The other thing I would say is I like Justice Bland's suggestion of having a presumption that if it's sealed in the trial court, it's sealed in the court of appeals. Maybe we could have a similar presumption that if something has been submitted for in camera inspection in the trial court it can be submitted in camera for the appellate court to review, and then the -- and that would simplify the rule to where the only category where we really needed to lay out in detail with the court of appeals all of these different steps that we need to go through is the category where it was not sealed in the trial court or is being submitted for some reason for the first time on appeal.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, back during the big argument, that was what the New York lawyers and the ones that came down representing the news media wanted to avoid, that two lawyers could just get together and they would agree it would be sealed, and it would be sealed, and that's where the thing had to be a determination by the trial court, and Steve raises a good point. It was not presumed that the trial court wouldn't do their job, but that was one of their arguments. That's what gave

rise to all of that. They wanted these documents, and the lawyers were agreeing, and that's why 76a came about.

HONORABLE STEPHEN YELENOSKY: Well, and if I can add to that, 76a is not completely adversarial because it puts a burden on the trial judge, regardless of what the parties think. I agree we shouldn't put that burden on the court of appeals, but there is that burden on the trial judge to make sure it meets the standard no matter what the parties think.

MR. LOW: Right.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I would like to pick up on something Justice Busby said about making sure that the proposed rule covers documents that were tendered for in camera inspection in discovery disputes, because the way the rule reads now, in order to be eligible to be sealed they had to be the subject of either a sealing motion or a sealing order in the trial court. Well, that's not what happens in a discovery motion. The documents are tendered for in camera inspection with the permission of the court, and the judge rules they're discoverable or they're not discoverable, but there's nothing part of the discovery process that says sealed, unsealed, public record, not public record, and then second as a -- once again, having, you know, the bird dog fears the fire here, I think it

needs to be clear that if -- that the party -- if the original documents tendered for in camera inspection are no longer with the trial court, that the motion to identify those documents and perhaps be allowed to submit them or alternatively to request the trial court forward them, and they would be deemed under seal once they arrived there. And finally, once again, you know, I hate having a mother-may-I kind of procedure, but once again, if the court of appeals finally decides not to grant the sealing motion or the motion to keep them under seal, again, I think at that point they ought to be returned to the party rather than open to inspection by the public and the court of appeals. But, I mean, in other words, I don't think it's a good idea to expose the relator to the same problem that -- we've gotten rid of that problem in the trial court. Let's not have it happen in the court of appeals or the Supreme Court.

CHAIRMAN BABCOCK: Okay. Lisa, did you have your hand up? Bill, did you have your hand up?

PROFESSOR DORSANEO: Yeah, but I don't know what I want to say.

CHAIRMAN BABCOCK: That's all right. Peter has hand up, and he does know what he wants to say.

PROFESSOR HOFFMAN: That never stopped you before, Bill.

MR. KELLY: I'm just curious about what the courts of appeals -- they had a case that went up to -- documents were tendered to the trial court under medical peer review privilege. Trial court said "produce them," went up to the court of appeals. Possible files for mandamus, and I was just checking the docket, and it just says, "Documents filed under seal," and then -- in the First Court of Appeals, and then when it went up to the Supreme Court it was "Documents filed under seal," and apparently Justice Willett opened the seal at some point, but I have no idea what actually happened to the physical documents. How did the -- do you know what the First -- you weren't on the panel, but do you know what the First did with them when they had them, this sort of documents that were filed under seal?

HONORABLE JANE BLAND: What do you mean what did we do with them? They become part of our record, but they're not available to the public. Is that what -- you want to know are they in electronic form? I mean, we prefer them in electronic form on a disk or flash drive.

MR. KELLY: So does Chris keep them under lock and key or something or --

HONORABLE JANE BLAND: We have a safe, but he would say that we can keep a firewall up, that we can keep them undisclosed to the public even without a safe

and physical possession, but if the -- he would just encourage the committee to consider electronic media submission rather than, you know, paper documents so that -- because that's how we all work now.

CHAIRMAN BABCOCK: Frank, did you guys come across a case called *Tuttle vs. Jones*? It's pending in the 95th District Court of Dallas County.

MR. GILSTRAP: I didn't come across it.

CHAIRMAN BABCOCK: Chief, do you remember that case?

CHIEF JUSTICE HECHT: Vaguely.

CHAIRMAN BABCOCK: What happened in that case?

CHIEF JUSTICE HECHT: I don't remember. A big fight over sealing.

CHAIRMAN BABCOCK: Yeah, it was a big fight over sealing and led to 76a.

CHIEF JUSTICE HECHT: Yeah.

MR. GILSTRAP: Chip, I don't know how much you want to go into this, but we're kind of -- you know, we're hung up --

CHAIRMAN BABCOCK: The Chief just remembered something.

MR. GILSTRAP: I'm sorry, go ahead. Pardon me.

CHIEF JUSTICE HECHT: I was trying to remember, maybe Justice Boyd remembers better than I do, but the sealing issues in our court have been briefs discussing settlement terms that were sealed and whether they had been breached or whether they were appropriate or discussions about that. Then we've had some cases -- I think they were family court cases where the details about the divorce or proceedings that were -- could be embarrassing and people didn't want them to be disclosed. Usually that's by agreement, but we have had cases, one case comes to mind, in which one party wanted to file the entire brief under seal, and there were questions about bigger security issues like national security, bigger security issues than just the issues in the case, and we neither had the wherewithal or the interest in conducting lengthy hearings on these issues. We just want to get the -- decide whether to seal it or not and get on with the case.

When stuff comes up in a discovery case that's been filed under -- in camera or filed under seal in the trial court and the question is should it have been or what -- you know, is it subject to production, there's rarely a question about that. We just treat it as being -- if the trial court sealed it, we seal it. I guess we've never had a -- that I know of, a media -- a

member of the press come to our court and say, "This stuff was filed. You sealed it, and you shouldn't have, and let us see it," but I guess it could happen.

CHAIRMAN BABCOCK: Oh, it did happen in Tuttle and Jones.

CHIEF JUSTICE HECHT: Oh, yeah. That was before my time, though.

CHAIRMAN BABCOCK: Well, before your time on the Supreme Court. What happened was the records got sealed by the trial judge, and the Dallas Court of Appeals --

CHIEF JUSTICE HECHT: The learned trial judge.

CHAIRMAN BABCOCK: Huh?

CHIEF JUSTICE HECHT: The learned trial judge.

CHAIRMAN BABCOCK: Oh, learned trial judge of the district court in Dallas County, and the Dallas court of appeals essentially affirmed the learned trial judge, I forget who it was, but then it went up to the Texas Supreme Court, and somebody from the *Austin-American Statesman* came down to the clerk's office and said, "Hey, we'd like to see all of the records in this case," and the clerk said, "Sure." So that Sunday in the newspaper there was a big huge article quoting all of the records that the

learned trial judge in the trial court had sealed.

MR. GILSTRAP: The case is over.

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: And the case is over. The discovery -- the sealing issue is moot.

HONORABLE STEPHEN YELENOSKY: That issue.

CHAIRMAN BABCOCK: Well, that's not what the learned Texas Supreme Court thought, but anyway. One thing that Justice Hecht raised, which I thought in looking at this rule, Bill, is that one of the big problems that you have with sealed records -- let's say the records are sealed and properly so, but then when you're filing a brief either in the trial court or in an appellate court and you want to quote something from the sealed record, well, how do you do that? What I've seen done a lot is that there will be a brief filed in the public record that's redacted that has the confidential information, but then how does the court get to see the unredacted part, because you sure want them to see it, and I've encountered lots of problems with the courts not knowing how to deal with that.

Some courts will say, well, just hand-deliver the unredacted copy to chambers, and we'll read it. Of course, that may not be satisfactory.

MR. GILSTRAP: Judge Evans talked about that

in terms of his difficulty in accessing documents that are sealed in the trial court, and apparently some places that's hard.

CHAIRMAN BABCOCK: Absolutely. Yeah, Bill.

PROFESSOR DORSANEO: Well, you know, I'm trying to make notes of what people are saying and come up with an idea of, well, what to do about that, and it seems pretty clear that there's going to need to be a draft of the -- or at least a mention of a separate motion to unseal documents that had been sealed, at least unseal documents that have been sealed in the trial court. That won't be that hard to draft, but it's something I -- I hadn't really thought of what's the effect of a sealing order in the trial court, what happens. You know, presumption I think -- I think I'd just say that that can be -- you're going to have to have an appeal or an original proceeding in which these motions, you know, make sense, but that should be pretty -- you know, pretty easy to identify, and that's how I would plan right now to deal with the answer to the question whether any of the documents have been sealed by a temporary or final order of the trial court.

CHAIRMAN BABCOCK: Judge Yelenosky, and then Justice Bland.

HONORABLE STEPHEN YELENOSKY: Yeah, I mean,

I was implying earlier that you could make it clear -- I think it's implicit, but clear that these procedures kick in only if there's not already a sealing order, and it's something new because if it's been filed in the trial court and there is a sealing order, maybe the judge did it wrong, but that's a problem that can't be fixed just on, you know, those that go up on appeal. That's a trial judge problem, an education problem, but it ought to defer to that so that the appellate court, like Justice Bland said, can say, "It's sealed down there, that's good enough for us," but if it's something new that the trial judge didn't have a handle on at all then you have to go through this procedure or send it back down and have the trial judge go through it.

On a motion to unseal there isn't any procedure on it, but the way I would take it, it's the same standard. If somebody wants to come in and years later say, "Well, these trade secrets might have been sensitive 10 years ago but they're not anymore," I would hear them on that and decide.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: So instead of having a parallel track in the appellate court, could we do something like say, "An order sealing records from the trial court presumptively seals those records for all

appellate proceedings. Any motion to seal or unseal records shall be filed in the trial court. If a party seeks to seal records in the appellate court, the appellate court shall refer the motion to the trial court," and we can do that because under 76a(7) the trial court has continuing jurisdiction over sealing of records.

It says, "Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records." So let's put this where it should be, which is in the trial court. Let's not get a whole second track of appellate proceedings, which we all know the appellate courts are not nimble at handling in this kind of circumstance and just have something in the appellate rule that flags the issue, says it's presumed in the court of appeals, if it was sealed in the trial court it's sealed in the appellate court. Anybody seeking to seal something not sealed, go back to the trial court. Anybody seeking to unseal something that they think was improperly sealed by the trial court, go back to the trial court. Once the trial court makes findings on that motion then we have the appellate -- the collateral appellate review that's provided for in 76a. Could we do something like that?

MR. KELLY: When permitted.

HONORABLE JANE BLAND: Yes, when permitted.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think the only thing that wouldn't address is the in camera documents, which may not have technically been sealed by the trial court. They may have just been reviewed in camera and so if we had a separate -- I think that would work if we just had another separate special provision for in camera documents that said if they were in camera in the trial court they can be reviewed in camera in the court of appeals.

HONORABLE JANE BLAND: Same. Somebody challenging in camera status, file a motion in the trial court.

HONORABLE BRETT BUSBY: Right.

HONORABLE JANE BLAND: Sort of like we do with the other aspects of the appellate record. When there's a dispute about supplementation, that really happens down in trial court.

HONORABLE JEFF BOYD: Chip.

CHAIRMAN BABCOCK: Yes, Judge.

HONORABLE JEFF BOYD: Sometimes you get an affidavit, like on a petition for writ of mandamus, in the court of appeals that never existed in the trial court, so somehow you would have to address that as well, because the party may file the petition for writ of mandamus with

the supporting affidavit that they ask be sealed for the first time in the court of appeals.

PROFESSOR DORSANEO: Gosh, I wonder would that ever happen.

HONORABLE JEFF BOYD: It just did.

PROFESSOR DORSANEO: I know.

HONORABLE JANE BLAND: It didn't -- it shouldn't have because it should have been filed in the first instance in the trial court.

HONORABLE JEFF BOYD: Not necessarily if it's a writ of mandamus, because a writ of mandamus can be supported separately by an affidavit explaining the circumstances leading to the mandamus.

PROFESSOR DORSANEO: Zwacko.

HONORABLE JEFF BOYD: Yeah, we just --

CHAIRMAN BABCOCK: Frank.

HONORABLE JANE BLAND: We may disagree about that.

MR. GILSTRAP: I think Justice Bland is right on point, except for the exception that Justice Boyd raised. I mean, it's a little -- if the documents are sealed for the first time in the court of appeals, it's a bit of a problem to go to the trial court to -- ask the trial court to consider the unsealing motion in the first instance, but this gets us into an area that I thought

would be the most controversial and really hasn't drawn a lot controversy, and that is the notion of the court of appeals remanding the case to the trial court to go through the whole Rule 76a rigamarole, and apparently everybody is okay with that.

You know, certainly there are problems with that, and I think we need to at some point address them. I would also think that before we get out -- we get past this discussion we needed to ask -- we need to consider whether we write the standard for sealing, whether the presumption of openness that's in Rule 76a into the rule or whether we simply refer to the trial court, trial court, and the reason for that is -- and I'll throw this out because we now have the Texas Uniform Trade Secrets Act, TUTSA, you know, and it has a completely different standard for sealing.

Here there's a presumption against sealing, and so for those kind of -- and I can't see the Legislature imposing -- you know, making other exceptions, so maybe for those if they're going to be reviewed by the court of appeals under this rule, they're applying a different standard, so maybe we need to simply say that it's reviewed under the standard applicable in the trial court, because I promise you, trade secrets are presumed to be closed. Your family secrets that invade your right

of privacy are presumed to be open, and that's just the way the law is now.

CHAIRMAN BABCOCK: Okay. Any other comments? Bill, are we still on track on the way you wanted to handle this?

PROFESSOR DORSANEO: No, we went off the track about the last 45 minutes.

CHAIRMAN BABCOCK: You want to steer the engine back onto a --

HONORABLE STEPHEN YELENOSKY: No, it's found a better track.

PROFESSOR DORSANEO: Well, I've got this -- what I had in mind was I had this list, and I was going to say, "Well, what do you think of that, what do you think of (a)," and we got to (b), and (b) said, okay, we already have the sealing order, what are you going to do about that? And I'm comfortable with talking about requiring somebody in the -- somewhere to move to unseal, okay, and I guess if we move to unseal in the context of documents that have been sealed, we could refer that motion -- I wouldn't call that remand, but refer that motion back to the trial court to decide whether it should be unsealed. Doesn't seem --

HONORABLE STEPHEN YELENOSKY: But you just appeal it.

MS. HOBBS: Yeah.

HONORABLE STEPHEN YELENOSKY: It's severed, so the trial court says "Seal it." They say, "That's wrong." That's a severed action. It's appealed. The court of appeals reviews the trial judge, but if it's never been to a trial judge you send it to a trial judge. I mean, there's an appeal, right? You don't want to send -- you don't want to have the trial judge seal it on day one, and it goes up to the court of appeals and somebody wants to unseal it or says the trial judge was wrong and you tell the trial judge, "Well, consider whether you were wrong or not."

PROFESSOR DORSANEO: Well, that's what you all just talked about, though.

HONORABLE JANE BLAND: No.

HONORABLE STEPHEN YELENOSKY: No, because if you think the trial judge is wrong, you appeal it.

MS. HOBBS: I think we're -- Professor Dorsaneo, you may be confused, because Judge Yelenosky and I were talking earlier about an intervenor who wasn't a part of the original decision to seal can at any time intervene even after final judgment and seek sort of reconsideration of the sealing order, and so that's not really a motion to unseal. That's kind of its own different thing, but that might be where the confusion is

coming between the four of us.

But I agree with everything you just said about -- Judge Yelenosky, about there's no need for a motion to unseal. You either appealed it because you were unhappy or you didn't, but that's done.

CHAIRMAN BABCOCK: Levi.

HONORABLE LEVI BENTON: I'd like to know how the committee feels about the comment Roger made. What if documents have been sealed, temporarily or otherwise, and the court of appeals or the Supreme Court disagrees? Should the documents go back to the relator or be put in the public record? Or could the party move to seal them?

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I guess unless there's a strong feeling otherwise it seems like what happens in the trial court is pretty workable. You give them back to the person who gave them to you and then they have a duty to produce them or whatever within a certain time, but the court doesn't just throw the doors open and say, "Okay, anybody can have them."

HONORABLE STEPHEN YELENOSKY: Well, Levi, are you talking about in camera or something else?

HONORABLE LEVI BENTON: It's --

HONORABLE STEPHEN YELENOSKY: Because they're different, of course.

HONORABLE LEVI BENTON: Actually it was Roger's comment, and you're right, there is a difference. It could be in camera discovery documents, but even if they're in camera discovery documents, presumably they're only being tendered because there was a request for the documents.

HONORABLE STEPHEN YELENOSKY: Right, but if they're in camera, I think everybody just thinks they need to go back to the producing party. If the court doesn't seal -- if I don't seal and somebody thinks I'm wrong, I don't throw them open. I give them a chance to go to the court of appeals so it's not mooted out, and there may be the same question at the court of appeals. It's just a question of preserving the jurisdiction, but ultimately if you lose a motion to seal and you've exhausted all of your appeals, it's public. It's filed with the clerk.

MS. GREER: Well, I feel very strongly about that because you're creating a terrible situation for the litigants because you're basically putting it in a place where they lose control over it, and they have no control, and that document goes to somebody. I think it ought to be clear. This issue came up when we were doing the rules for the Western District of Texas, and we created a sealing rule to deal with this, and of course, the Federal courts do it very differently.

There's not the presumption, although they're trying to be more open, but a lot more are sealed, but we really fought hard as the practitioners to say, "We have to have some assurance that if you reject our sealing that we get it back" and that it's our choice whether or not we're going to put it into the record and risk it being public and have it be public, or we may decide to change our trial strategy. It may be that important. Especially when you're talking about trade secrets. I think the litigants can't be put in that position, and I have been in situations in courts, which shall remain nameless and no one in this room, where I have been terrified that that document was going from the judge's hand to the other side, and I think it really ought to be clear that if you lose that battle at any stage you get to pull it back, whether it's in camera, whether it's a motion, whatever it is. I think it's critical.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, I want to thank Carl Hamilton for sort of calling my hand. The rule of procedure -- and I think it's -- yes, 193.4. It says, "If the court decides in camera review is necessary, the documents are segregated and produced in the court in a sealed wrapper within a reasonable time after the hearing." The next paragraph says that "if the objection

or claim of privilege is overruled, the party must produce the information within 30 days after the court's ruling," which to me assumes that, number one, that it's the party who then produces the documents to the other side, not the court. That's not expressed, but I think intended.

Now, as far as what happens to the documents, it seems to me that one of two things, either they remain with the court, still in camera, or the party can ask to have them returned. I think the reason to leave them with the court, if I were the objecting party -- I mean, the party seeking it and had lost was that's my only record. Otherwise, if I appeal later, I have no way of showing the court of appeals what it is I didn't see. And so then the party, if they lose the claim of privilege and must seek a mandamus, they're probably in the position of either trying to tender duplicates under seal in the court of appeals or asking that the documents be forwarded under seal, but in any case it seems to me the intent of the current rule is that if you lose the claim of privilege it's not the court that turns over the documents. The court keeps them or you can get them back, but it's the party who then has to turn over the documents, but they remain in camera and not available for public inspection.

CHAIRMAN BABCOCK: Right. I think that's

right.

MR. GILSTRAP: Chip.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, all of these concerns that have been expressed over discovery documents that are being submitted in camera also apply to all the other documents. You know, what if it's a false affidavit that somebody is trying to get in the record and it's filed under seal and then -- initially and then maybe there is an unsealing order. It's in the clutch of the court of -- in the trial court, and when that order is lifted it can be released. I don't see -- we have more experience with discovery documents submitted for in camera inspection, but all of these concerns apply to all the other documents that are subject to Rule 76a.

CHAIRMAN BABCOCK: Any other comments? Bill, you want to take us somewhere else?

PROFESSOR DORSANEO: Well, let's go and look at the situation that deals with where we don't have a sealing order or even where we perhaps don't have the filing in the -- you know, in the trial court as in the last sentence of the letter. It seems to me that those would be the circumstances where we're clearly concerned with the appellate court not avoiding the requirements of 76a, if 76a, you know, applies.

So, you know, (b), the (b) situation is just a distinct thing. That's probably "State whether any of the documents have been sealed." (D) is in the same kind of bailiwick as that, "State whether a motion to seal or unseal any of the documents is pending in the trial court." We're dealing with motions in the trial court and orders in the trial court. It seems to me those would be dealt with differently than if we didn't have a filing in the trial court or a motion to seal in the trial court in those circumstances, but we would need the appellate court to decide whether the documents submitted for filing in the appellate court under seal are court records, right, under 76a.

So my problem here is I didn't think clearly enough about the distinction between a situation where we've got something that the trial court's decided or is bound to decide and situations where we don't really have that done yet. Where we don't have that done yet, what to be done, it seems to me, would be (e), "State whether any of the documents are court records." The court will have to determine whether they're court records within 76a(2) in order to decide how to deal with them; and (f), I think (f), (g), and -- (f), (g), (h), and (i) look like -- well, you tell me. To me they look like those will work in the situation where we don't have a ruling on whether -- on --

where we don't have a determination that the documents have been sealed by a temporary or final order because we're going to give that some sort of presumptive effect to deal with that in some way that's not completely clear to me yet. Okay?

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR DORSANEO: So I like when we're not in a (d) or -- a (b) or a (d) situation, that (e), (f), (g), and (h), even (i), the rest of the things work then, because what we're talking about is if we have court records under (f) we can get a temporary sealing order. If they're not -- if it's not court records that will be under 76a, we could still get a temporary sealing order, but the standard will be different and presumably, you know, less onerous; (h), (i), and (j) all seem to work, but I'm still stuck on what to do if we have a sealing order in the trial court. Everybody seems to want that to count until it's eliminated by somebody in some manner. My thought is that will be eliminated in some manner by the court of appeals ruling on it. Huh?

Okay. And that would be -- that would be the issue, whether the trial court did what it needed to do under 76a or otherwise, and should that be a motion to unseal in the trial court, if we don't -- if we have a ruling sealing? Should it be a sealing, okay, in

compliance with (e), (f), (g), (h), (i) in the appellate court? I mean, I just really didn't understand what you want me to do if we have this -- if we have the documents have been sealed. It would seem to me that determination needs to be made the subject of some kind of request for relief, okay, in the court of appeals.

MS. HOBBS: So, Professor Dorsaneo, I think you're -- are you talking about the 76a appeal?

PROFESSOR DORSANEO: Yes.

MS. HOBBS: Okay.

PROFESSOR DORSANEO: But it should be applicable more generally under different standards.

MS. HOBBS: Well, it should be its own appeal, though, right? Because that's a final judgment by rule, and so that should be its own appeal, not -- and I agree with you.

PROFESSOR DORSANEO: Well, the 76a is its own appeal final judgment.

MS. HOBBS: Right.

PROFESSOR DORSANEO: I'm familiar with that provision. I wrote it. Okay?

MS. HOBBS: But I don't know when else --

PROFESSOR DORSANEO: When it's in a mandamus, you're going to have the same kind of --

MS. HOBBS: You'll have to have dual -- you

would have to file your 76a appeal and your mandamus, but I don't think you could file a mandamus seeking review of the final judgment that was sealed -- that is now that the order -- the sealing order that is now a final judgment.

PROFESSOR DORSANEO: Well, we wouldn't even be talking about an appeal if it wasn't a 76a situation. Probably.

MS. HOBBS: Well, the -- it could have been sealed two years ago, and it's just now for whatever reason coming up in an appellate context.

CHAIRMAN BABCOCK: It seems to me there are three situations you're talking about.

PROFESSOR DORSANEO: Help me.

CHAIRMAN BABCOCK: I'm not sure I'm right, but, one, as Lisa says, the 76a appeal. You've had a press organization that's come in and said, "There are sealed documents here. We want to see them," and the judge says, "No, you can't," and so that goes up, and it seems to me --

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: -- that the documents going up to the appellate court would keep their sealed character because otherwise you moot the appeal. Right?

PROFESSOR DORSANEO: Yeah.

CHAIRMAN BABCOCK: That's what Frank said

earlier, right, and so there's no need for a motion to seal under that circumstance. Is there?

PROFESSOR DORSANEO: No, but it would be some sort of relief in the appellate court.

CHAIRMAN BABCOCK: Well, yeah, the relief that --

PROFESSOR DORSANEO: It would just be a complaint that they were sealed.

CHAIRMAN BABCOCK: Yeah, the press organization is saying, "We're appealing this sealing order from the trial judge, and we want you, appellate court, to give us relief and tell the trial judge he was wrong and unseal these documents, because we want to see them and write an article in the newspaper about them." That would be one typical situation.

Another situation would be the mandamus situation that you were talking about, and in the trial court the defendant -- the plaintiff is saying, "I want these documents. I want to look at these documents"; and the defendant says, "No, no, no, that's trade secrets. We won't give them to you"; and the district judge says, "Yeah, I agree, that's going to be -- that's going to be sealed, and we're not going to let you see them." Or flip it around and say, "I will let you see them." In either event if there's a mandamus on that, again, isn't the

trade secret document going to go up under seal, because otherwise you're going to moot that appeal. Right?

The third situation is during the -- during the lawsuit a document is produced and the judge says, "Yeah, it can be sealed, but both parties can look at it," and the case is tried to a final judgment, and then you go up on appeal, and once the loser goes up on appeal, part of the record is sealed. It's sealed in the trial court. Now, are you saying that you've got to have a new motion to seal it in the appellate court even though it's going up as a sealed record? Is that something that litigants are going to have to do?

PROFESSOR DORSANEO: That's not --

CHAIRMAN BABCOCK: I wouldn't think so.

PROFESSOR DORSANEO: You know, it doesn't have to be done that way.

CHAIRMAN BABCOCK: So in all of those three situations, wouldn't the records from the trial court, the under seal when they're under seal, wouldn't they be going up under seal, it seems to me, and then you wouldn't need a motion to -- a separate motion to seal in the appellate court.

HONORABLE STEPHEN YELENOSKY: Only if it's new documents.

CHAIRMAN BABCOCK: Huh?

HONORABLE STEPHEN YELENOSKY: Only if it's new documents.

CHAIRMAN BABCOCK: Only if it's new documents.

HONORABLE STEPHEN YELENOSKY: You don't really even need the rule except to say, "Do what the trial court did."

CHAIRMAN BABCOCK: Right.

MS. GREER: Chip, couldn't we just build into the rule that once a sealing order is put into effect, it continues on forward through the appeal unless set aside for some reason?

CHAIRMAN BABCOCK: Could do that, yeah.

MS. GREER: Because I'm a little bit worried about a presumption because that makes it sound like it needs to be revisited as opposed to continued in effect, which gives it its own pathway.

CHAIRMAN BABCOCK: Well, the presumption, however gauged, as the cases say --

PROFESSOR DORSANEO: Yeah, presumption is not good.

CHAIRMAN BABCOCK: But that's applied at the trial court level by rule and by -- and there's common law, too, that creates a presumption, but anyway, Justice Bland.

HONORABLE JANE BLAND: So the one situation that seems to be bothering everyone, including me, is the tender of the documents by one side and the other side is requesting those documents be produced, and the big problem is the parties should have control over "I'm tendering these documents under seal not to be produced to the other side." Ultimately the trial court disagrees that they're privileged or that they can be withheld from production based on some kind of privilege; and the trial court unilaterally makes them available; and that seems to be an issue with our privilege procedure that, you know, an order, you know, requiring the production of in camera documents to the other side, you know, has -- you know, you have to give notice and you have to -- you know, we have to build in something that says, you know, because it still happens with some regularity the judge leans over the bench and says, "Here, they're yours," and so, you know, we have to put in the time for the meaningful review of that tender, but that's really a privilege issue and not a sealing records issue.

HONORABLE STEPHEN YELENOSKY: It's not a sealing records issue. That's right. Yeah.

MS. GREER: What if it's trade secrets?

HONORABLE JANE BLAND: Trade secret privilege, attorney-client privilege, any kind of

privilege.

CHAIRMAN BABCOCK: But if the privilege is handled properly by the trial judge, and the trial judge says, "I've looked at the document in camera. I don't believe it's privileged, and I'm ordering you to, you know, turn it over to the other side"; and you say, "Judge, with all due respect, we're going to mandamus you on this," and so you file the writ of mandamus. That in camera document is going to go up with the mandamus, isn't it?

HONORABLE JANE BLAND: Right, but the problem, I suppose, is that some trial judges are, you know, making those documents available --

CHAIRMAN BABCOCK: I know, but that's a separate problem.

HONORABLE JANE BLAND: -- before the judge can issue the stay, but I mean, I think that's getting mixed up in our discussion today.

CHAIRMAN BABCOCK: Right, I agree.

HONORABLE JANE BLAND: And we need to fix that under the privilege work.

CHAIRMAN BABCOCK: Right, I agree. Justice Boyce.

HONORABLE BILL BOYCE: I'm trying to follow the thread of the different scenarios you sketched out,

and putting aside issues of production instanter in the middle of the fight over whether documents are discoverable, even if everybody is proceeding to allow stuff to happen, when you get to the situation where the trial court has said, "It is going to be discoverable. It's going to be discoverable in X days," that gives the litigants time to -- the party advocating confidentiality to challenge that in the court of appeals; but there's still got to be some mechanism to maintain the status quo and potentially have appellate court sealing until you sort it out; and so I wasn't sure if that was within the scenarios that you sketched out. If it's determined to be confidential and doesn't get produced and that stays in place until disturbed then that's fine. You can proceed up to appeal, but there needs to be some mechanism, motion, temporary sealing, or whatever you want to call it.

CHAIRMAN BABCOCK: Well, what do we do now? Because, you know, there are lots of privilege issues that go up on mandamus where the trial court has said, "I don't believe this document is covered by attorney-client"; or, you know, there may be other privileges; and the losing side in the trial court says, "Well, Judge, that's just wrong. I'm going to mandamus you." Well, what happens now with that? Surely the document is not --

HONORABLE STEPHEN YELENOSKY: The judge gives you enough time.

MR. GILSTRAP: The judge should stay his order.

HONORABLE STEPHEN YELENOSKY: Yeah. You give them enough time to go to the court of appeals and ask them to enter a stay. There is no fix in the rules for bad trial judges. I mean, the rules can't fix bad trial judges. No, but -- and if it's pointed out to the trial judge that you're about to destroy jurisdiction and he or she does it anyway, I don't know how a rule fixes that.

CHAIRMAN BABCOCK: No, no, no, but Judge Boyce is talking about something different. What he's saying is how do you keep -- how do you keep the confidential nature of those documents while you're going up on appeal? The judge made stay his order, but he hasn't gone through 76a. The document has just been tendered to him in camera.

HONORABLE STEPHEN YELENOSKY: As an in camera document.

CHAIRMAN BABCOCK: As an in camera.

HONORABLE STEPHEN YELENOSKY: Right, so it hasn't gone through 76a. What actually happens is it's in an envelope, and I usually -- somehow my court reporter

gets it in an envelope up to the court of appeals. I'm not sure how that magic happens, but we understand that it has to stay sealed. I mean, not sealed -- that's the wrong word.

MR. GILSTRAP: It's in a sealed envelope.

HONORABLE STEPHEN YELENOSKY: It has to stay confidential in an envelope that --

CHAIRMAN BABCOCK: That is sealed.

HONORABLE STEPHEN YELENOSKY: That is closed.

MR. GILSTRAP: That's what the court of appeals and -- the court of appeals, my experience, it comes up in a sealed envelope, they treat it as sealed.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: And I'm probably one of the bad trial judges that does it wrong.

CHAIRMAN BABCOCK: No, no, no, you're not a bad trial judge.

HONORABLE ANA ESTEVEZ: Well, I may be doing it wrong, but what I do is when I get them from the resisting party, I mark the ones they have to produce, give it back to the resisting party, and if they want to appeal it then they would be putting whatever they want in their own envelope in their own mandamus, and so it's an original sealing at the court of appeals. I never kept

any documents. I don't want to keep them. I give them all to someone who is responsible for them.

Now, obviously if there's fraud, and there's bad lawyers on one side, and they start pretending that I didn't order that, I can't prevent that, you know, so there might not be a way to get rid of that issue, but I don't keep the documents. My court reporter doesn't get those documents, and if she does, if it's a hearing, someone else was talking about the judge handing them over. Well, when that happens and we're actually in a hearing, they didn't produce them at a different time. You know, I'm going to get those in camera, so someone brings them to me. They're now in my office as opposed to them bringing them to the hearing, and they hand them to me, and I'm looking at them. When that happens I hand them back again to that other party. Now, if that party hands it to them when I say, "You have to produce A, B, C and D," they just waived it.

CHAIRMAN BABCOCK: Right.

HONORABLE ANA ESTEVEZ: You know, and that happens a lot, but -- or even if I -- if for some reason I'm handing it to them and I say, "This is the production," and I give it to them or the other guy starts grabbing it, I mean, if they don't make an objection it's the same as anything else at that point. "Judge, you

know, I want to appeal this."

HONORABLE STEPHEN YELENOSKY: How does the resisting party get it to the court of appeals in a sealed envelope?

HONORABLE ANA ESTEVEZ: I don't know. I figure that's their problem. I think they just file it sealed in a mandamus.

CHAIRMAN BABCOCK: Marcy, and Justice Busby.

MS. GREER: And that's exactly the way I have handled it, is I want the documents back, and I always have a copy of exactly what I gave the judge so that I can swear in an affidavit to the court of appeals, "This is an identical set." I even Bates label them if it's more than a few pages and have an identical, in an identical sealed wrapper with the initials over the seal, et cetera, so that I have an identical thing to give the court of appeals, but that's the way we handle it because I worry that even in the court reporter's record it has become a court record potentially.

HONORABLE ANA ESTEVEZ: And can I -- I know you didn't call on me, but that goes back to what Judge Evans said, and I do think the word should be -- at least the way I do it, it's tendered to me. I don't ever file it. I don't keep it. I don't consider it part of any record.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: That's the way it should be done, and I wish everybody did it that way, but a lot of people don't. I mean, we had a case on mandamus recently where the trial judge had given everything back and then we wanted to see what the trial judge had seen in camera; and how can you -- you know, we had to have the trial judge have a hearing and rely on his or her memory, is this the stuff you saw, you know; and most trial judges probably aren't going to remember that if there's a large stack of documents; but that's probably a problem with the trial court rules about in camera inspections, not a problem with what we're trying to deal with here; but the answer to the question of how do those documents get to the court of appeals, is if you're the resisting party you file it with your mandamus record. It doesn't come from the court reporter or anywhere else, because the party, the relator, is the one that's putting the record together on the mandamus. It's not coming from the clerk or anybody else.

HONORABLE STEPHEN YELENOSKY: Well, what gives them authority to file it in a sealed envelope? What gives them that authority? If they haven't -- if the trial court hasn't said, "This is in camera, court reporter puts magic on it and get it to the court of

appeals," or "Clerk, get it to the court of appeals" and I've just given it back to the resisting party, how do they put it in an envelope and say to the clerk at the court of appeals "This is sealed" or "This is confidential, file it like that"?

HONORABLE BRETT BUSBY: Well, I think you can do it a couple of ways. If they keep it then you can get it from the trial court or either from the clerk or the reporter or however they did it. If not, then they're probably going to file a motion in the court of appeals and say, "This is what was submitted in camera. Please seal it."

MS. GREER: Or just tender it --

HONORABLE BRETT BUSBY: Right now there's no rule, so they don't know how to do it.

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: The way that it's -- the last three that I have had to deal with, all of them have gone up in sealed envelopes with a letter attached, taped on the face of the sealed envelope from me certifying that those are the documents I examined in camera, prepared by the reporter, and they're transmitted up to the court of appeals generally with the help of the records clerk that's involved from the district clerk's office. I think after listening to the discussion it

would be helpful to the trial judges -- I've always thought that since it's tendered to the court and it's my ruling, it's my obligation to retain what was tendered to me until any chance of my ruling -- until all possible appeals from my ruling have expired, much like a tender that -- I've said that analogy -- tendered as an exhibit in trial, and so it would be nice to clarify, after listening to the discussion, whether the trial judge is supposed to retain the in camera documents or return them to the producing party. I've always thought I was the person who looked at them, and much of the case law determines on whether or not the content is what the judge goes off on whether or not it's privileged or not. That's sort of the way I would think you would have to do to get the record, so that would be nice to clarify.

CHAIRMAN BABCOCK: Peter, and then Roger.

MR. KELLY: Assuming a new mechanism is adopted, it needs -- or drafted, it needs to account for how does the requesting party get the documents up there as well, and it might be some way to --

HONORABLE STEPHEN YELENOSKY: Right.

MR. KELLY: And I'm just thinking in terms of mandamus jurisdiction and if there's an automatic appeal from 76a. Expand 76a to include any documents that are tendered for in camera inspection, there is an

automatic right to appeal from it so you don't have to have mandamus jurisdiction going forward, but then the documents would automatically be sealed in the trial court. They would remain sealed going up to the court of appeals and Supreme Court, and that I think would solve some of the problems of how do you deal -- you have this differentiation between in camera review and sealed records. Seal them all in 76a.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: Well, perhaps this shows that the discovery committee may need to work hand in glove on this sealing because, as I just found out myself, the Rule 195 doesn't say what the trial judge is supposed to do once a ruling has been made with the document. It doesn't say "return to the party," "keep in the records." That might be a useful thing to address.

The second is -- and this is strictly to clean up a mother-may-I sort of problem -- I think in the past those of us who have had to do it, we either tendered the request to tender the documents to the court of appeals under seal for in camera inspection or we filed the motion and then waited for the order granting seal, because some people took the position that until an order was granted to tender them under seal in the court of appeals, they were open season. There was nothing

protecting them at all, and so that should be addressed in the order -- in the rule I think, that if we're going to require you to first get a ruling from the court of appeals, that the documents may be tendered to the court because they won't come up with the record, then that's one way; but if you want the documents tendered with the motion before there is an official ruling, there should be some interim protection for them; and then obviously a disposition of what does the court of appeals do with the documents at the end of the day.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, okay, to catch up a little bit, in the (b) context whether the documents have been sealed by a temporary or permanent order, the idea is that the effect of that sealing order -- for that sealing order is effective pending the determination of the appeal of that order. So it would go up and be handled. Okay. And then if I understood what people were saying, particularly Judge Evans, if instead of an order sealing there's a denial of the request for sealing, you know, do it the same -- the same way, the denial of the order situation would yield a situation where the -- where -- even where the order is denied the documents that have been submitted for in camera -- I mean, not for in camera, to the trial court for sealing but they weren't

sealed is sealed for appeal purposes, pending a determination of the order. So it's like whether it's granted or denied, they are kept.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: They are kept secret, they are kept confidential, and they go up, and then that's determined up there. And then the other one is where it hasn't happened yet, where we have a motion to seal any documents pending in the trial court, and presumably what the court of appeals would do there would be to say to the trial court to do it or possibly just assume jurisdiction over it and do it itself. I would think that the court of appeals would prefer to have the trial court do it first.

HONORABLE STEPHEN YELENOSKY: I imagine they would.

CHAIRMAN BABCOCK: Yeah. You would guess. Yeah, Judge.

PROFESSOR DORSANEO: Am I beginning to catch on a little bit?

CHAIRMAN BABCOCK: After all these years.

HONORABLE ANA ESTEVEZ: I just thought of something. It may be inappropriate at this time to bring it up, but since we are talking about appellate rules I do the criminal side, and they have sealing since they get

all of the cases first before it goes onto the Court of Criminal Appeals, but we had a situation in which they were -- the defense attorney was asking for all of the confidential informants regarding the Mexican Mafia, you know, something that during trial maybe he has a right to get, maybe he doesn't, because one of them would have started all of this and all the constitutional issues that could arise. So I allowed them to put stuff in the record, never did an in camera review, didn't want to know, you know, so I could live a little longer as well, but, you know, there's other issues that are coming up that we're not even thinking about that have to do for the appellate purposes in the criminal world, and I don't know if all of these circumstances we're talking about if there might be some other circumstances that we haven't covered that it's not practical.

I don't know how many other judges -- I mean, I let them seal before they -- if I'm doing punishment in a criminal case, I don't want to know what the offer was, but they want to avoid an ineffectiveness of counsel, so before we start trial they want to put their client on the stand, tell them what their offer was without me seeing it, so they show them a piece of paper and stick it in an envelope. You know, is that technically sealed, I don't know, but it's sealed from me.

I mean, does this encompass those type of issues, or are those just privilege?

CHAIRMAN BABCOCK: Frank, what's the answer to that?

MR. GILSTRAP: I don't know.

CHAIRMAN BABCOCK: Well, you know, you've got to answer that before you speak.

PROFESSOR DORSANEO: He did speak.

CHAIRMAN BABCOCK: Impudent.

HONORABLE ANA ESTEVEZ: It's just it's so much.

MR. GILSTRAP: I have two points. First of all, I said earlier that the -- you know, we have this piecemeal appeal, and I think I gave the impression that the court records determination could be appealed. I don't think that's true under 76a.8, which says, "Any order or portion of an order or judgment relating to sealing or unsealing court records shall be deemed to be severed," and if the court determines they are not court records, I don't know that this applies, and you may be thrown into a mandamus situation.

With that clarification, I think we need to inquire into one more thing, and what form, however the vehicle, what form do they go up to the court of appeals in? Do they go up as paper records in a sealed cardboard

box, or do they go up electronically?

PROFESSOR DORSANEO: Well, right now we have two directives, right?

MR. GILSTRAP: Right.

PROFESSOR DORSANEO: We have Rule 9 that says that the sealed documents are not meant to be -- or documents filed under -- what exactly does it say? The paper approach, okay, which is in Rule -- appellate Rule 9, and then as you pointed out during our discussions, in, you know, in the appendix in the appellate rules it says this is supposed to be done electronically. Right?

MR. GILSTRAP: Right. That's the problem.

PROFESSOR DORSANEO: And the other problem with the submission of documents, I mean, it is true. How does the person who's trying to get a hold of something, which is -- you know, which has been submitted for determination under seal and sealed, how does -- is that person going to see those things? They get a copy of them? No. I mean, the whole thing is going to be in camera, right?

MR. GILSTRAP: Yeah.

PROFESSOR DORSANEO: So how would you get the -- how do you get the documents to begin with, whether they're going to be filed in paper form or electronically?

MR. GILSTRAP: How do the clerks do it?

Does anybody know?

CHAIRMAN BABCOCK: Let's ask Bonnie. Justice Bland.

HONORABLE JANE BLAND: Well, I mean, they do it -- the format doesn't matter. It's the transmission separately from the electronic appellate record either in electronic format or paper format. It's received by the clerk, and it's kept as part of the file, but separately not available for public view.

MR. GILSTRAP: So in your court they're never filed?

HONORABLE JANE BLAND: Well, they are -- I mean, you mean -- oh, the in camera documents we're talking about? We're back on in camera documents?

MR. GILSTRAP: Yeah.

HONORABLE JANE BLAND: I think we say "received" or something.

MR. GILSTRAP: Well, the documents that come out of the trial court, whether they're as part of an in camera proceeding or anything else that haven't been filed in the trial court, what does your clerk do with them?

HONORABLE JANE BLAND: They haven't been filed in the trial court?

MR. GILSTRAP: Yes.

HONORABLE JANE BLAND: You know, we get a

record of everything filed in the trial court. We don't get -- are you talking about like in connection -- documents that aren't part of the trial court's record?

MR. GILSTRAP: I don't know. I don't know. It's unclear.

HONORABLE JANE BLAND: Tendered for in camera review, we get those just like we get the rest of the record. We just keep it separately from --

MR. GILSTRAP: But it's not filed in your court, or is it filed?

HONORABLE JANE BLAND: It's filed at the -- yes, it's filed, but not available to the public.

MR. GILSTRAP: So it's filed under seal.

HONORABLE JANE BLAND: It's filed under seal.

HONORABLE ANA ESTEVEZ: Here's how -- hey, here's how it works. If you got online right now and you went through our county that's totally online you could get all of the documents except for any sealed cases -- sealed documents. I as the judge have a special little world that I can go to, another queue, and I type in my information, and I get everything, even if it's sealed. So when she says sealed from the public, it means when they get on they don't get access to it, but everyone else, so it's not really sealed. It's just unavailable.

MR. GILSTRAP: Well, there's a lot of uncertainty as to exactly whether it's sealed and how they're sealed, and I think that might be white meat for the *New York Times.* I think they could cut it up and say, "Hey, we want the documents, and you've got to give them to us. They're not filed under seal."

PROFESSOR DORSANEO: You can't just say they're unavailable, they're not giving them to you.

HONORABLE ANA ESTEVEZ: Well, no one else can see them. They're still electronically kept, but they're kept in a different location that unless you're the judge of that certain area, you know, just think of it as -- it's easier to think about in an adoption because you know the adoptions are always sealed. You wouldn't be able to open that, because it's sealed. You would need a court order to be able to get --

MR. GILSTRAP: They're under seal by law or by order, and what I'm hearing is, is they're sealed but -- they're filed, but they're not filed, and they're sealed but there's no sealing order.

HONORABLE ANA ESTEVEZ: There is a sealing order. There is an order that went with it, that is -- you can read it if you opened it, but if you click to get to that, no access. There is a sealing order on the documents that's been sealed that are stored

electronically.

HONORABLE STEPHEN YELENOSKY: You can't see the sealing order?

HONORABLE ANA ESTEVEZ: The sealing order is available.

HONORABLE STEPHEN YELENOSKY: Oh, you can see the sealing order?

HONORABLE ANA ESTEVEZ: Yes.

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think we have enough fodder now for the subcommittee to go back and work on most of this, but what would be helpful for --

CHAIRMAN BABCOCK: Did you just call it fodder?

HONORABLE BRETT BUSBY: Well, you know, grist for the mill or whatever you want to -- the comments have been helpful, and I have been taking notes, so I think we've got enough. I think we have enough material to go back and information from you-all to go back and work on what this should say, but it might be helpful to have some further thoughts on whether the documents should be submitted in paper form or electronically. Our clerk has said that if they come in paper form he just scans them, and so they're going to come to us electronically

even if you don't submit them electronically, but there is a tension between what the rule says. As Professor Dorsaneo pointed out, 9.9(d)(2) now says paper, whereas the appendix says electronic, so there's that tension.

The other thing we haven't talked about yet that we talked about some in the subcommittee is that right now there's not a requirement in 76a that the trial court specify who can have access to the sealed records, and so sometimes our clerk has to call -- has to call the trial court or get the trial court to clarify their order if they want a copy, you know, is it something that both parties can see as they're preparing their briefs, is it something that only one party can see, who can see the documents, and so there is a proposal in a different document -- I don't know if it was circulated for this meeting -- to require the trial court to specify who can have access to the sealed documents so that when somebody comes to our clerk's office on appeal they know who can see it and who can't, and if -- so one way to do that would be to require the trial court to specify. If you want to backstop in case the trial court doesn't do that, you could have a presumption that if it's not otherwise specified these are the people who have access, but it would be good to get some feedback on --

HONORABLE STEPHEN YELENOSKY: Is there a

problem now?

HONORABLE BRETT BUSBY: -- what people think we should do.

HONORABLE STEPHEN YELENOSKY: Is there a problem now with that?

HONORABLE BRETT BUSBY: Yeah. We get sealing orders that don't specify who can have access, and so then our clerk has to pause everything and figure out can one of the parties look at these documents while they're preparing their brief or not because the order doesn't say.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Yeah, and when I am doing these orders now I write in there like who can see it because I have had where I have been denied access, even though I was the person tendering them or whatever, because the order didn't say, so smart lawyers will make sure in their sealing order that they write who can see it, you know, as part of the order because it is a problem.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Just one final.

CHAIRMAN BABCOCK: I'll be the judge of whether it's final.

HONORABLE JANE BLAND: You get a vacation from Jane for the rest of the afternoon. People often

frequently do move to withdraw sealed, in camera exhibits. Sealed, comma, in camera exhibits at the conclusion of the appellate proceeding, and I think the appellate courts routinely grant those.

CHAIRMAN BABCOCK: Yeah, Marcy.

MS. GREER: I think one way to help keep these concepts separate would be to talk about "tender" or "submission in camera" versus "filed" because even though I know that we used the word "filed" in so many different ways, but when it's submitted in camera it is only tendered for that purpose, and it doesn't become a part of the record, and I mean, I think Rule 76 could be clearer on this point, too, because it's not just limited to discovery. There are also some other things that, you know, people submit fee invoices, and there's a whole issue there, but bottom line is if we could separate those two concepts. To me, in camera never touches the file and becomes an official part of the record. It may go up in a sealed wrapper as a convenience, but that's why I always want to pull it back because I don't want it to ever become part of the record because it's only been submitted for in camera review; whereas, if it's filed, you know, again, there may be a docket entry on the official court record that says this has been submitted in camera, but I think if we can kind of separate those two terms and maybe

use "tender" as one verb and "filed" as another, that might clarify some of this confusion.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Are you saying we should expand in camera from what it says in 76a now, which is solely for discovery? Because the other thing, you're going to -- that's a huge loophole.

MS. HOBBS: Yeah.

HONORABLE STEPHEN YELENOSKY: Lawyers are going to come in and say, "We're trying the case in camera. Judge, you don't need to seal it. Whole case is in camera. No problem." You've got to limit it, and they do it now. I mean, lawyers don't understand the motion to seal, and they come in and say, "Oh, no, we didn't seal it. We're just -- we both have it. We're just giving it to you in camera." Well, you know, if I see it, the public is supposed to see it unless it's sealed, and they will abuse that either because they don't understand it or because they'll abuse it, and so it's not so easy as just saying whatever the lawyers want to call in camera, and there are a lot of things that should be in camera, like the fees thing. I don't know whether that should be sealed or not, if it meets the standard under 76a or not. So and I understand your problem on the other end, and maybe something needs to be done about that, if sealing is

denied you can withdraw it, but the judge has already seen it, and so you're talking it out of the record essentially at that point. Right?

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Judge Evans, I thought I heard you say that you have a procedure that would allow somebody who didn't get to see a document, okay, because it had been sealed or --

HONORABLE DAVID EVANS: Well, a document that's going to be sealed and not one submitted for in camera inspection is seen by everybody that's a party to the lawsuit. If you think -- that has been my experience, so I don't know of a situation when that doesn't occur. We're talking about non-in-camera discovery hearings and talking about regular sealing procedures. The issue that comes up is the judge refuses to seal. Is there a temporary sealing order that should be issued at that time so that the judge's order could be reviewed on appeal without the general public having access to the sealed pleading or document? Okay. And, you know, we're trying -- and the Trade Secrets Act does have to be considered, Frank, because that's where we're seeing most of this stuff.

We get sealed documents in a record as attached to motions for summary judgment, and they have to

follow 76a. We get sealed exhibits in trial and motions to close courtrooms under trade secret litigation, and those are exhibits, not just the discovery issues, and they get -- so we'll have sealed exhibits and even sealed portions of a reporter's record in trade secret litigation, and then we'll have sealed portions of the clerk's record. We do commonly receive discovery orders, agreed discovery orders, in almost all cases involving confidential documents where they try to bypass 76a and say that anything that they marked as confidential will go in, and we have standard procedures for just -- in my court, for reviewing every confidentiality, marking through every one and say "cannot be filed under seal without complying with 76a."

So that's the real world civil problem on sealed documents as I see it, and my procedure is, is that we set up -- we get alerted on a 76a motion. We check to make sure the notice is filed. We have the hearing, and then I take it on myself that if I say it's not going to be sealed I offer to temporarily seal it for purposes of appeal and get some sort of record up to the court of appeals. In camera material so that I could keep up with it and know that I've got it and know when I reviewed it, I simply log in with my court reporter and require her to keep every in camera submission because I treat them, as I

said earlier, more redundantly now, as a court exhibit. That having been said, she's got it; and she keeps it under lock and key; and when I need to send it up, I arrange something with the clerk of the court to send it up, clerk of the court of appeals to send it up; and that's the two procedures that I've followed so far; and I just don't think a trial judge -- I guess the last one is I think it's our duty as a trial judge to retain whatever we rule on until such time as we can -- as the parties have had an opportunity to test our ruling.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Okay. Everybody is focused on documents submitted to the court for in camera review. All right. What about a settlement agreement not filed of record, and the parties sign a settlement agreement, and the plaintiff comes in and says, "Judge, we want this" -- you know, "We want this -- this is a court record, and we want a hearing on it, and here's this settlement document that" -- what does it do? Do we hand that to the judge for in camera inspection, or do we file it?

HONORABLE DAVID EVANS: If it's a settlement document, Frank, if the question is directed to me, and it involves a minor, I require them to file a motion to seal, and I seal it in the clerk's record because the minor will grow up and never be able to find a copy of their

settlement document. The parents are probably not sophisticated and may or may not keep a copy of the settlement document, so I just tell them "I'm filing it. If you think it's that confidential, haul off and file your 76a, and let's get after it," and they get filed.

MR. GILSTRAP: What about a settlement agreement that the plaintiff says contains a lot of information that the public needs to know about it? It's a matter of public safety, and what are we doing with that document? Is it submitted in camera, or is it filed?

HONORABLE STEPHEN YELENOSKY: It's -- well, I think we're mixing up terms --

HONORABLE DAVID EVANS: Yeah.

HONORABLE STEPHEN YELENOSKY: -- because it's never in camera, in my opinion, if all the parties have seen it. In camera is so I can see it.

MR. GILSTRAP: No, we're trying to keep it from the public.

HONORABLE STEPHEN YELENOSKY: Well, that's sealing. It's not in camera. Seal is keep from the public.

HONORABLE DAVID EVANS: Temporary seal for purposes of the determination as to whether or not it should be permanently sealed.

HONORABLE STEPHEN YELENOSKY: Yeah. And so

if you brought that in, I mean, it would be the same thing as somebody who wants to file their motion for summary judgment and seal the -- but they bring it in. The rule says it's not a court record because they haven't filed it yet, but you say, "Well, if I let them -- if I make them file it first then it becomes public," so you treat it as a court record. You make your decision. If everybody is happy with the decision, you go forward. If not, you make sure you don't -- you don't destroy jurisdiction, but they have to bring it in whether it's something like a motion or it's an outside settlement agreement.

MR. GILSTRAP: Well, I fail to see why documents that you're trying to keep from the defendant or from the plaintiff are treated differently -- and from the public, from documents that you're trying to keep from the public.

HONORABLE STEPHEN YELENOSKY: Oh, I thought you were talking about the plaintiff had the settlement agreement and was saying, "We've settled this, but we think this is -- should be known by the public," and the defendant says, "No, it shouldn't."

MR. GILSTRAP: That's right. That's what I'm talking about.

HONORABLE STEPHEN YELENOSKY: Well, you're not keeping it -- you're not keeping the information from

the plaintiff. The plaintiff signed the settlement agreement.

MR. GILSTRAP: No, but you're keeping it from the public, and that's why you want it sealed.

HONORABLE STEPHEN YELENOSKY: Well, when you said you're keeping it from the plaintiff, you're not doing that.

MR. GILSTRAP: Okay, I agree.

HONORABLE STEPHEN YELENOSKY: You're keeping it from the public.

MR. GILSTRAP: Maybe the in camera documents you're trying to keep from the plaintiff.

CHAIRMAN BABCOCK: Yeah, but that's different.

HONORABLE STEPHEN YELENOSKY: That's different. This is no different from a motion that has trade secrets attached to it. They want to file it as a summary judgment. They bring it in. They have the hearing on that document. They have to post it and everything else, so somebody brings in -- the plaintiff brings in that document, says -- or the defendant brings in that document and tries to seal it, and the plaintiff says, "No, you shouldn't seal it."

CHAIRMAN BABCOCK: Yeah, in your hypothetical with the settlement document, the plaintiff

and the defendant have agreed that it's going to be confidential, so the plaintiff can hardly, you know, in the next breath breach his agreement, but where it's going to come up is that a third party, the press or somebody, is going to say, "Hey, look, you just settled a nuclear accident, and we need to see what the settlement was," and so they'll bring a motion.

MR. GILSTRAP: And so how is that settlement document handled? Is it filed, or is it handed to the judge for in camera inspection?

HONORABLE STEPHEN YELENOSKY: It's handed to the judge, right, and it's kept from the public --

MR. GILSTRAP: Yes.

HONORABLE STEPHEN YELENOSKY: -- because you can't destroy that, but the parties have seen it, right?

MR. GILSTRAP: Yeah.

HONORABLE STEPHEN YELENOSKY: Everything that's going to be sealed or not sealed is handed to the judge and not filed nakedly, because if it's filed, you've just mooted it out.

MR. GILSTRAP: Yeah. Unless it's filed under temporary seal.

HONORABLE STEPHEN YELENOSKY: Right. So they bring it in, they want a temporary sealing order that they can take with them to the clerk, and it doesn't

matter whether they're bringing in a settlement or they're bringing in a trade secret document or something else.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, Judge Yelenosky got to what I think I was going to get to. There's provisions for temporarily sealing --

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: -- but if the lawyer is going to do it the right way they bring that motion and proposed order along -- it's almost like presenting a TRO in a way.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: To do that, so you can order it under seal, and then you proceed to have the hearing and all of that, but -- and I agree, what happens often times in judgments, "Well, Judge, we don't want to put this in the record, but we just want you to look at it." Well, sorry about that. "We want this, but we're not going to file it," and that's the kind of stuff that happens, and you have to tell them, you know, "Look, if it's not -- if it's not excepted under Rule 76a, it is a court record, and you have to seal it."

CHAIRMAN BABCOCK: That's the bottom line on that.

HONORABLE R. H. WALLACE: Reached a

settlement agreement or whatever it is, it doesn't matter.

CHAIRMAN BABCOCK: All right. Jane, last word.

HONORABLE JANE BLAND: Let's take a break.

CHAIRMAN BABCOCK: Let's take a break.

(Recess from 3:27 p.m. to 3:54 p.m.)

CHAIRMAN BABCOCK: All right. Carl. Rule 183.

MR. HAMILTON: Our assignment was to look at Rule 183, which is interpreters, and taxing of costs. In view of the Department of Justice's letter and claims that some courts are not providing any interpreting services to what they call LEPs, limited proficient -- limited English proficient persons, they call those LEPs, and not only were they not providing services, but they were in many instances taxing the costs to those LEPs who couldn't afford it, and they believe these are civil rights violations and need to be corrected, so we were to look at the rule and see about that.

Roger Hughes volunteered to work on this, and he did most all of the work on it, but before he gives the report, I'll report to the Court that I did talk to Scott Griffith at the Office of Court Administration, and he tells us that OCA does provide translating services in Spanish for a limited number of types of cases. Mainly

those that involve 30 minutes or less, short hearings or criminal cases, some family law cases, but they don't provide them for all cases, but what they do provide, those services are free. And they do them like a deposition. They'll have a telephone set up on the court desk and everything is translated, what anybody says in the court is translated so that everybody can hear it. Sort of like in Federal court where they have an interpreter, and those that can't speak English have headphones on, and they get every word interpreted so they know what's going on in the court. So we do provide some services.

The other thing that the DOJ's claim is for those courts that are funded or receive any Federal assistance, that's the only way that these Federal statutes or regulations would apply. Scott Griffith tells me that there are some courts that may get some Federal assistance on a particular program but not just for the court itself, and he believes that there are many courts that get no Federal assistance at all, but he hasn't done the research on that and thinks that all courts should know whether they get Federal assistance or whether they don't get Federal assistance, and I don't know whether the district judges here know that or not, but --

HONORABLE STEPHEN YELENOSKY: You're saying

that matters under the DOJ's ruling?

MR. HAMILTON: Yes, because that's the only way they have jurisdiction over these courts.

HONORABLE STEPHEN YELENOSKY: But I thought Congress changed it so that --

MR. RINEY: Steve, can you speak up?

HONORABLE STEPHEN YELENOSKY: -- it's no longer program specific.

MR. HAMILTON: I'm not aware of that. At any rate, some of the courts may not get Federal assistance, so the rules that we're proposing, Roger, we might have to tweak those a little bit so that it only applies to those getting Federal assistance.

MR. HUGHES: Yeah.

MR. HAMILTON: But go ahead and tell us, Roger.

MR. HUGHES: Well, the sole objection raised by the Department of Justice was that 183 permits the court to tax the fees of a court-appointed translator to a person who is an LEP, that is, limited English proficiency; and as Carl said, the OCA does provide this dial-a-translator. Several counties on the border will already have translator -- Spanish language translators on staff. The judges from the bigger cities could tell us how they handle some of the more difficult procedures

involving, say, Vietnamese or Chinese or the like, but the only objection the DOJ can have is that under -- that Rule 183 permits the court to tax a court-appointed translator's fees as court costs and then assess them against an LEP. How they get taxed against anyone else is not the DOJ's problem.

Basically 183 says the court "may appoint" a translator, and that's discretionary. Now, there are other schemes, and I outlined them in my paper. There are statutes in the Government Code and in Chapter 21 of the Civil Practice and Remedies Code and the Probate Code and the Mental Health Code about appointing translator for various proceedings, but 183 is a standalone, separate proceeding from all of those, and it basically says that the court has to determine a court-appointed translator's fees, but then those fees are taxed like court costs. So they're up to the judge to decide who is going to pay them under the Rules of Civil Procedure or whatever law.

Now, the reason this becomes an issue is Title VII, 1964 act, that basically no one may be denied on the basis of race, national origin, the benefits of or participation in any program that receives directly or indirectly any kind of Federal assistance, which is usually money, but it can be personnel, it can be property, whatever; and so there is a regulation passed by

the DOJ that basically lays out in greater detail all of the top possible ways that it could be a denial of -- of the benefits of participation; but then in 2002 there was an executive order that basically said language is a barrier and failing to provide translation services is a way of -- that a program denies participation in the program or the benefits of program; and the President then ordered all the departments, the Federal agencies that provide financial assistance, to then provide guidelines on developing plans that basically each Federal agency will then say, "Okay, everybody that gets money from us for programs, you're going to have a language assistance program," and it's very broad. It's very -- it's very flexible about what it takes.

That's not the worry. The worry is that DOJ thinks that the ability of the trial court to appoint a translator and then tax the fees against someone who doesn't speak English and is the reason that we appointed a translator, that person ends up paying the fees, which is a way of burdening non-English speaking people who are then caught up in the system, such as family law cases, juvenile cases. Criminal is an entirely different matter because that's not governed by 183, and the Code of Criminal Procedure has its own translator provisions.

Now, the -- I drew up a draft change, and

there were a couple of things. First, 183 as it stands now allows the court to appoint uncertified translators. The Government Code, Chapter 57, has a procedure for requesting translators, but they have to be either certified under the Government Code or they have to be a dial-a-translator service certified by the Government Code, but 183 permits the court to select an uncertified translator. Now, the court sets the person's fees, but the court has no power to order the fees be -- the government pays the fees, and there's a case that's cited in the paper that essentially says the court can set the fee, but it can't order the county to pay it.

Next, like I said, this essentially other than taxing it against the parties, it's an unfunded mandate. It has to look -- the court has to look to the counties to provide the funds to pay, for example, the appointment or hire translators for the court. So this is what I did. The first section basically says, "Except as is otherwise provided by the law, the court may appoint a qualified interpreter for court proceedings." Now, number one, that requires the court to use qualified translators, so they can't appoint the bailiff, appoint a bailiff and then try to tax the bailiff or the judge's secretary's fees -- to award them fees.

The other thing is it also picks up the

provision about "otherwise provided by law." There are other means to appoint a translator. "The court shall determine the reasonable fees." That's as it is now. Number (b) is where we get -- we make differences. Interpreters and -- what I proposed was that if the court uses a court translator or uses a translator who is under contract to the county or uses a dial-a-translator and the county has already hired their services, those are free to everybody. Those don't get taxed as costs. The county basically absorbs them.

Next, the default provision is that "Except as otherwise provided by law the reasonable fees for a court-appointed translator or a privately hired translator will be taxed as court costs." So if the parties hire one, the costs can be transferred to the other side as we do with other court costs, and by the way, in Chapter 18 of the Civil Practice and Remedies Code it has a statute dealing with what costs can be included in the judgment, and one of them is translator fees. So there is that provision. However, it carves out an exception, that "In no case will the court costs be taxed against a person of limited English proficiency unless they first find in writing that the person can easily afford the fees and the assessment does not otherwise impair access to the judicial process."

I borrowed that from the ABA standard. That's the ABA's provision, and it's a little awkward, but the ABA basically says we don't think you ought to be able to transfer the costs of translation to either -- well, of course, the indigent, if they filed indigency, they won't be paying, but to either poor people or to even people of middle income because translators can be expensive, and essentially it would require the court to first find that this person can easily -- I think the ABA's phrase was "well-resourced." I wasn't sure how that was going to translate into something we could put in a rule, so I just said "easily afford the fees and that it doesn't otherwise impair access to the judicial process"; and then the (c), the definition of "limited English proficiency," that comes straight out of the Federal regulations; but once again, the idea was translator fees of privately retained or specially appointed translators. Those get taxed as court costs. You don't tax them against LEPs unless they're well-resourced and it won't otherwise impair access to justice.

CHAIRMAN BABCOCK: You may have said this, but how is this going to get funded if we do it this way?

MR. HUGHES: Number one, the funding for court -- I mean, it doesn't address funding. The answer is the rule -- the change doesn't address funding. The

idea is that if the court already has a translator on staff or the county has already hired translators or a translation service, nobody pays for that. The county just absorbs that.

CHAIRMAN BABCOCK: Right.

MR. HUGHES: If the parties say, "No, I want a specially appointed translator" or the party just says, "Heck, I'm going to go out and hire one," then that's an expense treated as -- depending on the rules, can be treated as court costs and can be taxed, but in -- when you can tax the translator fees, you can't tax them against an LEP unless they can easily afford it and it doesn't impair access to justice, and of course, if the person has put up a -- has been -- you know, has filed a pauper's oath, as we say, they're not going to pay anyway.

CHAIRMAN BABCOCK: Right. Right. But, Carl, just one more question about the funding. So what about a county in, you know, in Midland County or someplace where there's not a lot of foreign speakers? How would they fund it if they have Vietnamese parties or Spanish parties, Spanish speaking parties?

MR. HUGHES: Well, now, that's a problem. The OCA, like I said, will provide dial-a-translator for up to half an hour, and if it's another language, the person can file a motion under Chapter 57 of the

Government Code, which does not address how it gets paid.

CHAIRMAN BABCOCK: And this rule, proposed 183, doesn't address it either. It just says you're going to do it.

MR. HUGHES: No. In other words, if the court specially appoints a translator that the county doesn't have to pay for, maybe you could ultimately tax their fees against an LEP or against one of the other parties, but in the interim they're not going to work for free. The only thing I can tell you is there is a memorandum case that basically says the court can say, "I'm going to appoint this person to translate for you, but if you want them to actually show up and do any work, you will have to pay them in advance," and that's the problem, and I don't know how it can be solved, because the judges have -- I mean, if you read these statutes, the judges have the power to appoint people, but they do not have the power to tell the county commissioners, "You're going to pay them."

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Thanks, Roger.

MR. HAMILTON: A couple of more things, OCA does also have a service where they will go out and find translators such as Vietnamese, Japanese, Chinese, something like that. They have a service where they'll

help you find those translators. They're not going to pay for them, but they'll help find them.

The other thing is under Chapter 21 of the Civil Practice and Remedies Code, which deals with counties along the border, it does say that the court interpreter -- the qualifications for the court interpreter is that they must be well-versed and competent to speak Spanish and English language. That's all it says. So sometimes we hear about we have to have certified interpreters. I'm not sure I know what a certified interpreter is, but that language isn't used in Chapter 21.

The other thing Chapter 21 has is that the clerk of the court shall collect an interpreter fee of $3 as court costs in each civil case in which an interpreter is used. Number one, I don't know how the clerk is going to know in what case is an interpreter used, and number two, $3 is not going to go very far paying for interpreters. Now, you know, maybe if there was a provision for a 10-dollar fee for every case that's filed or something --

CHAIRMAN BABCOCK: Yeah.

MR. HAMILTON: -- that might raise enough money to pay interpreters fees.

CHAIRMAN BABCOCK: But depending on your

county, that might irritate people. Yeah, Tom.

MR. RINEY: I want to change your example from Midland to Amarillo, because we have a number of languages spoken there. We brought in a lot of refugees. I mean, it is not unusual -- I mean, we're okay with Spanish, I think, but I can't remember what language they speak from Myanmar. We have a number of those. We have a number from Somalia, Serbo-Croatians, on and on, and it's creating a lot of problems in the school district, so -- and I've been involved in a case with some of those, and there's not any interpreters in Amarillo that are really very good that do it. Some can speak both languages, but they don't care to serve as interpreters. In one case we had to bring someone in from out of state, and it was a specific dialect of Myanmar, as I recall. A significant number of people there, so it can be an issue, and I don't know how you solve it, but what I'm saying is if you then say, okay, we can appoint someone, the party that doesn't speak English can ask someone be appointed that's qualified, we're talking about a pretty significant amount of money, if you can find someone.

The second thing is then to impose those as costs against someone, it seems to me this ought not to be a court issue on the funding. It ought not to be a court cost issue. It ought to be decided by -- I mean, it's a

political question, and if the Federal government is pushing it down on us, I don't think the courts ought to then push it on down to the district court level or the county courts or so forth. It's a political question that should be determined by the Legislature in terms of how to fund it, because it seems very unfair to me to say, "Well, court costs can't be imposed against you if you don't speak English unless you've got a lot of resources, but if you're a small business owner and you do speak English then you're subject to having to pay a significant amount of money."

So I just have some real problems with this concept of we're just going to shift it to people who speak English or have a lot of money, either one.

CHAIRMAN BABCOCK: Well, what do you do about the justice department irritated with our Rule 183?

MR. RINEY: Well, I think we can just change it and say, "If you want an interpreter, we'll give you an interpreter," and then the Legislature can decide how to fund it.

CHAIRMAN BABCOCK: Well, but what does the judge do while the Legislature is pondering that?

MR. RINEY: Well, I suppose the same thing we've done for a long time.

CHAIRMAN BABCOCK: Okay. Which is?

MR. RINEY: Nothing.

CHAIRMAN BABCOCK: Okay. Hayes, did you have your hand up?

MR. FULLER: This is a little on-topic/off-topic, and maybe we're ahead of our time, but I just thought addressing the cost issue, I did a quick search. I wonder how far away we are from voice recognition translation software, and there actually are some examples, Google has some and so forth. I don't know exactly how they work, but at some point that might be something that the Legislature needs to look at.

CHAIRMAN BABCOCK: Yeah. Lamont.

MR. JEFFERSON: I don't know if the rule is intended to cover persons with communication disabilities, deaf and hard of hearing or other kinds of disabilities, who require some kind of interpretive services; and as I understand the Americans With Disabilities Act, they cannot be under any circumstances required to pay more than others to access public facilities like courtrooms.

CHAIRMAN BABCOCK: Carl, then Judge Evans.

MR. HAMILTON: Again, Chapter 21 has a provision for interpreters for the deaf, and it's got a whole section on that, and it says, "The interpreter shall parade a reasonable fee determined by the court after considering the recommended fees of the Texas Commission

for the Deaf and Hard of Hearing." They have to pay his travel and his lodging, "shall be paid from the general fund of the county in which the case was brought." That's part of the statute.

CHAIRMAN BABCOCK: Okay. Judge Evans, did you have something?

HONORABLE DAVID EVANS: The rule as drafted seems to be workable to me based on my experience. I don't know about some of the compliance issues. I'm worried about the term "qualified," Roger, since as I recall the interpreter statute, there's some different language used with regard to different types of interpreters for the deaf and for those who have limited English capacity, and so that may be something you want to look at, and I just remember that from a licensing provision. We're taxing costs now to interpreters by parties, but when we have pro se parties, and we do, and even in Tarrant County we receive pleadings in Spanish at times, which it's hard to find any case law on what you're supposed to do on that. We've taxed -- we've brought in the interpreter, and we've taxed it against our county, and the county has paid it.

Now, they're not -- they're more used to it in a criminal environment and we have people on staff for. We have not made this finding and determination about

whether or not they have the resources, but you don't normally need to do that when they're represented by counsel. They'll tell you. If they're going to invoke some resource issue, they'll invoke that as counsel on the costs, and so it hasn't been overwhelming. We've got Farsi, and I've tried one with Farsi, and I've tried different brands of them, but I had -- one of the things I've never understood is how the judge is supposed to determine whether somebody is a good interpreter or not. I barely speak English, ask my wife, and --

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I think this is helpful, and I did -- we have a committee of the Texas Access to Justice Commission that's looking at language access through our rules committee, so I know those folks will be interested in providing some comments on this. We don't have those today because we just saw the proposal as it was put on the agenda, but I did have one question in the meantime about under (a), the beginning phrase, "except as otherwise provided by law." Is that intended to indicate that there are some cases in which the court may not appoint a qualified interpreter or that there are some cases in which the court must provide a competent interpreter?

MR. HUGHES: There are cases in which the

court must. Chapter 57 --

HONORABLE BRETT BUSBY: Right.

MR. HUGHES: -- says "must," and I've forgotten the mental health statute in the Probate Code, but they also may be mandatory as opposed to discretionary, and that's why I put that phrase in there.

HONORABLE BRETT BUSBY: Well, it might be -- to avoid the implication that there are some cases in which a court may not appoint a qualified interpreter, perhaps it could say something like, "The court may appoint a qualified interpreter for court proceedings, and it must do so in certain cases where required by law" or something like that to make clear that it's usually "may," but there may be some cases where it's "must."

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: Well, that raises another issue. Chapter 21 on this Spanish thing says, "On the request of a district judge who has made a determination of need, the commissioners court of the county shall appoint court interpreters on a full or part-time basis." I recently had a case in district court there and had a witness who couldn't speak English, and I asked the court for the interpreter, and she said, "We don't have an interpreter. You have to bring your own." Well, that caused a real problem. We finally were able to get the

interpreter from the adjoining court to come in and interpret, but she just doesn't have an interpreter in her court and requires you to bring your own. Well, that's a big expense and could be a tremendous expense if that interpreter has to sit there not only for the witness, but for the whole trial. So you have a party that doesn't understand English, has to be interpreted everything that goes on. So that's a big problem, and I'm thinking that the rule ought to provide that the court must appoint an interpreter.

CHAIRMAN BABCOCK: Okay. Richard, and then Lisa.

MR. MUNZINGER: The rule says that fees or costs of the interpreter may be taxed as costs, so a defendant who speaks English or a party who speaks English who is sued directly or by connoting by someone who doesn't and requires a Somali translator, and the Somali translator wins his case or loses his case, I, the Texas citizen, can be required to pay for the Somali translator's fees, even though I won the case. I'm concerned about that.

CHAIRMAN BABCOCK: It doesn't seem fair, does it?

MR. MUNZINGER: It does not seem fair, and it's one thing the concern of the justice department is

well-placed that you don't want to take advantage of people and hurt people. At the same time you're -- you've got citizens who have problems. For those of you -- I practice on the border. To get a document translated, to get this piece of paper right here translated in Spanish accurately is 150 bucks or more.

CHAIRMAN BABCOCK: Both sides or just the one side?

MR. MUNZINGER: This is just a one-side piece of paper. It's terribly expensive, and it's cumbersome. So a litigant in court, and here's a document thrown up on the screen in front of the fellow, and you've got to translate the dadgum thing into whatever language it is. The rule doesn't distinguish between languages. It's one thing to have a staff of Spanish translators. We have for years, but we now have a society without borders, or we're getting there; and so you've got, as Tom said, Somali, whatever, 15 languages in Amarillo, Texas, for goodness sakes; and you've got 30 languages in some school districts. They can't teach the children because there are 30 or 40 languages being taught in the schools, and we're going to have a court rule that says you can tax the cost against a litigant to pay for the translator. I think you need to be careful.

CHAIRMAN BABCOCK: Lisa. Don't say we're

going to build a fence.

HONORABLE STEPHEN YELENOSKY: A wall.

CHAIRMAN BABCOCK: Sorry, a wall.

MS. HOBBS: We're going to build more tables and less walls. So I had a question about this first sentence of (b) that the interpreter -- the "services provided through the court are paid out of funds provided by law shall be provided free of charge and not taxed as costs."

MR. HUGHES: Yes.

MS. HOBBS: My initial question was do we know for sure that no county who has on staff interpreters are recouping their costs in some way, perhaps in some pro rata basis or something, and then I heard one -- someone said that there's a three-dollar filing fee, and that may be how the counties are recouping their costs for these interpreted services; and if so, does that practice -- or does this first line of (b) conflict with that practice? Is charging a fee that you're allowed to charge by statute still providing it free of charge but not taxed as costs?

MR. HUGHES: Well, that might be an issue, but first the -- it would -- I hadn't even thought about the three-dollar fee, but the costs that they're not to be charged that I was thinking about was that if you have a court staff translator or you have an independent

contractor under contract in a county, their fees don't get taxed. If the county already has a standing contract with a dial-a-translator, they don't get taxed. So that would leave if you're talking about a three-dollar filing fee for a translator, I really hadn't thought about that they're exempted from that.

MS. HOBBS: Well, my guess is they're recouping the cost somehow. The counties that have those, they are somehow at least offsetting. They may not be recouping, but they're offsetting the cost in some way, and so to say it's free of charge is probably not accurate.

HONORABLE STEPHEN YELENOSKY: The people who are using the interpreters?

MS. HOBBS: No. I bet the county has set up something, some way to get that money back, like a three-dollar filing fee or something.

MR. HUGHES: Well, they may have a three-dollar filing fee, but they may not be providing any translators.

MS. HOBBS: No, but I'm saying when you're a county who needs a translator on staff, you're a judge, you go to your county and say, "We need this translator on staff because we have these jurors who are coming in, and we've got to be able to communicate with them. Here's how

I'm going to fund it, commissioners. I'm authorized to charge this three-dollar fee by the Legislature" or whatever. I'm sure that at the beginning of that situation there was some pitch to the county commissioners of how that was going to be funded, and if that's the case, it seems like your first line is now saying that you can't do that.

MR. HUGHES: Well, no, what I'm saying is, is that if that's the translation service that's provided, you can't tax as court costs.

MS. HOBBS: Yes, but that's not what your sentence says. I see what you can't tax as costs as different than it needs to be provided free of charge.

MR. HUGHES: Okay. Well --

MS. HOBBS: It may just be a drafting issue. I mean, it's a bigger issue obviously, but --

MR. HUGHES: Well, the idea was a certain class of translators -- translation services funded by the county or by public monies will not get taxed as court costs. I took the language "provided for free" from other states, because that's what they said, but the main thing here is that they simply not be taxed as court costs and also I suppose that they not be that -- we don't also have a pay as you go. In other words, "I'm not going to tax -- the court's translator will not be taxed as costs, but if

you want him here you're going to have to pay $50 in advance."

CHAIRMAN BABCOCK: Judge Evans.

HONORABLE DAVID EVANS: I think we need to look at the relationship with 183 and section 57.002 of the Government Code, because it breaks counties into two different categories, those with populations less than 50 and those with populations of more than 50,000, and they set out the circumstances under which you have to have a certified interpreter versus a noncertified interpreter, and they also deal with those who report for the deaf -- I'm sorry, a deaf interpreter is certified, a language interpreter is licensed, and then there's a tie to 21.021 Civil Practice and Remedies Code, which provides for counties to hire interpreters, and those on the bench have -- and it's been in the continuing judicial education, have thought that 57.02 was preemptive in the field as to what interpreters you could use and when you could use them; and if you're in a county greater than 50,000 you have to have a certified interpreter in Spanish, and if you -- and you've got to make a search for other languages within 75 miles or make a finding. So I would think this would just say in any -- would apply to any interpreter appointed under 57 under the law and then that's when you would have to make the findings, and

that's what worries me about the "qualified" terminology, is that there is another category being created. I just see 57.02 as being all-encompassing on all trial level interpretations.

MR. HUGHES: Well, I have seen some cases that treat 183 as a separate grant of authority.

HONORABLE DAVID EVANS: Well, it existed prior to the statute.

MR. HUGHES: Yeah. And I can see taking the word "qualified" out.

HONORABLE DAVID EVANS: Or "interpreter appointed in accordance with the law," and then you just fall in whatever category that you're in.

CHAIRMAN BABCOCK: Tell me why again you would take "qualified" out. You want to have an unqualified interpreter?

HONORABLE DAVID EVANS: Because there's terms of art under 57.001. You're certified if you do it for the deaf, and you're a CART writer. A CART writer is somebody who comes with a realtime type machine and sits there and writes for the deaf while the proceedings are going on so that the deaf person can see the transcript as it comes up, and the department is required to keep a list -- not the judicial department, but the parties that license that group are required to keep a list of CART

writers and then you have to line up a CART writer for the hearing, and we have always taxed those against the county. We just have the county pay that, and part of it -- and then the second part is you have licensed interpreters and you're a licensed interpreter if you're licensed in a language, and whether you have to use a licensed interpreter depends on whether the language is Spanish or not Spanish.

Licensed interpreters have to be used in every jurisdiction -- every county regardless of population, and then in other languages, in counties less than 50 you can get away without using a licensed interpreter for German or any other thing. So you've got to figure out what pigeonhole you fit in, what district you're sitting in that day. If you have a judge who sits in Wichita County and also has a district -- and also has jurisdiction in another county, that judge has to figure out what county they're in for that purpose and that hearing on interpreters. Now, that's part of why I think OCA came up with the support system they did.

CHAIRMAN BABCOCK: You know, the problem, though, of qualifications is an issue. I know California requires certified interpreters unless the language is such that there aren't any certified interpreters.

HONORABLE DAVID EVANS: I just wanted to

make sure that the rule didn't imply that there was another area -- another way to certify --

CHAIRMAN BABCOCK: Got it.

HONORABLE DAVID EVANS: -- interpreters other than what the statute provides and following the statute, certify or licensed or qualify or whatever.

CHAIRMAN BABCOCK: I just don't think we should ignore the qualification issue --

HONORABLE DAVID EVANS: Yeah.

CHAIRMAN BABCOCK: -- because if you don't have a good interpreter, you're going to get an inaccurate record. Elaine.

PROFESSOR CARLSON: Yeah, does the justice department rule speak in terms of covering both interpreters and translators? Because I notice (a) applies to interpreters and (b) is interpreters and translators. One oral, one written.

MR. HUGHES: (b) was interpreter and translation services, such as dial-a-translator, CART, that sort of thing.

PROFESSOR CARLSON: Translators, right, don't they translate from the written word as opposed to interpreters translate the --

MR. HUGHES: That was not a distinction I was sensitive to.

MR. HATCHELL: There was a very lengthy piece in the *Austin Statesman* this week, I think, that I have been looking for that says there is a very technical distinction between interpreters and translators; and interpreters are allowed to sort of assess the situation and give their own viewpoint, whereas translators have to be literal to the language. So I just call your attention to that's out there, and I even think there may be certifications in each, so you might just want to look into that.

MR. HUGHES: Maybe I'll look into that and check because --

PROFESSOR CARLSON: And I guess the flip side, don't the evidence rules require if you want to admit in evidence a document in another language that the party who is seeking to offer the document has to pay for the translation?

MR. HUGHES: Well, this gets into another area that I hadn't touched on, is what are the court proceedings for which a translator might be required, and if you take a very broad reading of the Government Code, they could appoint a translator for depositions. They could appoint a translator for court-ordered mediation. I mean, presently in the valley sometimes we will pay translators -- pardon me, interpreters, to attend

mediation, and that's just an expense the parties have to absorb, and the same goes that if you take a long look at the DOJ's regulation -- their guideline that they published in response to the executive order, there's some broad hints that court documents, not necessarily evidence, but, you know, written communications from the court, warnings, advisories, here's how you do it sort of thing, might need to be translated, too.

The whole question of whether this would -- the interpretation services would extend to depositions, mediations, exhibit conversions, that sort of thing, that's a gray area that's not easily addressed. I was looking -- I think -- I think the main focus of the DOJ's regulation is when this person comes to the courthouse, they ought to be on the same footing. They ought to be able to read what they need to read, to understand the proceedings, they ought to be able to understand what the judge is saying to them. They ought to be able to understand what the judge is telling them, and when they have court-appointed counsel, they should be able to communicate with court-appointed counsel.

CHAIRMAN BABCOCK: Anything else? Okay. Carl and Roger, nice job. Is there enough fodder to maybe come back next time and --

MR. HUGHES: Yeah.

CHAIRMAN BABCOCK: -- not to coin a term there or anything. Okay. Cristina, you're up in place of Justice Christopher.

MS. RODRIGUEZ: Okay. Terrific, and I'll pass around a one-page handout that I didn't get sent in.

All right. I'll go ahead and start speaking in the interest of time. My apologies for not having submitted this memorandum to Marti. It's a short memorandum, front and back, in this copy that was prepared by Judge Christopher, who chaired the committee consisting of Judge Christopher, Professor Carlson, and myself, and it attempts to resolve a conflict in the JP rules and in the county and district court rules on the time frame for requesting or demanding a jury in a de novo appeal of an eviction. So it's a fairly narrow issue, although as y'all know, Judge Christopher's memo states that her court has had a couple of instances where this conflict has arisen and prompted her to make this request.

Judge Christopher drafted the language that is on the back of the memorandum that suggests two changes to make clear that in this de novo appeal the JP rules should govern and that there is not a conflict with the general rule that requires 45-day notice for trial, but rather the JP rule that allows for trial to go forward on as little as eight days govern. So you'll see at the top

of page two of the memorandum, we propose adding a clause that notwithstanding Rule 245, which generally requires 45 days for notice, the eviction case can go forward after eight days; and then the second red language on the second page of the memorandum attempts to reconcile the conflict with -- it's Rule 216 in the civil rules that requires 30 days for a jury demand and allows that in these eviction appeals it remain at three days.

Professor Carlson and Judge Christopher and I did not have extensive debate on this issue. We felt this was a -- perhaps not elegant to use the term of the day, but at least a succinct, reasonable approach to make this clear and avoid confusion for litigants in the court. So happy to take any comments or questions.

CHAIRMAN BABCOCK: Elaine, you down with this?

PROFESSOR CARLSON: Yeah.

MS. RODRIGUEZ: That's an elegant, succinct way to --

CHAIRMAN BABCOCK: Anybody else have any comments on this proposal? Carl.

MR. HAMILTON: I don't think it's going to be possible to get a jury in the county court at law in three days or even eight days for a trial.

PROFESSOR CARLSON: Well, Justice

Christopher assured us she thought it was.

MS. RODRIGUEZ: Yeah, she raised that. She did raise that issue with us in our discussion and felt that that was not a concern, that it would be manageable. She did raise that issue.

CHAIRMAN BABCOCK: Okay. Any other comments? Judge Evans and Judge Wallace think that they could get a jury in this amount of time in county court in Tarrant County?

HONORABLE R. H. WALLACE: I have no idea.

HONORABLE DAVID EVANS: How long to get a jury in Tarrant County?

CHAIRMAN BABCOCK: I'm sure you can. I've gotten them before. Any other comments on this? All right. Hearing no comments, we'll pass this along to the Court. Thank you very much. You are going to be awarded the gold star for the quickest --

MS. RODRIGUEZ: I think it's by virtue of the time of day, no doubt.

CHAIRMAN BABCOCK: Our last agenda item was the garnishment rule, which my notes indicated we completed at the last meeting, but, Carl, you think we didn't?

MR. HAMILTON: Well, we did not complete it because there was some suggestions made about having some

examples, and we did prepare a memo, which you-all have that. We have two examples, two versions. One is a version which has -- on page six it has examples of current wages for personal service, certain personal property, workers comp benefits, and benefits for life, health, or accident insurance policy. These are just some exemptions --

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: -- which we've added to the rule. We also added some language changing "for funds or property" so that that's all consistent, and we added -- there's are some policies -- or "some of the exemptions s which you may be able to claim. It may be in your best interest to consult a lawyer." Then we put into two paragraphs, "Pending a decision on the garnishment, you cannot regain your property unless you put up a bond." That's one way to regain it. The other way is "You also have a right to regain it by filing a motion to dissolve it on the grounds that your funds or property are exempt from garnishment or for other grounds." The "for other grounds" is something that we added to that because there may be other reasons for dissolving the writ of garnishment.

Then we're going to have another version on -- without any examples, but have a comment, which

would inform everybody about some of the things that you could find that are exempt, but we ran into a problem because some of the statutes say certain things are exempt from garnishment. Others say "exempt from seizure" without garnishment. Others say "exempt from forced sale" without garnishment.

Now, Property Code 42.01, specifically says that "The personal property is exempt from garnishment, attachment, execution, or other seizure," sort of suggesting that garnishment is a form of seizure, and if that's true, then some of the statutes that merely say "seizure" and not "garnishment" maybe the court would construe that to mean garnishment as well. Some of them don't use either "seizure" or "garnishment," but talk about "forced sale," but the concept of all of it is that you're getting somebody's property or depriving them of it without a hearing. So it may be that the court wants to consider all of these, the seizures, the forced sale, or anything, as exempt, even though the statutes don't use the actual word "garnishment." So that's why -- because of that confusion we didn't try to create a comment until we get that all resolved.

CHAIRMAN BABCOCK: Okay. Great. Yeah, Elaine.

PROFESSOR CARLSON: You know, that issue,

Carl, came up -- I think Richard Orsinger raised it -- when we were looking at the private process servers. Private process servers can act in lieu of the constable or sheriff except when there is a seizure of persons or property, and I know we had that same concern, and I don't remember how we came out on it.

MR. HAMILTON: I don't either.

PROFESSOR CARLSON: And I know Richard had done a lot of research on that issue.

CHAIRMAN BABCOCK: Okay. What else? Any other comments on this? Justice Hecht, do you have anything else on this?

CHIEF JUSTICE HECHT: No.

CHAIRMAN BABCOCK: Martha?

MS. NEWTON: No.

CHAIRMAN BABCOCK: Okay. Carl, thank you. Thanks for all your work, and thanks, everybody, for all of your hard work. I can't believe we got through this docket today. Good for us.

MR. GILSTRAP: We're not going to do one more?

CHAIRMAN BABCOCK: Huh?

MR. GILSTRAP: We're not going to do one more?

CHAIRMAN BABCOCK: If there's one more to

do, let's do it. I think next time since we're going to take up these discovery rules we maybe ought to plan on a Saturday morning meeting.

PROFESSOR CARLSON: When is our next meeting?

CHAIRMAN BABCOCK: September 16. September 16 and 17, so let's tentatively plan on that, and if there's no other business, then Jane --

CHIEF JUSTICE HECHT: Has the final word.

HONORABLE JANE BLAND: Are we adjourned?

CHAIRMAN BABCOCK: We're adjourned.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

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 10th day of June, 2016, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,731.25 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 6th day of June, 2016.

/s/D'Lois L. Jones
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