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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

April 28, 2017

(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 28th day of April, 2017, between the hours of 9:59 a.m. and 4:52 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: All right. Well, welcome, everybody. I feel like we're in a hospital ward between the Chief, who has a very good story about ninja warriors that attacked him and he defended them off, and you should see them. They're all lying prone in the street, and Justice Bland who has got a cast on her right leg, and my arm, and apparently our long-time member and friend Professor Dorsaneo has had some health issues but is better Elaine reports.

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: So anybody else that wants to report on a medical condition?

HONORABLE DAVID NEWELL: I have a bit of a cough.

CHAIRMAN BABCOCK: Judge Newell has a bit of a cough. So Judge Estevez has got some children at home.

HONORABLE STEPHEN YELENOSKY: Between you and Justice Bland, you have all good limbs.

CHAIRMAN BABCOCK: Yeah, we were together actually, and the people that attacked us --

HONORABLE JANE BLAND: They're worse.

CHAIRMAN BABCOCK: -- are in very bad shape. All right. Well, welcome, everybody, and we'll start as usual with the report from the Chief.

CHIEF JUSTICE HECHT: The -- I went over to the Senate State Affairs Committee yesterday to testify on the judicial pay formula bill, which is moving along incidentally; but Judge Alfonso Charles from Longview was there, and he had hurt his finger holding the reign of his wife's horse out at their place when lightning struck. And so, as Chip said, I told the committee, well, my story is better than that. I ran into terrorists coming over here and beat them all off, and it reminded me of what my father used to say about fishing stories, that the last guy doesn't have a chance, but Judge Charles is in good shape, too.

So just a word about what we've done: We created board certification standards for a new specialty in child welfare law in February. That was after a lot of study, and lots of people were very glad to see that. The Court of Criminal Appeals and our Court made some cleanup changes to appellate Rule 33.1, just, as I say, cleaning up things. The Court is looking at ways to implement the report of the Commission to Expand Civil Legal Services in Texas, so we're working with the Bar on that. We don't want you to think that's gone away. It's just taken us some time to begin to really see that those suggestions are put in place.

On the legislative front, as I say, the

judicial pay formula bill seems to be moving, and we'll hope for that. Please call your state reps and senators if you can. We have bills on bail bond reform that are -- the bill is supported by the Texas Judicial Council. There has been similar reform in other states, and some of it is ongoing, but I think that the bills have a very good chance of passing. There does not seem to be opposition from prosecutors or from the association of counties or the sheriffs, and so we're hopeful that that will be successful. There is a bill to try to reform the way fines and fees are imposed in traffic cases. I may have told you before, we have about seven million of those cases a year. We have 2,100 judges that handle them, 1,294 municipal judges, and 806 JPs, so it's an even 2,100. Seven million cases. They bring in about a billion dollars a year in fees and fines, but 16 percent of the defendants are jailed, and it's not clear whether they should be. So this bill will begin to address those issues.

There's a major effort to improve the handling of mental illness in criminal courts as well as in the probate courts and other courts that deal with these issues; and it's similar to the way we've approached the children's cases, by improving communication between the courts and law enforcement and health care providers

and other types of assistance that weigh in on this. You may know that the Meadows Foundation has begun a 10 million dollar -- I think it it's five-year program to try to improve access to mental health care in Texas, so we're trying to piggyback onto that.

There was a bill to extend the terms of judges in Texas by two years. I don't think it's going anywhere. There's a bill to eliminate straight ticket voting, which may pass. Right now we're only -- there's only one other state, Alabama, that elects judges on a partisan ballot that lets you vote straight ticket, and there's only a handful of straight ticket states left in the whole country. So this is a way hopefully of insulating judges from partisan swayings like we saw in Harris County over the last eight to ten years. And -- but it seems to -- there seems to be some support for it.

So I think that's the major legislation. I'll just report briefly on access to justice. I was telling several of you that I was up in Washington when I fell, and we were doing what we do every year, which is go see the congressional delegation and ask for funding and support for the Legal Services Corporation; and in January the Trump administration, office of management and budget, put out what they call a blueprint that called for zeroing out LSC. And so that -- that kind of frightened us a

little bit, but it's because we don't know how Washington works, and maybe you don't want to know, so I understand that.

But it works in kind of perverse ways, so we were afraid that that would provoke Congress to want to zero out LSC, too; but actually it had the opposite effect, that Congress is very resentful of the executives' interference in budget issues, which they think are their own prerogative. So the zeroing out of LSC actually provoked some of our most conservative members to support LSC when they had not done so in the past. So we need to write the President a thanks on behalf of LSC, but seriously, money is tight, and they may get cut some going forward. We can't tell, but at least our delegation is supportive of legal services; and in the legislature, they have been supportive this time as well as they have in the past. And so I think over the years we really have persuaded policymakers in that branch that Legal Aid to the poor helps society. It's good policy. It's good for the rule of law, and we get a lot of support that we didn't used to get.

We have -- did orders come out this morning?

MS. DAWSON: I haven't seen them yet.

CHIEF JUSTICE HECHT: But we should have -- orders should come out today, and we'll have some opinions

on it, and we should have something like 33 left, and we had 38 this time last year, and so we're on schedule to issue opinions in all our argued cases by the end of June as we have the last two terms. That's my report.

CHAIRMAN BABCOCK: Who is cracking the whip on these guys?

CHIEF JUSTICE HECHT: It's a mean, old guy.

CHAIRMAN BABCOCK: A mean, old guy. All right. First item on the agenda is the discovery rules. And a footnote to that, Bobby probably will -- knows all about this, but I got an e-mail from Kent Sullivan this morning, who is a member of that committee. He could not be here. Apparently there's some -- some court proceeding that came up out of the blue, and he apparently has been interacting with the Governor's office, and somebody in the General Counsel and the Governor are interested in a spoliation rule that has particular characteristics, and Kent was hoping to be here to talk about that, but he asked if we would defer at least his part of discussion about spoliation until he was here for the next meeting. That does not mean that we can't trash him in absentia because that's sometimes the best way to deal with Kent, just to beat up on him while he's not here; but we'll talk about that -- spoliation, the Kent Sullivan proposal -- next time, which does not mean we can't talk about the

committee's ideas about that this time. But I just wanted to alert everybody to that, and the Court is interested in hearing what Kent, who is I guess in a way representing the views of the Governor, what he has to say. So with that, Bobby, take it away.

MR. MEADOWS: All right. So the discovery subcommittee has been working on this review of our discovery rules since last August as a committee, meeting as a committee. There have been individual efforts by committee members to bring issues forward, read and suggested changes, and obviously we've discussed some of our work with this full committee as recently as last February. Spoliation is certainly a topic of concern to our committee as it apparently is to others on this committee, and maybe we'll get to it today as the last item.

The work that we've been superintending so far started at the beginning of the discovery rules, 190, and has progressed through experts essentially. And as I said in my note to the Supreme Court Advisory Committee coming into this meeting, we seem to have as a committee reached a consensus or largely reached consensus around a number of items. We, for example, started with Rule 190, and we've agreed -- as I noted and I want to make sure it's understood, none of this is binding and that we're

going to continue to talk about it. Since we met last time, members of this committee have reached out to me to express continued -- new thoughts and ideas about what we ought to do around certain parts of the rule. So we will as a matter of process keep going.

What I'd like to do today is get through a discussion in this committee of items in the rules that we have not discussed yet, but leading into that, let me just remind everybody of some of the things that we've done. We've agreed to raise the amount in controversy for a level one case to a hundred thousand dollars from 50,000. We've provided that level two cases can be tailored in order to come to the format of choice for litigation. We've called for mandatory conferences in level three cases, and in Rule 191 we have removed the requirement of good cause to modify the procedures and limitations of the rules. In Rule 192 we've made it clear that no discovery can be conducted until after initial disclosures. We've introduced the concept of proportionality to discovery; that is, that discovery needs to be proportional to the needs of the case. We placed that concept in the definition of scope of discovery as well as the limitations on discovery.

We've made initial disclosures and trial disclosures man -- I mean mandatory and dealt with the

content of those, and we've dealt with the question of experts and agreed that draft reports are not discoverable, attorney-client communications -- attorney-expert communications are not discoverable, reports are not required, and that discovery of consulting experts will remain privileged unless there are exceptional circumstances where it might be possible to get to -- to obtain the facts that are in the possession of a consulting expert. And that's largely -- I mean, that doesn't capture everything we've talked about, but that's just a little bit of a refresher of ground we've traveled, which basically takes us to production and inspection in Rule 196. So if you have the material that we sent you, I guess going back to January -- January?

HONORABLE TRACY CHRISTOPHER: Yeah, January.

MR. MEADOWS: It's still the live document, and if you could just turn to Page I think 34, this is, again, the redlined version of our rules with some annotations on the side that explain thinking and points of -- for discussion about changes. We'll just pick up there, but I guess it might -- before we do it we could just pause for a minute and make sure from the Chair and from Justice Hecht that this is the way you want to proceed. That is, we've covered ground to here. What we intend to do as a subcommittee is we intend to take that

work and to prepare it -- a new draft, a new proposal, a new set of suggested changes, along with what we accomplish today. Ideally we would like to get through the remainder of the rules, even spoliation. At least we could have a discussion around spoliation that can be continued when Kent is here next time, but the thought being if we could get the benefit of the thinking around these rules front to back, we could come back next time with a new set of proposals and suggested changes.

CHAIRMAN BABCOCK: Yeah. Subject to the Chief's thoughts about it, I think that's a perfect way to proceed, Bobby. Is that okay with you?

CHIEF JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: The only thing I would say is of the items -- of the six items that you list here that we covered, I know this committee probably spends every waking hour thinking about the discovery rules. So between our January meeting and today, has anybody had any thoughts about the topics that we have already covered that you want to talk about or that we need to discuss again today and if not --

MR. MEADOWS: You understand that's a very risky question, because it invites a review of everything we've done so far, and I know that there are members of this committee who have thoughts about what we've already

done so far because they've already reached out to me.

CHAIRMAN BABCOCK: But if you hadn't called me on it, it would have been a clever way of moving on to the next thing; but nevertheless, anybody want to talk about anything that we've already discussed? Okay. I don't hear anybody, so we'll -- but that doesn't foreclose it.

MR. MEADOWS: No, of course not. And obviously when we come back with a finished product, we'll be talking about it front to back again I'm sure.

CHAIRMAN BABCOCK: Yeah. Absolutely. So Page 34.

MR. MEADOWS: Page 34, Rule 196.1, and with this rule and with the next rule or two, you'll find that largely the changes are stylistic. They're seeking clarity around the purpose of the rules and also involve an effort to conform them to the federal rules. So there are some things we need to talk about, but for the most part they are largely nonsubstantive and mostly stylistic. But starting with Rule 196.1(a), what you should notice is that we have drafted it to specifically cover electronically stored information. So that's new. It makes it clear, and you'll find that throughout the rules that we're bringing that forward as something that is expected in every production, every manner of discovery,

is that you need to produce and disclose electronically stored information. So do you want to -- I guess we should find out whether there's any --

CHAIRMAN BABCOCK: Yeah. Anybody opposed to including ESI information into the -- into 196.1(a)?

It's going to take them a while to get the blood going. Munzinger and Orsinger aren't here, so -- all right.

MR. MEADOWS: Then from there, Chip, until we get to 196.2, the changes are largely formatting changes, changes to a line with "Federal Rule of Civil Procedure 34." When we get to 196.2 you'll see that we have deleted the language that would indicate that you could serve discovery with -- I'm sorry, with the petition, that they cannot have -- cannot receive discovery under this change in the rules until after initial disclosures, and we've made that change throughout the rules.

CHAIRMAN BABCOCK: Okay. What do people think about that? Judge.

HONORABLE ANA ESTEVEZ: I think it's great.

CHAIRMAN BABCOCK: And why do you think that?

HONORABLE ANA ESTEVEZ: Because I -- I think that it's very difficult when I'm doing a default and they

have served admissions, and I have to look at the service, and they said served just the petition and they don't put the admission or they don't attach the admissions to it. I just feel like the person is always -- the defendant is always at a disadvantage. I think that sometimes they give their insurance company the petition and don't give them the discovery that -- I spend a lot of time undoing things that shouldn't have been done, but the rules were there to kind of get you on a "gotcha."

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: So I just think it's more fair.

CHAIRMAN BABCOCK: Okay. Reaching back into the memory bank from when we did these discovery rules the first time, I mean, the initial changes, I think the thought -- and people who were here, correct me if I'm wrong -- but the thought was that would allow the case to get rolling.

HONORABLE ANA ESTEVEZ: But now we have automatic disclosures that will take care of that. So it's going to start rolling the minute you file an answer.

CHAIRMAN BABCOCK: Professor Albright.

PROFESSOR ALBRIGHT: As I recall, it was allowed under the old rules before 1999, and people weren't comfortable in getting rid of it at that point in

time.

CHAIRMAN BABCOCK: Okay.

PROFESSOR ALBRIGHT: So but I agree with her that we now have these disclosures that, you know, wait until the answer. I think when judges say they have problems with defaults, I think it's time to move on.

CHAIRMAN BABCOCK: Okay. Good. Buddy.

MR. LOW: Yeah. How does any of this play with the anti-SLAPP, you know, where you get certain -- you don't get discovery? I mean, I guess there would be no conflict. Is that true?

CHAIRMAN BABCOCK: I don't think so. The anti-SLAPP statute stays discovery and imposes on the nonmovant the obligation to move for limited discovery --

MR. LOW: Yeah.

CHAIRMAN BABCOCK: -- if they want it.

MR. LOW: Yeah, I wasn't aware of any conflict. I just -- there might be other statutes that deal with discovery that I'm not -- because there's statutes I'm probably not aware of.

CHAIRMAN BABCOCK: Well, I don't know, maybe the Medical Malpractice Act, but I don't know of anything other than the anti-SLAPP statute.

MR. LOW: I just have a lot of questions. I didn't have the answers.

CHAIRMAN BABCOCK: All right.

MR. MEADOWS: I also think it provides for an element of parity around the whole kick-off of discovery. If you think about it, the plaintiff is in a much better position to launch discovery because they've been thinking about their case before they file it and certainly before the defendant had any awareness of it; and with dealing with these mandatory disclosures, at least lawyers know what's going to be expected in every lawsuit, and so it's just sort of more of an equal starting position as opposed to getting the petition and being hit with some fairly extensive discovery requests. So I think it adds to the whole efficiency of discovery and the fairness.

CHAIRMAN BABCOCK: Yeah. Makes sense. Jim, you got any thoughts about that? Okay with you? All right. Good. Any other comments on this? All right. You're on a roll, Bobby, keep going.

MR. MEADOWS: All right. So then we get to -- I'm sorry? Okay. We'll move right into spoliation then. Rule 196.2, again, talks -- we talked about that. If we turn to 196.2(b)(1), you'll find that what we've done again in conformity with what we see in the federal rules is that we've made it clear that an objection needs to state with specificity the grounds for it. That's a --

that specificity requirement is a new concept in the rule, and it's lifted from the federal rules, but --

CHAIRMAN BABCOCK: And how does that change current practice?

MR. MEADOWS: Well, now it just says -- the current practice doesn't require that.

CHAIRMAN BABCOCK: You mean you can just say "We object" and you don't say anything? Professor Albright.

MR. MEADOWS: Right. Do you have to provide the grounds?

PROFESSOR ALBRIGHT: If you look at Rule 193.2(a) it says currently that "The party must state specifically the legal or factual basis for the objection and the extent to which the party is refusing to comply with the request," and we have agreed to add, at least according to my notes -- it restates it. We need to fix that, but I think what Rule 196.2(1) is doing is just making it clear that you have to have a detailed response. I think we had hoped with the '99 rules that we would not do away, at least decrease the number of form objections, you know, outside the scope of discovery; but from what I've heard we have not -- that has not happened. Everybody is still making form objections, so I think this is just one more step towards making people put more

specific objections in their written objections and, you know, hoping to resolve some things that way without these form objections that are meaningless.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: The federal rules were written in a different way from our rules. Like, in each one of the categories of discovery they would go through the objection process. Instead we have 193 as a separate stand-alone kind of objection process. So some of what we have done is incorporate again some of the objections within each type of discovery. You know, we could get rid of 193 and put, you know, within each type of discovery the whole objection process if we wanted to, and that's really the way the federal rules do it.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: But we had such a sort of history of case law under 193 that we didn't want to do that, just for ease of practitioners', you know, understanding.

CHAIRMAN BABCOCK: Yep. Justice Busby.

HONORABLE BRETT BUSBY: I guess two questions and comments. Is the word "grounds" here intended to be something different from "legal or factual basis" in 193.2(a), and if not, maybe we ought to just stick with the terminology we're already using so that

we're not suggesting a difference there. And then the second question is it says at the end "including the reasons." Does that relate just to the privileges or also to the grounds for objection? And if so, how is it different from the grounds?

MR. MEADOWS: The term "grounds" I believe is lifted from the federal rules, so -- I don't think it's intended to be any different -- any different concept or scope than what we have in our rules.

PROFESSOR ALBRIGHT: "Reasons" came forward, too.

HONORABLE BRETT BUSBY: I guess it seems to me if our rule has used "legal and factual basis" rather than "grounds" we should probably do that throughout just to be consistent; and if "reasons" is also the same, then maybe we don't need that, even though the federal rules have it.

CHAIRMAN BABCOCK: Frank, then Robert.

MR. GILSTRAP: Since we're keeping 193.2, what's the purpose of repeating the language later on every time? I mean, and when we repeat the language later on, are we meaning something different from 193.2, or is it just the same thing?

MR. MEADOWS: It's essentially the same. It's for clarity. It's for alignment of the rules and

clarity when, our view, it doesn't come at any cost. Now, if we're identifying some dislocations and possible problems, then we can deal with those; but we're not trying to do anything more than just make -- create alignment, create clarity, improve performance.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: One of the issues that came up in the federal rules with this provision, the one that they added, was that a responding party could be put in a position of having to find the information that they're not producing and then provide detail about those documents. I think that we want to avoid a circumstance of somebody's making an objection that the documents are beyond the scope of discovery or not discoverable for whatever reason, that you don't have to go find those documents and then provide the detail about them to meet the requirements of the rule. So I just want to point that out as an issue, and I think that was addressed in the notes in the federal rules where it was clarified on that.

HONORABLE TRACY CHRISTOPHER: And I understand that issue, but we also see in the trial court someone will object that something is overbroad, you know, "Oh, it's going to be so burdensome to produce these documents"; and then you ask, "Well, you know, have you

made -- have you taken steps to see it's really overbroad or that it's going to be burdensome," and a lot of times they haven't. So it's kind of a fine line --

MR. LEVY: Right.

HONORABLE TRACY CHRISTOPHER: -- between, yes, I agree with you, they shouldn't have to collect this huge body of documents, but at the same time they should make an effort to show that it's a huge body of documents.

MR. LEVY: And I agree with that.

HONORABLE TRACY CHRISTOPHER: So I don't know exactly how to word it to make sure that that's accomplished.

MR. GILSTRAP: How are you wording it? Is that for the word specifically?

HONORABLE TRACY CHRISTOPHER: Well, I mean, one of the things that we added in 193.2 is are -- you know, are you holding -- withholding responsive materials. Okay. Because, you know, that was also part of the problem with these sort of global document requests. And, you know, if someone has a better idea on how to do it, we would be glad to hear it; but, I mean, that's really the issue. So, you know, somebody will say, "Well, that's overbroad or burdensome," but they haven't really checked to see what's involved in doing it. Or they'll say it's overbroad and burdensome and won't make an effort to

actually produce what they consider to be not overbroad. So, I mean, that's where we see problems in document production and the nature of our objection process.

MR. LEVY: If I could, just the challenge, though, obviously is that if you say that "Responding to this will require me to review and produce another hundred thousand documents that I had to find and identify to make that objection," and at that point you're half the way there, and even the preparation for a detailed objection of that nature would itself create a significant burden, and so I take what you're saying. I think a lawyer needs to make a prima facie showing that's more than just "I think intuitively this is going to be difficult for me."

HONORABLE TRACY CHRISTOPHER: Right. You know, I mean, I've gone to different seminars where people say, "Well, you know, the best way to do it is to say things like, you know, 'We've given you the documents from the computers of these four key people,'" all right, and "We're not -- we're not going to the 40 other people's computers who might have been cc'ed, you know, on these documents.'" As a way to understand I'm being responsive, this is what I'm doing versus, you know, this humongous universe of tracking down everyone who might have gotten a copy of, you know, the four key players' documents. I mean, it is very difficult in the electronic discovery age

to -- and that's where you most often get the problems obviously --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- in crafting a way to explain that obligation to at least say, "This is what I've done," and, you know, "This is what I think is proportional to the discovery. These are the, you know, four main decision-makers or five main decision-makers that worked on this project, and, you know, we have given you their documents." Any suggestions? Help.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, it is a problem in trial courts; and as an example, I mean, this is kind of an extreme example, but I see it. You get a request: "Any and all documents relating to -- pertaining to or supporting your claims in this lawsuit." Okay. That's clearly overly broad. Now, is the recipient of that request then under a duty to go out and try to parse out and figure out, okay, here's what you really want, or should maybe there be a procedure. You rule on that objection. You say, "No, that's overly broad," and then they submit a more properly limited request or something of that nature. It is a problem, and that's the kind of thing -- same way with privileges. Sometimes with that type of request there's probably privileged documents in

there. So does the recipient need to say, "I'm withholding documents on the basis of privilege," or wait until there's a ruling on the -- whether or not that's a proper request.

CHAIRMAN BABCOCK: Does the request that you just outlined -- does that implicate work product?

HONORABLE R. H. WALLACE: It would implicate everything, what I just asked. I mean, just "Any and all documents relating to or pertaining to," but it may, but if they narrowed it down it may not.

HONORABLE TRACY CHRISTOPHER: But even a document request that says, you know, "All documents about the -- that concerned the drafting of the contract at issue." Okay. Even something that's tailored like that, again, in the electronic age in a big company can just be this --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- you know, huge amorphous, you know, who might possibly have, you know, seen a copy of a draft somewhere along the road.

THE COURT: Professor Albright.

PROFESSOR ALBRIGHT: I think our rules already deal with that issue to some degree if people will follow it. 193.2(b), duty to respond when partially objecting. So you would have an obligation to respond to

it to the extent that you think it is appropriate. Like you can say, "I'm producing these documents from these three people's computer files," and then it says if -- unless it's unreasonable under the circumstances to do so before obtaining a ruling on the objection. So you can say it's -- for me to even get into this is burdensome, so, "Judge, I need some guidance from you as to what the parameters are here." So I think that there is a procedure here for dealing with those issues.

CHAIRMAN BABCOCK: Okay. Professor Christopher, and then Roger. I mean, Justice Christopher, not Professor Christopher.

HONORABLE TRACY CHRISTOPHER: I'm sorry. I thought we were going to have another professor here.

CHAIRMAN BABCOCK: Sorry, although you're very professorial.

HONORABLE TRACY CHRISTOPHER: I'm hopeful -- I'm hopeful with the change to level three and, you know, the initial conference that you're supposed to have that that will help in a lot of these, you know, big document cases. So, you know, to have that automatic procedure that has to, you know, take place.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: I agree with Alex that there are ways under our rules to handle it, but

people don't seem to do it very well.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN BABCOCK: Roger, sorry.

MR. HUGHES: Well, the way this is phrased about "State with specificity the ground for objecting or request of certain privileges" I have two things. The first is it almost seems like we're ending up nullifying the original rule, which hasn't been changed. It's 193.3 about -- that you respond to the request by stating that you're withholding responsive material and stating the privileges asserted, because this seems to go further. Now, it's not enough to comply with 193.3 and just say, "I'm withholding responsive documents because of an attorney-client privilege." You practically have to explain the privilege, and the way we did this originally was is if you want to know what it is that's being withheld, ask for a privilege log before you go running to a court.

Now, I understand that 193.3 doesn't apply to the vague and overbroad objection, which, frankly, I now see in almost every response to a request for production, and I can understand that people going -- it's being overused. People haven't even really tried to find out. To that I say, well, my first concern is if you leave this in place, in order then to make a vague or

overbroad objection I practically now will have to write the motion for protection without the affidavits; and so you're adding an extra layer of expense simply to give the other -- to make a sufficient objection, and I'm not sure it's necessary given the rest of the changes.

Now, of course, we haven't enacted -- one is before anybody starts filing these motions, somebody has to pick up the phone and call the other side; and maybe that's where one side can go to the other and say, "Have you really looked? You know, what's the universe of documents we're talking about here?" And the other thing that stays the hand, of course, is that we're tightening up under Rule 215 about sanctions, that someone who has -- who can't justify and makes the pro forma objection may end up facing sanctions, attorney's fees.

The alternative is if someone wants to jump the gun and say, "I'm going to send you an e-mail and then -- about explaining this overbroad stuff" and then five minutes later files a motion to compel. They, too, may be facing sanctions. So I think the way to deal with the concern about, you know, form objections of overbroad, unduly burdensome, is that rather than have the person practically write a motion for protection and put it in their response, you simply rely on the confer before you file a motion to compel; and if you've made this objection

and haven't even done a lick of homework, you're looking at sanctions. That's my response.

MR. MEADOWS: So this has been helpful, and a quick caucus over here with the discovery subcommittee. What if we changed this to state that you either -- that you either perform or you state -- or you state an objection under Rule 193? And just delete the language "state with specificity the grounds" and the rest of the sentence, just say, "or state an objection under Rule 193."

PROFESSOR ALBRIGHT: "Objection or privilege."

MR. MEADOWS: "Or privilege under Rule 193."

CHAIRMAN BABCOCK: Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: Bobby, I think this example here is an illustration of it's hard to draft generally, and I think you're seeing it's made harder still when you try to borrow parts of the federal rule, but you have to modify them to fit. So like the federal rule, as an example, doesn't talk about privileges at all. 34(b)(2) that you referenced, and so you end up with Justice Busby's very good observation that it's confusing when you add in the phrase "including the reasons." Was that meant to be limited to privileges or not? Well, privileges doesn't show up in the federal rule, but it was

in our original state rules. So sort of layered on top of this I think you have a point that Frank was making, and it's worth repeating. I think if it's in the rule now, while you may have the ambition of making it more clear by repeating it in other places. "Hey, we already said that in 192.3, don't forget, you've got to be specific in your objections." You end up with a lot of ambiguity and what was your intent, and the game may not be worth the candle here. So my suggestion to think about is we may be better off not making any change here. You're gaining very little, and you're running a number of gamuts that are hard to run it seems.

CHAIRMAN BABCOCK: Can I ask, Bobby, a slightly different question? We now are going to adopt proportionality, if what we've done last time is accepted, what kind of objection is appropriate when you're claiming that proportionality has not been met? Do you do an objection and just, you know, cite the factors, or do you take the factors and expand upon them and talk about them factually and what the legal basis is? What's our thinking, if we have any thinking on that topic?

MR. MEADOWS: I don't know that we have any collective thinking on that. My thinking is that you would make the objection around the language that describes portionality and the limitations on discovery.

CHAIRMAN BABCOCK: Okay. Yeah, Roger.

MR. HUGHES: Well, of course, I wasn't here last time, so I didn't quite get to be involved, but I think that's -- this is an important question to answer right now, because maybe it's because I come from an insurance background, and I tend to think of things is it covered or is it killed by an exclusion. The question is, if we're going to get into a discovery battle over proportionality, is the discovery being proportional something that the requesting party has to prove? In other words, they have to show it's within the scope of discovery, and, therefore, they have to show it is proportional as a need.

Or by raising the objection is this a form of the unduly burdensome, therefore, putting the burden on the responding party to show that it's not proportional. I think that's going to inform what kind of objection it's going to be so that -- and to bring it to a fine point. Is the party objecting when he says it's not proportional, essentially this isn't within the scope of discovery because it's not proportional? Or is the person saying it's within the scope of discovery, but it's not proportional, so therefore, it's like unduly burdensome? And like it may be this is just something and we just say they can make the objection and we'll let the court

straighten out who has the burden of proof, but I think it could be an issue that might be worth resolving now as a rule or may be too much trouble to resolve

CHAIRMAN BABCOCK: Yeah. I asked the question borne of some experience with the federal rule. Robert.

MR. LEVY: That's what I was going to reference. This question came up in the discussion of the federal rule, and the issue was does it shift the burden, and the federal rules and notes say that there's not an intention to shift the burden on either the requesting party or the responding party, and it's basically addressed a couple of ways. One is that a responding party would object to the discovery as being outside the scope of admissible discovery based upon either that it doesn't relate to the claims or defenses or that it's not proportional. And then either that party can then seek a ruling on the objection or the requesting party can then seek -- you know, move to compel to the extent that they're not able to resolve it. And then obviously when you do produce documents, you would indicate that you're not producing documents based upon your objection so that you don't just make the objection and then give them everything. So I think that that issue probably would work out similarly in this scenario, that instead of

making proportionality a basis for an objection or for relief it informs the court about whether this is permissible discovery and then the parties have to address that issue.

CHAIRMAN BABCOCK: Okay. The reason I asked Bobby the question is because I had an experience in a federal court, not in Texas, not too long ago where the objection to a request for production of documents was made, and one of the objections was not proportional to the needs of the case. It was asking for way more documents than would be necessary for the case and then just listed the factors, and the court said that that wasn't a sufficient objection. You had to take the factors and then say how each factor applied to the situation at hand and which makes some sense. It also increases the burden of responding to discovery. But Jim. Oh, I thought you raised your hand. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I mean, I think we already have that problem with respect to burdensome, just in terms of what we've talked about before.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: When you say something is burdensome, I expect you to have an affidavit from somebody that says it's going to take me, you know,

10,000 man hours to find these documents. You know, that's my estimate, and this is a case for $50,000.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: So that's not proportional. It's burdensome, and it's not proportional. So, I mean, once you get down to the proof I think you have to have something -- I don't think the actual written objection has to state that, but when you're at the motion to compel for the protection point --

CHAIRMAN BABCOCK: That's when you've got to do it.

HONORABLE TRACY CHRISTOPHER: -- I would expect that sort of evidence.

MR. MEADOWS: You have to establish it.

CHAIRMAN BABCOCK: Right. That makes sense to me. The question is whether or not you've got to in the objection say just what you said. "It's not proportional because this is a $50,000 case, because I'm a small business with only three employees; and it will take, you know, two weeks of working to find this stuff." "This isn't important because" -- you know, whatever. You have to do all of those things in the first step. Somebody had their hand up here. Frank, and then Professor Albright.

MR. GILSTRAP: Well, I just -- you know, in

the real world what's going to happen is proportionality is going to be added to the list of boilerplate objections every time.

CHAIRMAN BABCOCK: Every time.

MR. PERDUE: Yep.

CHAIRMAN BABCOCK: Every single time. Professor Albright.

PROFESSOR ALBRIGHT: I just want to make clear that the Court has recognized that some objections don't need any proof at the hearing. Some are overly broad and not proportional on their face, and I don't think any of this -- I just want to make clear that this discussion does not prevent a court from saying a request is overly broad or not proportional even if nobody puts any evidence on.

CHAIRMAN BABCOCK: Yeah. I don't want to beat the -- beat this horse to death, but to take Buddy -- you know, Buddy is very interested in the anti-SLAPP statute now. So you get a case that is arguably subject to the anti-SLAPP statute, and nevertheless you're in federal court and discovery is tendered. Is it enough in your objections to say, "In addition to the anti-SLAPP statute barring discovery, because there's an automatic stay, in addition to that, it's not proportional and under the very first prong, considering the importance of the

issues at stake." Well, do you say that by rote, or do you say, "This is a case involving speech, and burdensome discovery in a speech case is a very important issue of constitutional dimension; and therefore, the issues are very important on the subject of non -- on the issue of nondisclosure, and so you ought to take that into account," and that's got to be in your response. That's the question I'm raising.

MR. LOW: But first in anti-SLAPP you've got to get permission to get discovery.

CHAIRMAN BABCOCK: Well, maybe in federal court you do; maybe in federal court you don't.

MR. LOW: Well, the way I read the rules, but --

CHAIRMAN BABCOCK: There are cases that say the --

MR. LOW: I know there are cases that go everywhere.

CHAIRMAN BABCOCK: -- anti-SLAPP statute, the state anti-SLAPP statutes, conflict with the federal discovery rules, and when there is a conflict, the federal rules prevail over the anti-SLAPP statute.

MR. LOW: There are cases that you can find almost that are coming out daily, and there's going to be a lot of conflicts. That's what worries me.

CHAIRMAN BABCOCK: Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: So kind of circling back around to the language here and kind of using this as another example of where I always worry about changes and the unintended effect. So to kind of link up to Chip's comment, look at 196.1. Y'all have added under (a), 196.1 -- you've added under (a), "within the scope of discovery." So, again, I understand partly what you were trying to do. You were trying to turn to Rule 34 on the federal side, but this precisely triggers many of the same questions that Chip is raising. And my point is it seems to me that as rule-makers we should always start with this premise of do no harm, and so the question is are we actually making things better here by making that change. Is it even necessary to add that in there, or is it likely to lead to even more confusion for poor souls like Chip who have to actually deal with these rules on a daily basis? Unlike me, I get to sit in the tower.

CHAIRMAN BABCOCK: Poor injured souls, by the way.

PROFESSOR HOFFMAN: So my point is here is another example where it's not at all obvious to me how we're making thing better, but I can show you that there are going to be folks who are going to be confused by what the intent and import of the change is.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to make a comment that some of these -- this draft isn't necessarily our recommendation. It was the charge that was given to us, and the charge that was given to us was to compare it to the federal rules, and so we don't always have an opinion. And you'll see on the side, but we put in those words and we underlined them for us to discuss whether or not that's what we want to do or not. And when we do have a strong opinion we do bring it up. "This is something we would really like to change."

So those were words and when you get to the rules that at least I worked on, I put in everything that the federal rule had that we didn't have so that the committee may decide that it's something they want to do, and they can see it right there on what the federal rule had done and what we did and how they compare in a very easy way, which is why you don't like it, because it's so obvious to you that it may change something. Whereas if we had it right next to each other, it may not be that obvious

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: So I'm just defending our committee, our subcommittee.

CHAIRMAN BABCOCK: Nobody is attacking your

work product. Well, I mean --

HONORABLE ANA ESTEVEZ: Well, I guess, you know, I think the issue becomes as a judge you always hear somebody say "you," "you," and so it seems almost like a side bar, and it's not necessarily us. Do you know what I mean?

CHAIRMAN BABCOCK: No, I know exactly what you mean. We're just --

HONORABLE ANA ESTEVEZ: I know. Okay, fine.

CHAIRMAN BABCOCK: We're trying to get to the goal line.

HONORABLE ANA ESTEVEZ: I'm sorry.

HONORABLE DAVID NEWELL: Stay strong, sister.

HONORABLE ANA ESTEVEZ: I'll just withdraw my comment and say some of these aren't necessarily our suggestions, so if you strongly feel about it --

CHAIRMAN BABCOCK: But you raise a great topic that as soon as Bobby gets his hand --

HONORABLE ANA ESTEVEZ: Now Bobby is going to say, "No, I really believe in this."

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: No, well, I think this is very helpful, and I don't have Justice Hecht's letter in front of me; but as I recall, our principal assignment was to

examine our rules. It's time to re-examine our rules to see if they can be made more efficient, more effective for resolving litigation in a less costly way, and that work was to be informed by the federal rules.

So our committee, looking at a very big job, took -- divided up the rules and went off. Harvey Brown had this set of rules; and Ana had, when we get to the next, the interrogatories, she -- or Cristina did. I can't remember, but everybody went off, and they studied the federal rules in the context of our rules with that assignment in mind of can we make things more efficient, better, and have greater alignment with what's happening with the federal rules because practitioners deal with both for the most part.

So this, the only thing I would take issue with Ana, is that this is essentially our recommendation. It may be that we were misguided in the scope of our assignment, and this discussion may -- is important to us because maybe we ought to go back and have a different light that shines from Lonny on how this ought to be done in terms of, basically, don't touch anything; and, you know, frankly, I don't -- I don't really know. I think -- I think there is some value in consistency and parallel understanding of what you're supposed to do in discovery, whether it's federal court or state court

CHAIRMAN BABCOCK: Yep.

MR. MEADOWS: To me, having the words "within the scope of discovery" in this rule is of no moment. To me I don't have any problem understanding what's within the scope of discovery. I think any lawyer in this room can lawyer something to the dirt; but to me that's pretty straightforward, and it's just borrowed from the federal rule. If we should be avoiding that, that's a different kind of assignment.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Because you're going to see all of this work populated with stuff that's in the federal rule amendments.

CHAIRMAN BABCOCK: Bobby, you do a lot of practice in federal court. The new proportionality rule has been in effect for about a year and a half. Is it -- is it working, not working, too early to tell?

MR. MEADOWS: Too early to tell. It hasn't -- I don't really see it -- in the matters that I'm dealing with, the lawyers figure this stuff out on the front end for the most part in terms of what the size and shape of discovery. I mean, there are fights about it, but I haven't gotten in any huge fights about proportionality.

CHAIRMAN BABCOCK: Professor Albright,

anything in the literature? Has there been any study about whether these proportionality rules are working out well?

PROFESSOR ALBRIGHT: I'm sure there are, but I haven't read them, I will admit. I do know that Judge Rosenthal thinks they're wonderful.

CHAIRMAN BABCOCK: I wonder why.

PROFESSOR ALBRIGHT: Yeah. You know, I do think what we have to deal with in Texas are some state court judges who just do what they want to regardless, so you can't -- you know, a state court judge is not going to make people make specific objections. They're not going to make them. I think what we can do with our rules is try to present a practice that is -- that we hope people will follow, and I think what we did in 1999 has done that a lot. And now people are used to that, excuse me, and we can move forward some more, and I don't think that these changes that we're making here are anything extraordinary, but I do think what we're dealing with now has changed extraordinarily even from 1999 because of electronic discovery, and we have to do something to give the judges who want to make things more reasonable, give them the tools to do so.

CHAIRMAN BABCOCK: Yeah. Chief Justice Roberts in his state of the judiciary speech in I think it

was 2016, so right after the amendments were adopted, described them as not looking like a big deal, but they are a very big deal; and the question or concern that I have is that any time you change something, you add a new element of complexity into the practice. And one of the biggest issues in discovery in Texas state court, I think, and in federal court, but that's not our problem, is the cost of discovery on both sides of the docket. And I think we need to be thinking about whether or not adding another thing to be concerned about, to worry about, to inject into our rules, as Professor Hoffman says, you know, when you start, you know, putting in "within the scope," now all of a sudden, oh, now I can go back to the rule that talks about proportionality, and I can --

PROFESSOR ALBRIGHT: Well, honestly, how does "within the scope" make a change?

CHAIRMAN BABCOCK: Because our proportionality proposed rule is 192.4(b), "Limitations on scope of discovery."

PROFESSOR ALBRIGHT: Well, aren't you supposed to think about that when you write your requests?

CHAIRMAN BABCOCK: You are. You are. Absolutely. I'm just saying is proportionality a neat enough idea that we need to be putting that into our rules? I mean, it's definitely within the scope of what

we're asked to look at.

PROFESSOR ALBRIGHT: Well, I think then that's the question of Rule -- how we're going to change Rule 192. I don't think that's really the issue of Rule 196. If we don't want to --

CHAIRMAN BABCOCK: I think that's probably right.

PROFESSOR ALBRIGHT: If we don't want to put proportionality in it, that's something to address in Rule 192.

CHAIRMAN BABCOCK: Yeah, I think that's probably right. Professor -- why do I keep calling you professor today?

HONORABLE TRACY CHRISTOPHER: I don't know.

CHAIRMAN BABCOCK: Get her off the bench.

HONORABLE TRACY CHRISTOPHER: I'm looking good today.

CHAIRMAN BABCOCK: Justice Christopher, a very smart judge.

HONORABLE TRACY CHRISTOPHER: So I guess I would like -- I mean, our charge was to make our rules look more like the federal rules. So we've done that. We've incorporated some of the language in the federal rules, and if the committee doesn't want that, that's fine. But, you know, we can go through every single one

of these rules and people will say, well, you know, do we really want to make this change? We have identified some substantive changes that we've already -- that we've already talked about, and I think most of them from here on out are just sort of -- I mean, I think we would have to take a little break and look through it to see if what's from here on out is a substantive change versus a stylistic change. So, for example, I mean, some of the substantive changes that we did was to, you know, increase level one, make the mandatory conference, include proportionality in the scope of discovery, expert reports, draft reports protected. I mean, those were big substantive changes that we presented to the committee, and we can double-check; but I think from here down, other than spoliation, it's more stylistic.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: To make it look more like the federal rules. And if we don't want to do that, you know, we don't need to talk about every single little change we've made and say, "Eh, I don't really like it."

CHAIRMAN BABCOCK: Yeah. I don't -- I was trying to see if I had the referral letter. I don't think it was the Court's intent -- and Justice Hecht, Chief Justice Hecht, had to step out for a minute. I don't

think it was the Court's intent to say, oh, let's go look at what the feds do and just copy them. I don't think that was the intent, but he can correct me if I'm wrong. I think it was more they've done something major. Let's see if what they did made sense, and if it does make sense, let's borrow from it.

HONORABLE ANA ESTEVEZ: Yeah, but when we asked for clarification he said go ahead and look at it all.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR ALBRIGHT: And I think we felt that things like proportionality were a good -- I think the sense of our committee was something like proportionality was a good thing to do. Otherwise, we would have said the federal rules include proportionality, and we think we're not ready for that, but our sense of the committee was that we were.

HONORABLE ANA ESTEVEZ: We thought it would save you money, too. So when you were talking about the cost of discovery, we thought it would be a cost-saving objection, not something --

CHAIRMAN BABCOCK: And the cost-saving would be that even though it would be a little more effort to --

HONORABLE ANA ESTEVEZ: Avoid it.

CHAIRMAN BABCOCK: -- suggest that the

discovery request was not proportional then when you get to court and the trial judge has this tool they would not order discovery because it's not proportional even though it might be marginally relevant --

HONORABLE ANA ESTEVEZ: Right.

CHAIRMAN BABCOCK: -- or reasonably calculated or whatever it may be.

HONORABLE ANA ESTEVEZ: It was actually to make it cheaper.

CHAIRMAN BABCOCK: Cheaper in the long run.

HONORABLE ANA ESTEVEZ: In the long run.

CHAIRMAN BABCOCK: Yeah. Robert.

MR. LEVY: I think one thing that supports the idea of putting the reference to scope in this particular rule is that one of the issues that came up on the federal rules is that with proportionality, for example, that language was by and large already in the rules, but it wasn't being properly applied. And so the focus was make the reference in the scope of discovery to push the parties and the court to look at that in one context; and here it's a similar issue that I think is a positive, that with all of these discovery requests you, do need to have them within the scope of permissible discovery, and making that link reinforces that.

I will, though, also, in response to your

question about studies -- there are some studies that are being done on proportionality. Duke University is doing one, and there have been some reports, summaries of cases and developments, and I can get those to you. Tom Allman, who is at University of Cincinnati has been doing a review of key cases; and John Barkett, who is on the rules advisory committee, has also prepared a one-year out review of the cases, and it's very instructive on what the courts are doing. I think it -- anecdotally it's having an impact. It's slow. Courts were still -- even after the rules were adopted, they were -- some courts were issuing opinions talking about leading to the discovery of admissible evidence as a standard, but I think the trend is positive that it's trying -- that it's accomplishing the goals of trying to rein in some of the costs of discovery and keep the parties focused on information that's going to help the fact finder.

CHAIRMAN BABCOCK: Yeah, that's helpful. I'd love to see those studies if you can send it to me. You might send it to Bobby, too. Yeah, Bobby.

MR. MEADOWS: Just quickly for a point of reference because we're all reaching back, I have Justice Hecht's letter in front of us assigning us this task, and he says, "The Court requests that the committee review part two, section nine of the Rules of Civil Procedure and

consider whether changes should be made to modernize the rules, increase efficiency, and decrease the cost of litigation. The committee should specifically consider the December 2015 amendments to the Federal Rules of Civil Procedure and the attached proposals of the State Bar Rules Committee."

CHAIRMAN BABCOCK: Yeah, which is what I thought. Buddy.

MR. LOW: You're absolutely right. When we first did the discovery rules, the charge was to reduce the cost. We -- that was the main charge, and there would be questions asked, well, that rule sounds fine, how does that reduce cost, and the Court surely hadn't lost sight of that.

CHAIRMAN BABCOCK: Right.

MR. LOW: That was --

CHAIRMAN BABCOCK: I mean, I don't know about everybody else, the practitioners in the room, but I think by far the biggest complaint I get from clients, whether I'm plaintiff or whether I'm defendant, is about the cost of discovery.

MR. LOW: We had one company I represent, it was going to cost us close to a million dollars in a 500,000-dollar lawsuit. I mean, I don't know how. I didn't go back and see their figures; but I asked Bobby a

question that when I'm thinking of how to reduce the cost, something that occurred to me and apparently is not a good idea because nobody has ever done it; but I asked him if there were any states that just had a simple discovery rule, that you get bare bones, you get so much interrogatories. That, and if you have, you want more. You have to request it, and the standard the court is to go by is proportionality. And he said nobody ever -- and I can understand, because our discovery rules are so vast now. You would have a revolution if you tried something like that.

CHAIRMAN BABCOCK: Well, maybe, maybe not, but Robert, isn't it true that your company spends how much per year just on litigation hold notices?

MR. LEVY: We spend I think probably 8 to 10 million dollars just on the various aspects of the litigation holds and the impact to the individuals that are subject to holds. We have holds, thousands of people on hold, and over 90 percent of the time we never have to collect their data because it's not called for, but we obviously do the preservation. We collect substantial amounts of data even when we do collections. In one recent case, over 25 million documents were collected and probably about six -- maybe 600,000 actually were produced. So we do a tremendous amount of data

collections when -- and, you know, Microsoft did a very instructive letter about this where they did a detailed analysis of the volume of information they put on hold, the volume that's actually run through collection versus the volume that's actually used at court in trial; and it was literally a one to two million range from that which is used at trial versus that which is held; and it just is a tremendous amount of lost opportunity, tremendous amount of cost associated with the actual preservation and collection efforts.

CHAIRMAN BABCOCK: Yeah. Yeah. The flip side of that story is that people worry that if you don't have that kind of a system in place, that the -- that the document that gets into evidence in trial will never be disclosed because it will be -- it will be lost in the -- you know, up in the ether of documents that are not saved or documents that are not searched for.

MR. LEVY: What Judge -- Justice Christopher was talking about, I think, or Professor Christopher, that I think the -- what most parties I believe do is what she was suggesting. You look at the core custodians, the people that are going to have the information that are involved in the transaction. You get those four people. You put another 10 people on hold, but there are another 20, 30, or 40 people that might have had interaction at

some point or another, and do you put all of them on hold? You end up putting the whole company on hold and then you get information overload. So I don't think the risk of losing that key information is that great, but we're not -- we're not in a world where all data is always obtainable, preservable, and discoverable, but that has never changed. In the days of paper you had the same problem. It's -- you focus on what is the core information that's going to assist the fact-finder, good or bad, and you provide it. And I think that these changes or the goals that we're trying to achieve will not impact that outcome, which is you're still going to have the information that relates to the case preserved and produced.

CHAIRMAN BABCOCK: Yeah. Yeah. Okay. Well, sorry to digress on that, but it's important because, you know, what -- you know, here's another opportunity for us to hit a home run on discovery rules, which is a huge problem in our civil justice system, driving people out of our system, and so I think it's an important issue to talk about.

MR. MEADOWS: Well, no question, and this conversation is very helpful in terms of what we do next as a subcommittee and as a committee at large. The -- between here and spoliation, Justice Christopher and I

have identified, I don't know, half a dozen or so items that probably would be considered substantive; and we obviously should talk about those, but I think that before we just drop the task at hand, which is examining what we've already done, we should get maybe some sense of this room and our assignment. Because there's no question but that we've done things to -- in our judgment, that will make the litigation in Texas state court more efficient and less costly. And we've talked about a lot of those: What we want to do about expert discovery, what we want to do about the mandatory disclosures, what we want to do about how to manage level two cases, the default area of most litigation.

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: We've done all of that. The federal rules have really been imposed on this effort because of their treatment of ESI, and we have largely accepted that examination and how to deal with ESI in these rules, and we can talk about whether or not we want to take a step, you know, out beyond what the federal courts have done. But for the most part I think the federal courts have been pretty sensitive to the effect that ESI discovery has on the cost of litigation and tried to cap it down. So that's in here. Otherwise, I think what we're dealing with in terms of harvesting from the

federal rules is we've just tried to clean up our rules after all of these couple of decades we've tried to make them -- reformat them a little bit, clean them up, borrow language that we thought was benign. I guess the real question is whether or not we should be doing that.

CHAIRMAN BABCOCK: Oh, I think for sure you should be, but -- but I don't think -- I don't think it was the thought and not that you have crossed a boundary or anything, it's just I don't think we necessarily thought that we should just accept the federal rules just because --

HONORABLE JANE BLAND: We didn't.

HONORABLE ANA ESTEVEZ: We're not saying --

MR. MEADOWS: By the way, we really -- I think before I read from Justice Hecht, I think I fairly described our assignment, which is make it less costly, make it more efficient --

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: -- take into account the federal rules. We've done that. I could point to any number of places -- and we'll probably bump into them -- where we considered what the federal rules did and rejected them.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: One day deposition, no more

than seven hours. We said we don't need that because we've got a six-hour rule that takes care of it. You know, there are places where we just thought we had something that was better. Didn't consider it. So we didn't just take wholesale the federal rules and put them on top of what we have. But that does -- but that doesn't escape the issue that I think Lonny has been raising, and that is we did -- if it was our judgment, we could use something that essentially said the same thing.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: It was cleaner, it was formatted differently, more clarity, we took it, and I guess the question is should we re-examine that?

CHAIRMAN BABCOCK: Well, I don't think so, but -- and, you know, don't have a thin skin about this.

MR. MEADOWS: Don't worry. I've been here a long time.

CHAIRMAN BABCOCK: You guys have done terrific work, so don't think anybody is attacking your work. Yeah.

HONORABLE ANA ESTEVEZ: Well, I think that what I liked about doing that, just for the practitioner that practices in both state court and federal court, I think they're really going to like it because we structured it in the same order. So when they're trying

to go back between the federal rule and the state rule, I mean, the numbers aren't going to match, but the order is going to match, and they're going to know right off if it really is very similar or if it is the same thing or not. And so I think we really made it -- I don't know if it ends up being cheaper, but I think it made it easier for the practitioner.

CHAIRMAN BABCOCK: Yeah. That's a good point. That's a good point. Okay. Well, Bobby, sorry about the lengthy digression here, but why don't -- why don't we move through and talk about the language change that you and Justice Christopher think we should look at.

MR. MEADOWS: Okay. We can -- so you want to go to the things that we would point out as clearly substantive and talk about those?

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Or you want to just continue to plow through what we've already done?

CHAIRMAN BABCOCK: Well, I think when we got off, and it was -- I was the one that got off on the tangent, so I think we left at 196.2(1), and I think we ought to go rule by rule and see if anybody has got anything to say about your changes.

MR. MEADOWS: Okay.

CHAIRMAN BABCOCK: And you can point out if

in the view of the subcommittee or you think there is a substantive change.

MR. MEADOWS: All right. And I certainly invite Justice Christopher and other members of the subcommittee to speak up and highlight things. I think at this point it would be in our best interest to move quickly through most of this.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Because it will be -- that will give the subcommittee an opportunity to bear down on the work in light of these -- some of these comments and decide whether or not we think we really are benefiting our rules by borrowing from the federal rules and knowing that there will be another discussion around the entire body of work.

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: So let's just go to 196.3. This highlights just a quick point there which --

HONORABLE TRACY CHRISTOPHER: I think it will be useful -- sorry. I mean, because we have made a lot of, you know, stylistic changes, borrowing words from the federal rules that we thought were useful for the reasons that we've talked about: Our rules used to be based on the federal rules, the federal rules have changed, we change our rules to look a little bit more

like the federal rules again, and obviously we've had three or four people that think that that's probably not a good idea, and I'd kind of like to have a -- I don't know, a sense of the whole committee as to whether that that's a mistake. Because we won't know whether to take all of this stuff out for our next draft or leave it all in. So if -- you know, if you think that that would be useful.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: And then we can talk about the substantive things that we've done.

CHAIRMAN BABCOCK: Sure. Comment on that, Justice Busby?

HONORABLE BRETT BUSBY: Yes. And I guess it doesn't -- you know, my comment was one of the earlier ones where you had picked up the words "grounds and reasons" from the federal rules instead of "legal and factual basis," and I honestly don't care which one of those we use. I just think we should pick one instead of having three concepts that mean the same thing. So, you know, it doesn't make any difference to me, whichever one you think is going to be clearer or more effective. If you like one of the ones that's in the federal rules, that's fine.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: You remember when we did the

evidence rules, the first thing we did was stylistic changes, you know, not substantive.

CHAIRMAN BABCOCK: Right.

MR. LOW: And then went to there. So apparently they are making both of those at one time now; is that correct?

CHAIRMAN BABCOCK: I think that's right. Yeah.

MR. LOW: Okay. Nothing wrong with that. I just meant that's the way that approach was and then the next thing I had, the committee, which they're working on now, is to compare the federal rules with the state rules and not to follow it, but see if we need to make any changes and then in the process make what other changes. And they're doing all of that at one time, and it's pretty difficult.

CHAIRMAN BABCOCK: Uh-huh. Okay. Well, Justice Christopher's thought was to get a sense of the committee whether -- whether hearkening back into the old days, if you said, "Here's what the federal rule is," this committee would say, "Well, then that kills it. We're not going to do that."

HONORABLE TRACY CHRISTOPHER: Well, and it seems like that's kind of what you're saying again.

MR. LOW: She's right.

HONORABLE TRACY CHRISTOPHER: So we just need to know that.

CHAIRMAN BABCOCK: Yeah. So does anybody -- Professor Hoffman.

PROFESSOR HOFFMAN: I'll try to start us off.

CHAIRMAN BABCOCK: Oh, good. And then we'll go to Hatchell. He's an old-timer.

PROFESSOR HOFFMAN: So it seems to me that it is a very productive thing to try to ask substantively how can our rules be better. More efficient, save people money, and don't make some cases less efficient, right? Sometimes you change rules, you have unintended bad consequences. So thinking about substantive changes, that seems to me -- first of all, it's the Court's charge, whether I think it's a good idea or not. I just happen to agree it's a good idea, but it's the Court's charge, so we've got to do it anyway. It doesn't seem to me to be an independent good, independent value, to make our rules look like the federal rules. I mean, this is not like the evidence side where the rules match up fairly closely, and one can sort of talk about this.

I mean -- I mean, first of all, the rules are just -- they have a totally different providence. They have different numbers. They are filled with many,

many different things. Sometimes we were ahead of the federal rule-makers, sometimes we've been behind them. So the notion that we might also try just as a stylistic matter to take our rules strikes me as a -- a very difficult challenge, and I was trying to give a couple of what I thought were pretty innocuous examples, mostly picking up on what Justice Busby and Frank had previously said in the section of 192 point -- 196.2(b) about how that's a really hard thing to do, because our 196.2 doesn't look like 34(b). And so you-all had this weird transplant that -- so it's hard to do in some cases. So my bottom line point is of course we should be thinking about substantive changes that are good changes to be made. I don't think it's an independent value to try to make our rules look from a language standpoint -- not a substantive, you know, sort of, no, we don't think there's a substantive improvement there, make that change. So that would be a suggestion I would throw out.

CHAIRMAN BABCOCK: Okay. All right. Hatchell, I told you I was going to call on you. What do you think on the question on the floor?

MR. HATCHELL: I'm against change.

CHAIRMAN BABCOCK: All right. But that's not an option for our subcommittee to say we're against change. What do you think about the issue that Justice

Christopher raised? Should we give them a sense that, okay, you've looked at the federal rules, but maybe you shouldn't be so quick to try to incorporate them into our rules?

MR. HATCHELL: Well, traditionally when this Court has -- I mean, when this committee has changed rules there are just a lot of uproar, and I would tinker as little as possible. I mean, I don't quite get the necessity for similarity with the federal rules, the complete similarity, as long as we, you know, don't find the discovery process suffering. If there is something to be borrowed from the federal rules that improves the administration of justice, I'm all for it. I do believe that this -- that the subcommittee needs guidance. I mean, I think, you know, I'm serving on a number of subcommittees now.

HONORABLE ANA ESTEVEZ: Amen.

MR. HATCHELL: We -- you know, we have suffered from -- I mean, we suffered from not even really understanding what the charge was in one of our recent things. As much guidance can be given to the subcommittee, the better this committee will operate in the end.

CHAIRMAN BABCOCK: Very well said as usual. Justice Bland, and then Professor Albright.

HONORABLE JANE BLAND: Look, we did not rotely envelope our rules with federal language. There are many places where the federal language didn't work, and we did not adopt it. We adopted federal language when we thought the federal language was better than the language that we had. That's not to say that we were perfect. I mean, Judge Busby pointed out a place where we are inconsistent. We can fix that. This idea, though, that we should just ignore better language because this is the language that we've always had is not a good idea, because in the next decade the language that people will become familiar with is the federal language. So it doesn't make a lot of sense to continue.

It's just like, you know, continue driving an old car. Yes, it can get the job done, but, you know, there are new things that come along and newer cars that make them safer to drive, so why wouldn't we look at language that would improve our rules? And as far as the committee needing guidance, I mean, we have an amazing subcommittee of people who have spent a lot of time, including a lot of time over their summer vacation, a lot of time ahead of Thanksgiving to look carefully at these rules and not to make some snap judgment about the efficacy of the federal rules, but rather to say, well, what would be better going forward.

This committee needs to look to the future. We are not a committee of the past. We are a committee of the future. We adopt new rules. That's what we're here to do. We try to fix old rules. So this idea that we should just be slaves to the old rules is not a great idea. And I -- so I'm speaking for progress and in favor of change, which this committee hates, so --

HONORABLE STEPHEN YELENOSKY: So vote for Justice Bland.

CHAIRMAN BABCOCK: I tell you what, she's going to get my vote for sure, and I'm writing you a big check right now.

HONORABLE JANE BLAND: Yeah, so make the rules great again.

HONORABLE ANA ESTEVEZ: Can I have your speech because I'm up for election next?

HONORABLE JANE BLAND: So please, you know, cut us some slack and not because you detect one mistake or two along the way, which is what you're supposed to do. You're supposed to fix our mistakes, but this idea that we went at this with a lack of guidance or without a care in the world for, you know, the tried and true rules of the state courts is just not -- is just not accurate. And I just had to speak up because we're just going off on a tangent when we should be talking about the real issues,

like, you know, should we adopt particular parts of the federal ESI, should we adopt paying for experts, which we decided we wouldn't, which was a new federal rule that our committee recommended that we not adopt.

And so, you know, this is my filibuster and you guys do not vote for sticking with old language when you have a bunch of people that looked at it and said, "You know, the old language isn't as good."

CHAIRMAN BABCOCK: I love your image of these rules as like the airbags of the auto industry. Kennon, then I'll get Buddy.

PROFESSOR ALBRIGHT: I think I was next.

CHAIRMAN BABCOCK: Oh, I'm sorry. Professor Albright, then Kennon.

PROFESSOR ALBRIGHT: I've just spent two days at the powerful women conference, and I just want to say, "Here, here."

HONORABLE STEPHEN YELENOSKY: Yes. Resolve.

CHAIRMAN BABCOCK: She's not going to run the 440, but --

PROFESSOR ALBRIGHT: Well, I also want to put in a -- another reason why you might want to move forward instead of looking backwards with your rules is that we now have a lot of repeat litigants in our litigation world. Our litigation world looks very

different than it did 20 years ago, 50 years ago, a hundred years ago. And when you're dealing with electronically stored information, which is what most of discovery is right now, you can decrease the cost of discovery substantially when these repeat litigants know what to look for in whatever court they're in. And if they're in federal court in the state of Texas or they're in state court of the state of Texas and they can look at what's discoverable and how to deal with discovery, you can save a lot of money. And just to be different because we're different, which is the way things have been for many years -- and I'm speaking as someone who taught Texas civil procedure for 29 years, and my job would not be there if we weren't different.

So but sometimes the differences don't make a lot of sense, and I think when you're talking about discovery of electronically stored information and the sanctions for that discovery, you need to really think about what we're doing in comparison with the rest of the country.

CHAIRMAN BABCOCK: Kennon, then Buddy.

MS. WOOTEN: I'll start by saying, "Here, here," as well.

CHAIRMAN BABCOCK: Oh, please, she's had enough applause already.

MR. MEADOWS: I want to make her the chair.

CHAIRMAN BABCOCK: That's an idea.

MS. WOOTEN: From the practical perspective, it makes it much more difficult for language to be different just to be different. Because I will open up the rule book and look at a rule and then I'll go and look to see how many cases have cited that rule and what the Texas courts have done with it; and because of the way our system works, oftentimes trial courts' decisions about the Texas rules are not recorded. And so then I go to the comparable federal rule, and I look for authority under that rule, and I tend to find more there because of how the federal court system works. There's more written on the discovery rules there, and so then I look at the language, and I see how close is my Texas language to my federal language. So how much does that federal authority help me? And this process takes a while. It's kind of time consuming. If there isn't intended to be a difference between the Texas rule and the federal rule, I think there's a lot of value in making the language more similar because it makes the practitioner's job so much easier and it makes the bill for the clients so much less.

CHAIRMAN BABCOCK: Okay. Buddy, then Judge Estevez.

MR. LOW: I'm not necessarily for just

following the federal rules, but there's one thing unique. Those people have committees, and they have subcommittees, and they have so much research and everything that we don't have. So they got there some way with some guidance, and so we know that. So why take it and say, "Well, it's federal, we won't adopt it?" I mean, there's something to be said about looking at the federal rule because it's there for a good reason, much research and much thought. And that's --

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to make a comment that I don't want to stop going forward where we were because I think some of the stylistic changes -- I think we should consider them all in our organizational changes because it will help the practitioner, and it will also help the pro se litigant, the indigent person that comes and looks. Because sometimes we put -- even though it's in a separate rule, we put everything in one, and although -- I don't know if it's just now probably 80 or 70 percent are represented by counsel. We have a huge amount of people that are not represented by counsel anymore.

CHAIRMAN BABCOCK: Yeah.

HONORABLE ANA ESTEVEZ: And they don't know to go -- you know, they didn't memorize Rule 190, 191,

192, and the way that our rules are right now, you really have to know all of the rules to do it right, and sometimes it might just be one rule that you need, and it has all of that information in it. We just rearranged things, and we -- you know, as the other people of our subcommittee have already stated, I mean, a lot of work and effort was put in here, and I think it does -- it may not deserve a huge amount of time. If you think something is really changing the substance, then maybe we need to vote on it faster, move on, and just cut it out; but I think we should consider what we have and not use as much of our time doing this part, whatever this is called.

CHAIRMAN BABCOCK: Okay. Anybody -- yeah, Skip. I skipped you.

MR. WATSON: No, that's all right.

CHAIRMAN BABCOCK: I skipped Skip. Sorry.

MR. WATSON: To repeat the obvious, I don't think that Bobby's committee set out to, A, complicate, or B, increase costs, and I see a very workman-like work product. A second to what Kennon said, I think that rather than change for change sake, what I see is adopting the federal language as cutting out a step of people saying, "Whoa, the rules changed." No, you know, we've got the precedent. We know what this language means. Look at the federal precedent. I'm assuming that's the

point, and that's what I was hearing, and I think it's correct, but the only way to Ana and Chip's point, and Buddy's, that I know to go through and say do each of these things really affect the ultimate goal or at least an overarching goal of decreasing the cost of all of this is to work through them the way we are, one at a time, with each of us being conscious of, okay, yeah, it's federal, but -- and I'm sure they thought it was good, but does it increase or decrease cost? And if it increases cost, is it worthwhile? Do we need to? I wasn't sensitized to that until you said that; but, you know, in a former life I had served on the Biden committee that did the federal courts --

CHAIRMAN BABCOCK: Right.

MR. WATSON: -- you know, cost in delay, and discovery was -- you know, 30 years ago was what we were talking about, and --

MR. LOW: Right.

MR. WATSON: -- it's not under control. It's killing the litigation process. I mean, the trials are going down, down, down, and yet it had slipped my mind that that was the overarching purpose of what we're doing. So I would just say that we do need to slog through it, as much as I hate to say that and just, you know, be conscious of that. I personally doubt that there's going

to be a red flag that comes out based on cost because I think you probably got it right.

HONORABLE JANE BLAND: I have no problems slogging through it. My problem was with the comment that we needed to not make changes.

MR. WATSON: I think we got that, Jane.

HONORABLE JANE BLAND: Well, sometimes, you know, you just have to be emphatic and then people do get it, so --

CHAIRMAN BABCOCK: Well, you just -- you know, you just keep speaking your mind. Yeah, Professor Carlson.

PROFESSOR CARLSON: There are -- of course, most Texas practitioners probably don't practice in both federal and state court. There a lot of Texas practitioners who only practice in state court. That does not mean you shouldn't change the rules. If this is going to be a wholesale change like 1999 in the discovery rules, this is the time to do it, because this is where you put a big burden on a lot of lawyers to learn a new system and to look at this and say, "I don't know what this language is. I knew the old language. You're changing the practice. Now what do I do?" They're not going to think, "I'm going to go look at the time federal rules," but if we do a good job training and setting this up and

commentary that came out in the 1999 rules, they will do that.

So I first should have said thank you for all of your hard work. Please don't take offense, but I think we're sensitive to not let's keep the old rules for the old rules' sake. It's, you know, we're going to change a lot of rules, and that's a big job for the practitioners that we have to be mindful. So if there's not a good reason to do it, we shouldn't, and I'd love to hear your good reasons as we go through. I think that's very helpful so we can pass it on.

MR. LEVY: I'll point out that I think that our looking at the federal rules does have a lot of value. I'll also suggest that I think some of the changes that the federal rules adopted came from the rules that we changed in Texas, including the idea of having specificity of objections. That was a Texas innovation, and we're not going to adopt them wholesale, but there is value in looking at them and applying them where possible. And as you suggested, there are many practitioners who are just in state court, but there are many parties that are in both.

PROFESSOR CARLSON: Right.

MR. LEVY: And to have commonality, to know what the requirements are, companies like mine get sued in

state court and federal court about the same issues all the time. And if you have disparity of approaches then you have inconsistencies, sometimes unfairness that can occur, and so having a commonality can be very advantageous. Not to mention the fact that the case law, the research, all of the developments that are understood at the federal level can be used to help us as well.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: When we speak of the practitioner, it's as if it's static, and the people who are practicing now are going to live forever. They're not, and things change. When I started practicing as a lawyer there were no special issues. I imagine that change upset a lot of lawyers who had been doing special issues. Maybe they liked it. I don't know. There are new lawyers who are coming along who are going to learn whatever we do from the start, and that will be what they've always known. And so if we say we can't upset the current practitioner, we can never make a change. Lawyers coming out now can't imagine a time when you didn't file electronically, right? So whenever there's a change there's going to be some upset, but you have to do that sometimes.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: A lot of this goes to the lawyers, I mean, and I don't know how you change that. There's no rule on that, but Robert's company killed or severely injured the people working out there, 13 people, and we first -- we called a meeting of the lawyers, and we told them what we would do, what we would give them, and not -- we finally ended up settling all of them without one request for admissions or without one deposition. It took two years, but lawyers saved a lot of money for the costs, and I don't know how you put that in a rule. I'm not suggesting, and I don't have the answer to it, but lawyers can help avoid if they have early meetings and can agree.

HONORABLE ANA ESTEVEZ: That's our level three.

CHAIRMAN BABCOCK: Yeah. Okay. Well, yeah, Bobby.

MR. MEADOWS: Well, Elaine makes a very good point, and that is it was clear in 1999 what this committee was expected to do. It was a wholesale rewrite. That was the charge. I suppose it could become that now. The question is look at the rules, can you make them more efficient, can you make litigation less costly, and be informed by these -- this work by the State Bar Rules Committee and the federal rules. So that's where we are in the process right now, and I mean, I think that's fine.

We can just see where it leads us. I mean, if we do what we've already agreed to do in this committee as recommended by the subcommittee, there are going to be some very big changes in terms of how discovery is handled. Just think about the way we've dealt with experts, proportionality, mandatory disclosures --

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: -- pretrial and initial. The way we've reconstructed the whole tier process, I mean the level process, so, you know, what we add on to that it just seems to me to be a question of kind of scope and extent of the work.

CHAIRMAN BABCOCK: Yeah. And I think you're right about that, Bobby, and I think the charge -- this charge -- without commenting on Hatchell's charge -- this charge I think is reasonably clear what the Court wanted to do. I think your subcommittee has been doing that. I think that to the extent you need more guidance, you've heard, as is typical of this committee, various views on what should or should not be done, and I think we just continue the path that we're on, finish talking about these today, and when we come back at our next meeting hopefully we'll have the whole package that we can talk about. And Kent can have his spoliation discussion that he's looking for, and then we can get it to the Court, and

the Court will decide, you know, what's the best path. So, Justice Christopher, I don't know that we can get any more clarity about what this committee feels about what ought to be done than the views that have been expressed in the last 15, 20 minutes.

HONORABLE TRACY CHRISTOPHER: I would prefer to just focus on the substantive changes that we've made rather than the stylistic ones if we hope to get done within another hour or so. And I would also suggest that if people have looked at the stylistic changes we have made and can identify, oh, you know, you're using grounds here instead of legal and factual basis, that they send us an e-mail that says, "You know, I've looked and this could cause a little language confusion." It seems like that would be a better use of our time.

CHAIRMAN BABCOCK: Well, this is so important that I think we can take a little extra time if we need to; and, you know, one man's substance is another man's -- you know, this is stylistic. So I don't want to dwell on things, as we sometimes do, but I do think it would be -- it would be good to go through all the language and see where we come out. Evan.

MR. YOUNG: Well, I agree, one man's substance is another man's style, but it seems to me there is a distinction; and perhaps one of the things the

subcommittee is asking for is some sense about whether or not aside from substance there is some value in having a default presumption that when we're talking about the same sort of thing we try to use the language, the terminology, the terms of art the federal rules now use; and I think there's a lot of value to that regardless of any substantive change choices in part because that will make it harder to mask situations in which our rules actually intend to be different. So if we have different terminology, then sort of back to Kennon's point, that could mean one of two things. We're using different terminology to reach a different outcome, or we're using different terminology just because we're using synonyms or something that has an equivalence.

CHAIRMAN BABCOCK: Right.

MR. YOUNG: And it seems to me that in service of the effort that we want to do to achieve the clearest possible substantive guidance for practitioners there would be a lot to be said for a default presumption at the very least that we're going to try to do what the committee I think has wisely done, and that is when possible borrow from the federal language, because otherwise it seems to me that whatever meaning the Court might intend by a change would be much more difficult to ascertain. And so to that end it is two questions.

First, should we have some default presumption; and then secondly, once we speak in a language that's more consistent about the same topics, we can use additional words, using common vocabulary to make very clear Texas is doing it in a very different way.

CHAIRMAN BABCOCK: Yeah.

MR. YOUNG: And I thought that what Professor Justice Christopher was asking for in part was a sense of that initial, you know, is there a default presumption that's beneficial about trying to use federal language when it's sensible and it's possible to use aside from any substantive change.

CHAIRMAN BABCOCK: Yeah.

MR. YOUNG: And I strongly support doing that. I don't see any great value in not doing it, and I see a heck of lot of benefits for the future. Judge Yelenosky's point I think is spot on. We're writing something hopefully that will endure and just glomming on to -- continuing to ride the old cart, and all of these great analogies to me are very persuasive in aligning vocabularywise with the federal rules every way we can and then maybe having some different presumption about substance, a slight presumption in favor of adopting the federal rules, but not nearly as strong a one.

CHAIRMAN BABCOCK: Justice Christopher.

Sorry.

HONORABLE TRACY CHRISTOPHER: No, no, no. Okay. Well, if you want to go through line by line we can. So back to 196.1, within the scope of discovery, we have one person who thought that that was a problem adding that language in. Do other people feel that that's a problem, and if so, why? Because we did not see that as a particularly troublesome addition.

PROFESSOR HOFFMAN: Just to be clear, the reason I thought it was problematic, Tracy, is because you changed the scope of discovery previously by adding proportionality into it. In other words, if you didn't change scope of discovery, then it's a -- then you're just adding a change and I might wonder why you're doing that, but this links up to what Chip was talking about earlier, which is this lends to the confusion of whether proportionality, the burden of showing something as disproportionate is the responsibility of the party asking for the information. So and that's what my concern is.

HONORABLE TRACY CHRISTOPHER: Well, I think we talked about that a party who is asking for discovery should consider proportionality before they draft their discovery, so -- and, yes, the burden is still on the responding party to say it's not proportional, but the idea is that you as a person asking for discovery should

have that in your head that what I am asking for is proportionate. You know, it should be part of your duty.

PROFESSOR HOFFMAN: Right, just as the current rules require.

HONORABLE TRACY CHRISTOPHER: Yes. But, you know, we're just making sure people understand that.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, in the interest of maybe drawing certain things to a head and giving the subcommittee specific guidance, I might propose two things that you might want to vote on after lunch after we've had a chance to digest all of this.

CHAIRMAN BABCOCK: Including our food.

MR. HUGHES: The first one being that if we're going to put proportionality in the rule the way it's been suggested, who is going to have the burden of proof if proportionality becomes an issue? Does the moving party have to -- is the consensus that if -- is it going to be on the party sending the discovery to show it is proportional, or is it going to be on the responding party to show it's not proportional? I think that would be an important -- or maybe we don't define it at all and we just leave it for the -- some appellate court to figure it all out. The second one is --

MR. MEADOWS: Roger, I would just say on

that point that was discussed and voted on. Not to say we can't reconsider it, but that's been decided in this room.

MR. HUGHES: Okay. The second one is the way this is proposing now is that we have a general rule for making objections, it's 193, and then for each type of discovery vehicle we have a separate additional rule about how you respond and make an objection, so now we're going to have two layers. I'm not sure that's going to be helpful. First, if we're going to have a rule about how you make objections, I don't see that we need to have a different one for every vehicle.

The second thing is, as I've said earlier, imposing the second layer the way it's been in the rules, I fear what we're creating is we're making it akin to objecting to the court's charge, that when you respond to discovery you not only have to state a general reason, you have to state all of the specific reasons to support it, and whatever reason you don't give, you lose, you waive for all time. And so before we can even talk about whether you've, for example, identified the correct privilege, attorney-client, or maybe you've said it's unduly burdensome; and if you don't give a reason, you've waived it even if you should happen to be right. If you give reasons for supporting why this is a matter of attorney-client privilege or this is unduly burdensome,

you have given up every reason you don't identify. You can no longer argue that. You can't support it with evidence.

Well, of course, my feeling, my thought is you're just going to increase boilerplate. That's the first thing we're going to see. Instead of getting a simple sentence "This is attorney-client privilege," you're going to have them basically quote the entire rule and so that they don't give up any ground or the same with unduly burdensome; and it will be like charge because everyone will be afraid that if it's not enough to state the privilege or the general reason, I now have to give all of my supporting reasons.

And basically you're going to have to either write your motion for protection and stick it in your response or your response to the motion and put that as your discovery response. I'm not sure that's helpful. I think it's going to increase boilerplate. It certainly is going to increase expense, simply because the responding party is going to be -- I can't risk going -- I don't want to have to figure out later that if this wasn't enough detail, and so the judge goes, well, I don't have to consider your valid objection because you weren't specific enough. That might be useful because that would rekindle -- I mean, that would spare a lot of drafting.

CHAIRMAN BABCOCK: Yep. Okay. Anything more on this "within the scope of discovery"? Do we need to take a vote on it?

MR. MEADOWS: I hope not.

CHAIRMAN BABCOCK: Let me put it this way, besides Professor Hoffman is there anybody that is opposed to having the phrase "within the scope of discovery" included in 196.1(a)? Okay. So let's move on to the next thing.

MR. MEADOWS: I think --

CHAIRMAN BABCOCK: The record will reflect that nobody raised their hand. And, Dee Dee, we're going to break at noon if you can hang on five more minutes.

THE REPORTER: I'm fine. I'm good.

MR. MEADOWS: I think we can take care of at least this in the next five minutes. We had gotten to 196.3 --

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: -- which deals with time and place of production. This is a good illustration of what the subcommittee was focused on in terms of our assignment. So under the current Texas rule you have to either produce it to -- make a production as requested or at the place and time stated in the response. We changed that in conformity with the federal rule to say you either

have to make the production at the time and place as requested or another reasonable time specified in the response, so it's to introduce the requirement of reasonableness. Small thing, but a change.

CHAIRMAN BABCOCK: Okay. Any comments about this? No problems with it? All right. Let's move on to the next one.

MR. LEVY: I was just going to say, this is not -- this is a good change. I believe it's not insignificant in that parties won't be able to respond in their discovery saying that we'll produce at a reasonable time to be determined later. The responding party will have to state what that time is. That's at least how the federal rule is designed, so it really puts the responding party on burden to figure out when they're going to be able to complete their production, so it will have some significant impact.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: Any further discussion on that?

CHAIRMAN BABCOCK: Anything else on this? All right. Let's move on to the next one.

MR. MEADOWS: All right. Rule 196.4, our changes here are directed at modernizing the rule to specifically compel production of ESI always. And then

the only other change is the -- is the imposition of specificity to any kind of objection to it. And, again, we -- just to be fair to Lonny and to Judge Busby, this is -- reintroduces those same questions about language. You'll see it, you know, "specify the grounds for objecting, including the reasons," and obviously we need to work on that. That's something that's already been highlighted for us that we've got some inconsistency, but the overall effort here was to modernize this part of the rule for ESI and to introduce specificity around objections.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Since you've said we would go ahead I guess and talk about it line by line, I suggest taking out five words, "that exist in electronic form," for two reasons. One, "electronically stored information" sufficiently conveys that sent, and it's the term that everybody understands; and two, and so "that exists in electronic form" conveys no more information. And two, the word "form" is used twice then and has to mean different things because basically what this says is that you must specify in what form information "in electronic form" should be produced. So I would have it read "to obtain discovery of data or information" -- or "to obtain discovery of data or

information that is electronically stored information or to obtain discovery of electronically stored information the requesting party must specify the form in which the requesting party wants it produced."

MR. MEADOWS: Sounds good.

CHAIRMAN BABCOCK: Yeah. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, we do make a note that there are two pending Supreme Court cases on this whole form of electronic data, so when that comes out we'll need to look at that and see if we want to write a rule that conforms with what the Supreme Court has done or write a rule --

CHAIRMAN BABCOCK: Let's overrule them. What do you think?

HONORABLE TRACY CHRISTOPHER: -- or write a rule that says that was a bad idea and we're not changing it.

CHAIRMAN BABCOCK: Martha is not even smiling over here. Do you notice that?

HONORABLE TRACY CHRISTOPHER: I mean, you know, sometimes we do. Sometimes, you know, nine judges that don't deal with ESI might not understand it as well as a big committee.

CHAIRMAN BABCOCK: Exactly.

HONORABLE TRACY CHRISTOPHER: Just saying.

CHAIRMAN BABCOCK: Exactly.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: Was this -- the language in 196.4(b), did this come out of the federal rule? Because this seems to fairly track *In Re: Weekley Homes* by the Texas Supreme Court, so at least in that opinion they figured that much out.

PROFESSOR ALBRIGHT: I think in that opinion they looked to the federal rules.

PROFESSOR CARLSON: Because this is really *In Re: Weekley Homes*. But is this also the federal rule?

MR. MEADOWS: I believe so.

HONORABLE TRACY CHRISTOPHER: Yes.

PROFESSOR CARLSON: Well, I don't think this is a big change then.

CHAIRMAN BABCOCK: I'm sorry, what did you say?

PROFESSOR CARLSON: I don't think it's a big change.

CHAIRMAN BABCOCK: Okay.

MR. LEVY: Well, I don't think -- the federal rule --

CHAIRMAN BABCOCK: Robert.

MR. LEVY: Sorry.

CHAIRMAN BABCOCK: No, it's all right.

MR. LEVY: -- doesn't call out the distinction with ESI in terms of the request part. So I'm not sure this one -- this is as much the federal rule as probably trying to codify *In Re: Weekley*. Or and/or -- yeah.

CHAIRMAN BABCOCK: Okay. Any other comments about this? We're about at our lunch break. I've got an issue -- not an issue, but some comments about 196.4(b)(2), which we may not be at yet, but when we get there I've got some comments about that. But I think our lunch is set up. Dee Dee's hands are wrung out, so why don't we take our lunch break, and we'll be back at 1:00 o'clock? Is that okay, Bobby?

MR. MEADOWS: Beg pardon?

CHAIRMAN BABCOCK: Is that good?

MR. MEADOWS: Absolutely.

CHAIRMAN BABCOCK: Okay. We're in recess. Thank you.

(Recess from 12:00 p.m. to 1:10 p.m.)

CHAIRMAN BABCOCK: Okay. Where's the next one?

MR. MEADOWS: I think we are at 196.4 little (b)(2), just where you said you had something to offer.

CHAIRMAN BABCOCK: Well, I don't know if I

have anything to offer. I've got an observation, and that is this says that if you don't like the ESI format that the other side proposes then you have to object to it and provide your own -- your own format. A lot of times the proposal will be very vague in the request for documents, and it won't -- it may say something like "We want you to produce it in TIF" or "We want all metadata" or it will just be like a very vague thing so that it's hard to -- sometimes hard to formulate a response; but this rule and the federal rule is the same, I think, would permit you to do it. You just say, "no," -- and you could probably even say, "It's too vague. We don't know what you're talking about, but we propose to do it this way."

I've seen cases, in the federal system now, get completely off the rails because multiparty, multiplaintiff, multidefendant cases -- because there's no mechanism for resolving this issue of format. So the observation or what I'm -- I don't know if I'm proposing it. I'm just raising the issue. You know, do we want to have a mechanism whereby a conference on EIS protocol is -- occurs at a -- at an early stage in the process and hopefully resolution reached without judicial intervention, but if there's an EIS protocol meeting and it doesn't result in an agreement then early judicial intervention. So that's kind of the outline of what I'm

talking about. And you guys may have considered it and said, no, that's stupid; and if you have, I'll stand down.

MR. MEADOWS: Justice Christopher is looking elsewhere to see whether we've got --

HONORABLE TRACY CHRISTOPHER: Oh, yeah, it's in our conference, Rule 190.4, discovery control plan conference, the form or forms in which it should be produced. It's on Page six of the draft.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: This is designed for, you know, the level three case where you have this kind of --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- level of detail. So you are supposed to have a conference about it to begin with.

CHAIRMAN BABCOCK: Page six, what's the number?

HONORABLE TRACY CHRISTOPHER: Subpoint (6), "Disclosure, discovery, or preservation of ESI including the form or forms in which it should be produced."

CHAIRMAN BABCOCK: Okay. So when the parties state their views and proposals on ESI protocol and what happens?

HONORABLE TRACY CHRISTOPHER: Then they

prepare a propose -- if they can't agree, they each give proposed plans to the judge, and the judge makes a ruling on it --

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: -- is basically how it's supposed to happen.

CHAIRMAN BABCOCK: Is that -- I'm sorry for not having caught this before, and where is that in -- well, if it's there, we don't need to spend any more time on it. In terms of timing, Judge, wouldn't this -- wouldn't the discovery control plan already be in effect or at least discussed before you get to a 196.4(b)(2) thrust and parry?

HONORABLE ANA ESTEVEZ: It's under (c)(6).

HONORABLE TRACY CHRISTOPHER: No. Before you do any discovery you're supposed to have this conference.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Under level three.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: Yeah.

CHAIRMAN BABCOCK: So you have a conference and --

HONORABLE TRACY CHRISTOPHER: Right. You

should know what form your ESI is going to be in then.

CHAIRMAN BABCOCK: But then after you have a conference then a request for production comes along, and the requesting party has a form that does not comply with the protocol that was either agreed upon or ordered by the court.

HONORABLE TRACY CHRISTOPHER: Well, then you file a motion to say "You're not complying with the discovery control plan."

CHAIRMAN BABCOCK: So the objection is "Hey, we agreed on something different."

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Or "the court ordered something different".

HONORABLE TRACY CHRISTOPHER: The court ordered something different.

CHAIRMAN BABCOCK: "Get out of town."

HONORABLE TRACY CHRISTOPHER: Yes.

CHAIRMAN BABCOCK: Okay. Yeah, that makes sense. Okay. Sorry about that.

MR. MEADOWS: Yeah, because the court must issue a docket control order in a level three case after receiving the proposed discovery plan or agreed discovery plan.

HONORABLE TRACY CHRISTOPHER: That includes

all of this stuff that you've given to the judge.

CHAIRMAN BABCOCK: Got it. All right. Let's go to the next -- does anybody else have -- yeah, Roger, sorry.

MR. HUGHES: Yeah, on (b)(1) it says that you have to -- if you're going to object it says you have to state with specificity on the grounds. Yeah, you have to state the -- with specificity the grounds for objecting, and then it goes on to say "including the reasons," which suggests that reasons is yet a narrower level and a more -- a greater level of detail than simply stating the grounds. Aside from my earlier comments that -- that you're essentially having to write your motion for protection as part of the objection, asking an inclusion of reasons seems to be a bit much for the ESI because in order to do that you're probably going to have to coordinate with an IT or an electrical engineer or some sort of scientific expert.

And quite frankly, I think any time attorneys try to understand engineers and information technology people or vice-versa, there is some severe translation problems; and requiring a detailed statement not merely of the grounds but all of the reasons why I don't like your format and why my format is better and more convenient may require a great deal of lengthy talks

with an IT person, which might be better postponed until somebody actually says, "Okay, I really -- what you want, your objection, I can't live with your format."

And at that point -- because usually when people want to fight over formats and they want to litigate it, usually this is not like attorneys dealing with a more common sense subject matter they feel comfortable with, like attorney-client privilege or work product. You're basically talking about almost a battle amongst scientific experts, and I think by requiring more than specific grounds you're putting -- you're creating a lot of maybe unnecessary work and also creating a serious problem for waiver because you're then asking the attorneys to set down specifically in writing what the experts are telling them, and there's always going to be slippage and what I call "translation" problems.

MR. MEADOWS: Yeah, we talked about this language earlier in connection with Rule 196.2 and agreed that we were going to remove the "provide reasons" language.

MR. HUGHES: Okay.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: So next I think we would come to -- well, let me just say perhaps people want to flip through the next couple of pages, but we think that all of

the changes that are offered from here at this point through the end of the rewrite of this rule are intended to be just stylistic for clarity, and nothing substantive in our view is intended.

CHAIRMAN BABCOCK: Through what page, Bobby?

MR. MEADOWS: Through page 40.

CHAIRMAN BABCOCK: Through page 40. Hang on for a second. You've already noted that the Court has two cases that might affect 196.4(c), so obviously we'll have to be alert for that, but why doesn't everybody take a minute and read the language on pages 38, 39, and 40, and just see if there's anything that pops out at anybody?

HONORABLE TRACY CHRISTOPHER: Okay, well, there's two things. We're going to change the "grounds and reasons" language based on prior discussion. That's on page 39, (b) -- (d)(2).

MR. MEADOWS: We're going to change it wherever you find it.

HONORABLE TRACY CHRISTOPHER: Wherever you find it, we're going to work on that language.

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: And then we had changed -- on (e) on page 40, we had changed to "claims or defenses," and we're going to need to change it back to "subject matter" based on our previous discussion

about subject matter versus claims or defenses.

CHAIRMAN BABCOCK: Great, got it.

HONORABLE TRACY CHRISTOPHER: So don't worry about those two problems.

CHAIRMAN BABCOCK: Okay.

MR. LEVY: Chip.

CHAIRMAN BABCOCK: Yes, sir.

MR. LEVY: I apologize.

CHAIRMAN BABCOCK: Robert.

MR. LEVY: I apologize about going backwards, but I was trying to work through language in 196.4(e).

CHAIRMAN BABCOCK: Can you hear him, Dee Dee?

THE REPORTER: Barely.

MR. LEVY: Yeah, let me speak up. I'm sorry. On 196.4(e)(3) the question is now that you've put subpart (2) in, which talks about objections to the form, which is part of the Federal Rule 34. With (3) it talks then about a mandatory objection regarding the form that the data is requested in, and that does seem to be duplicative now of (2) and perhaps taking "in the form requested" of out of (3) will then focus new subsection (2) on objections about form or the way the data is produced, you know, what type of process the data will be

produced, but then (3) will focus on just the broader issues regarding objections and broader claims about challenges to producing to the other side.

MR. MEADOWS: Okay.

CHAIRMAN BABCOCK: All right, thank you.

MR. LEVY: That's why it took me a while to come up with the hopefully cogent suggestion.

HONORABLE TRACY CHRISTOPHER: So, yeah, I think -- so (2) should be about form and (3) should be about -- you know, it's deleted, and it's going to take --

MR. LEVY: Right.

HONORABLE TRACY CHRISTOPHER: -- a million man hours --

MR. LEVY: Exactly.

HONORABLE TRACY CHRISTOPHER: -- to put it back together --

MR. LEVY: Exactly. That's better stated, yeah.

HONORABLE TRACY CHRISTOPHER: -- for production.

CHAIRMAN BABCOCK: Okay. Anything more on 38, 39, or 40? Everybody had enough time to look at it? Pam, that's not a dirty picture you're showing Evan, is it? I think it may be.

MS. BARON: Sorry.

CHAIRMAN BABCOCK: You were just called upon.

MS. BARON: To do what?

CHAIRMAN BABCOCK: To comment about whether that's a dirty picture you're showing him.

MS. BARON: No.

CHAIRMAN BABCOCK: Anything else on these three pages, 38, 39, and 40?

HONORABLE DAVID NEWELL: I think they're great.

CHAIRMAN BABCOCK: Huh?

HONORABLE DAVID NEWELL: I think they're great.

CHAIRMAN BABCOCK: Judge Newell thinks they're great, so contrary to the sort of atmosphere of the room this morning, here we have an afternoon "This is great."

HONORABLE ANA ESTEVEZ: He had chocolate.

CHAIRMAN BABCOCK: That must be it.

MR. MEADOWS: I'm afraid Justice Hecht missed some of that -- that dialogue.

CHAIRMAN BABCOCK: He's the poorer for it, I'll tell you that.

CHIEF JUSTICE HECHT: I can read it.

MR. MEADOWS: Interrogatories.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Rule 197.1.

CHAIRMAN BABCOCK: And this is Judge Estevez is responsible for this mess?

HONORABLE ANA ESTEVEZ: Yes, for the mess. Are you ready?

CHAIRMAN BABCOCK: We're ready.

HONORABLE ANA ESTEVEZ: Where is Lonny? He didn't come back.

CHAIRMAN BABCOCK: He didn't come back. You know, you had a foil all ready for you here. Where is he?

HONORABLE ANA ESTEVEZ: I don't know. I hope we didn't run him off, but 197 -- again, some of these there's a few substantive changes because of the previous substantive changes that we had discussed in the prior meeting. So when you start off on 197.1, the format, first of all, now mirrors the federal rules, and we never had an (a). We never had somewhere where right under the interrogatories it told you how many you could have. You had to go back and look at Rule 190.2, 190.3, and 190.4 to figure that out.

CHAIRMAN BABCOCK: Uh-huh.

HONORABLE ANA ESTEVEZ: So this is not intended to add anything. It is intended to just be a place where you could find it all in one spot, and so it

is -- it says 15 for level one and then it says 25 for level two or level three cases, but I do want to make the point before anybody else notices that in our new level three case there is no number of interrogatories now. So it doesn't say you need to have 25. So this is -- we can argue what it can be, but the intent is to start somewhere with 25 written interrogatories for level three cases, and obviously people can then decide if they want more or less.

CHAIRMAN BABCOCK: Okay. Great. Can I just note here, which I should have done right before you started speaking, the Chair continues to believe -- and I know it's not the sense of the subcommittee or the committee -- that there should be a limit on the number of requests for productions, contrary to the situation now where we have unlimited requests for production, which I think causes a lot of mischief and adds to expense. So I just wanted to reiterate -- I've said it before. I just want to reiterate that. So carry on with interrogatories.

Yeah. Justice Bland, you're not going to attack us now, are you?

HONORABLE JANE BLAND: No, I'm cowed. We have not taken a position on whether or not there should be a limit and what that number should be to requests for production on the subcommittee.

CHAIRMAN BABCOCK: Okay.

HONORABLE JANE BLAND: So just to let you know that.

CHAIRMAN BABCOCK: Okay. Well, just to again reiterate what I think, I think there absolutely should be, and I can understand how a plaintiff's lawyer might say, "Well, you know, I asked for documents. I get some, and that just leads me somewhere else." So I can see maybe a two-prong, like you get 10 to begin with and then you get 10 at some point during the litigation. I can see that, but I think that's necessary. Yes, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Okay. So in level one we have 15 requests for production.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: And in level two we have 25 requests for production.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: So I think the idea is that in level three you-all talk about it and get the judge in on deciding what would be the appropriate number of requests for production. So, I mean, we did build in the 15, and the 25 as --

CHAIRMAN BABCOCK: No, no, no, I understand.

HONORABLE TRACY CHRISTOPHER: -- our sort of

standard ones in level one and level two.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: And so then level three would be after conference. Because we thought that in the level three cases it would be very difficult to say, you know, it's just 25 or it's just 35 without knowing the cases, because they're bigger and more complicated, and we wanted people to discuss it.

CHAIRMAN BABCOCK: Yeah. Well, you know, they always say you fought -- you always fight your last war, and I don't think we need to make policy based on abuses, but I will tell you that last year I had a case where, I think at the time it settled, we were up to almost 400 requests for production, and we very much did try to have that conversation with the trial judge. And her attitude was, you know, you guys are all competent lawyers. You know, you guys go out and figure this out; and of course, there was no reaching consensus and because one side was doing it then the other side thinks, well, by God, we're going to do it. So pretty soon you've got hundreds of requests for production, all of which are leading to motions and just incredible expense, so --

PROFESSOR ALBRIGHT: Isn't that the default?

HONORABLE TRACY CHRISTOPHER: Would you want to have a default in level three? Because we have

defaults in level one and level two, and if you want to have a default in level three, what would you put in?

CHAIRMAN BABCOCK: Well, what I said, I would put in maybe two phases. Maybe you could have, you know, 10 or 15 in phase one and then at some point down the road in the litigation you could have another 10 or another 15. The number is not as important as the fact that there be a number, in my opinion. Judge Wallace.

HONORABLE R. H. WALLACE: Well, or if you could make it clear that you get a total of 25.

CHAIRMAN BABCOCK: Use them any way you want.

HONORABLE R. H. WALLACE: Period, and you use them. I don't know if the language is such that that would be clear, but that would be one way to accomplish what you're talking about.

CHAIRMAN BABCOCK: Yeah.

HONORABLE R. H. WALLACE: It would make them ration it.

MR. MEADOWS: It would. It would, but at least in that element it would make level three the same as level two, which is in -- I think the thinking has been that level three is something very different, and we've attempted with this rework to make level two the default -- the default place --

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: -- for litigation.

CHAIRMAN BABCOCK: And I think, Bobby, your experience may be different than mine, but any -- any case where there's any money involved, they always go to level three.

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: They never go to level two. I mean talking about the plaintiff.

MR. MEADOWS: Well, we had a big discussion about that over the last few meetings.

CHAIRMAN BABCOCK: I know.

MR. MEADOWS: And part of the leap was that those cases -- not the really enormous cases you may have in mind, but a lot of litigation that migrated to level three would have stayed in level two if the parties had been able to tailor the discovery for something that worked for us, what they were dealing with, and so we have rewritten all of level two procedures and taken good cause out and let the court --

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: So that was an attempt to drive litigation there. In level three, I guess we should take a view of the room here, because I hear you. The thinking is that the parties work that out. You've got to

do this discovery control plan. You've got to submit it to the court. The court is required to enter a docket control order, and production is a big part of that.

CHAIRMAN BABCOCK: Yeah, Tom.

MR. RINEY: I think the parties can work it out and still start out with a limit, because I think limits lead to a more judicious use of discovery processes. When we adopted limits on six hours of depositions, and there has to be some limit on the interrogatories -- a lot of times we default to level two for the number; but there is a lot of complaining, "Oh, we can't do that, that will never work"; and it's worked very, very well. So if we started off with a number even in level three -- and I think that number is debatable -- I mean, I think it's going to be just like those other things. If you have room for six hours and it's a legitimate examination, and the parties say can we come back another day and do another couple of hours, most of the time the parties are going to agree.

I mean, I think it's -- I don't ever really recall having to go down to the courthouse on a motion where somebody really pushed more than six hours, and that was unthinkable when we adopted those rules. So having that limit there I think causes parties to be a little bit more judicious; but then the idea is, yeah, can you work

it out and hopefully you will work it out.

CHAIRMAN BABCOCK: Yeah, I'm totally in agreement on that myself. Anyway. Justice Bland.

HONORABLE JANE BLAND: Well, if we want to do that then why don't we do for the request for production what we're doing for the interrogatory, which is mirror level two as the default, which would be more than what -- more request for production than what you're contemplating at least initially, but it would be --

CHAIRMAN BABCOCK: Yeah. Like I say --

HONORABLE JANE BLAND: And then we would just provide for court relief from that number.

CHAIRMAN BABCOCK: Sure.

HONORABLE JANE BLAND: Or by agreement.

HONORABLE ANA ESTEVEZ: Yeah.

CHAIRMAN BABCOCK: Yeah, absolutely. Yeah, I don't think the number is quite as important as the fact that there be a number.

MR. MEADOWS: I think it's a good suggestion; and as you see, we have that work -- that concept working for interrogatories.

CHAIRMAN BABCOCK: Right. Right. And you tell me, people in the room, you know, since we've done that with -- since there have been limits in both federal and some state cases, interrogatories are rarely a

problem, right?

HONORABLE ANA ESTEVEZ: No, they're not. Request for productions are.

CHAIRMAN BABCOCK: Yeah, request for production is the problem.

HONORABLE ANA ESTEVEZ: That's where we see it all the time.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: If we're going to have a safety valve -- if we're going to have a number and then a safety valve, I think we need to have some parameters when the safety valve, the judicial -- when the judge can allow for more.

CHAIRMAN BABCOCK: Yeah.

MR. KELLY: Whether a showing of prejudice or good cause or whatever it is, but it should be spelled out to the court. And sometimes you get a judge who just doesn't like your case, and you need to have something you can point to. "Look, I've given you good cause, therefore I'm entitled to expand the number."

CHAIRMAN BABCOCK: I agree with that, and that could be on either side. It could be on plaintiff or defendant side. That doesn't much matter. Yeah, Scott.

MR. STOLLEY: If you put a limit on request for production, can you wire around that limit by sending

a deposition notice duces tecum that exceeds that limit?

CHAIRMAN BABCOCK: To a party?

MR. STOLLEY: Yeah.

CHAIRMAN BABCOCK: I would think not.

MR. STOLLEY: Okay. That would probably be -- if you said it in the rule --

CHAIRMAN BABCOCK: Yeah.

MR. STOLLEY: -- you can't wire around this by sending a subpoena duces tecum for a party's deposition.

CHAIRMAN BABCOCK: Yeah. I've seen where they will -- somebody will say, okay, I'm going to notice and subpoena the branch manager from Tulsa, and I'm going to request documents, but I don't want the company's documents. You should have given me all of those. I want his personal documents. I want his Snapchat, and I want his text messages, and his Gmail account e-mails. We have to give some thought about whether that would be exempted or not.

MR. STOLLEY: Yeah.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: So we'll make that change.

CHAIRMAN BABCOCK: Okay. Thanks, Bobby. Go ahead, Judge.

HONORABLE ANA ESTEVEZ: I'll just point out

there's some language from the federal rules that we did not use that's on the side.

HONORABLE DAVID NEWELL: What?

CHAIRMAN BABCOCK: I thought you were a slave to the federal rules.

HONORABLE ANA ESTEVEZ: No, I'm just pointing that out that it's there.

CHAIRMAN BABCOCK: Judge Newell is shocked.

HONORABLE ANA ESTEVEZ: You might see that a few times over here. Then you have 197.2, and this is just moving it again. I know there's different viewpoints on whether or not it should mirror the federal rules, but if we wanted it to be a little more consistent as far as the order I did maneuver them around in here. It has the verification requirement that had been in 197.2(d), and now it's in 197.2(a). In addition we changed some language to remove some confusing language indicating an agent could not respond and to add the declaration language, so you might want to just review that and see what you think about (a).

CHAIRMAN BABCOCK: Okay. Any comments about this? And by "this" I mean 197.2(a). Yes, Roger.

MR. HUGHES: Oh, no, not about 2(a), no.

CHAIRMAN BABCOCK: Okay. What about -- well, what is your comment on?

MR. HUGHES: Well, it was 2(d) about --

CHAIRMAN BABCOCK: Okay.

MR. HUGHES: First an inquiry: It has the sentence at the end, "Any ground not stated in a timely objection is waived" unless you are let off for good cause. Is that still in there, because that's not in any of the other specific discovery rules?

HONORABLE TRACY CHRISTOPHER: That's one of the ones we're going to look at.

MR. HUGHES: Okay.

HONORABLE TRACY CHRISTOPHER: Yeah. We're going -- all of those languages we're going to go back and come back with a new proposal.

MR. HUGHES: The other thing is a suggestion for thought on 197.1(b). An objection that's becoming popular in my neighborhood is "I don't want to answer that as an interrogatory; I'd rather answer that in a deposition." It's usually phrased as "I object to this interrogatory as it's more suitable for questioning in a deposition than an interrogatory" and you might -- as a suggestion, I'm not sure if I have any elegant language for it, but a suggestion that where we say that they can ask about a specific legal or factual contention, et cetera, that it's simply not an objection that it could be obtained through some other discovery vehicle. I mean, I

fully -- we need the one that says you don't have to marshal all your facts, but I think it's simply an abuse, in my personal opinion, to say "That question is better to be asked in a deposition."

It's just evasive, and it keeps you from being able to prepare intelligently for the deposition. On the other hand, there may be no clear way to write it briefly. But it's -- I suggest it.

HONORABLE TRACY CHRISTOPHER: Could we -- I haven't seen that before. Is that something that's now becoming common in interrogatory answers?

HONORABLE R. H. WALLACE: I've seen them, yeah; but, I mean, it's not really a legitimate objection, but it's made.

MR. MEADOWS: I've never seen that actually. Clever.

MR. LEVY: Yeah, it's a good idea.

MR. HUGHES: Well, it may move its way north.

MR. LEVY: Have you ever granted that -- you know, sustained that objection?

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE R. H. WALLACE: Just for the record, my default position is to do away with interrogatories.

HONORABLE TRACY CHRISTOPHER: And admissions.

HONORABLE R. H. WALLACE: We've been down that before, but --

CHAIRMAN BABCOCK: Well, to my way of thinking there is some limited benefit to interrogatories. You know, to identify witnesses.

HONORABLE R. H. WALLACE: If they were used properly.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: But you have to do that now under the automatic disclosures, so --

HONORABLE ANA ESTEVEZ: We could expand disclosures and add the three most important interrogatories and get rid of interrogatories.

CHAIRMAN BABCOCK: It's a thought. Yeah, you are supposed to except that, you know, your party opponent has a division that manufactured the defective part, and there are a bunch of people in that division; and they think that, you know, four people are necessary to be disclosed. But as the opponent, I want to say, well, wait a minute, who else is in that division that touched that part? You may not have disclosed them, but I want to know who that is.

HONORABLE TRACY CHRISTOPHER: Yeah, but

don't they just say, "Look at our records to find out who touched it"? I mean, you know, that's the problem when we have this option to look at records to answer that interrogatory.

CHAIRMAN BABCOCK: Yeah. Judge.

HONORABLE R. H. WALLACE: I will bet if we had a rule that said you could not propound interrogatories without leave -- without first obtaining leave of court as to why you need an interrogatory, it can't be addressed through disclosures, request for production, or anything like that, the use of interrogatories would virtually disappear, I'll bet.

CHAIRMAN BABCOCK: I think that's probably right. What else? I hardly ever use interrogatories. Peter.

MR. KELLY: The problem with reverting to only disclosures is disclosures aren't sworn, can't use them as summary judgment evidence.

CHAIRMAN BABCOCK: Right.

MR. KELLY: Can't use them as responding to summary judgment evidence.

CHAIRMAN BABCOCK: Right.

MR. KELLY: So that's the value of interrogatories when I've seen them used, is in summary judgment motions to dismiss.

CHAIRMAN BABCOCK: Good point.

MR. JACKSON: The other thing they use interrogatories for is to obtain medical records from doctors and hospitals --

CHAIRMAN BABCOCK: Yeah.

MR. JACKSON: -- and that sort of thing. So that would fall outside that.

CHAIRMAN BABCOCK: Right. Okay. Judge, keep on going.

HONORABLE ANA ESTEVEZ: Okay. Part (b), again, we cut out that last sentence because if we don't have any -- any type of discovery that could be served with a petition we don't need the second part of (b).

CHAIRMAN BABCOCK: Any comments on that?

HONORABLE ANA ESTEVEZ: I think we're going to want to just have a chance to change (d), objection, so I don't know if I even want to go through it and have everybody -- I think there was already some complaints about that, so I don't know that it's going to be useful to talk about the language if we're going to change it anyway. On the objections, it has the specificity, some other issues. Is that right, Mr. Hughes?

MR. HUGHES: I'm sorry, what?

HONORABLE ANA ESTEVEZ: You had some problems with (d)?

MR. HUGHES: Well, aside from my general objection that I think Rule 193 is all we need. It was just the second sentence about the effect of failure to timely object. So far this is the only rule I see that in, and it might lead to confusion about why do we have a rule like this for an interrogatory but not for other rules, and it might -- it might lead to confusion about whether the judge can excuse untimely objections for other ones or only for interrogatories.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: Another little comment of something else we didn't add that was on the side that came from the federal rules, we didn't add -- on part (e), "electronically stored information" is added and then I don't think there is any substantive changes in the rest of this.

MR. MEADOWS: Well, we -- I don't know that you would consider this substantive. Did you mention that we added the grounds for offering the review as an examination auditing?

HONORABLE ANA ESTEVEZ: I didn't mention that. Yeah, but we did.

MR. MEADOWS: Just to draw your attention to it, we lifted that from the federal rule.

CHAIRMAN BABCOCK: Frank, then Justice

Christopher.

MR. GILSTRAP: What about contention interrogatories? I mean, are we saying that those need to go away, too? They're a substitute for special exceptions.

HONORABLE TRACY CHRISTOPHER: It's still in the scope.

MR. GILSTRAP: Well, I mean, we're talking about getting rid of interrogatories. That's the thought I'm hearing.

HONORABLE ANA ESTEVEZ: No. I didn't think anybody is voting for that.

MR. GILSTRAP: We're past that?

HONORABLE R. H. WALLACE: That was overruled again.

MR. MEADOWS: If there's interest in it.

PROFESSOR ALBRIGHT: Contentions are in disclosures.

HONORABLE TRACY CHRISTOPHER: Yeah, contentions are in your disclosures, and it seems like the contention interrogatory is mirroring the disclosure.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: And you don't get any more information out of the interrogatory than you do out of disclosure.

MR. GILSTRAP: Well, you could say, "You say this in your answer," and you can have them explain it where that's not in -- the disclosures are much more general.

HONORABLE TRACY CHRISTOPHER: Well, and I think what Peter said is valid in that, you know, you swear to that contention answer and then you could cross-examine them in a deposition about it, so I do see the advantage of keeping it for that reason.

CHAIRMAN BABCOCK: Yeah. Yeah, I don't -- Frank, I don't know that there's consensus to do away with interrogatories. I think it's an idea that, you know, merits some thought, but, you know, contention interrogatories, I mean, properly used they can be helpful. You know, "Do you contend that the plaintiff shot" -- I mean "the defendant shot the plaintiff in the course and scope of her employment"? You know, "No, we don't," or "Yes, we do," whatever.

But a lot of times -- I had a case, you know, where recently where there was a -- there was a difference between the disclosures and the answers to the contention interrogatories, difference in wording mostly; but, you know, there is a motion about how there had been inadequate disclosure because the answers to the contention interrogatories were different than what were

in the disclosures. Whether that's something we can fix by a rule, I don't know. Anyway. Keep going, Judge

HONORABLE ANA ESTEVEZ: I don't think I have that much to add. I think that the bottom part of (e) was just kind of rearranged, and I don't think it creates -- I took off whatever was under (2) and put it where (1) is now, and it was rearranged just to correspond with the federal rules, so it's kind of in the same order.

CHAIRMAN BABCOCK: Okay.

HONORABLE ANA ESTEVEZ: And those were all the changes for that rule.

CHAIRMAN BABCOCK: Thank you. Any other comments on interrogatories? Hatchell, be careful, we're going to call on you again. We called on Hatchell, Judge.

CHIEF JUSTICE HECHT: That's amazing.

CHAIRMAN BABCOCK: Yeah, it was. He was very erudite. All right. Bobby, request for admissions?

MR. MEADOWS: Okay. This is, I suppose, a place of substantive offer, and that is the number of request for admissions. We've specified the number for the various levels: 15 for level one, 25 for level two and three. That corresponds with the number for interrogatories and now request for production.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: Then the -- another change is

that in a request to admit the genuineness of the document must be accompanied by a copy of the document. Make that clear in the rule.

CHAIRMAN BABCOCK: All right.

HONORABLE TRACY CHRISTOPHER: Although, you know, if we really want to keep things cheaper then, you know, if we had a rule that basically says if you have produced something that on its face appears to be a company document it's authentic, you know; and we wouldn't have to have this separate, you know, sending a request for admission, attaching the document, and "Is this authentic?"

HONORABLE R. H. WALLACE: Isn't there something like that now?

HONORABLE TRACY CHRISTOPHER: I mean, you know, we --

HONORABLE STEPHEN YELENOSKY: The other side produces it.

HONORABLE R. H. WALLACE: Yeah.

HONORABLE TRACY CHRISTOPHER: Yeah. Well, there is, but you have to -- there is something like that, but it takes another step as opposed to automatically. Like, you have to say -- there's some way to do it where you have to say, you know, "You've produced these documents to us, and, you know, so I think they're all

authentic."

HONORABLE STEPHEN YELENOSKY: I think it's automatic unless some action is taken by the other side.

HONORABLE TRACY CHRISTOPHER: Yeah. But, no, you have to do something first to start that 15-day time limit. I've forgotten what it is, but you've got to do something.

MS. WOOTEN: You have to give the other side notice that you're going to use it.

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: So many days before trial you have to give notice that we intend --

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: -- to treat your documents, the following documents, as self-authenticating.

HONORABLE TRACY CHRISTOPHER: Right. So, yeah. So it's this kind of -- and it's this kind of unnecessary time-consuming process really.

MS. WOOTEN: I may be misconstruing that process, but the way I think of it is if I have an exhibit attached to a summary judgment motion, I've given notice of actual use; and if I give the other side my trial exhibit list, I've given them notice of actual use to trigger that self-authentication procedure in the rules.

HONORABLE TRACY CHRISTOPHER: Well, you better look at some cases out of my court.

MS. WOOTEN: Uh-oh.

HONORABLE TRACY CHRISTOPHER: We take a dim view of authentication, unfortunately. I dissented, but now the rule is what it is.

HONORABLE STEPHEN YELENOSKY: You couldn't convince the others.

HONORABLE TRACY CHRISTOPHER: And, I mean, if you just attached it to your summary judgment, if you didn't say in your summary judgment that "I have followed X rule and they failed to contest the authenticity," we would not consider it an authentic document unless we knew that all of those steps had been taken.

MS. WOOTEN: So just putting it in as evidence --

HONORABLE TRACY CHRISTOPHER: Correct.

MS. WOOTEN: -- doesn't just show your intent of actual use of evidence?

HONORABLE TRACY CHRISTOPHER: Not unless you, you know --

HONORABLE ANA ESTEVEZ: Is that without an objection from the other side?

HONORABLE TRACY CHRISTOPHER: Yepper. What I disagree with, but --

HONORABLE ANA ESTEVEZ: So they can bring it up on the -- I'm just curious. They can bring it up on appeal for the first time?

HONORABLE R. H. WALLACE: It's Rule 193.7.

HONORABLE TRACY CHRISTOPHER: I'm telling you, we went en banc, pet denied. Just saying.

CHAIRMAN BABCOCK: Well, we have some people that could fix that, you know. Justice Bland.

HONORABLE JANE BLAND: Well, to have an automatic authentication upon production we would have to have some sort of a -- there has to be a way for you to produce something that you are not --

HONORABLE TRACY CHRISTOPHER: Vouching.

HONORABLE JANE BLAND: -- vouching for, because there are often, you know, files that you have that contain documents that you have received from others that you're required to produce because they're relevant, but they're not yours, and you can't vouch for their authenticity.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: So if we don't do this, we've got to think about how to do something else.

CHAIRMAN BABCOCK: Yeah. To your point, I had a case once where the whole case was about what was in our file at a particular point in time, and the other side

didn't bother to think through that issue about authenticating what was in our file. You know, he assumed what we produced was in our file. Yes, sir.

HONORABLE R. H. WALLACE: You're right. The rule, 193.7, says "The parties production of a document authenticates it" -- I'm paraphrasing -- "for use against that party in any pretrial proceeding or trial unless within 10 days or longer after the producing party has actual notice that the document will be used they object." So it's not just --

HONORABLE STEPHEN YELENOSKY: And it's actual notice.

HONORABLE R. H. WALLACE: Yeah, some kind of notice.

MS. WOOTEN: I feel like appending an exhibit to my motion would be actual notice. But not in Houston.

HONORABLE TRACY CHRISTOPHER: Well, I mean, if the other side produced it, probably, but I'm just suggesting that you cite the rule.

HONORABLE R. H. WALLACE: Yeah, well, and I've seen people say in summary judgments that we intend to utilize the -- whatever is attached. That would probably satisfy it.

HONORABLE TRACY CHRISTOPHER: It just

seemed -- I think this whole authentication process is kind of burdensome, and we've got that rule. Then we've got, you know, this rule where we're sending out these admissions to authenticate stuff. I mean, if we want to think outside the box, we can do something a little differently.

HONORABLE STEPHEN YELENOSKY: Yeah, like how often is authenticity really an issue? We're doing an awful lot. The default ought to be it's authentic, and nothing happens unless somebody else does something. I mean, I've never had anybody really claim that a document, in 12 years on the bench, was really not authentic, go through the process of claiming it.

CHAIRMAN BABCOCK: Have you had anybody claim that -- not that it's not authentic, we just don't know?

HONORABLE STEPHEN YELENOSKY: Sure.

HONORABLE TRACY CHRISTOPHER: Well, I mean, it's very typical, especially with pro ses.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: It's very typical for a pro se to just attach a bunch of documents to their summary judgment response. You know, and there's lots of case law that says, you know, just attaching something doesn't prove it up to be anything.

HONORABLE STEPHEN YELENOSKY: Well, but if we're thinking outside of the box we could just say, well, then you just on the other side raise your hand and say, "We don't think it's authentic," and that's good enough, but why would we put the burden on the 99 percent of the time when there's not a problem to contest authenticity. It seems backwards.

HONORABLE TRACY CHRISTOPHER: I agree.

CHAIRMAN BABCOCK: Okay. Keep going.

MR. MEADOWS: Okay. The -- in 198.2(a) the -- essentially just put emphasis on the fact that the response is not timely served or the request considered admitted without the necessity of a court order.

CHAIRMAN BABCOCK: Any comments on that?

MR. MEADOWS: Then moving to subparagraph (b), this just goes to how you answer a request. It borrows from Federal Rule 36, seeks to just have it better understood what's required in answering how you answer, if you don't admit it. We viewed this as largely a stylistic change.

CHAIRMAN BABCOCK: Any comments on this? Keep going, Bobby. You're on a roll.

MR. MEADOWS: Okay. Paragraph (c), this is new language from paragraph -- from Federal Rule 36(a)(6). I think it's part of the common practice around

admissions, but it's new to our rule.

CHAIRMAN BABCOCK: Any comments on that? Yeah, Tom.

MR. RINEY: It doesn't specifically say that it can't be used against another party, and I think we do have that in the interrogatory rule. Perhaps that is included that it can't be used -- not an admission for any other purpose. Does that encompass it?

MR. MEADOWS: Isn't that in the next -- yeah, on the next page. "An admission made by a party under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding."

MR. RINEY: So, yeah, I think that's the language. My question is I think the interrogatory rule specifically said it couldn't be used against any other party.

MR. MEADOWS: Okay.

MR. RINEY: I think it's probably included within that, but I just raise that question.

MR. MEADOWS: Okay. Got it.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: A general issue on -- I don't know where it would actually be reflected in the rules -- on the use of request for admissions. I had a case a few

years ago, with all due respect to the Corpus court, they just completely got wrong. There was a -- we had served mirror image requests for admissions. "Admit A, you received the document before September 21st." "Admit you received it after September 21st." Then they were deemed against the other side because they hadn't properly responded. We moved for summary judgment on the ground of the -- sort of the ones that helped us, right, the odd numbered ones, one, three, five, seven; and the court held that, well, because they also admitted two, four, six, eight, the mirror images, that created fact issues; and so I did a lot of research on the history of request for admissions, and what they are is not proof of a fact but rather waiver of the proof of the opposite of the fact. So actually the -- you know, the even-numbered ones were not proof of a fact, but it gave the requester the opportunity to select which one of the waivers he wanted to take advantage of. Now, my argument was, well, I was taking advantage of waivers one, three, five, seven. Two, four, six, eight were simply nullities.

Then there was also the issue that because they were deemed admitted, attaching them to the -- and I can't remember exactly how the court ruled on this, but attaching them to the motion for summary judgment they were not summary judgment evidence because there was

nothing that was -- because waiver happened by operation of law and not by some court order, it didn't constitute summary judgment evidence at all. So sort of two rulings from the court on that. Luckily it was an unreported decision, and it hasn't been cited lately, but I think something in the rule stating that it's a waiver of proof rather than proof of a fact so you actually can have motions for summary judgment based on mirror image admissions. You know, for instance, if it's authenticity, admit it's authentic, admit it's not authentic. Well, if they get deemed admitted, well, both of those statements are deemed to be true, and you wouldn't be able to move for summary judgment on a document because you would also have the admission out -- there would be a fact issue as to whether the document was authentic.

So there should be something in the rule specifying how it's used and what the actual legal effect of it is, and I think it's up further in (1), "the truth of any matter within the scope of discovery including," but I think that needs to be fleshed out to say that it's a waiver of the -- waiver of the obligation to disprove the truth of any matter.

CHAIRMAN BABCOCK: Kennon and then Judge Yelenosky.

MS. WOOTEN: This thought isn't as deep, but

the current section (c) that's been added is somewhat duplicative I think of what's in 215.4(a) on pages 74 and 75. It's the Rule 215 that addresses -- when you don't do what you're supposed to in response.

MR. MEADOWS: Kennon, where are you looking?

MS. WOOTEN: If you look on page 74, Rule 215.4 addresses failure to comply with Rule 198. "A party who has requested an admission under Rule 198 may move to determine the sufficiency of the answer or objection." And it goes on to address the same concepts that are in proposed paragraph (c) on page 45.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: While we're thinking of jettisoning some of our discovery tools, I don't know what the utility is of request for admissions unless the other party is deemed and they don't move to withdraw them, and how often does that happen? Because the case law is if somebody moves to withdraw deemed admissions and they would otherwise be dispositive, you're supposed to as a judge essentially allow them to withdraw the deemed admissions, and the case law also is the admissions are not for dispositive issues. They are for things that there really shouldn't be a dispute about, which you can do by stipulation anyway. So when lawyers come in with deemed admissions and somebody comes in

moving to withdraw them, you pretty much say if it's going to matter I am going to allow them to withdraw the admissions. So why do we have them?

CHAIRMAN BABCOCK: Judge.

HONORABLE ANA ESTEVEZ: I have lawyers that have not moved to withdraw them.

HONORABLE STEPHEN YELENOSKY: Well, sure, but why is it important to give somebody the tool to win by --

HONORABLE ANA ESTEVEZ: Well, I understand that, but I wish that they would all do that, but they didn't all do that, and I think the reason they really wanted them is they wanted to be able to move cases along that people aren't going to respond to them so that they can get the deemed admission, try to get a summary judgment or something based on it. Because where they really, really use them and I have the most are civil forfeitures. The drug cases where they took away the car, I see the deemed admissions. They are -- the guy is in jail still. They serve him. They're serving him with the admissions, the admissions are deemed admitted, and they're sending me a summary judgment or, you know, or a default or whatever, and they don't want to get an affidavit for whatever reason. I don't know, but --

HONORABLE STEPHEN YELENOSKY: That's my

point. Why can't they get an affidavit? Why is it so important to allow somebody to win based on a deemed admission where there was no motion to withdraw the deemed admission? Why is that so important that they can't just do it by affidavit when they want to do a summary judgment, and there's no response to it?

HONORABLE ANA ESTEVEZ: I'm not disagreeing with you. I'm just telling you that it doesn't work out as pretty as that.

HONORABLE STEPHEN YELENOSKY: Well, I mean, given the case law I don't see the point of request for admissions.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: No, I didn't realize it was that easy to withdraw a deemed admission. It isn't in Jefferson County. You're bound by --

HONORABLE STEPHEN YELENOSKY: Well, maybe they're reading different case law.

MR. LOW: No, seriously, what is supposedly the standard for being able to withdraw because you rely on it for a week and then they come along and say, "I'm withdrawing it."

"Okay. You can withdraw it," and I don't understand that. What is the standard for withdrawing? I would like to see.

HONORABLE ANA ESTEVEZ: Supposed to be good cause.

HONORABLE STEPHEN YELENOSKY: Well, the standard that -- you know, that I've reduced it to is I'm going to allow you to withdraw them, but that's not a good standard. I understand that somebody could be relying on them and all of that.

MR. LOW: Right.

HONORABLE STEPHEN YELENOSKY: I guess that's something you could take into account.

MR. LOW: Yeah, I understand.

HONORABLE STEPHEN YELENOSKY: But we're creating the problem. We don't need a standard if we don't have them.

MR. LOW: But if it's not important, I mean, okay, but if it's important and they've relied on it they ought to be --

HONORABLE STEPHEN YELENOSKY: Well, my point is we don't -- we shouldn't have -- we don't have a need for a request for admissions for somebody to prove up their case when the other side is not going to put up a fight, and if they are going to put up a fight you can look at a standard for allowing them to waive the admissions. But again, admissions, as I read the case law, aren't supposed to be about dispositive issues

anyway.

MR. LOW: Well, they're supposed to reduce what you have to do in discovery and reduce the expense of proving certain things, prove it very simply. That was the purpose of it.

HONORABLE STEPHEN YELENOSKY: Well, but, I mean, I disagree a little bit of what the purpose is under the case law now; but to the extent you're trying to do a shortcut to proving liability or something, admit that you were negligent, I think that that's not a correct use of request for admissions. If you're trying to get them to say "admit that you were there," those are the kind of things that you might get in your stipulation or you just put an affidavit in.

MR. LOW: That's true. That was the purpose of it.

CHAIRMAN BABCOCK: Professor Carlson.

PROFESSOR CARLSON: Well, I think the standard is good cause and no undue prejudice to the party who obtained them.

MR. LOW: Yeah, that.

PROFESSOR CARLSON: And I agree with you, Judge Yelenosky, that if they are -- if the deemed admissions rise to the level of being death penalty sanctions then, yes, you're supposed to apply death

penalty due process analysis and allow them to withdraw if you meet that standard.

HONORABLE STEPHEN YELENOSKY: That's a pretty high standard or low standard, depending on how you look at it.

PROFESSOR CARLSON: One big difference between an interrogatory, I thought, and an admission is a person cannot testify at trial contrary to their admission. So when you get an admission you kind of take it to the bank and say this is out of the case, which I thought was the purpose of it. "Admit that there is a binding contract."

"We admit that," so now we're down to breach and damages.

HONORABLE STEPHEN YELENOSKY: Well, maybe so, but in practice if somebody says in an interrogatory "Yes, it's a binding contract," is that really a case in which, "A-ha, they're going to testify at trial"? It's not "and if I only had an admission." I just don't see the utility versus the cost here because I don't think people are going to -- I don't know that request for admissions is really going to operate in most cases in the way that you've just described.

PROFESSOR CARLSON: What if the party won't -- the other side won't stipulate and it's more

expensive to put together the affidavit than to just ask for the admission?

HONORABLE STEPHEN YELENOSKY: Well, again, how often does that happen? How often do you go before a judge and say, "Well, I wouldn't stipulate that this is the contract," or "I wouldn't stipulate to that"? I just don't think there's much utility to it. And not that there isn't some, you can point it out, but we're talking about, you know, overall.

CHAIRMAN BABCOCK: Buddy, then Judge Wallace.

HONORABLE STEPHEN YELENOSKY: I don't think it's a necessity

MR. LOW: But, I mean, you don't even have to meet for it -- assume that you were present or saw something. You know, you were there, and that was a big issue of whether you had knowledge; and you don't have to go and ask them "Well, we want you to assume we do that." You just submit an admission, and they admit it. That puts that part of the case to an end. You don't have to deal with that. So if used properly -- I'm not saying that they're not misused, but there are easy ways to answer misused ones.

HONORABLE STEPHEN YELENOSKY: The ones I see are summary judgments where basically the person hasn't

responded and everything is deemed; and one, if you come and move to withdraw it then I'm going to allow them to withdraw it. Also because, you know, the instructions to the trial courts is, you know, not to decide cases if possible on essentially what are essentially death penalty sanctions.

MR. LOW: I'm not saying that you shouldn't try to do justice, because I've been in position of begging for it, but in a situation like that, but I'm just saying there is a good use for admissions when used properly to eliminate certain issues, and that puts an end to it. You don't think about it after that.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: But maybe your issue is more you don't like deemed admissions, because if somebody does respond, it does cut out the issues.

HONORABLE STEPHEN YELENOSKY: That's true.

HONORABLE ANA ESTEVEZ: But, I mean, we don't see those because nobody comes to talk to us about them. But the ones we really see as trial judges are the deemed ones that they're doing the summary judgments or the defaults or something like that, depending on where they are on that part of it. So --

HONORABLE STEPHEN YELENOSKY: There's no limit on admissions, though, right?

HONORABLE TRACY CHRISTOPHER: Yeah.

HONORABLE STEPHEN YELENOSKY: Is there a limit?

HONORABLE TRACY CHRISTOPHER: We made a limit.

HONORABLE STEPHEN YELENOSKY: Oh, good. Good. That helps.

HONORABLE ANA ESTEVEZ: So it may be that the issue isn't necessarily that there's no -- sometimes it feels or we feel that justice isn't served with a deemed admission. I think that would be probably what the issue is.

HONORABLE STEPHEN YELENOSKY: That's a good point.

HONORABLE ANA ESTEVEZ: And we want justice. We're not trying to advocate for one side or the other, so we don't see the utility in somebody losing so much by doing nothing and maybe because they just didn't know what to do.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Yeah, I was going to agree that -- although, you know, Buddy said there's a laudable reason for an admission, I never see them used that way. I never saw them used that way.

HONORABLE ANA ESTEVEZ: Because we're up at

the other level. I mean, they settled the case, right?

HONORABLE TRACY CHRISTOPHER: But, I mean, I've never seen them used in a trial where both sides answered -- sent admissions and answered them. "I'd like to stand up and read this request for admission, Judge," you know, like, okay, you know, to me.

CHAIRMAN BABCOCK: I've done that.

HONORABLE TRACY CHRISTOPHER: You see them more often in the defaults, and I'm kind of with Judge Yelenosky. If you want to prove that you owe this -- you are the owner of this credit card debt and the guy really owes you 5,200, you know, I'd like somebody to swear to that rather than having these deemed admissions.

CHAIRMAN BABCOCK: Okay. Peter and then Judge Wallace.

MR. KELLY: The value of them comes a lot of times in your small PI case. Was the -- "Admit the light was red," right? Because if you don't admit it then I have to go hire a light sequencing expert and track down witnesses, and it costs me five to ten thousand dollars to prove the light was red when you know full well it was red. So that's one reason you have the cost shifting; and if I actually have to prove that, you know, the defendant would then have to -- if they just proved something they should have admitted, that actually -- the cost shifting

actually helps and cuts out a lot of the "foofoorah" and denials.

So it actually serves a purpose that the judge may not even see that something is not brought to the fore and not contested. But and it's very important to have that cost shifting in there for that sort of basic fact. It's in between mere authentication and "admit you were negligent," but there are sometimes facts that can be established by admissions.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, the example Peter just used would be a good example of a legitimate admission. But back to what Justice Christopher said, in six and a half years I've never seen them used like that. The way they're normally used are credit card cases and small contracts where, yeah, in lieu of getting an affidavit, you know, maybe a pro se who answers so they've got to prove -- they've got to come in and ask for summary judgment, and they'll just attach those deemed admissions, and there it is. They can do it by affidavit. I mean, they can do it by form affidavit they use in just about every case.

HONORABLE TRACY CHRISTOPHER: But perhaps the judges just aren't seeing the usefulness, and maybe you-all settle cases after you get a good admission. So,

I mean, if the practitioners think they're still useful then --

HONORABLE STEPHEN YELENOSKY: It could still take away the deeming, but then not -- there's no reason to respond.

HONORABLE TRACY CHRISTOPHER: Then they file a motion to compel because they didn't answer and then -- then we get into the whole sanctions process, which it really is a death penalty sanction --

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE TRACY CHRISTOPHER: -- on these deemed admissions often, but we don't ever look at death penalty case law on deemed admissions. They're just deemed admissions --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- that you assign to summary judgment.

CHAIRMAN BABCOCK: Something you said a minute ago, though, Justice Christopher, I may have misunderstood, but whether they're deemed or they're just admitted by the party, you know, "Admit that you owned the Red Chevrolet, March 1st, 2015."

"Admitted." And the lawyer who has sent those at trial wants to stand up and say, "Ladies and gentlemen of the jury, here are some facts that have been

admitted by the defendant here," and you read them. Is that probative, or is that just a waste of time? At the jury level it's okay.

HONORABLE TRACY CHRISTOPHER: No, no, no. I mean, that is what you're supposed to do with admissions. I just never see them done.

CHAIRMAN BABCOCK: Oh, okay. All right. Not that it's improper, it's just like --

MR. MEADOWS: It's rare.

HONORABLE TRACY CHRISTOPHER: No, no. That is the way you're supposed to do it.

HONORABLE ANA ESTEVEZ: There's impeachment sometimes. Every now and then somebody is on the stand and then they'll pull out an admission or interrogatory just to say this is --

HONORABLE STEPHEN YELENOSKY: Well, or interrogatory.

HONORABLE ANA ESTEVEZ: Or interrogatory. I think interrogatory is more often.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: In the early days that was a more common practice. You would get up and tell the jury, "They're not claiming this. They know that. They know that," and you read that. We always did that.

CHAIRMAN BABCOCK: Those are the old days.

That was then; this is now.

MR. LOW: Oh, you mean I lived in the old days?

CHAIRMAN BABCOCK: We're not doing it that way anymore, Buddy. Yeah, Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, and I don't think you need admissions even -- even in that proper sense because, I mean, before we would start the trial I would try to get clear on what they weren't arguing about, and they would tell me. And I, you know, would hold them to that; and there was no need to, you know, do anything to say, "This is not an issue and the other side has admitted" unless somehow it came in question, somehow the trial put it in question unwittingly or whatever. And then they might get an instruction: "You're not to consider whether or not the light was red. The Court instructs you that it's already been determined or it's already been agreed that the light was red."

CHAIRMAN BABCOCK: Okay. Anything more on these request for admissions on page 45? Or 46? Anything you want to talk about, Bobby?

MR. MEADOWS: Well, I just think that on page 46 we deal with the -- maybe the other side of the question about the significance of admissions because we're dealing with what it takes to withdraw or amend an

admission. We make it clear that to do so requires a motion. That's -- we've added that, and then in paragraph (b) we have essentially offered a rewording of the standard that should govern the court's allowance.

CHAIRMAN BABCOCK: Right. Any comments on that? All right. Moving right along to depositions upon oral examination. One of Justice Hecht's favorite --

HONORABLE STEPHEN YELENOSKY: Should we get rid of those, too?

MR. MEADOWS: Does anybody want to get rid of deposition?

HONORABLE STEPHEN YELENOSKY: Does anybody want boxed discovery?

CHAIRMAN BABCOCK: Let's go back to trial by ambush. What do you think?

MR. LOW: Now you're with me.

CHAIRMAN BABCOCK: Yeah. Buddy's --

MR. LOW: Lucius Bunton.

MR. MEADOWS: Jane took the laboring oar on depositions, and she's going to lead our discussion on this.

HONORABLE JANE BLAND: All right. So under Rule 199.1, the first branch to the side is that the federal rules incorporate a 10-deposition limit, and in the federal rules the 10-deposition limit applies to oral

depositions and depositions on written questions. Our subcommittee had a long discussion about whether or not to have a 10 deposition limit in our rules, and for the first two levels of discovery the consensus was that we have -- we have deposition limits that work fine, and we have an overall hour -- total hour number of depositions limit so that there wasn't a need to adopt the federal 10-deposition limit rule. But I guess the first thing we would like to know from everyone is whether you-all think it would be a good idea to adopt the 10-deposition limit rule.

CHAIRMAN BABCOCK: Okay. Roger.

MR. HUGHES: If it's strictly oral, limiting oral depositions, I think that might have -- be a good idea; but there needs to be some attention given to is that 10 per side, 10 per party, or just 10 by everybody all together as an aggregate?

The other one is I'm not sure if it's going to be a good idea to do -- to have a limit for deposition on written questions because even in a moderate-sized personal injury case it's not unusual for a plaintiff to have maybe five or six different health care providers, especially if they're claiming a back injury.

CHAIRMAN BABCOCK: Right.

MR. HUGHES: And, therefore, frequently you

have to send out one deposition to get the paper records and then another deposition to another custodian to get the electronic -- well, they used to be called "films." Today they're all digitized. And then a completely separate one for the financials, the billing. So you may end up with five providers. You may have 10, 15 depositions, DWQ's, you'll have to send out just for that, so I'm not sure if it make sense to limit DWQ's or whether to be more generous.

CHAIRMAN BABCOCK: Okay. Peter had his hand up, and then Buddy.

MR. KELLY: No, for two reasons. One is we receive more and more contested 18.001 affidavits. We're going to have to take the depositions of the health care providers and billing custodians and the -- whoever it is who signs the affidavit for the defendant. And these aren't necessarily long depositions, but having an arbitrary number, whether it's 10 or 12. And secondly, more and more cause of action require proof of notice or knowledge on the part of the defendant; and you have to talk to a lot of employees and take a lot of -- again, these are not long depositions, 15, 20. You know, "Did you see that the fence had fallen down on the day shift the day before the accident."

"No, I hadn't seen that." But you have to

establish that both ways, either that there was knowledge or there was not knowledge, and so perhaps an hour limit can make sense if it's a generous enough hour limit, but having an arbitrary number of depositions would be counterproductive I think.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: And just to add a little bit to this for level three cases, the anticipation was that the parties would work with the court and come up with whatever restrictions on depositions there are for a level three case, but if like for -- and so we didn't take a position on how many for a level three case. But if, like, for a request for production the committee is interested in having some sort of default number where the limits of level two apply unless you seek a leave of court or you agree or something like that, then we would be interested in knowing that, too, here.

CHAIRMAN BABCOCK: Okay. Buddy, and then Roger.

MR. LOW: There could be situations. Like I represented Steve Bechtel, Jr. Sued five railroads, and we had three different officers and each railroad we had to depose, so --

CHAIRMAN BABCOCK: That would be nine. So you got one extra one, right? Yeah, what are you griping

at?

MR. LOW: Don't count my math. We had five times three would be 15, and we're over it. I mean, it doesn't count -- you might have multi-defendants, so I'm against the number.

CHAIRMAN BABCOCK: Roger, then Peter.

MR. HUGHES: Well, and maybe people who litigate in federal court already know how the Feds handle this. Picking up on what Peter said, a corporate rep deposition certainly puts in the hands of the defendant how many witnesses are going to be produced. I mean, if the plaintiff designates 10 topics and produces three witnesses, is that one deposition or three depositions? I can see problems coming up in good -- where people could have good faith disagreements over that. I wouldn't be surprised since if the Feds limit it, they may already have answers to that question.

CHAIRMAN BABCOCK: Yeah, Justice Hecht.

CHIEF JUSTICE HECHT: Well, that's my question. I mean, this has been a rule in the federal rules for a while. How's it working?

CHAIRMAN BABCOCK: Well, I had a case where there was an issue about the number of depositions, and I think there was some case law -- it's not in Texas, but if you had the same person on all of the topics then that --

then the corporate deposition counted as you got your seven hours for that one person. If you -- if you split it up and you had three people, then there could be seven hours for each of the second and third person, and that was an hours question. I'm not sure how they did it in counting against the 10, but I think they just counted it as one, one deposition, even though it was three people for 21 hours.

CHIEF JUSTICE HECHT: Hmm.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: Touching back to what you were saying earlier about whether there should be a number or a cap, and I understand these are all -- these are level three cases we're talking about; but having a number, having a default number, becomes the default ruling. And as a practical matter, in the federal system you have an almost -- it's almost an inquisitorial judicial model rather than a purely adversarial one. The federal courts have more resources to examine each individual case, and to actually make a good cause finding for what the number should be, it should be higher or lower than the default number. You don't necessarily have that in the state district courts, and so a default number often will become the hard and fast number. And so having one, especially on a complex case, you could be just arbitrarily limiting

something unfairly low, especially when you get to multiplicities outside of, say, one party's hands or the other's.

CHAIRMAN BABCOCK: Yeah, Alistair.

MR. DAWSON: So I'm a fan of the number of hours as opposed to the number of depositions for reasons that have been stated. In addition, it encourages the lawyers to be more efficient with the use of their time, which I think may be advantageous. It seems to me that the number that's in level one or level two, nobody is really complaining that those numbers are inappropriate or too high or too low, so I would leave those where they are. And if you wanted just -- if you want to -- I mean, and I think in level three, you leave the parties to try and see if they could reach agreement; and if they can't, you know, maybe you have a suggestion of no more than 60 hours, which would be six hours per deposition for 10 depositions, as a suggestion.

CHAIRMAN BABCOCK: There's a federal judge in Texas in the Eastern District that even in complex cases limits it to 10 hours per side, for deposition.

MR. DAWSON: For depositions?

CHAIRMAN BABCOCK: Huh?

MR. DAWSON: For depositions or trial?

CHAIRMAN BABCOCK: Depositions. Ten hours

of --

MR. DAWSON: Got to be pretty efficient.

CHAIRMAN BABCOCK: Huh?

MR. DAWSON: You've got to be pretty efficient.

CHAIRMAN BABCOCK: And I went all the way right up to trial under that order, and, yeah, people -- I mean, you didn't waste any time on, you know, "Who was your high school Spanish teacher?" Robert.

MR. LEVY: In responding to Justice Hecht's question, Judge Campbell on the federal rules committee I think would be a very helpful resource. What they talked about, they actually looked at even further limits on the numbers because the studies showed that in the average case the number of depositions in federal court were far lower than the current limit. So they thought about lowering that number; but, in fact, in the end they decided not to make a change on the numbers, mostly because they were still concerned by the parties.

One of the issues is having -- having a limit does give you the opportunity or a judge the opportunity to manage the case a little bit more because the parties do need more -- the court should be open to consider that, but the parties just have to come to the judge if they can't otherwise agree. I suspect that in

most cases the parties will agree, but this gives you at least an argument -- if you have a cap, an argument to take to the judge if you can't agree that it at least doesn't meet the threshold cap, even though good cause should be freely given to amend it.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I do think one thing we need to consider in terms of the difference between federal and state court is that in state court people play depositions all the time, even when the witness is available.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: In federal court that's often restricted, depending on your federal judge. Sometimes they let you do it. So, I mean, in the state court, you know, people always depose the doctors, people always depose the police officers, and then, you know, play the videotape or read the deposition. In federal court they just bring those people live. So there's a reason why we might have more depositions under our current practice.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: I was just simply going to say that I agree with Alistair. I think the subcommittee agreed with Alistair, that we prefer controlling this with

the number of hours that are available to the lawyer to use in the way that they think is most efficient, and I got to 60 the same way he did, which is if we want to treat it as somewhat different than level two, you borrow from the federal system that allows 10 depositions and use our six hours and not their seven. Maybe you start with that and just see how it works. I'm not saying it can't be another number, but I think driving this by-the-hour allocation is the better way to go consistent with how we have done it in our discovery system.

CHAIRMAN BABCOCK: You think 10 hours is too low?

MR. MEADOWS: Ten hours was too low? Ten hours, didn't sound like it.

CHAIRMAN BABCOCK: We got it ready. We were ready for trial.

MR. DAWSON: It must have been a simple case.

CHAIRMAN BABCOCK: It wasn't a simple case. Alistair.

MR. DAWSON: The other thing I was going to say is I wouldn't -- whatever the limitations are, I would put depositions on written questions in a whole different category, and I wouldn't have -- if you do it by hours it wouldn't matter, I don't think; but whatever time you

spend on depositions on written questions, those are to prove the documents. That's not -- that's separate from oral depositions in my opinion.

CHAIRMAN BABCOCK: Okay. Do we have consensus that there ought to be an hours limit as opposed to a number of depositions? Tom, yes?

MR. RINEY: Yes.

CHAIRMAN BABCOCK: Anybody disagree with that? Judge Wallace.

HONORABLE R. H. WALLACE: No. I agree with that.

CHAIRMAN BABCOCK: You don't not disagree with it?

MR. KELLY: If there is to be a limit.

HONORABLE JANE BLAND: All right. Well, we'll put the default, and this will just even more strongly encourage the lawyers to reach agreement and to have a conference that they're supposed to have to agree, unless I'm hearing that people don't want the default. Okay.

CHAIRMAN BABCOCK: Buddy wants to be heard, and so does Peter.

MR. LOW: No. A lot of the cases they take depositions because the subject is not -- is out of some state or out of some other place.

CHAIRMAN BABCOCK: Right.

MR. LOW: And you would prefer to have them come live, but you can't make them come live, and some of the cases you have a lot of witnesses like that.

CHAIRMAN BABCOCK: Sure.

MR. LOW: And they take their deposition and they say, "Man, I wish I could make him come live, but I couldn't do it." So it depends on your case.

CHAIRMAN BABCOCK: Peter.

MR. KELLY: Just to respond to Judge Bland's open-ended question, yes, I do oppose the default number.

CHAIRMAN BABCOCK: Yeah. Do we need to take a vote on whether there should be a default hours limit?

MR. JACKSON: Are we talking about level three?

CHAIRMAN BABCOCK: David.

MR. JACKSON: In level three we're talking about?

CHAIRMAN BABCOCK: In level -- we're talking about level three, yeah. Anybody have an appetite for a vote? We haven't voted all day. I'm getting antsy. Professor Albright.

PROFESSOR ALBRIGHT: Doesn't the rule say that the default is level two unless it's changed in the order?

HONORABLE TRACY CHRISTOPHER: Well, yeah, but we're talking about putting -- like we have put 25 interrogatories and 25 admissions in level three, so the question is should we put 60 hours in level three, just like we did --

PROFESSOR ALBRIGHT: Okay.

CHAIRMAN BABCOCK: All right. Everybody that thinks there should be a default for level three depositions at some number of hours, raise your hand.

Everybody opposed? Of course the court reporter is going to be opposed. All right. It's 20 to 2 in favor of having a default at some number of hours, the Chair not voting. All right. What else can we do, Bobby?

MR. MEADOWS: I think we -- are you about to turn it over?

HONORABLE JANE BLAND: No. The next thing is 199.1(b). Right now the Texas rule is that a party can take an oral deposition by telephone or remote electronic means if you give notice of your intent to do so. The federal rule requires the agreement of the parties or leave of court, and our committee or our subcommittee recommends adopting the federal rule.

CHAIRMAN BABCOCK: You're at 199.1. Did you say (c)?

HONORABLE JANE BLAND: (b), right below

where we were discussing about the 10 depositions.

CHAIRMAN BABCOCK: Okay. And what's the thinking about requiring agreement?

HONORABLE TRACY CHRISTOPHER: I'm against it.

HONORABLE JANE BLAND: Well, you weren't when we did it.

HONORABLE TRACY CHRISTOPHER: I know, but I'm just saying, I'm looking at it going why are we doing this?

CHAIRMAN BABCOCK: You know, you two are usually so simpatico and today it's like --

HONORABLE TRACY CHRISTOPHER: I know. I had to leave early one day.

HONORABLE JANE BLAND: Oh, no, no, no, no.

CHAIRMAN BABCOCK: Tom.

MR. MEADOWS: She's not getting to the future, Jane.

MR. RINEY: I recently had an experience where I was just presenting some witnesses. I was not representing the party, and the other party wanted to depose my witnesses by a form of Skype. Now, there was a court reporter present in my office where we were doing the depositions. And again, I wasn't a party, so my interests weren't as directly involved, but there were a

lot of problems with it. And I remember thinking, you know, if I was a party I'm not sure that I wouldn't object to that. And since we're looking to the future, I think it's important to keep in -- to take into account what this can mean; and I think, you know, it's like a lot of things with video and so forth, we kind of had to learn; and I think this suggestion is a good one.

CHAIRMAN BABCOCK: Yeah, that's a great point, Tom, because there are some technologies -- I don't know if Skype is one of them or not -- that are very insecure. And so if you're taking a deposition where there's any level of confidential information going on, you may want to preserve the right to make sure that whatever technology is being used is a secure technology.

Now, I suppose if you keep the "by agreement" that would for sure make that happen. If you took it out, I mean, you could always go to court, I guess, and say, you know, "They want to do it by this technology that, you know, the Russians are listening to I know."

MR. RINEY: But at least with this provision in here, that would give me the right to say, "Well, no, wait a minute. Before we agree to that I need to know how we're doing it and what those parameters are." So I think it's a good change.

CHAIRMAN BABCOCK: So Justice Bland is nodding her head like an Astros bobble doll. Yeah, Frank.

MR. GILSTRAP: Well, this "other remote means," which includes Skype is very problematic. I had some litigation in the West Indies over property in the West Indies, and we had a witness in the United States, and they were conducting the examination by Skype. And the question would be posed and then Skype would go down and then when Skype came back up the witness had talked to his attorney and could answer. It happened repeatedly, and Skype is -- is notoriously deficient for that and --

CHAIRMAN BABCOCK: That's their special litigation software.

MR. GILSTRAP: And it's notoriously unreliable anyway, even when it's not being manipulated.

CHAIRMAN BABCOCK: Kennon, and then David. David, we're going to have a thousand hours of depositions per case, don't worry. Kennon.

MS. WOOTEN: I appreciate the concerns about Skype absolutely, but I'm concerned about the fact that this change could create more cost and require more court time. I think the idea behind the rule in its current form is to make things cheaper and easier, and I think the proposed amendment could cut against that goal.

CHAIRMAN BABCOCK: David.

MR. JACKSON: We were experienced with conference depositions. We were the first court reporting firm in Texas to have video conferencing offered, and it depends on the bandwidth that you use.

CHAIRMAN BABCOCK: Right.

MR. JACKSON: If you use 128 bits per second, there's clipping and chopping, and you can't -- you know, somebody starts talking before you actually see their lips moving, and so they talk on top of each other; and it's almost impossible to make an accurate record of, but it's getting better. Skype I think uses that real low bandwidth, and you're probably never going to get a good transmission unless you go with a higher bandwidth.

CHAIRMAN BABCOCK: Yeah, I was present at the deposition of Jose Conseco. You know who he is? And the plaintiff's lawyer was taking the deposition from New York on a big screen. Jose and I were in Las Vegas, and the screen turned this guy's fingernails pink, and Jose couldn't get over that. And so he said he was totally distracted and refused to answer questions until the guy would put his hands under the table. Yeah, Professor Albright.

PROFESSOR ALBRIGHT: This sounds a whole lot like our discussions about fax machines and that newfangled e-mail stuff, so I would say we don't get into

the details of what kind of technology.

CHAIRMAN BABCOCK: Are you in favor of agreement or not agreement?

PROFESSOR ALBRIGHT: I'm in favor of agreement, but I'm against getting into like saying, okay, but no -- you can use anything but --

CHAIRMAN BABCOCK: No, I agree. Yeah. Yeah.

PROFESSOR ALBRIGHT: -- these kinds of technology.

CHAIRMAN BABCOCK: Justice Hecht.

CHIEF JUSTICE HECHT: One of the concerns -- one of the concerns before that if somebody was trying to do it on a budget and the other side was trying to run up the cost, they would never agree. They would say -- you would say, you know, "I want to take three depositions. I just want to take them real quick. I want to do it this way," and the other side, "No, you've got to pay for it."

CHAIRMAN BABCOCK: We've got to go to Barbados.

CHIEF JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: Yeah. Evan.

MR. YOUNG: It seems to me the technology on this front is increasing so rapidly that by the time this is actually promulgated there will be relatively easy

access to high quality means of transmission that don't rely on something that we had 10 years ago like Skype on your iPad.

HONORABLE STEPHEN YELENOSKY: Holograms.

MR. YOUNG: Perhaps. We're getting there, right? And so I just wonder if perhaps, you know, in light of the comments that Kennon and the Chief just made and the hope that I would have that, increasingly, technology would be used as a source to facilitate the speed and lack of cost for litigation, that the default could be flipped so we continue to introduce the option of the court to make a ruling, but instead of you have to get the court to say that you can do it this way, to say you can do it unless the court says otherwise and expressly include the option for the court to rule. And the court can always make changes.

CHAIRMAN BABCOCK: Yeah.

MR. YOUNG: But to have that in there, but to flip that, the presumption, from the way that it is in the revised text here.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: Well, maybe we want to vote on that because if you look at the next paragraph (c), you'll see that if you want to proceed with something that's a nonstenographic record, the person responsible for it is

responsible for a recording that's intelligible, accurate, trustworthy, has to give five days notice of how they want to do it. So if you think that it's not going to produce that sort of record, you're in a position to object to it.

PROFESSOR ALBRIGHT: I think it's not the records.

MR. MEADOWS: Well, but we could enlarge it to address this issue about the -- basically the usefulness or the fairness of the proceeding. But to me it's a question -- somehow without doing what you're saying, Alex, and getting into the actual technology we need to ensure that for the lawyer that wants to do it on a budget that it's going to be -- kind of be a product that can be -- that's fair, and it's not going to be -- you know, it's going to be useful if you're only getting to do this one time. But, yeah, this is a different point, but I think it's the same thing. There could be some burden shifting or some burden application that requires the party requesting it see that it's in a technology that would work.

CHAIRMAN BABCOCK: Okay. Peter.

MR. KELLY: Just to reiterate a previous point, I think any time that we have -- I mean, it's a subtle distinction of how it should be "may." Any time you have a motion, you said "may stipulate or the court

may on motion order," we have to be clear as to whether it requires a showing of good cause or an absence of prejudice, or maybe both, because those could be radically different results depending on what the standards are the court has to review it; and it may be just on a showing of good cause regardless of prejudice suffered by the other side; or maybe it can be blocked any time the other side can show that there's prejudice. But it is something we need to look at any time if -- if we're going to have these defaults that may be changed by motion, by judge ruling after motion, we have to give them some standards to rule on.

MR. MEADOWS: But isn't the -- I think that's important. The first question is do we want to give parties the right to just do it.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Without agreement and court order. And if we do then what kind of controls do we want to place on that so we end up with something that's useful.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: It seems to me that it's simpler and less costly to allow the -- as a matter of right if you want to use telephone or Skype or teleconference or Facetime or whatever it is, you have

that right unless the court says otherwise. And so in your situation, Chip, where you've got confidentiality issues, if that's an issue then you go to court and seek a protective order. And those are rare occasions where otherwise, you know, requiring agreement of the parties, as Justice Hecht points out, you know, is people can engage in gamesmanship and say they're not going to agree then you have to go to the court. And I think it does unnecessarily increase the cost, and so I would have the default position that you could do it by other non-steno -- non-video means, which is I think what we're really talking about.

CHAIRMAN BABCOCK: Yeah, Robert.

MR. LEVY: I think one thing that this change does that could be helpful is it appears to give both the requesting party and the party representing the witness the opportunity to propose a telephonic deposition, whereas the current rule only appears to give the party that's requesting the deposition that right. And I do think that it's -- you should have the ability to object to that. If you don't -- you might not want to present your witness telephonically, because you know he or she won't do well, and I don't think we should put the burden on a party to raise an objection to the court if they're not comfortable with presenting the witness under

that fashion. So while I recognize the potential for gamesmanship, I do think that it should be by agreement.

CHAIRMAN BABCOCK: Okay. Hayes.

MR. FULLER: What was the federal courts' rationale for doing it their way, or was there one?

HONORABLE JANE BLAND: I can't recall. I can look into that.

MR. FULLER: Okay. Yeah, I think that would be worth looking at because it may address and give us some background of why we're using that.

CHAIRMAN BABCOCK: Anybody want to vote?

MR. LOW: Chip, could I ask a question?

CHAIRMAN BABCOCK: Buddy wants a question before we vote.

MR. LOW: Who can be there? Can somebody be there nodding at him? I mean, there are a lot of things that can be controlled just by who can be at a deposition and that. This was a very simple rule that came at a simple time when AT&T was only it, and another lawyer and I didn't want to go to Tyler. Things are more complicated now.

CHAIRMAN BABCOCK: You didn't even want to drive to Tyler.

MR. LOW: No, we didn't, and we agreed, and we swore him in. Nobody was with him in Beaumont. The

court reporter was there, and the notary was there, and we agreed, this is -- but now it raises a lot of different things. Who can be there? Can somebody else be a witness? It's just more complicated than when we started this rule.

CHAIRMAN BABCOCK: Yep. Judge Peeples.

HONORABLE DAVID PEEPLES: I think in state court there's more small potatoes litigation than there is in federal court, and I think in federal court lawyers are more afraid to be unreasonable and disagree, and those are two reasons why I'm not sold.

CHAIRMAN BABCOCK: I'm going to challenge that comment.

HONORABLE DAVID PEEPLES: We wouldn't want to follow, you know, blindly the federal lead here, and I just think to have the default that you can do it, put the burden on the other side to stop it, is better for the kind of things we do in state court.

CHAIRMAN BABCOCK: I forget, you were simultaneous. Go ahead, Judge Wallace, and then Justice Christopher.

HONORABLE R. H. WALLACE: I've got a question. As I read this, this would apply or would it apply if I -- somebody represents the defendant sued in Tarrant County. The plaintiff says, "I want to take your

deposition," and he says, "Okay, my client lives in Kansas. I want you to depose him by telephone." You know, it would work either way, right, because certainly the other side is not going to probably agree to that, but it's not just the party asking for the deposition that can say they want to do it telephonically. It's the other party.

HONORABLE JANE BLAND: I think under our current rule it is the party asking for the deposition.

HONORABLE R. H. WALLACE: Asking for it.

CHAIRMAN BABCOCK: But as Buddy says --

HONORABLE JANE BLAND: We could consider not using the federal rule and tweaking our state rule to allow either side to --

CHAIRMAN BABCOCK: But as Buddy says, just because the person taking the deposition wants to do it by phone, that doesn't mean you can't be there in person. It happened with Jose Conseco. I mean, he did it by phone from New York, but I was present with Jose.

MR. LOW: And the other lawyer --

CHAIRMAN BABCOCK: Trying not to laugh.

MR. LOW: -- and I agreed nobody would be there with him. He would be by himself, and we don't know if he was or not because neither one of us were there. We didn't want to go to Tyler.

CHAIRMAN BABCOCK: Well, videographer or the court reporter should say who's here.

MR. LOW: The court reporter was in Beaumont, Texas. We did it by phone, conference phone, and he was on the phone. Nobody was in Tyler but him. I mean, that wasn't --

CHAIRMAN BABCOCK: Could you have asked him the question, "Is anybody in the room"?

MR. LOW: Pardon?

CHAIRMAN BABCOCK: Could you have asked him a question, "Hey, is there anybody in the room with you there"?

MR. LOW: We weren't concerned about that. We just tried -- it was certain facts we wanted to find out. We didn't know what he was going to say.

CHAIRMAN BABCOCK: Ah.

MR. LOW: But we agreed that he would be there, and he agreed nobody would be with him coaching him or anything, and it worked so well. So we proposed it and whoever was on the court approved it. I mean, not -- he wasn't on the committee then. I was.

CHAIRMAN BABCOCK: Okay. David.

MR. JACKSON: Who swore him?

MR. LOW: Pardon?

MR. JACKSON: Who swore in the witness?

MR. LOW: The court reporter there in Beaumont, Texas.

MR. JACKSON: Over the phone?

MR. LOW: In my conference room there's a -- he was sworn in there. I was there. The other lawyer was there. Everybody was there. He's in Tyler supposedly. That's where he claimed he was and is sitting there, and we got what we wanted out of him, and that was it, but there was no other means other than AT&T. I mean, we didn't have many choices.

MR. JACKSON: Normally the rules that the court reporters are supposed to follow requires the person administering the oath be present with the witness.

MR. LOW: We waived everything they had to do and said this is like a regular deposition. Okay.

CHAIRMAN BABCOCK: Let's vote, and the vote will be everybody in favor of the subcommittee's proposal. I'm sorry, Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I just wanted to say that I think our rule was ahead of the federal rule back in the day, and it shouldn't be changed.

CHAIRMAN BABCOCK: Okay. With that endorsement, the vote will be everybody in favor of the subcommittee's proposal in 199.1(b) that says, "The parties may stipulate or the court may on motion order an

oral deposition by telephone or other remote electronic means." Everybody in favor of that, raise your hand.

Everybody opposed, raise your hand. Well, it's a close vote. Ten in favor, twelve against, the Chair not voting.

MR. LOW: But, Chip, when you said "order" it doesn't mean you couldn't have the court order that nobody else could be there. Or, I mean, order just means it would be allowed, but it could be certain conditions imposed in the order.

CHAIRMAN BABCOCK: I would think, yeah. Hayes.

MR. FULLER: Following up on my earlier inquiry, it says that the federal rule is -- it's because "These methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is being recorded, preserving the file, and may contain whatever additional safeguards the court deems necessary." So that's the federal rationale.

CHAIRMAN BABCOCK: Okay. Thanks, Hayes. All right. On to the next issue. Justice Bland.

HONORABLE JANE BLAND: All right. Just as an aside, the next couple of pages we didn't recommend any

changes; but to answer your question, Scott, about subpoenas having limits that dovetail with the limits in discovery, that's on page 99, 199.2(a).

MR. STOLLEY: I saw that.

HONORABLE JANE BLAND: You saw that? Okay. Then we move to page 51, which is under 199.3 -- oh, I'm sorry, 199.5(b), and the federal rule has some specific requirements about what needs to happen at the beginning of every deposition and after every break, and those were -- are largely housekeeping items, and they are -- the rule requires that the officer put all of it on the record. The committee thought the idea of having the information contained in the federal rule be also contained in any state deposition was a good idea, but we thought that really what we should do is instead of requiring an officer to begin the deposition with an on the record statement with all of these items, we could -- often in state court the court reporter just puts all of these items on at the beginning, and everybody, you know, goes from there.

So the idea is that the record has to state it, but it doesn't necessarily have to be somebody designated as the officer taking the deposition. And it's really just, you know, the date, place and time of the deposition, the deponent's name, that the oath was

administered, and the identity of all the parties or persons who are present

CHAIRMAN BABCOCK: Okay. Any comments about that? All right. Keep going.

HONORABLE JANE BLAND: Okay. I'm skipping over the translator because I don't think we have -- there's statutory things, and there's other things that I don't think we have any language to offer there, but we think at some point there needs to be a rule about qualifications and objections to translators at depositions.

CHAIRMAN BABCOCK: Okay.

HONORABLE JANE BLAND: Next, time limitations. We did not want to adopt the federal limit of one day and seven hours, and I think we've already talked about why that is, that we already have the limits that we have in our rule that seem to be working well and that we did add that the court may allow additional time, but if there was any evidence that something impeded or delayed the examination.

CHAIRMAN BABCOCK: Any questions about that? Okay. Keep going.

HONORABLE JANE BLAND: Okay. (e), if you have reported depositions, we added the sentence from the federal rule that the -- neither the deponents nor the

attorneys' appearance or demeanor could be disported through recording techniques.

CHAIRMAN BABCOCK: Okay. Anybody opposed to that?

MR. GILSTRAP: I mean, how do you do that?

CHAIRMAN BABCOCK: You know, you make them have --

HONORABLE DAVID NEWELL: Make their fingernails pink.

CHAIRMAN BABCOCK: You know, you get high frequency on the voices and make them talk like Mickey Mouse or Minnie Mouse. Make them look like they're in a fun house. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I have just a question, and just in connection with this, and it came up occasionally where normally the videographer only takes a picture of the witness.

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: And sometimes now people are doing the split screen when they present the deposition at the -- in trial and the split screen might have half of the witness and the document that they're talking about and -- or they might have, you know, the other people in the room, you know, on the split screen so you could see who was asking the questions

versus the witness. And I don't know whether we want to have you know, any sort of rules about that.

The only problem I ever saw about it was that people didn't know what it was going to look like before they got to trial. Okay. Because they just thought it was a regular deposition where it was focused on the witness. Then all of the sudden, you know, and now we're talking about Exhibit 1, and Exhibit 1 comes right next to picture of the witness. So, you know, I ultimately said it's okay, but is that something that causes a problem for anyone?

CHAIRMAN BABCOCK: I've never had a problem with it, and I do it all the time. And particularly with videotape, if you're asking a witness to look at a videotape. But to your point, the video -- the videotape of the deposition will actually have the split screen on it, so if you look at what you're given by the court reporter, by the videographer you're going to know that that's there. Now, if you're talking about something that's produced later --

HONORABLE TRACY CHRISTOPHER: Correct.

CHAIRMAN BABCOCK: I mean, that's -- that's done all the time, too. I mean, you have a video on the screen and then you have another screen in the courtroom that shows Exhibit 1 that he's talking about.

HONORABLE TRACY CHRISTOPHER: And then there's another question of sometimes they'll put the deposition up and they'll have --

CHAIRMAN BABCOCK: Text.

HONORABLE TRACY CHRISTOPHER: Closed captioning basically.

CHAIRMAN BABCOCK: Scrolling text.

HONORABLE TRACY CHRISTOPHER: Right. Which sometimes is different from what my court reporter hears. So, you know, and which is kind of difficult because, you know, the court reporter in the courtroom only -- is supposed to rely upon what she hears, not necessarily what's being scrolled across.

CHAIRMAN BABCOCK: Yeah. The scrolling text is taken from -- typically is taken from the court reporter, right, David?

HONORABLE TRACY CHRISTOPHER: Well, but sometimes -- sometimes the court reporter is wrong.

CHAIRMAN BABCOCK: That would be true if you read the deposition.

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. MEADOWS: It's almost always true.

MR. JACKSON: It's a software program where they take an ASCII file of the court reporter's notes and sync it with the audio, and it matches up with the text

scrolling across.

CHAIRMAN BABCOCK: Yeah. Okay. Peter, sorry.

MR. KELLY: Not to bounce way back, but the idea of technologically or technically messing with the files that are produced, with the images, going back to the production of documents, we had -- I was in trial a month and a half ago, and the copies that were produced to us were fuzzy and crooked, and putting them up for the jury to see. And they could barely read them, but somehow the defendant's files were all crisp and just, you know, beautiful images, high resolution images; and maybe there could be some way -- as long as we're a forward-looking group and leaping boldly into the future, we could specify that if documents are produced electronically they could be available in the same level of resolution.

CHAIRMAN BABCOCK: Okay.

MR. KELLY: Sorry to leap back in time.

CHAIRMAN BABCOCK: Justice Bland, anything more on Rule 199?

HONORABLE JANE BLAND: Yes. 199.5(f), the rule that we have right now is the current rule under objections. The federal rules do not have the state practice of objection, form; objection, leading; objection, nonresponsive, which are the three that are

allowed in depositions in state -- in the state courts.

Rather the federal rules say that you can make -- you must make -- "You must interpose any objection to the question at the time of taking the deposition, but that the objection cannot be argumentative or suggest the answer," and the question that the committee had was now that we had, you know, a decade or more of experience with "Objection, leading. Objection, form," do we think that we ought to go back to requiring a substantive objection during the deposition?

There are a couple of reasons. One is that we were finding more and more that at trial lawyers don't know how to make substantive objections. They stand up to the witness' testimony, and they say "Objection, form." And so they don't know what a hearsay objection is supposed to sound like. They can't detect it at the time that the witness is talking.

Secondly, when these depositions, "objection, form," "objection, leading" are then presented to the trial judge for ruling prior to playing the deposition in front of the jury, all of the sudden the "objection, form" expands into about seven objections to the question. It's speculative, it's hearsay, it's this, it's that, and none of which the lawyer who took the deposition at the time or the party -- the lawyer

representing the witness would, you know, come -- have come up with at the time of the deposition.

CHAIRMAN BABCOCK: Yeah.

HONORABLE JANE BLAND: It was an attempt to keep, you know, Rambo tactics out of depositions, and it may be that that good, you know, is still for policy reasons better than having -- requiring the lawyers to make the actual objection to the question to alert both the other side and the trial judge as to what the objection is. But so the committee wanted to flag that the federal rule requires the substance to be made at the objection and to have this discussion with this committee about whether or not we should require it as well or should we just stick with form and leading as the only two appropriate objections to questions at depositions.

CHAIRMAN BABCOCK: I tell you my own personal experience is that our change cut out a lot of BS in depositions, a whole bunch of nonsense --

MR. LOW: Oh, yeah.

MR. HUGHES: Yeah.

CHAIRMAN BABCOCK: -- at depositions. I would be loathed to even take half of the road back, but Judge Wallace.

HONORABLE R. H. WALLACE: Well, I was going to say the same thing. I mean, I was practicing when that

rule went into effect, and it changed deposition practice tremendously. But the only -- the bad thing about it is that a lawyer -- a lot of lawyers, if they hear any question that they're not sure how they want their client to answer, will just say, "objection, form," "objection, form," okay, and it goes on and on and on. So that's the downside to it. They don't know whether they've got a valid objection or not, so they'll say "objection, form."

Now, the other side has a right to say, "What's the basis for your objection?" But oftentimes they don't. So I agree with you. It knocked a lot of stuff out that -- that didn't need to be in depositions, but it also has that downside, so I don't know. I don't know which would be better.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I agree. I think we should keep it as it is. The point about lawyers not knowing what to do in court, a bigger problem than that, I suppose if we start using depositions to train lawyers then it seems like we have a bigger problem. I guess they come in --

HONORABLE JANE BLAND: Well, I think that's how young lawyers learn how to, you know, cross-examine a witness, examine a witness. It's all in depositions. And I'm not saying that it's a teaching tool, but honestly,

that is a -- that is one of the pieces of it. And I agree there was a lot of nonsense, but the bottom line is the federal rules gets at it a different way. They say can you make the substantive objection and nothing else, but maybe we don't really think that we can all abide by that in Texas and we need to keep --

HONORABLE STEPHEN YELENOSKY: Well, the other part about coming to court on it, I mean, the judge hopefully is in control; and if they add all of these other objections that couldn't have been foreseen, they shouldn't be considered under the umbrella of form, and that's a problem with judges. I mean, we have a problem with lawyers, problem with judges, but I think --

HONORABLE JANE BLAND: Other than leading, that's the only objection you can make.

HONORABLE STEPHEN YELENOSKY: Well, I know. I know, but you're saying they add all of these objections that are substantive, right?

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE STEPHEN YELENOSKY: Okay.

HONORABLE TRACY CHRISTOPHER: Like six.

HONORABLE STEPHEN YELENOSKY: Right. Oh, right. Yeah, they're allowed to do that.

HONORABLE JANE BLAND: You know, you've done it. Speculation, hearsay, you know, assumes facts not in

evidence, you know, just on and on.

HONORABLE STEPHEN YELENOSKY: That they never would have made at the deposition is what you're saying.

HONORABLE TRACY CHRISTOPHER: Correct.

HONORABLE STEPHEN YELENOSKY: Yeah, well, I think, though, the harm of going back is greater than that. I don't know if you have had this problem with trial court. Some lawyers object to form and then want to later say, well, that was also a leading objection because leading is the form of the question. Have you ever had that? I mean, there's some confusion among lawyers about what's the difference between leading and form and why don't we just object form to both. It's a small thing, but I see it all the time.

CHAIRMAN BABCOCK: Yeah. Tom.

MR. RINEY: I agree with you. I mean, that's one of the reasons the six-hour limit works. We don't have these long, you know, talking objections or speaking objections to tell the witness how to answer the question. So I think any step backwards would be a step backwards. I think maybe we could combine "objection, form," "objection, leading." It is the same thing, and as far as coming up with other objections at trial, I think a lot of those are not really objection to the form of the

question, and they cannot be cured at the time of the deposition. You don't know if it assumes facts not in evidence because the facts aren't in evidence yet.

So I think we're pretty good where we are, and finally, Judge Wallace has a good point; but usually, you know, if you're confident in your question you can just ignore it. And if it's an attempt to instruct the witness, just a couple or three times of "State your basis for your objection," and, you know, they stammer and stutter and can't come up with anything, usually it stops.

CHAIRMAN BABCOCK: Yeah.

MR. RINEY: So I don't think that's a tremendous problem if we utilize that part of the rule.

CHAIRMAN BABCOCK: Peter, then David.

MR. KELLY: I was just going to make the same point Tom did. You're going to have to tighten time limits on the amount of depositions, and you're giving the other side the ability to control with multifarious objections, then you've ruined the time limits.

CHAIRMAN BABCOCK: David.

MR. JACKSON: The only time I ever hear an "objection, leading" is when a lawyer is asking his own witness questions on a cross in a deposition. I mean, the adversary can't lead. Can he? I mean, I don't think.

CHAIRMAN BABCOCK: If you're asking your own

guy, yeah, you shouldn't be leading, I wouldn't think.

MR. JACKSON: That could be leading.

CHAIRMAN BABCOCK: All right. We're going to take our afternoon break, but when we come back we're going to get into the appellate sealing rule, because Bobby has got a really serious emergency that he's got to go take care of right now. So we'll pick back up on page 53, Rule 200, either tomorrow or when Bobby gets back, but more likely tomorrow.

MR. MEADOWS: Tomorrow.

CHAIRMAN BABCOCK: Sorry, tomorrow.

MR. MEADOWS: Well, I mean, we're going to come back to it this meeting, either today or tomorrow?

CHAIRMAN BABCOCK: Yeah. So, what, is your BMW getting a massage or what? All right. We're in recess, thanks.

(Recess from 3:07 p.m. to 3:34 p.m.)

CHAIRMAN BABCOCK: Justice Boyce, we're going to turn to you and the proposed appellate sealing rule and Rule 76a, and could you give me a time estimate on -- is this going to take the rest of the afternoon?

HONORABLE BILL BOYCE: Well, as short as it is, I don't think so.

CHAIRMAN BABCOCK: I wouldn't think so, either.

HONORABLE BILL BOYCE: I would guestimate, you know, 45 minutes-ish, depending on how much detail we want to get into drilling down.

CHAIRMAN BABCOCK: Okay. This group will often take longer than the estimates, but that's helpful. And, Hayes, are you going to do the justice court rules?

MR. FULLER: Yes. Carl can't be here, so he called me and said, you know, can you report on something, and I can. Basically we're recommending that we don't revisit the issue, but I'll give you a background as to why.

CHAIRMAN BABCOCK: Okay. And how long do you think that's going to take?

MR. FULLER: Less than five minutes. I could do it now.

CHAIRMAN BABCOCK: And, Jim, that takes us to the Code of Judicial Conduct, and how do we feel about that?

MR. PERDUE: Justice Bland?

HONORABLE JANE BLAND: We need a little more time.

MR. PERDUE: Not that we need -- not that we need more time with the committee, but we --

CHAIRMAN BABCOCK: You need more time to study it.

MR. PERDUE: No, we don't need to study it.

HONORABLE JANE BLAND: Well, no, it's an easy tweak. We need to put a -- we need to just add a section into another section of the canons, but we don't have that language for you today.

CHAIRMAN BABCOCK: Ah. So you would like to pass on the Code of Judicial Conduct?

HONORABLE JANE BLAND: Yes, and with the promise that we will have it ready for you the next meeting.

CHAIRMAN BABCOCK: Okay.

MR. PERDUE: So if we're on the record, by way of background, this was the issue with the county court at law judge who wants to be able to arbitrate and mediate.

CHAIRMAN BABCOCK: Right, right.

MR. PERDUE: As you know, the subcommittee said we don't think that's a good idea.

CHAIRMAN BABCOCK: Right.

MR. PERDUE: The Court came back and said "We understand that. We would like to see some language." Justice Bland and Justice Christopher figured out how to do that this morning at my request, and so we don't have the actual end language.

CHAIRMAN BABCOCK: They actually agreed on

something today? Okay. Well, we'll pass that to the next one.

HONORABLE JANE BLAND: Thank you.

CHAIRMAN BABCOCK: That's helpful, too.

HONORABLE JANE BLAND: We appreciate that.

CHAIRMAN BABCOCK: All right. Now, the deadlines prescribed by Rule 55.7. 53.7. I need my glasses. 53.7, is the subcommittee ready to report on that, Justice Boyce, or anybody else who --

MS. BARON: I can report on that very briefly.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Provider Dorsaneo wanted to be the lead on that because he has substantial knowledge about that issue.

CHAIRMAN BABCOCK: Right.

MS. BARON: So I asked him if he wanted me to proceed at the last meeting. He said "no." And now he has hasn't been able to turn his attention to it, so I think we need to table that.

CHAIRMAN BABCOCK: Okay. So your recommendation is to pass that to the next meeting?

MS. BARON: Correct.

CHAIRMAN BABCOCK: Okay. Yeah, Peeples thought we weren't going to get through our docket. Okay.

So then we have the Texas Rules of Civil Procedure 21a, c, 57, and 244. And, Frank, are you the --

MR. GILSTRAP: Richard is going to be presenting that tomorrow.

CHAIRMAN BABCOCK: He will be doing that tomorrow?

MR. GILSTRAP: That's my understanding. I don't think it will take long.

CHAIRMAN BABCOCK: Great. And the amendments to the State Bar rule, and, Judge Peeples, what's your preference? Nina is going to come for that or not?

HONORABLE DAVID PEEPLES: She plans to be here tomorrow, and she will lead the discussion. I will have to be gone, but most of the committee I think will be here. I don't know, 30 minutes or an hour. What do y'all think?

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: We probably need 30 minutes or an hour, just depending on the schedule.

CHAIRMAN BABCOCK: Because of your absence do you request that we pass it?

HONORABLE DAVID PEEPLES: No, no. I think we should talk about it.

CHAIRMAN BABCOCK: So we won't pass it. All

right. Great. So I think that if we get right to it we will get done with items four and five, and we will take Saturday for the Rules of Procedure 21a, et al., and the amendments to the State Bar rule, and if we have any extra time we'll come back to discovery. Does that sound like a plan? That good?

Okay. With that said, Justice Boyce, why don't you lead us through the appellate sealing rule and Rule 76a?

HONORABLE BILL BOYCE: Well, I'll start off with a little bit of an overview and explanation for the differences between the draft in front of you and the draft that we all looked at in February. The February discussion was fairly extensive, covered a lot of different areas. The rule -- the charge started out as a direction to look at procedures for sealing documents on appeal. Over the course of discussions at multiple meetings, particularly in June of last year, the scope kind of expanded in response to input to cover not just sealed documents but also documents submitted for in camera inspection.

The result of that process was the December 2016 draft that we looked at at the February meeting, which was a fairly elaborate addition of a subsection 9.2(d) and a lot of subparts to that, containing fairly

detailed procedures covering both sealed documents and procedures for documents submitted for in camera inspection.

The main points that I distilled from the comments in February is that there was a potential for confusion in the way that the rule was approaching the question because it was referring to sealed documents to encompass both documents that nobody gets to see other than the parties and in camera documents that one party gets to see but the other party does not, in conjunction with a privilege fight or something along those lines, and that the procedures and the nomenclature referring generically to sealed documents to cover both of those situations had a potential for confusion, and there were other comments as well.

So the draft you have in front of you is a significant rewrite, basically an entirely new rewrite. Credit goes to Frank Gilstrap and Judge Yelenosky for distilling the comments from February and really trying to simplify and draw some distinctions. So the main architectural distinctions that we have here are as follows. We're not trying to channel everything into a new Rule 9.2(d). Instead we have broken out a section for protection of sealed documents as a proposed addition to Rule 9.11, a section addressing protection for documents

submitted for in camera review as an addition as Rule 9.12, and the logic of it is that 9.8 and 9.9 and 9.10 already exist. They already address aspects of confidentiality in appellate documents, appellate filings, and records. It makes sense to put these additional considerations as part of that group.

Probably the most significant structural change is instead of creating a new motion mechanism within Rule 9, this draft tries to make use of the existing motion rule under Rule 10, and again, there are already specifics within Rule 10 for specific kinds of motions. Motions relating to informality in the record to extend time to postpone argument. So the notion is to add a Rule 10.8, motions regarding access to materials in appellate courts, and if this looks substantially shorter than what was there before, that's only because it is. And that may be something to discuss about what balance do we want to strike between brevity versus spelling out more detailed procedures, but a lot of the detailed procedures in the prior draft were probably duplicative of motions under Rule 10, so we tried to strip that out.

The main meat of it is in 10.8(a), motion and response; 10(b), temporary orders; and 10.8(c), referral to the trial court. The 10.8(a) redraft is intended to be broad and catch all. It is intended to

cover the existing areas of confidentiality that Rule 9.8 already sets out with the addition, too, of 9.11 and 9.12.

One of the points that the committee was very cognizant of is that the universe of circumstances where documents may be sealed does not begin and end with Rule 76a, and specifically Frank had identified that the Texas Uniform Trade Secrets Act sets out a separate statutory scheme dealing with confidentiality of materials in trade secret cases, and it explicitly says that the rules shall not contradict what we're setting out in the statute here. So there has to be an accommodation for that that's reflected in new 10.8(a).

The subcommittee also had a significant concern that if we have kind of a broad catch-all rule that tries to address motions to seal things in the appellate record and specifically contemplates that a motion to seal a document in the appellate record that was either not sealed in the trial court or not -- perhaps not filed in the trial court, which was part of the charge we were given, that there's concern to not let a broad rule become an end run around Rule 76a. That concern is reflected in the proposed last sentence of 10.8(a), which in a more shortened version encompasses the considerations that are reflected in Rule 76a(1).

So that's the overview, and I guess I would

look for direction from the Chair about how to -- how to best move forward. I guess what the subcommittee would really look for in addition to comments, specific line-by-line comments, is whether this different approach is on the right track or not and addresses some of the concerns that were raised at the February meeting.

CHAIRMAN BABCOCK: Yeah. If you want the Chair's view, I think you guys have done a terrific job. I think this is definitely on the right track. I say that before everybody else rips it to shreds, and I've got some thoughts about specific things; but as people have had a chance to look at it I would say that what you've done is short enough that we could just take general anything in the rule rather than going line by line. So with that said, Judge Newell.

HONORABLE DAVID NEWELL: Yes, I don't mean to suggest -- I echo the sentiment of the Chair. I do think this is really well done. The wrinkle that I hate to throw in here is that we just -- our rules committee just approved e-filing rules that actually are in -- that say sealed documents are -- should -- must not be electronically filed.

HONORABLE BILL BOYCE: Okay.

HONORABLE DAVID NEWELL: So I think that might create a conflict here, even though I know what this

is trying to do. It's trying to take stuff from the trial court to the appellate courts, and our rules cover all of those things, but it does seem that it would prohibit the electronic filing of sealed documents.

HONORABLE BILL BOYCE: Well, that's one of the nested issues in here, and it's been touched on multiple times in terms of do -- do we want to allow, require, encourage, or some other verb related to the electronic filing of sealed documents. And one of the tensions that I think was identified at the last meeting is that consistent with the Rule that you're describing, current Rule 9.2(c)(3) contains a -- as it reads right now contains a prohibition, "Documents filed under seal must not be electronically filed." There's a little bit of tension with that with Appendix C, the order directing the form of the appellate record under Rule 1.1(g) that to my eye indicates that documents will be filed electronically in the -- and the documents will be filed, each sealed document separately from the remainder of the clerk's record and include the word "sealed" in the computer file name, which sort of contemplates that this is going to be electronically or not.

So there's a little bit of potential tension there, so I think as we work through the rest of the rule one of the issues that we need to work on to achieve

consensus is do we want to allow, require, or encourage the electronic filing of sealed documents. An additional data point, we have conferred with Blake. We've conferred with Chris Prine at the First and Fourteenth Court, and I'm given to understand through Chris that the means to electronically file sealed documents in a secure way are available.

HONORABLE DAVID NEWELL: Right.

HONORABLE BILL BOYCE: But it's been carved out and treated in a paper form, at least under the existing form of the rule.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, certainly if the Court of Criminal Appeals wants them in paper, they should get them in paper; and it's not a problem to do a carve out here in the rule if this rule is applicable to the Court of Criminal Appeals. With regard -- I think the real issue that we were dealing with was the 14 courts of appeal. My impression is that most of them are receiving sealed documents in electronic form, and the district clerks in all of the larger counties handle a large number of sealed documents in electronic form, and they spend a whole lot of money on security. If you go online and you look at some of the county budgets, they have a very large item for computer security, because let's face it, no

district court wants to be the court that's hacked. No district clerk wants to be the clerk that's hacked.

HONORABLE STEPHEN YELENOSKY: And none have yet been hacked by the Russians as far as we know.

CHAIRMAN BABCOCK: But we're looking into it.

MR. GILSTRAP: But it's a real issue to them. And the sealed documents that we're sending the court of appeals are very small potatoes to them. They've got a lot of documents that involved -- and look at 9.8, 9.9, 9.10. These are all documents that deal with -- rules that deal with documents that are protected from the exposure to the public, and they're being dealt with, and I don't see technologically any real problem with saying everything that goes to the Court of Appeals is in electronic form.

CHIEF JUSTICE HECHT: Chip?

CHAIRMAN BABCOCK: Yeah, Justice Hecht.

CHIEF JUSTICE HECHT: The reason the rule was written the way it was and prohibited electronic filing of documents under seal was a concern among the clerks that internally they would not be able to separate those out. So that when you're putting, like we do -- and we're putting documents on the web, so that if you want to see briefs and motions and things that are filed at the

Supreme Court, all you have to do is go to the web page and look and you can see all of that; but you can't see drafts of opinions, internal memos, that kind of thing. And it -- the way our management system works, it's very easy to keep those separate, and it's very hard to make a mistake and put something confidential on the public web page; but the concern at the time was that might not be true of sealed documents that are coming from the court of appeals.

The clerk might make a mistake and look at something and think, oh, that's just an appendix to a brief or something, and put it out on the web page. It wouldn't be hacked. It would just be a mistake. Now, whether that's still true today, I don't know. And it was really, I thought, at the time, this was several years ago, an abundance of caution. It wasn't -- we didn't think that this needed to be the case forever and ever. We just didn't know -- we didn't want the electronic filing of documents to be criticized because the first crack out of the box some sealed documents were put on some court's web page. But today it might be fine to do that. The clerks may not have a problem handling it.

MR. GILSTRAP: I think we can, I mean, some of the courts of appeals might not be ready to do this, but we can deal with this in 9.2(c)(3), the very first

one. It says "For good cause an appellate court may permit a party to file documents in paper form on particular cases." I would just delete the words "for good cause" and, you know, the court can sit down with the clerk and say, "Can we handle this?" If not, we want it in paper form and we're probably not talking about a lot of documents.

CHIEF JUSTICE HECHT: I mean, my own sense -- we should ask Blake, but my sense is that we could do it, that this would no longer be a problem, but that was just the concern.

CHAIRMAN BABCOCK: Yeah. Peter.

MR. KELLY: I was going to concur with what Frank said that it's really not that many cases going up on appeal that involve sensitive -- or maybe if there's a privilege issue on appeal. A case I have went up to the Supreme Court. It was 330 pages. It was easy enough to manage just in an envelope that was kept in trial court safe, the court of appeals safe, and Supreme Court safe.

HONORABLE DAVID NEWELL: Well, in criminal cases, though, there's a lot of sexual assault crimes against children.

CHAIRMAN BABCOCK: Judge Newell, I think you were saying something, but Dee Dee couldn't hear you.

HONORABLE DAVID NEWELL: I'm sorry. I was

just saying that criminal cases have a lot of -- you can have a lot of child crime cases that has a lot of sensitive stuff that you're going to be very -- that's I think where our reluctance comes from. We really don't want --

HONORABLE ANA ESTEVEZ: Child porn.

HONORABLE DAVID NEWELL: Yeah. So I think that's where our reluctance comes from with that is that we're very cautious about letting something like that that should be sealed get out in the public. I think that's where our reluctance is.

CHAIRMAN BABCOCK: Judge Estevez, did you have --

HONORABLE ANA ESTEVEZ: I just said "child porn."

HONORABLE DAVID NEWELL: We have that kind of relationship.

CHAIRMAN BABCOCK: Yeah, I can see it.

HONORABLE ANA ESTEVEZ: I do criminal.

CHAIRMAN BABCOCK: Yeah. It's not like those two up there.

HONORABLE DAVID NEWELL: Right.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: If we have the exception -- and I like the new language, but I would like

it to be limited to sealed documents.

CHAIRMAN BABCOCK: Sealed and not what? I'm sorry.

HONORABLE JANE BLAND: So in 9.2 it says "exceptions," and our new language is "An appellate court may permit a party to file documents in paper form," and I'd like it to say "sealed documents" because we are getting -- we still have a few -- something less strong than "recalcitrant," but we have a few courts that are -- as a favor to their court reporter are doing a one-off order, and the order says, "You don't have to electronically file," fill in the blank. And usually it's like something that was available on disk but hasn't been converted to the appropriate format for electronic filing. And then, you know, that becomes either something that the appellate courts are supposed to take custody of, which we are not really taking custody of materials like that any longer; or we have to kind of have a tussle and say, you know, "We really mean it. You need to follow the rule and convert this to something in electronic form." So if we don't limit this to sealed documents I'm afraid that people will glom onto that and say, "Well, we don't have to file -- I'm going to get an order from my judge to file this in something that's not electronic form," paper form.

CHAIRMAN BABCOCK: Justice Boyce, do you

have any objection to inserting the word "sealed" in front of "documents"?

HONORABLE BILL BOYCE: No. I guess the question I would ask is since we are now drawing a strong distinction between sealed documents and in camera documents --

HONORABLE STEPHEN YELENOSKY: Yeah, I'd add that.

HONORABLE BILL BOYCE: -- does it need to be a little bit broader than sealed but still address your concern?

HONORABLE STEPHEN YELENOSKY: Yeah, I was going to bring that up. I think it needs to say "sealed and" or "sealed and/or documents submitted for in camera review." Because that is a separate category now.

CHAIRMAN BABCOCK: Okay. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I was just going to say we have an awful lot of sealed documents in our appellate files. I would say one out of five have sealed documents, so mostly in the criminal cases, but sometimes in the civil cases too. I mean, for example, and I think the Harris County District Clerk is still doing this. They will seal the juror information sheet. So if the parties need that in connection with their

briefs, the juror information sheet comes up as a sealed -- in a separate document.

MR. GILSTRAP: Does it come up as paper?

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: As a policy matter, I mean, is there a statute that says that the juror information stuff has to be sealed?

HONORABLE TRACY CHRISTOPHER: (Nods head.)

CHAIRMAN BABCOCK: Okay. So that's --

HONORABLE TRACY CHRISTOPHER: I mean, most of the time, you know, if it's not an appellate issue we don't need it.

CHAIRMAN BABCOCK: Right. Yeah.

HONORABLE TRACY CHRISTOPHER: But it's sealed within the court's files.

HONORABLE STEPHEN YELENOSKY: Certain information, not the identity. I don't think the identity is. I mean, their Social Security numbers, their address, that kind of stuff.

HONORABLE TRACY CHRISTOPHER: I don't -- they just seal the whole thing.

HONORABLE STEPHEN YELENOSKY: Well, they may seal the whole thing.

HONORABLE TRACY CHRISTOPHER: Just because it's easier.

HONORABLE STEPHEN YELENOSKY: Yeah, but I don't think that the names of the jurors are sealed unless you have some particular case in which there's an explicit order on that. Otherwise I don't think they're sealed by statute.

CHAIRMAN BABCOCK: Right.

HONORABLE DAVID PEEPLES: I thought there was a criminal statute that did it.

HONORABLE TRACY CHRISTOPHER: Yeah, even their names.

HONORABLE STEPHEN YELENOSKY: Oh, criminal, not civil.

HONORABLE DAVID PEEPLES: Well, but it doesn't make that distinction.

HONORABLE STEPHEN YELENOSKY: Oh.

HONORABLE DAVID PEEPLES: Is it in the Code of Criminal Procedure?

HONORABLE DAVID NEWELL: I believe so.

HONORABLE STEPHEN YELENOSKY: Well, I mean, the charge is filed, right? The charge has got every juror's name on it.

HONORABLE TRACY CHRISTOPHER: That's true.

HONORABLE STEPHEN YELENOSKY: So, I mean, you're not really hiding it.

HONORABLE DAVID PEEPLES: The jury list will

have all 30 or 40 or 50.

HONORABLE STEPHEN YELENOSKY: Right, but even -- I mean, the 12, 11 of their signatures and if they didn't sign it, their name is still there typed in for them to sign, so I don't think the names are as a practical matter secret.

HONORABLE ANA ESTEVEZ: I think it's the questionnaires, because they come and grab them from everybody and destroy them. They won't even let you take them.

HONORABLE STEPHEN YELENOSKY: Well, we do that, and the clerks are responsible, because they have Social Security numbers and all on them. All I'm focusing on is the identity, the name, because in a civil case -- I don't know about criminal, but in a civil case it's going to be in the file.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: That's the reason -- these type of questions are the reason that we chose to use very broad language. I think in the real world the clerks of the courts of appeal and the judges of the courts of appeal are going to work these things out for themselves and maybe we come back in a few years, hey, everybody has agreed on the same procedure, and we can be more detailed.

But I think if we try to micromanage how these files are handled, you know, we're going to run into a lot of resistance from a lot of people, and I don't think it's necessary.

CHAIRMAN BABCOCK: Judge Newell, back to your point, are these rules going to negatively impact your e-filing rules? I mean, if we were to pass revisions to TRAP Rule 9 in this form.

HONORABLE DAVID NEWELL: Well, that's what I said. I think they are at -- the current rules that we've just passed, I think they are in conflict. Now, we can go back and revisit them. That's the sort of thing that I would hope that we could get a chance to do, is have my rules committee look at these things to check that.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID NEWELL: I would sort of like to do that, but I do think that there's a conflict, at least as broadly as we've written. They do apply to appellate courts, and they do apply to sealed documents. They say that sealed documents must not be filed; and so if we wanted to change that, we would have to go through the amendment process to our rules.

CHAIRMAN BABCOCK: Okay. Well, I would think certainly we would want your committee to look over this rule and interact with us.

HONORABLE DAVID NEWELL: Yeah, we can do that.

CHAIRMAN BABCOCK: In some fashion.

HONORABLE DAVID NEWELL: Yeah, absolutely.

CHAIRMAN BABCOCK: Great. Okay. What other comments about TRAP Rule 9? Judge Wallace.

HONORABLE R. H. WALLACE: Well, I just -- I have a question. On the 9.12, this is the one that deals with in camera documents, under the expiration, "access to documents submitted through in camera review in the possession of an appellate court shall be restricted," et cetera, "until the order governing them expires or is vacated or modified by the appellate court." I'm not sure what form that order would even take, whether there would be an order sending them up to the appellate court, and do you ever want in camera documents to expire? And they just go back to the -- if they never go up to the appellate court, and not all of them do, now, probably each court handles in its own way. If they stay there until a new courthouse is built and then you throw them away or whatever, or you notify the parties, you know, "We're either going to destroy it or you can come pick them up." But how would the appellate courts -- I don't know what they do with in camera documents now.

HONORABLE BILL BOYCE: Well, I'll take an

initial stab at it. I think the notion is that this would assume that you've got an order saying XYZ document is privileged from disclosure, and if nobody does anything, that order stays and is not going to have an expiration date. If it doesn't have an expiration date, but if somebody comes up to the court of appeals to try to challenge that order, then there's an opportunity for the court of appeals to modify it or not, and a default would be that it stays intact. So I don't think this contemplates that there would be any expiration other than something that's within the four corners of the order itself, unless the appellate court does something with it.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah. Are you talking just, Judge Wallace, about what happens if the judge has got the in camera document and nothing ever happens, it doesn't go up on appeal, when that expires? This doesn't address that.

HONORABLE R. H. WALLACE: No, it doesn't, but I'm talking about the ones that do go up on appeal.

HONORABLE STEPHEN YELENOSKY: Yeah. I agree with Justice Boyce on that.

HONORABLE R. H. WALLACE: What kind of order do they go up on appeal with that's set out an expiration date? Is that something each court would or would the

appellate court set that or district court set that?

HONORABLE STEPHEN YELENOSKY: Well, it doesn't have an expiration date, I guess --

HONORABLE R. H. WALLACE: That's what I'm thinking.

HONORABLE STEPHEN YELENOSKY: -- is the answer, but some do.

HONORABLE BILL BOYCE: Or alternative.

HONORABLE STEPHEN YELENOSKY: I mean, if it's silent then it's current.

HONORABLE BILL BOYCE: Or alternatively an order denying a request to withhold a document --

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE BILL BOYCE: -- frequently the order would come to us, and it says, "I'm going to make you turn this over in 10 days from now," or whatever to provide time to go to the court of appeals on a mandamus and try to get a stay and tee it up there. And then at that point it would expire by its own terms and the court of appeals has done something with it or not and denied it.

CHAIRMAN BABCOCK: Okay. Peter. Sorry, I skipped over you.

MR. KELLY: No problem. Actually, it's the next clause where it says "or is vacated or modified by

the appellate court." 76a, there's a little bit of tension here. It allows for an appeal and then the order sealing is deemed severed and treated as a final judgment. Normally when we see final judgment that means that vests entire jurisdiction in the court of appeals, but in 76a(7) it says that the trial court has continuing jurisdiction and may modify, withdraw, or whatever else. It's over the order, so the provisions here in subsection 9.11(b) and 9.12(b) should provide for modification or vacation by the lower court in addition to the court of appeals. Otherwise it would conflict with 76a(7).

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

MR. HUGHES: Yeah. I was looking ahead at 10.8(c). Are we there yet or --

CHAIRMAN BABCOCK: We're skipping all around, so --

MR. HUGHES: Okay. Well, I'll be a cricket. I'm not sure I understand what the purpose of 10.8(c) is about referring it back to the trial court. What's there to -- if someone makes a motion to restrict access, why would that be referred back to the trial court at all?

CHAIRMAN BABCOCK: Frank has got the answer to that.

MR. GILSTRAP: Well, let me -- the problem

is this: We're concerned about -- it goes back to 76a. 76a was adopted by this committee. I wasn't on the committee then, but I understand it was quite a fight, and the view that prevailed was the public's right to know. So we have this procedure in 76a, and if you've never dealt with it, it's like dealing with an alternative universe. In the trial court, the court first makes the court records determination and then when it decides to seal -- when someone moves to seal the documents, they have to post notice in the courthouse, and anyone who wants to can intervene in the trial court. And typically and historically that's been the newspapers, you know, like the *Dallas Morning News*.

Well, we're living in an age where they don't do quite as much investigation as they used to, but we've got other people coming into being. Like I don't know if you have them in other counties, but in Tarrant County we have these court watchers, which are organized groups, often people who have not been pleased with how they came out in divorce proceedings or child custody proceedings.

HONORABLE STEPHEN YELENOSKY: Online papers.

MR. GILSTRAP: Right. Okay. Right. And they can intervene. Anybody can intervene, and the concern was that -- the evil that was being addressed was

that court files were being sealed by the plaintiff and defendant with consent of the judge all the time, and 76a was designed to avoid that. Well, it's still going on. I mean, there's still a lot of documents being filed -- files still being sealed without any attempt to comply with 76a, but at least we have the safeguards of 76a.

Well, now we go up on appeal, and we have documents that are filed in the court of appeals for the first time, and you know, can that be an end run around 76a? Well, you really can't go and have people intervene in the court of appeals, but at least you can have some way that the court of appeals can duplicate the trial court proceeding, the safeguards of 76a, and that's the source of the remand rule here that was originally proposed -- that was originally done in a case by Justice Ann McClure out of the Eighth Court. She actually remanded the case.

It gets into other areas, like, you know, cases get remanded so that -- for additional findings, that type of thing, but the attempt here is to allow some type of additional safeguard so that there isn't an end run around 76a, and I don't think we get all the way there. It's an attempt to get part of the way there.

HONORABLE STEPHEN YELENOSKY: Frank, can I expand on that from our discussion?

MR. GILSTRAP: Please.

HONORABLE STEPHEN YELENOSKY: My concern, as you well know, was exactly that, the end run, but in particular, the end run where somebody for the first time tries to seal something in the court of appeals that was filed in the trial court unsealed. Now, it doesn't make a lot of sense as a practical matter, but the original drafts seemed to sort of invite that by saying you can file a motion to seal in the court of appeals and then tell us whether or not it was sealed in the trial court or not, which implied that. And I think the charge asked for us to draft a rule: What do you do with the document you want to seal that wasn't sealed in the trial court? And I screamed bloody murder about that, saying, well, if they didn't seal it in the trial court then they've waived it, because they should have brought 76a and then they could have appealed, like Peter says, through a severed judgment. And so I wanted language in here originally that basically said you can file a motion with regard to documents that were not filed in the trial court. If you file them in the trial court and you lost your motion to seal, you got a stay from the trial court judge probably while you appealed on your severed judgment, blah, blah, blah.

I think the way the subcommittee went with

this, which I'm fine with, is not to say -- is to be silent essentially about whether we're talking about documents that might have been filed in the trial court, with the understanding that it would be a perfectly appropriate response to a motion to seal that this document was filed in the trial court unsealed and therefore, two things. One, as a practical matter it's no longer confidential. They didn't try to protect it, and two, they've waived any complaint or any appeal because under 76a they should have appealed that in the trial court.

So my point is that, as I understand it, this rule still allows for that argument to be made, and I certainly think it will be made by whomever. The problem is, of course, you don't have -- if it's -- you don't have the -- necessarily have the intervening entity, as you said, in the appellate court to come in and say that. So that is a problem we didn't fix.

CHAIRMAN BABCOCK: Holly.

MS. TAYLOR: I think Judge Newell maybe about to --

HONORABLE DAVID NEWELL: I was going to say, yeah, the one thing I was going to point out is like -- one thing that I wanted to point out here is we don't have a Rule 76a for criminal cases, and so there's not really a

presumption of openness that applies to criminal cases. So while I think this rule is very good --

HONORABLE TRACY CHRISTOPHER: It's the Constitution.

HONORABLE DAVID NEWELL: What?

HONORABLE TRACY CHRISTOPHER: It's the Constitution.

HONORABLE DAVID NEWELL: We do have the -- we do have the Constitution. That's exactly right. But in any event, these are procedures dealing with this Rule of Civil Procedure that doesn't necessarily apply, and so that's potentially a conflict. I don't know, but that's what I would -- that's just an observation that I would make.

MS. TAYLOR: And my comment was along those same lines, which is it looks like -- and I'm having trouble following what happens here, but it looks like the appellate court then sends this back to the trial court and says, "Trial court, follow Rule of Civil Procedure 76a." What if the case is a criminal case? Does the trial court follow a Rule of Civil Procedure when answering this question in a criminal case that the appellate court sends back?

CHAIRMAN BABCOCK: If we tell them to.

MS. TAYLOR: Okay. But is that what was

intended? Was that intended? And my other question is what is the intended interaction between 9.12 and these other provisions and Rule 9.10(g), which already sets out a process for handling sealed materials?

MR. GILSTRAP: Say again.

MS. TAYLOR: Rule of Appellate Procedure 9.10(g) for criminal cases.

HONORABLE BILL BOYCE: So I think the way that this tries to make sure that we're not getting crossways with existing procedures under Rule 9 is in 10.8(a) where it says that "access will be governed in accordance with 9.8," 9, 10, and then newly added 11 and 12. So to the extent that there are separate rules for statutory requirements with respect to confidentiality for information for criminal cases, the intent is that it doesn't get crossways with that, and that may not be perfectly realized, but that's the intent.

MS. TAYLOR: Okay.

HONORABLE BILL BOYCE: And I wanted to offer one other thought, if I may.

CHAIRMAN BABCOCK: Yeah, absolutely.

HONORABLE BILL BOYCE: In response to the remand point that Roger had raised, which is, at least speaking for myself, the notion of the possibility of a referral to the trial court, the way I've thought about

it, is not limited to 76a situations, and one of the reasons -- potentially, and one of the reasons why there was a bracketed language at the end of 76a at the end of subsection (c) is for that exact point. Do we want to limit potential remand situations or abatement situations to 76a related fights, or there may be separate fights over privilege and other things where an abatement to clear up some uncertain point in the trial court or some additional required fact-finding could be appropriate.

Obviously we're not able to do any fact-finding, so to the extent that a determination is made that the record is not -- has an issue with it that needs to be resolved, you know, maybe that's flat out denial of mandamus really, but maybe it's an abatement to address a problem.

HONORABLE STEPHEN YELENOSKY: But you don't -- if it's just sealed you don't have to abate because the parties have it. You can --

HONORABLE BILL BOYCE: I guess, unless it wasn't sealed, and somebody is trying to get it.

HONORABLE STEPHEN YELENOSKY: Yeah. Yeah. But you don't have to abate to hold a 76a hearing as long as the court of appeals during that time, you know, keeps it confidential and awaiting the trial court decision.

HONORABLE BILL BOYCE: Right. I guess, but

what we were contemplating is there may be some additional --

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE BILL BOYCE: -- trial court development that could be appropriate to address the issue. And maybe not, but again, the goal is to have a broad rule that allows referral. It gets done now through abatements through a fairly flexible standard, or at least a not specific standard. So do we want to have a mechanism to allow some referral to the trial court if additional trial court development was needed to address something?

MR. KELLY: It's already in 76a.

HONORABLE BILL BOYCE: And I guess my thought is 76a is part, but not all, of what might be encompassed by 10.8. Or an effort to -- or an effort to seal something, an effort to keep something confidential, to use broader language.

And I will make one other observation. Based on the feedback that we get from this draft, the intent is to go back and sync this up to make sure that it syncs up appropriately with 76a, with 193.4, and any other areas that, you know, need to be talked about; but the goal was to have this as an initial presentation and see where we were and then go back and talk about how things

need to be synced up more precisely, if they do; and Judge Newell has very appropriately identified, you know, additional syncing up that needs to happen based on what the CCA is doing with its e-filing rules.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: Well, the initial draft, it said "remand in accordance with Rule 76a," and if we take that out of there, you know, then this procedure becomes very open-ended. For example, and you might want to do this. For example, one of the times that you have a document filed for the first time in the court of appeals is an affidavit regarding jurisdiction. A classic case, the -- one of the parties accepts the benefits of the judgment. That's a ground for dismissing the appeal, and you do that by affidavit. And apparently that's how it's done.

This, under this, you could remand and have the trial court find out if, in fact, that has occurred if there's a battle of affidavits. Maybe that's what you want to do, but we need to be mindful of the open-ended possibility of this remand procedure. It could go a lot of different places.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So I recently had a TI appeal involving confidential information, and

the parties filed two types of briefs: One that had all of the information that they actually wanted me to read and one that was blacked out where there was all sorts of confidential information --

CHAIRMAN BABCOCK: Right.

HONORABLE TRACY CHRISTOPHER: -- in it. And the blacked out one became part of the public record, and the one with the full information record is, you know, available for me to look at. Is that the kind of order that we would see here in 10.8(a)? I mean, we just did it. I mean, that's just how we handled it at our court.

HONORABLE BILL BOYCE: It's drafted broadly enough to try to encompass that because one of the discussion points that came out was there can be sealing of an entire document or, you know, potentially an entire brief in some circumstances, but more often you're talking about redaction of specific sensitive information.

MR. GILSTRAP: You have a case involving, you know, a contract, and the contract is sealed, but the court of appeals has to construe the contract. Well, what you do is you send up a brief and you say, you know, "We're quoting from the contract in here," and you want either the brief or that part of the brief sealed. I think that is the most common instance in which you ask the court of appeals to seal a document.

CHAIRMAN BABCOCK: How does the opinion look when you have that circumstance?

HONORABLE TRACY CHRISTOPHER: You have to be generic.

CHAIRMAN BABCOCK: So you just write around it?

HONORABLE TRACY CHRISTOPHER: Yeah, I mean, you have to. I mean, you can -- you can -- well, for example, this case involved, you know, customer access and so the customer access, in the opinion we would just say, you know, so-and-so contacted customer X rather than the actual name.

CHAIRMAN BABCOCK: Yeah. The redacted brief that you got, did you sense that the redactions were appropriate or was it overredacted?

HONORABLE TRACY CHRISTOPHER: Well, that depends on the --

CHAIRMAN BABCOCK: Let the record reflect that Justice Christopher chuckled.

HONORABLE TRACY CHRISTOPHER: That would depend on whether we considered that information confidential or not, which is one of the issues on appeal. Okay. So because in the TI they claim this information is confidential, therefore, the TI was necessary. So part of the brief includes some of the redaction. If we conclude

it's not confidential then what they redacted would not be necessary.

CHAIRMAN BABCOCK: Yeah. Well, that's a good distinction, but putting that aside, let's assume the information is confidential. Were the briefs appropriately redacted of only the confidential information? The reason I'm saying that is because just as you can write an opinion that writes around the confidential, you can write a brief, too.

HONORABLE TRACY CHRISTOPHER: Well, I would prefer that they do it that way, but we have to -- you know, we have to double-check the record, and if they write "customer X" in the brief, then how do we go back and figure out customer X was in the TI hearing that's all sealed up?

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE TRACY CHRISTOPHER: Unless they do -- you know, we've talked about this before -- a cheat sheet, right?

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: You know, so in my brief customer X is so-and-so, customer Y is -- and that part only is sealed.

CHAIRMAN BABCOCK: Does this happen very often?

HONORABLE TRACY CHRISTOPHER: Not really on sealed briefs.

CHAIRMAN BABCOCK: I think that's a dangerous road to go down myself, sealed briefs, but anyway, Frank had a comment in response to something you said. You said this rule wouldn't allow anybody to intervene, and that's true if 10.8(a) is limited to parties, but if you'll notice there's an issue for debate as to whether or not we say "a party" or "a party or interested person may move."

MR. GILSTRAP: Let's have that debate, because, you know -- you know, we know how to intervene in the trial court. I'm not aware of any prior time that we've allowed anyone to intervene into an appeal. Now, maybe that's what we do here and to try to preserve all of the safeguards of 76a, but I would -- I kind of drew back from that because it was just so doggone radical.

HONORABLE STEPHEN YELENOSKY: Well, it won't work without notice. They don't know they're interested until they get notice of it, and so you have to have a notice provision like you do in the trial court. So you can't just say "interested party" because *Dallas Morning News* doesn't know you're trying to seal X if it didn't happen in the trial court.

CHAIRMAN BABCOCK: Well, but, yeah, but they

may know in some sense. They may be following the case.

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: And they may -- and then they go to the public file, and they say, "Wait a minute. You know, there's a whole bunch of stuff sealed here that shouldn't be sealed," and so then the *Dallas Morning News* --

HONORABLE STEPHEN YELENOSKY: Yeah. No, you're right about that. It just wouldn't be as broad as it is in the trial court.

CHAIRMAN BABCOCK: Yeah. Because that's how this whole thing got started with the *Dallas Times Herald* following a story and then going to the courthouse to look at a court file, and it was all sealed, and --

HONORABLE STEPHEN YELENOSKY: Yeah, you're right. You're right if they already know about it. Yeah.

CHAIRMAN BABCOCK: And 76a takes that into account because it has certain preclusive effects for interested parties who know about it but don't do anything, and then they can't five years later come in and say, "Oh, by the way, you've got to unseal this." So there's a way to do it, and, Frank, you know a lot more about appellate practice than I do; but the spirit of 76a was that not just the parties but third parties who are interested ought to be able to come in and challenge

sealing orders, because the parties typically are going to say -- are going to agree, and even if they don't there's not going to be much of a fight about it because they're going to get justice. They get to see the unredacted brief and go get the opinion. They get to write whatever they do, but the press or the public may not get that right. So --

MR. GILSTRAP: Well, you know, I mean, you know, we could contemplate, you know, recreating Rule 76a at the appellate level, and if the Court wants us to do that or if the entire committee thinks we should, but it's -- to me allowing someone to intervene in an appeal is just mind-boggling. Maybe I'm --

CHAIRMAN BABCOCK: Well, and here's -- I don't want to argue this too much, but --

MR. GILSTRAP: Go ahead. It deserves argument.

CHAIRMAN BABCOCK: There are two things. I mean, do you have to recreate 76a, or would it be enough to say in 10.8(a) that -- you know, just put the language "party or interested person," and then, you know, the *Morning News* says, "Hey, I've got standing to complain about this under, you know, 10.8(a)," and there is a standard for sealing in the rule. That is that sufficient cause demonstrated a specific serious and substantial

interest clearly outweighing the presumption and that hadn't been met, and you need to unseal these documents; and the parties go, "Oh, well, this is terrible." But that happens, and I don't think that the -- take the *Dallas Morning News* necessarily wants to get involved in the merits of the appeal. They just want this stuff open.

HONORABLE STEPHEN YELENOSKY: And this would be --

MR. GILSTRAP: You have these like -- you have groups that are maybe less responsible, like some of these court-watching groups. Are you going to allow them to come in and intervene in the court of appeals? And I don't know. If that's what we want to do, that's fine. We need to be real mindful of it.

CHAIRMAN BABCOCK: I don't think -- I don't think you can say, "Oh, responsible people can" -- responsible interested parties and, you know, goofball nutty people don't get to --

HONORABLE STEPHEN YELENOSKY: "Goofball" is in the eyes of the beholder.

MR. GILSTRAP: You're absolutely right.

CHAIRMAN BABCOCK: That's right. You remember what county you're sitting in. Pam.

MS. BARON: I think we should not call this "intervention" because it really wouldn't be an

intervention. I agree with Chip that a news agency or just an interested person in the public who comes to the website and sees a brief is sealed in a case that the court is deciding and wants to look at it should have the opportunity to come in and say, "I don't understand why this case, which is a run-of-the-mill contract dispute or whatever it is, falls within this standard, and I challenge it." And then the parties would have to come forward and make an effort. In theory they should have already made that. You should be able to look at their motion and see what the justification is and then come in and say that's not a proper justification under these circumstances, but I do think it should include interested persons, and it isn't time-limited because it does allow you to come in and ask permission to access an otherwise restricted document under an order of a court.

So I think that works, but it's not an intervention. It's almost like a "friend of the court" type brief.

CHAIRMAN BABCOCK: That's why I thought it was a very elegant way to do it without getting into all of the machinations of 76a.

HONORABLE STEPHEN YELENOSKY: Isn't there a problem with the word "interested"? Because that could be taken to mean "I'm interested. I have a legal interest

because what you're revealing affects me," as opposed to somebody who is interested in it, which is what 76a is, any person. So I don't like the word "interested" now that I think about it because it could be interpreted to mean somebody somehow has a legal interest in whether this is --

CHAIRMAN BABCOCK: Yeah, that's a good point.

MR. GILSTRAP: Replace it with "anybody."

CHAIRMAN BABCOCK: Huh?

HONORABLE STEPHEN YELENOSKY: Yeah, anyone.

MR. GILSTRAP: Just say "anybody."

CHAIRMAN BABCOCK: The public is a broad group. Yeah, Peter. Sorry.

MR. KELLY: I think this is all answered in 76, in 76a, and the procedure would be "Any person may intervene as a matter of right at any time before or after judgment." So if you're interested in it, you go to the trial court. You make your own 76a motion to unseal it. Then you go to section 8, and it says "any order or portion of the order related to the sealing or unsealing of the records." So your "any person" whether they're interested or not goes to the trial court and makes their application to unseal the record. If it's denied then they have their own appeal up to the court of appeals. So

you don't have to have a second opportunity for intervention into the court of appeals when the initial remedy belongs in the trial court under 76a.

MR. GILSTRAP: The problem with that is we're talking about documents that are filed for the first time at the court of appeals.

HONORABLE STEPHEN YELENOSKY: Or may be.

HONORABLE TRACY CHRISTOPHER: Like the brief.

MR. GILSTRAP: Or this affidavit, you know.

HONORABLE BILL BOYCE: And we're also talking about documents that are potentially not defined as court records under 76a, so again, does there need to be some sort of broader catch-all?

MR. KELLY: Well, this goes to sort of the question we're talking about remand for further proceedings, further fact-findings for the trial court. I mean, my understanding is the court of appeals has the authority to do that in any type of proceeding, whether it's an appeal after final judgment or a mandamus. I don't think there's anything in 76a prohibiting that even if it's a court of appeals order that the person -- any person can go and intervene and attack the court of appeals order in the trial court to present their facts that -- the facts that they think would support unsealing

the record. Even though the order was issued by the court of appeals, attack it first in the trial court.

HONORABLE BILL BOYCE: Unless it's a document to which 76a does not apply because it's privileged or it's otherwise protected by law in some other statute. Say like the theft -- the Trade Secrets Act. I mean, I think that's why 76a is potentially a partial answer to some of the questions but not an entire answer.

MR. KELLY: Maybe it would answer as a part of syncing it up to make clear that sync through 76a to expand the scope of the continuing jurisdiction or going forward through the appeal.

CHAIRMAN BABCOCK: Buddy had his hand up.

MR. LOW: Chip, the question I have, this whole thing came about because we're talking about the parties, but it was *Dallas Morning News*. We were here on a Saturday, and it was the news media that said these are public records, public people keep them, they're entitled to them; but if on appeal, what if it's sealed in the trial court, and the Dallas news is not interested in it, and they don't know about it, but then it becomes a hot topic and then they go to appeal? Can they for the first time -- have they waived their right to intervene, or what are their rights to get to challenge that?

MR. GILSTRAP: What if the case is stale? What if the case is old? Can they go into the court of appeals and say --

MR. LOW: Right.

MR. GILSTRAP: -- I want to file a motion to unseal?

CHAIRMAN BABCOCK: I don't remember the specific language, but I think 76a says they can unless they were on notice --

MR. LOW: Oh, okay.

CHAIRMAN BABCOCK: -- of the sealing and that passed.

MR. LOW: Because that was the thing that -- people are afraid to say "interested party." Well, it wasn't the parties that we were meeting. It was the news media, AP, and they're still going to have the same interest, and that's what I'm wondering if we've answered their demands.

CHAIRMAN BABCOCK: Yeah.

MR. LOW: That's all.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Peter, you know, I was the one who didn't really want an appellate rule except for the documents that hadn't been first been filed -- had not been filed in the trial court at all or

even attempted to be filed in the trial court. So I'm with you in spirit, but judges are not following 76a even when it originates in the trial court right now, a lot of them aren't. And so they are not going to listen to a motion to unseal something that was first filed in the appellate court or is in any way at the appellate court. They're just going to say that's the appellate court's responsibility, whether its should be or not and whether 76a reads that way or not.

So I think there has to be some direction here for that reason. Nobody ever, I don't think, responded to your first point, which was along those lines that it should say "by appellate court or trial court" and under -- on page two under (b). And I think the easiest thing is just to say "expires or is vacated or modified by court order," because we know that trial court orders can be appealed. It's whatever order is in effect.

CHAIRMAN BABCOCK: Yep.

MR. KELLY: I don't know if the charge to the subcommittee includes looking at 76a. I can't go into much detail, but having a very strange 76a situation in a probate court and the problems with the procedure in terms of filing the verified order with the Supreme Court when the verified order -- the constable has a verified order. We have to file it immediately with the Supreme Court. It

was very odd language, odd requirements for that, and then the court going far beyond the motion to seal and sealing the entire record rather than just the individual filing that needed to be sealed.

CHAIRMAN BABCOCK: I will tell you that Justice Hecht and I were there at the birthing of the 76a baby, and I don't know about him, but I don't want to go through labor again.

MR. KELLY: Well, maybe just amputate a couple of limbs or something to make it easier.

CHAIRMAN BABCOCK: Oh. Yeah, Frank.

MR. GILSTRAP: Peter's comment that he was going through a very strange dual 76a procedure is flawed because it's redundant. They're all that way. I would point out that in 10(c) on page three it says "The appellate court may," and so, you know, again, we were reluctant to say, "The appellate court shall," but that's what we're talking about here. If you're going to preserve -- if you're going to fully prevent the end run around 76a the appellate court has got to do something like this; and but if you say "may" they're probably not going to, and you've still got the evil of the court and the litigants getting together to seal the documents and to heck with the public's right to know.

CHAIRMAN BABCOCK: Yep. Okay. Well, have

we beat this thing to death? Anything else to talk about on this one?

MR. GILSTRAP: Well, before we go from here, I mean, I think --

CHAIRMAN BABCOCK: That was going to be my question.

MR. GILSTRAP: Well, first of all, let me say this. We all owe a debt to Justice Boyce for picking up the ball. He really -- you know, when I heard that Bill was going to be unavailable I said, well, we're not going to be talking about this at the next meeting, but here we are. It's largely through the efforts of Justice Boyce. But I don't know where we go from here. We could just tweak this rule up and we could send it to the Court and as best we can, but insofar as this business about -- about sealing in the trial courts is very problematic, maybe we just go with 9(a) and (b), with Rule 9, the additions to the Rule 9. I think that's easy. I don't think anybody has a problem with that, but 10 is a big problem, and we've got to know what the committee wants.

CHAIRMAN BABCOCK: Yeah. Well, I'll tell you what, for today let's close the discussion, and I'll get back with Justice Boyce after our meeting this week and try to give you some direction about where -- if any, where we go from here. But it's a great discussion, and I

agree with Frank, I think it's a terrific work product. Thank you for picking up the ball there.

HONORABLE BILL BOYCE: Well, thank you. I want to make sure that it's understood that the draft that you have in front of you is the product of Judge Yelenosky and Frank drilling down to the core of it and reconfiguring the revisions.

CHAIRMAN BABCOCK: Yeah. Well, Frank was quick to take credit. I didn't see Judge Yelenosky. All right. Good.

HONORABLE STEPHEN YELENOSKY: I'm not even on the committee.

CHAIRMAN BABCOCK: Let's -- Hayes, why don't you --

MS. BARON: Intervenor.

MR. JACKSON: Intervened.

CHAIRMAN BABCOCK: Didn't you say this would take five or 10 minutes?

MR. FULLER: Yes.

CHAIRMAN BABCOCK: Okay.

MR. FULLER: I'm a little cold on this because Carl -- we had a meeting after the last meeting, and we discussed it and forwarded it on to Carl, and then Carl called yesterday to say he could not attend, so I'm kind of thinking back one meeting --

CHAIRMAN BABCOCK: Sure.

MR. FULLER: -- but to report on what we're doing. The Rules 523-574 subcommittee was asked to report on a possible amendment to the justice court rules per Justice Hecht's letter from September 1, 2016, and this request was prompted by two e-mails that had been received from a Michael Scott, who is or was the president of the Texas Creditors Bar Association. Now, Mr. Scott had also been actively involved in the process which had resulted in substantial revisions, 2013 revisions, to the justice court rules. Additionally, he had attended two separate SCAC meetings which addressed those amendments.

Broadly speaking, his proposals address the following issues: First, appearance to obtain a default judgment in TRCP 508.3(c). His specific complaint there was that the judges or the justices were requiring parties to appear personally to obtain a default judgment. The second issue was redaction of sensitive data, and it implicates TRCP 21c and 502c -- excuse me 502.2 of the rules. 502.2 has to do with the petition you file in the justice court, which mentions what information or data must be in the petition. TRCP 21c deals with what data, sensitive information, must be redacted. Basically, apparently the banks that are dealing in this credit card debt can't reconcile the two rules. They want to redact

everything, and by the time they finish redacting everything, they can't satisfy the requirements of the petition. Okay. That's how I understand it.

The third issue is discovery, TRCP 500.9(a), and essentially that rule allows for the court to do reasonable and necessary discovery for good cause and, you know, if you would state a reason for it. Apparently the court -- some courts are granting motions for discovery routinely without any grounds being offered. And the last issue was proof of damages, TRCP 508.3(b), requiring business records affidavits to prove up a default versus a sworn account. Those were the specific issues that he raised. Of course, the committee's addressing -- not our subcommittee, but the committee is addressing Rule 21c, that particular issue on what information needs to be redacted.

The other issues, as we saw them, are primarily complaints with how the justice courts -- some of the justice courts are applying the amended rules. I'm not sure that any amendment we make is going to necessarily address the way some justice courts are applying the rules; but I did some checking around with our justice courts and with, you know, other segments of the bar, and apparently this credit -- this is all about credit card debt, and the credit card debt is a real

problem because for the banks that are dealing in these massive portfolios, if you will. It's a commodity that they're just trying to process through. For the individuals that are getting sued on this credit card debt, it's a legitimate serious legal issue that they're really worried about.

And there are some huge problems, as I understand it, with credit card debt, these portfolios. There's out of state service issues. There's fake address issues; there's stolen identity issues; there's -- a lot of these people don't owe the debt they're being sued for. It's fake debt. This debt is bought and sold in packages. I mean, it's just a mess. So this is a -- I'm not so sure that the justices who are applying the rules aren't doing justice by applying them the way they do and requiring the debt holders or the collection folks to come in and actually prove a case against these folks. But regardless of that, if we're going to open up this issue and seriously address it -- and I think the creditors had their chance when the rules were amended the first time. They certainly were participants of that. The sense of our subcommittee was we may not be the body that needs to do that or certainly should not be the body to do that without consulting the stakeholders, and there are significant stakeholders.

There is a Texas Justice Court Judges Association. There is a Justice of the Peace and Constables Association. There's the State Bar of Texas Consumer and Commercial Law section, which is very active in this issue, and of course, there's the Texas Creditors Bar Association, which apparently I think all of these folks participated in the last revision of the rules in 2013. But if they need to revisit it, I would suggest that is the more appropriate route as opposed to asking our subcommittee to try to address the concerns of one of the stakeholders.

CHAIRMAN BABCOCK: Okay. Any comments about what Hayes just said? Martha, what's your reaction to that? Is the Court interested in what this subcommittee or this committee has to say about that, despite Hayes' demurrer? I don't want to put you on the spot.

MS. NEWTON: Yeah. No, well, I think it might be best to get the opinion of the Chief when he comes back into the room about -- I mean, I think -- I mean, I would be inclined to agree.

CHAIRMAN BABCOCK: With Hayes?

MS. NEWTON: Yeah.

CHAIRMAN BABCOCK: That would be a first. On this committee, I mean.

MS. NEWTON: Because the thing is if this

committee proceeds with amendments, I mean, those guys are going to want to --

CHAIRMAN BABCOCK: Yeah.

MS. NEWTON: -- participate anyway, and it might be better just to get them involved in the front end. Might be more efficient that way.

CHAIRMAN BABCOCK: Yeah. Yeah. Judge Wallace.

HONORABLE R. H. WALLACE: Who is Mike Scott again?

MR. FULLER: At the time he sent the e-mails he was the president of the Texas Creditors Bar Association. I don't know how their terms are, so I don't know whether he still is or --

CHAIRMAN BABCOCK: Was this part of the charge?

MS. NEWTON: It was. So what happened was Michael Scott called me -- has called me a few times over the years, last few years, about justice the court issues, these issues that he put in the e-mail, so finally I just said, "Well, e-mail us your suggestions," and then, you know, we talked about it. The Court talked about it in conference and just to the extent of, well, we don't really know much about this, we need to get the advice of the advisory committee, and that was pretty much the

extent of our discussions in the Court about his suggestion. We don't really know whether these are good or bad, so let's ask the advisory committee to look at it.

CHAIRMAN BABCOCK: Yeah. And if we were to report back to the full court, Hayes, would we be saying, "Hey, our subcommittee, which is small, but knowledgeable, we've looked at this and we don't understand. We don't think there's a problem, and therefore, you know, tell Mr. Scott that, you know, go do some more productive things"? Or is it that we don't really know either, and we would have to get the stakeholders involved in order to understand it?

MR. FULLER: Yeah. I think -- I think probably the former -- I think what we can legitimately say is "We've received your message. We've looked at it closely. Quite frankly, we think, you know, the new rules at this point seem to be working okay, for a majority, you know, of the things." And I even followed up with several of the justices, and that's where I get the -- I mean, all of them are aware of this, the ones I talked to. It's like, "Oh, yeah, here comes the" -- you know.

CHAIRMAN BABCOCK: When you say "justices," you mean JPs?

MR. FULLER: Yes. And it's like that's a -- you know, "That's a credit card debt issue. I get those

all the time." And so I think if truly the rules aren't working, and I'm not so sure they're not, I'm not sure that we are in a position to really determine that. Certainly he's had some bad experiences on his practice or whatever. I'm not sure that we're the body to fix that. Certainly at the front -- at the front end in a vacuum, because, as Martha said, we're going to have to get everybody involved. You're going to have to get the justices involved. You're going to have to get the --

CHAIRMAN BABCOCK: Yeah, I get what you're saying.

MR. FULLER: Yeah. Yeah.

CHAIRMAN BABCOCK: But is it your recommendation based on the investigation you and your subcommittee did --

MR. FULLER: I'd leave it be.

CHAIRMAN BABCOCK: -- that it's not worth the effort?

MR. FULLER: I don't think it's worth the Court pursuing.

CHAIRMAN BABCOCK: And the flip side of that is --

MR. FULLER: Right.

CHAIRMAN BABCOCK: -- we've got a complaint from somebody who has raised legitimate issues in the past

and this one as well, and you know, maybe we should make the effort, but the subcommittee is saying we shouldn't.

MR. FULLER: Correct.

CHAIRMAN BABCOCK: Okay. And does anybody -- Judge Wallace, you look like you're ready to say something.

HONORABLE R. H. WALLACE: Well, no, I just -- is he from Dallas?

MR. FULLER: I have no idea where he's from.

HONORABLE R. H. WALLACE: Well, I think -- I'm not impugning his integrity. I'm sure he's looking out for what his clientele would best be served, how they would best be served, but I think maybe that's a lot of his motivation. I remember vaguely being contacted. I think it was when I first came on the bench, and he wanted to come over and introduce himself and meet me. I didn't know him and never met him. I mean, you know, he's probably doing a good job for his clients.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: But I don't know that it's necessarily an indication that the rules are bad. They might be better designed.

CHAIRMAN BABCOCK: I'm with you.

MR. FULLER: Our rules are pretty new, 2013.

HONORABLE R. H. WALLACE: Yeah.

MR. FULLER: And as recently as 2013 he and his organization had significant input into those rules, and since then, I mean, we've had the Wells Fargo fiasco where they're creating fake accounts, you know, all over the place. I mean, I think we -- this appears to me to be an isolated complaint. I don't think the court's hearing from any other segments of the Bar on a routine basis that this is a hair-on-fire problem.

CHAIRMAN BABCOCK: Yep. True?

MS. NEWTON: That's true. I've only heard from him.

CHAIRMAN BABCOCK: Okay. Well, let us huddle, and if we want you to do anything further we'll let you know and --

MR. FULLER: Be glad to.

CHAIRMAN BABCOCK: -- otherwise thank you for the effort in looking at it, and I think that takes us through the agenda except for two items, two and a half items tomorrow. One is the Texas Rule of Civil Procedure 21a, 21c, 57, and 244, and the other one is the amendments to the State Bar rule. So we'll take those up tomorrow, and hopefully we will have enough time to get back to the discovery rules and hopefully get through those, get through the end of it. I think we've got 25 or 30 pages to go, but a lot of them don't have any changes in them,

so hopefully we'll get done tomorrow, and then we'll come back on June 9th. We'll only have a one-day meeting at that time, but I think we're going to be okay with just one day in June. So unless anybody has anything else we'll be adjourned.

(Recessed at 4:52 p.m. until the following day.)

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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 28th day of April, 2017, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,613.00 .

Charged to: The State Bar of Texas.

Given under my hand and seal of office on this the 25th day of May, 2017.

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