Memorandum

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of August 4, 2017 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **August 10, 2017; Edited October 16, 2017**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Justice Melissa Goodwin, Professor Steve Goode, Donna Kay McKinney, Chris Prine, Joseph Varela, Michael Gross, Emily Johnson-Liu, Sian Schilhab, Kathleen Schneider, and Holly Taylor.

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1. Welcome & discussion regarding committee membership changes.

Judge Newell called the meeting to order at 9:05 a.m. He thanked everyone for coming and expressed appreciation for the new committee members. All committee members present introduced themselves.

2. Review of minutes from April 2017 CCA Rules Advisory Committee meeting (See Exhibit A).

The members reviewed the minutes from the April meeting. Ms. McKinney moved that the minutes be approved. Professor Goode seconded that motion. The committee voted to approve the minutes.

3. Update on Electronic Filing Rules published in June 2017 Texas Bar Journal (See Exhibit B).

Ms. McKinney, who is the Bexar County District Clerk, reported that electronic filing is going well in Bexar County. Her Chief of Criminal Operations, Anthony Cantu, reported that the main issue he has encountered is educating attorneys in how to use the system. The integration is working well with Bexar County's imaging system. The documents are available within five minutes to the courts. 1045 motions were filed between June 28th and July 28th and the number is growing daily. A few documents have been rejected because they were not legible. He observed that they have encountered one problem: attorneys do not usually number their pages and the clerk's office cannot tell if pages are missing from documents. He suggests that it would be a good idea to add a rule requiring the numbering of pages.

Mr. Varela said that he has been practicing in federal court for a long time. He said that certain

types of motions are filed in the federal electronic filing system (PACER) under seal, e.g., *Ake*[1] motions. He said that the State system needs to have a button (like the PACER system does) that indicates that a document is being filed under seal. Ms. Schilhab noted that the criminal electronic filing rules forbid sealed documents from being electronically filed. Mr. Varela asked why that rule was enacted. Judge Newell explained some of the concerns behind the rule. Judge Newell said that the Supreme Court Advisory Committee (SCAC) is considering whether their rule about sealed documents needs to be changed. Later, we will discuss whether the criminal rule needs to be changed when the civil rule is changed.

Ms. McKinney noted that the PACER system is different from the Texas electronic filing system, in which documents must be filed through a private provider, Tyler Technologies, Inc. (Tyler). Mr. Gross said he believes that the electronic filing system is working well. He said that he is aware of two issues that have arisen: (1) the attorney who files the motion does not know if the judge has seen the motion; and (2) the attorney does not receive electronic copies of the orders when they are signed by the judge. Ms. McKinney said it is a different system (for judge's orders) in Bexar County. She said that the criminal side actually works better than the civil side. They email attorneys to notify them of changes in the cases. She said it would be nice for Texas to work like the PACER system but it cannot because there are 254 counties.

Ms. Taylor noted that the Court has received two messages discussing the implementation of electronic filing. Ms. Laura Hinojosa from Hidalgo County stated in her message that the criminal electronic filings are easier to process than civil filings. They have noticed a number of filings going into the error queue, apparently because the titles were too long. This is a problem they also had with the civil system. Ms. Hinojosa said that there was a work-around that E-File Texas was able to implement to allow longer file names and they may need to implement that on the criminal side. Also, Ms. Taylor said that Denton County basically reported that they like the electronic filing system.

Ms. McKinney said that judges do not want to rule on orders that come through the electronic filing system without any argument or presentation by the attorneys. Her clerk's office handles the motions based on the particular judges' wishes. Some judges want the motions printed and placed on their desks. Mr. Varela said that Harris County has a system by which the judges can view the motions and proposed orders on their screens and then rule on them by affixing their electronic signatures

Judge Newell said that he is pleased that we are not hearing any complaints that pro se litigants are being excluded from the system. Ms. McKinney observed that pro se litigants continue to file documents in person. Judge Newell summarized the committee's observations/concerns expressed so far:

(1) there should be some way of filing sealed motions through the electronic filing

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[1] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

system; and
(2) there needs to be a system by which judges see the motions or are notified that the motions have been filed and parties are notified electronically of the judge's actions.

Justice Goodwin observed that the latter problem exists for the civil side as well and should be addressed through a global fix to the system. Other members agreed that a fix would need to be implemented through the system used in the individual counties. Ms. McKinney stated that they are sending emails of all kinds to the parties and would be happy to implement a system by which judges review and rule on motions electronically and then the parties are notified. Ms. McKinney said the judges want to hear from the attorneys and are unlikely to act on something that is just sitting in their in-boxes. Judge Newell pointed out that getting judges to rule on motions is a more widespread problem that is not is unique to the electronic filing system.

Judge Hervey asked if there is a booklet or person who helps attorneys learn how to use the electronic filing. Ms. McKinney said that she has staff members who assist attorneys in doing electronic filing. Travis Banks, a member of Ms. McKinney's staff, pointed out that there is a webinar on Tyler's website that attorneys can view to learn how to use the system. Judge Newell said that training might be a good idea to help influence the cultural preference for paper.

4. Update on proposed amendment to TEX. R. EVID. 615(c).

Ms. Taylor described a proposed amendment to Rule of Evidence 615 (regarding producing a testifying witness's statement) that the committee has discussed at two meetings. The committee previously voted to recommend a change to subsection (c) of the rule to clarify that the language directing a judge to redact unrelated portions does not authorize the judge to redact any material that must be disclosed under Texas Code of Criminal Procedure article 39.14 (The Michael Morton Act). The Court of Criminal Appeals did not approve the amendment because the judges had concerns about unintended consequences resulting from the language.

Professor Goode said that, whether you have the proposed new language in the rule or not, the statute must be followed. The amendment to the rule simply served to remind trial judges to consider the statute when applying the rule. Judge Newell asked the committee whether they believed that we needed to go back to the drawing board on a Rule 615 amendment or whether they felt that no amendment was needed. Professor Goode said that the rule language has already been amended to clarify that the rule only mandates the disclosure of information that has not already been disclosed pursuant to Morton Act. And, after the Morton Act, everything except very late-breaking statements should already have been disclosed, so the rule now primarily serves the purpose of requiring that the statements of testifying defense witnesses be disclosed to the prosecution. Mr. Varela noted that *Brady*,[2] *Bagley*,[3] and the Morton Act impose a continuing obligation and require the disclosure of late-breaking statements regardless of this

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

[3] *United States v. Bagley*, 473 U.S. 667 (1985).

rule.

The committee reached a consensus that no further work on a proposed amendment to Rule 615 was necessary.

5. TRAP Rules Issues:

(a) Discussion of amendment to TRAP 4.6 to deal with issue of late notice to defendants of orders in Chapter 64 proceedings (Misc. Docket No. 17-007) published in July issue of Texas Bar Journal & any comments received. (See Exhibits C, C.1, C.2).

Judge Newell explained that proposed new Rule of Appellate Procedure 4.6 was enacted through an initial order (Exhibit C) stating that the new rule will go into effect on September 1. Subsequently, during the comment period, the Court of Criminal Appeals received a letter from Chief Justice Tom Gray of the Tenth Court of Appeals. Chief Justice Gray expressed several concerns about the proposed rule. Mr. Gross stated that Chief Justice Gray made some good points in his letter (Exhibit C.1). Mr. Gross agreed with Chief Justice Gray that Rule of Civil Procedure 306a already sets out a process for providing notice.

Ms. Taylor explained that some version of this rule has been discussed at multiple previous rules advisory committee meetings. An earlier version of the proposed rule incorporated aspects of Rule of Civil Procedure 306a ("Periods to Run from Signing of Judgment") and TRAP 4.2 ("No Notice of Trial Court's Judgment in Civil Case"). There was a lot of discussion in the committee about subpart (a) of the earlier proposed rule which was modeled on parts of Rule 306a. Committee members opined that the rule should focus on the problems that have occurred in the few limited cases at issue, noting the case of Reginald Davis. (Mr. Davis is a defendant who twice did not receive notice that the trial court had ruled on his Code of Criminal Procedure chapter 64 motion for DNA testing and thus was unable to exercise his statutory right to appeal the trial court's ruling.) Kathy Schneider pointed out that there are very few cases where this problem has arisen–only 3-5 cases. Ms. Taylor explained that committee members had not liked the broad proposed language modeled on Rule 306a, and thus the rule passed by the Court did not contain the broader language. Chief Justice Gray has suggested that the rule should be modeled on Rule 306a and TRAP 4.2.

Ms. Taylor has written some proposed amendments to Rule 4.6 (See Exhibit C.2) to try to address some of Chief Justice Gray's concerns without expanding the rule to be as broad as the civil rules. Mr. Gross said that he did not see a need to put a 120-day cap on the motion for additional time. Judge Newell said that the civil rule has a 90-day cap and this was lengthened to 120 days in order to accommodate the delays that staff have seen in Chapter 64 cases. Also, Judge Newell noted that the committee did not want to make the rule really broad because it could create unanticipated problems and it was a very

narrow set of situations that the rule was intended to address. Mr. Varela expressed concern that the 120-day cap might foreclose a defendant from getting relief. Judge Newell explained that the worst-case scenario is that a defendant will have to re-file his Chapter 64 motion.

Mr. Gross noted that attorneys are required to send notice of appellate court rulings to their clients by certified mail. Committee members pointed out that defendants are not necessarily entitled to counsel in Chapter 64 proceedings. Mr. Gross suggested that the district clerks could be required to provide timely notice of these rulings.

Mr. Prine pointed out that the proposed rule appears to require that, even after a defendant's motion for additional time is granted, he still must file a notice of appeal. Committee members asked whether the motion for additional time could serve as the defendant's notice of appeal. Judge Newell noted that the committee previously discussed the idea of treating the motion as the notice of appeal and members expressed concern that this might exceed our rulemaking authority and invade the province of the Legislature. Therefore, the rule was written to merely allow the extension of the deadline for the notice of appeal. Mr. Prine noted that, in civil cases, if an appellant files a late notice of appeal and his motion for additional time is granted, then the late-filed notice is considered timely.

Ms. Schneider noted that Reginald Davis never received any notice of the trial court's ruling on his Chapter 64 motion, so he filed a late notice of appeal in the court of appeals. Ms. Taylor referred to TRAP 2 and stated that she believed that, if the defendant has filed a late notice of appeal and then his motion for additional time (under the proposed rule 4.6) is granted, he could be found to have complied with the rule. Justice Goodwin noted that her Court often employs Rule 2. Judge Newell asked whether Rule 4.6 should have a comment clarifying that a defendant's late notice of appeal can be treated as timely if the motion for additional time is granted. Ms. Taylor suggested that the language in subsection (d) could be very slightly modified to clarify that granting the motion for additional time just resets the time tables and does not require the movant to file an additional notice of appeal if he has already filed a sufficient notice of appeal.

Judge Newell said that, unless the Court of Criminal Appeals takes some action, Rule 4.6 will go into effect on September 1 as written. Professor Goode stated that it seems that there are a lot of questions and this is an issue that comes up so rarely that there is no rush. Professor Goode averred that the most logical course of action would be to "pull the rule down" for the time being to allow further consideration of the various issues that have arisen. Ms. Taylor said that, if the committee decides today to recommend that the Court "pull the rule down," the Court would still need to vote on the matter and sign an order to that effect.

Committee members asked why the Court could not simply allow the rule to take effect on September 1 and then amend the rule later. Mr. Prine said the court of appeals chiefs

would get together and discuss how to handle the ambiguities in the rule. He said they would probably decide to treat a late-filed notice of appeal as complying with the rule if the motion for additional time is granted. Mr. Prine noted that the phrase "proper court of appeals" does not have much meaning in the Houston area. Ms. Schneider said it makes sense that the motion for additional time should be filed in the convicting court where the Chapter 64 DNA motion is filed (as Chief Justice Gray suggested), rather than in the court of appeals (as Rule 4.6 enacted in June provides).

Justice Goodwin noted the difficulty of making any changes to the rule before it is published, given the publication deadline and the need to work with the Texas Supreme Court. Judge Hervey said that it might be difficult to get the Court of Criminal Appeals to vote on any changes within such a short period of time. Ms. Taylor explained that the Court of Criminal Appeals's usual practice has been to do joint orders with the Texas Supreme Court, even on strictly criminal law matters. Therefore, the Court would need time to consult with the Supreme Court for a joint order.

Mr. Prine asked if the proposed rule could just be changed to require the motion for additional time to be filed in the convicting court. Ms. Schneider said that the problem for Reginald Davis was the convicting court was not following the rules, so the language in subsection (c)(2) (see Exhibit C.2) requiring the district clerk to forward the case to the court of appeals is important.

Judge Newell asked about the purpose of the proposed amendment to Rule 4.6, subsection (a) (see Exhibit C.2). Ms. Taylor explained that the "within twenty days" language in subsection (a) was intended to address Chief Justice Gray's concern that, if the defendant got notice on the last day of the 30 days, it would not leave him enough time. The new language was modeled on the civil rule (TRAP 4.2) which says that the notice must be in the first twenty days. Ms. Taylor further explained that the change to the heading/title of Rule 4.6 was to incorporate any type of Chapter 64 ruling that is appealable under the law. The word "earliest" was added to subsection (c)(1) to clarify the meaning of that subsection (another change suggested by Chief Justice Gray). The change to subsection (c)(2) to allow defendants to file the motion for additional time in the convicting court was intended to address Chief Justice Gray's concern that defendants would not know the "proper court of appeals" and would be more familiar with trial courts. Subsection (d) was also modified to address Chief Justice Gray's concerns.

Judge Newell said that the committee has been working on various versions of this rule for two years. He does not want to "lose the name of action." Justice Goodwin said that perhaps we should just leave the language as it is for now, unless we could, without much trouble, change it to require the motion to be filed in the district court.

Judge Newell asked which amendments members want to make, if any. Judge Hervey said that, if we are going to make very many changes, she would prefer that the Court have sufficient time to consider them. Ms. Schneider pointed out that the location that

the motion is filed is a critical part of the process defined by the motion and it would be strange to pass a rule and then a few months later change an important part of the process in the rule. Ms. Taylor stated that the Texas Bar Journal deadline is coming up quickly for publication before the September 1 effective date. Judge Keller stated that she was of two minds–she did not want the time spent working on the rule to be wasted, but did not really have a problem making some changes in response to the comments. Professor Goode said he had already spotted some drafting problems and he felt uncomfortable moving forward with the proposed changes without vetting them more carefully.

Ms. Taylor and Judge Newell expressed concern about moving forward with the existing language and then making substantial amendments to the rule after it had been in effect only a short time. Ms. Taylor noted that it seemed like everyone on the committee thought that Chief Justice Gray had some valid concerns even if they did not agree with all of his comments. She said that it seemed to make more sense at this time for the Court to do an order delaying the effective date of the rule. This would allow the Court and the committee sufficient time to thoroughly consider the issues and proposed changes. Judge Newell remarked that we should perhaps change the boilerplate text that we place in our initial rules enactment orders to state when the comment period ends, but not state when the order will take effect. He said that way we will not again end up in this time-compressed situation.

Judge Newell said the question now is whether we let Rule 4.6 take effect as it is or whether we "pull it." Ms. Schilhab said there is a third option which is to only change the location where the motion is filed. Justice Goodwin said that she did not necessarily agree with Chief Justice Gray's opinion that the motion should be filed in the convicting court. She noted that the committee had talked for a long time about this issue at previous meetings and decided for good reasons that the motion should be filed in the appellate court. Judge Newell said that the proposed change providing that the rule be filed in the district court could invite more fact finding than originally intended.

Judge Hervey noted that any changes to the rule would require quite a bit of explanation for the Court and she thought the rule should be "pulled." Judge Newell asked if anyone thought that we should go ahead with the rule at this time. No one responded. The committee reached consensus to recommend that the Court of Criminal Appeals sign an order postponing or tabling the implementation of the rule to allow further consideration of Chief Justice Gray's comments and potential changes to the rule language.

Judge Newell stated that he wanted to change the order of the items on the agenda because we will not be able to get to all these items today and some are more time-sensitive than others.

(b) Update on amendments to TRAP 33.1 - final order (Misc. Docket 17-008) to be published September 1, 2017 in the Texas Bar Journal. (See Exhibit D).

Ms. Taylor explained that a very minor change was made to the amendment to TRAP 33.1 and the final rule has taken effect.

(c) Discussion of proposed amendments to TRAP 31 limiting the scope of the rule mandating accelerated appeals in habeas corpus proceedings. (See Exhibits F.1 and F.2)

Melissa Stryker, an assistant DA from Harris County, described proposed changes to TRAP 31 (Exhibit F.2). Ms. Stryker said that the proposal is intended to clarify which habeas appeals need to be accelerated and which do not. She said that the current rule has resulted in habeas cases on misdemeanor convictions taking precedence over direct appeals. Also, some courts of appeals have disposed of these accelerated habeas corpus appeals without allowing the parties an opportunity to file briefs. Ms. Stryker provided a few examples of cases decided without briefs: *Ex parte Uribe*, 516 S.W.3d 658, 660 (Tex. App.—Fort Worth 2017) and *Ex parte Duque*, No. 01-15-00014-CR, 2015 WL 5450530 (Tex. App.—Houston [1st Dist.] Sept. 15, 2015), pet. granted, judgment vacated, No. PD-1344-15 (Tex. Crim. App. Apr. 6, 2016).

Ms. Stryker explained that the proposed amendment to Rule 31 would still allow accelerated treatment of bail proceedings and pretrial habeas. Also, it would maintain accelerated appeals for writs challenging conditions of probation, but not writs challenging the actual order of community supervision. Ms. Stryker said that she handles *Padilla*[4] writs which often come up years after a conviction and after the defendant has served his time, but are nonetheless accelerated under the current rule. She said that it seems unjust that an appeal where the defendant is not incarcerated takes precedence over a direct appeal case in which the defendant is incarcerated. Ms. Stryker also noted that sometimes, in an applicant's brief, he will abandon claims raised in the writ, thereby making the process more efficient for the court of appeals.

Mr. Prine said that the Fourteenth Court of Appeals always allows the opportunity for briefing in these cases, but the First Court of Appeals does not. Ms. Stryker is not aware of the First Court of Appeals ever denying a motion for briefing, but they have decided cases without receiving briefs.

Mr. Varela distinguished between challenges to a probation order as a whole and challenges to a particular condition. He said that the proposed rule appears to lump both of these into the same time table. Ms. Stryker stated that she believes that, if the applicant is challenging only a particular condition, then it is not a challenge to the legal validity of the order of community supervision as a whole under the proposed rule. Judge Newell said that he believed that Ms. Stryker was interpreting subsection (a) of the

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[4] *Padilla v. Kentucky*, 559 U.S. 356 (2010).

proposed rule in this manner.[5] Mr. Varela said that he would like to see the rule's language changed to more clearly distinguish between these types of cases. Judge Newell agreed that the language could use some clarification in this area.

Judge Newell asked whether the committee members thought that making these changes to Rule 31 was generally a good idea. Mr. Varela said that he liked the idea because he does not like his direct appeal cases to be delayed by the unnecessary processing of writ appeals in an accelerated manner. Mr. Prine cautioned that this is an area where the Court is likely to receive comments on the proposed rule. Justice Goodwin agreed. Judge Newell wondered if some people might see the new rule as complicating matters rather than simplifying them. Mr. Varela said that writ lawyers may have some complaints, but that there is a legitimate rationale for the changes. Ms. Schneider noted that, in the appeals of Texas Code of Criminal Procedure article 11.072 matters, the defendant may still be on probation when he appeals. She said it may not be that easy to draw the line among these types of appeals.

Mr. Varela asked whether appellate courts will receive many motions arguing that "a more expedited timeline is required to do substantial justice to the parties" (asking to have their cases accelerated under the proposed rule). Mr. Gross suggested that this request for accelerated treatment could be incorporated into the appellant's docketing statement. Mr. Prine observed that only about one percent of their criminal case appellants even file docketing statements. Mr. Varela remarked that docketing statements are required by the rules. Mr. Prine noted that there is no "hammer" in the rules if a party fails to file a docketing statement.

Judge Newell said that he was hearing general approval from the committee members for the proposed amendments to Rule 31 along with concerns that we need to make sure that the new language is limited with regard to the distinction between appeals of probation conditions and probation orders. Presiding Judge Keller suggested that the rule language be changed to: "For appeal from a habeas corpus proceeding challenging the legal validity of either a conviction or an order assessing community supervision." Presiding Judge Keller said she would also add a comment explaining the distinction. Judge Newell suggested that we look at the language in Texas Code of Criminal Procedure article 42.12 that gives the right to appeal these matters and refer to the statutory sections in the rule comment to illustrate the types of appeals that should be accelerated. Ms.

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[5] Subsection (a) of the proposed Rule 31 reads:

(a) For appeal from a habeas corpus proceeding challenging the legal validity of a conviction or order of community supervision, the deadlines for the filing of records and briefs on direct appeal from criminal cases shall apply, unless the appellate court determines that a more expedited timeline is required to do substantial justice to the parties.

Taylor expressed concern about including a laundry list of the types of accelerated appeals because we might forget to list some. Other committee members cautioned that the statutes could change and some types may not be based on statutes.

Judge Newell said he was not hearing opposition to the idea of the rule change as a whole, just concerns about particular language. Committee members expressed an interest in asking Ms. Stryker to re-write the proposed rule language and to add a comment in light of the committee's discussion.

Mr. Gross suggested that we could simply amend the language to require the courts of appeals to offer the opportunity for briefing before disposing of accelerated matters. Justice Goodwin asked whether the primary problem we are trying to address is the number of accelerated appeals or the fact that courts of appeals are deciding accelerated appeals without allowing the opportunity for briefing. Mr. Stryker said she believes that the amendment needs to address both of these problems. Justice Goodwin said that she does not believe that accelerating these writs is a big problem for the appellate courts. Mr. Varela said that some of the writs do need to be accelerated. Ms. Schneider observed that some of them can be resolved quickly. Mr. Varela said that he has not heard an outcry among defense lawyers in Harris County about the failure to allow briefing.

Ms. Johnson-Liu noted that, in certain Article 11.072 matters, it would be helpful to allow more time for briefing and such a policy would improve the quality of the briefing. She noted that some of the issues that arise in these cases can be more complex than in a direct appeal. Ms. Stryker said that it is difficult for the State's attorneys to file a thorough brief in Article 11.072 matters in the time allotted.

Judge Newell observed that there is nothing in the proposed rule that directly addresses the problem of the courts of appeals not permitting briefing. Ms. Stryker expressed concern that language mandating that appellate courts permit briefing could prohibit the appellate court from expediting those types of appeals, such as bail matters, that need to be expedited and may not need briefing. Mr. Varela opined that we need two tracks: the standard-time-table-briefing-needed track and the "get it out in a hurry" track.

Ms. Stryker offered to work on the proposed rule 31 amendment language some more and bring it back at the next meeting. Judge Newell asked if anyone was opposed to having Ms. Stryker develop new proposed rule language in response to the committee's input and bring it back at the next meeting. No one expressed opposition. Ms. Stryker will send proposed rule amendment language to Holly Taylor to be distributed to committee members at least a week in advance of the next meeting.

(d) Update on Supreme Court Advisory Committee Subcommittee's ongoing work developing proposed changes to TRAP 9 & 10 regarding the handling of sealed documents and materials submitted for in camera review. (See Exhibit E.1).

Judge Newell explained that Exhibit E.1 contains very broad proposed rule amendments regarding the handling of sealed materials, which were discussed at the last SCAC meeting. He said that it seemed that some SCAC members had not considered the impact of the proposed amendments on criminal cases. Ms. Taylor explained that Exhibits E.1, E.2, and E.3 are proposals from subcommittees of the SCAC. These TRAP amendments will be considered by the SCAC and may eventually be voted on by the Texas Supreme Court. Judge Newell, who serves on the SCAC, said that he hopes to get our committee's input on these proposed rule changes so that he can take that information to the next SCAC meeting. Judge Newell said that the sealed document rule amendments are focused on taking the sealed documents from the trial court and electronically sending them to the court of appeals. The civil rule previously forbade the electronic filing of sealed documents and the criminal electronic filing rule was modeled on the civil rule.

Ms. McKinney said that this would be simple to implement if Tyler were to add a drop-down menu where a filer could designate an item as sealed. Mr. Prine stated that they do receive sealed documents from the parties. He said that he was present during the meetings in which the original rule was discussed and remembers concerns about access to sealed documents. He said that some of these concerns could be addressed with programming implemented by Tyler. He said he prefers to receive the documents in a paperless form and the judges can look at them that way. Ms. McKinney said that this issue "goes to the very essence" of whether we should have a private company handling sealed documents. She said she would rather personally deliver the documents, but she believes that the change is going to happen. She said it is very important to the attorneys that the items that they file under seal be kept confidential.

Mr. Prine said that they do not get a lot of requests at the appellate level to seal documents in criminal cases. He said that, if a document is marked "sealed" when filed in the trial court, his courts receive it in a sealed form. Mr. Varela said he does not want anyone other than the trial court and the appellate justices to be able to view certain sealed or in camera documents that he files.

Ms. Schilhab clarified that the proposed rule under discussion governs *appellate* procedure–i.e., how sealed and in camera documents are handled by the court of appeals and transferred to the court of appeals. Other rules such as the electronic filing rules govern the process of if or how sealed or in camera documents are electronically filed in the trial court. Ms. Schilhab said that we will have to look at our electronic filing rules to determine if those rules are in conflict with these proposed new TRAP amendments.

Mr. Prine cautioned that we should be wary of unintended consequences. He said that the records can be sealed by trial courts with no specification in the order regarding who is allowed see them. The committee also discussed the proposed language providing that documents not be disclosed to the public. Both Mr. Prine and Ms. McKinney observed that filers often do not adequately redact sensitive data.

Judge Newell said that it seems that the committee does not have many concerns about conflicts between these rules and our electronic filing rules. He asked what the committee thought about mandamus cases. Mr. Prine said that they would probably receive more motions to seal in the appellate court in mandamus cases. The committee discussed the fact that the proposed changes to TRAP 9 and TRAP 10 provide for a motion to seal documents in the appellate court.

Judge Newell summarized the discussion in the committee–stating that it sounds like the proposed rule is not terribly inconsistent with current practice–but we will need to examine our electronic filing rules to ensure consistency. Mr. Prine cautioned that the rules should specify that any order to seal must set out who is authorized to view the sealed materials.

(e) Update on Supreme Court Advisory Committee Subcommittee's proposed changes to the definition of "sensitive data"; adding "reference list" procedure (TEX. R. CIV. P. 21c, impacting TRAP 9.9). (See Exhibit E.2).

Judge Newell said that we have wrestled with the sensitive data definition in the past. Ms. Taylor said that the proposed changes to the sensitive data definition in the rules of civil procedure will eventually be incorporated into the rules of appellate procedure. Ms. Taylor read the existing sensitive data definition aloud and then described the proposed changes (see Exhibit E.2) and summarized the discussion at the last SCAC meeting concerning the proposed changes. Ms. Taylor also explained the differences between the TRAP sensitive data definition and the sensitive data definition in the criminal electronic filing rules: the electronic filing rules list "personal phone number" and provide an exception for juveniles transferred to district court under Texas Family Code Section 54.02. Ms. Taylor suggested that the committee should consider whether, if the Supreme Court changes the civil rules' definition of sensitive data as the subcommittee has recommended, those changes should be incorporated into our criminal rules.

Judge Newell said that the sensitive data definition can be confusing and parties may confuse the things that can and cannot be disclosed. Ms. McKinney said judges normally want access to un-redacted documents. She also expressed concern about what data will be eventually be accessible through re:SearchTX.[6] Ms. Schilhab stated that re:SearchTX should also be bound by these rules.

Judge Newell asked whether the proposed rule change will create a problem with our electronic filing rules and whether our sensitive data definition will need to be changed.

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[6] The Office of Court Administration's website describes re:SearchTX as "a secure web portal powered by the e-filing database, which includes all electronic filings as of January 1, 2016."

Ms. Taylor pointed out that part of the proposed civil rule creates the option to create a reference list that offers a key to the redacted sensitive data. Mr. Varela said that it seems unlikely that the reference list will be used much in criminal practice. Justice Goodwin suggested that we think about the potential effect of the proposed rule changes on charging instruments.

Following a discussion of possible dates, Judge Newell announced that the next meeting will be held on November 3rd at 9:30 a.m. The meeting was adjourned.