BEFORE THE

SUPREME COURT ADVISORY COMMITTEE

AUSTIN, TEXAS

FEBRUARY 9, 1990

Austin, Texas

ANNA RENKEN & ASSOCIATES

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

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B-E-F-O-R-E

LUTHER H. (LUKE) SOULES, III
CHAIRMAN

* *

SUPREME COURT:
Justice Lloyd Doggett
Justice Nathan Hecht

COURT OF CRIMINAL APPEALS:
Judge Sam Houston Clinton

COAJ CHAIR
Justice David Peeples

COARCE CHAIR:
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Sam Sparks (El Paso)

OTHER SPEAKERS:
Jim George
Tom Leatherbury

SUPREME COURT ADVISORY COMMITTEE

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FEBRUARY 9, 1990

P R O C E E D I N G S

Friday, February 9, 1990

Morning Session

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: These are the TRAP rules.

MR. McMAINS: Happily named.

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

CHAIRMAN SOULES: Yes.

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

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

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

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

Shall I begin, Mr. Chairman?

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

TEXAS RULES OF APPELLATE PROCEDURE

Rule 100(g)

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

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

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

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

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

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

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

To make a long story short, that particular

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

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

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

CHAIRMAN SOULES: What is the recommendation?

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

MR. EDGAR: Second.

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

Okay.

DISCUSSION

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

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

JUSTICE HECHT: Yes, that is the specific problem.

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

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

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

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

MR. DORSANEO: Yes.

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

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

Rule 130(c)

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

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

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

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

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

MR. DORSANEO: Yes.

CHAIRMAN SOULES: Okay.

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

CHAIRMAN SOULES: Okay, second?

MR. DAVIS: Second.

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

Rule 140

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

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

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

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

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

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

MR. DORSANEO: Yes.

DISCUSSION

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

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

MR. McMAINS: There are two changes.

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

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

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

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

Rule 140(e)

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

DISCUSSION

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

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

JUSTICE HECHT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE HECHT: It doesn't fix --

MR. McMAINS: Perfected?

JUSTICE HECHT: It doesn't fix your time.

CHAIRMAN SOULES: Well, you relate back when

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

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

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

Rule 133(b)

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

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

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

CHAIRMAN SOULES: All right. .

MR. DORSANEO: I think I will just let

Justice Hecht talk about it. It makes more sense.

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

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

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

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

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

DISCUSSION

CHAIRMAN SOULES: Discussion.

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

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

MR. EDGAR: Somewhat cryptically, the Court

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

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

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

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

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

CHAIRMAN SOULES: Bill Dorsaneo.

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

JUSTICE HECHT: Yes.

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

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

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

JUSTICE HECHT: Right, it takes six votes.

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

CHAIRMAN SOULES: Broadus Spivey.

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

JUSTICE HECHT: Well, I don't --

CHAIRMAN SOULES: Are we still on 133 or we

are on 170 now?

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

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

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

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

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

MR. EDGAR: I just have one question.

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

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

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

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

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

JUSTICE HECHT: If we add that?

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

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

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

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

to move our agenda.

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

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

MR. McMAINS: That is fine.

JUSTICE HECHT: And that just establishes --

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: What is the rule number?

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

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

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

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

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

DISCUSSION

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

MR. DORSANEO: Type size, margin size.

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

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

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

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

mechanical font size, margin size, page size limitations.

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

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

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

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

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

CHAIRMAN SOULES: Tom Ragland.

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

CHAIRMAN SOULES: Okay, next item.

MR. DORSANEO: Mr. Chairman, the other items

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

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

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

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

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

MR. DORSANEO: Yes.

CHAIRMAN SOULES: Okay, we will delay --

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

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

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

MR. DORSANEO: Yes.

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

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

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

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

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

DISCOVERY RULES

Rule 166

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

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

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

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

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

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

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

MR. McCONNICO: Well, one other.

CHAIRMAN SOULES: All right.

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

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

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

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

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

change.

Anybody else want to discuss this? Justice Hecht.

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

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

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

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

trial.

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

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

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

JUSTICE HECHT: Yes.

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

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

MR. DAVIS: Did I understand the present

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

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

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

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

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

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

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

MR. DAVIS: Right, just like it is.

MR. SPARKS (EL PASO): I second.

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

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

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

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

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

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

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

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

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

(At this time there was a brief

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

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

CAMERAS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

parties have consented and the witness who is being filmed?

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

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

DISCUSSION

CHAIRMAN SOULES: Discussion. Frank Branson.

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

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

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

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

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

JUSTICE DOGGETT: Should be what?

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

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

CHAIRMAN SOULES: Broadus Spivey.

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

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

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

MR. GEORGE: Let me respond.

CHAIRMAN SOULES: Okay, Jim George.

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

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

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

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

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

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

CHAIRMAN SOULES: Hadley Edgar.

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

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

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

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

MR. DORSANEO: Is that why --

CHAIRMAN SOULES: Bill Dorsaneo.

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

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

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

CHAIRMAN SOULES: John O'Quinn.

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

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

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

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

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

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

CHAIRMAN SOULES: Buddy Low.

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

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

MR. O'QUINN: Amen.

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

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

CHAIRMAN SOULES: Broadus Spivey.

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

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

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

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

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

CHAIRMAN SOULES: Judge Peeples.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

played throughout the country, great chuncks of it.

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

CHAIRMAN SOULES: Justice Hecht.

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

CHAIRMAN SOULES: Okay, Hadley and then Rusty.

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

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

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

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

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

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

MR. McMAINS: No, no.

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

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

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

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

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

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

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

cover all if we put it in the appellate rules.

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

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

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

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

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

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

MR. EDGAR: 21(c).

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

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

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

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

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

CHAIRMAN SOULES: Justice Doggett, I think he

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

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

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

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

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

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

MR. EDGAR: 21(c).

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

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

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

JUSTICE HECHT: What about 18?

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

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

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

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

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

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

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

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

JUSTICE DOGGETT: Right.

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

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

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

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

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

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

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

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

JUSTICE DOGGETT: I think that would be fine.

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

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

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

CHAIRMAN SOULES: It did occur to me when I

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

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

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

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

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

MR. McMAINS: Guidelines would still be --

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

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

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

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

CHAIRMAN SOULES: When everybody consents.

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

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

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

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

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

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

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

MR. EDGAR: 21, as well?

CHAIRMAN SOULES: Yes, we did.

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

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

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

SEALING COURT RECORDS

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

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

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

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

797.

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

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

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

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

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

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

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

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

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

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

interested in this rule because of that question.

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

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

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

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

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

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

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

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

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

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

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

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

public funds.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LEATHERBURY: Okay.

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

JUSTICE DOGGETT: It is under Tab C.

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

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

disagreement and be happy to answer any questions you have.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that is a very critical --

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

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

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

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

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

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

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

to be explicit about it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MORRIS: The thing is Tom is going to

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

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

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

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

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

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

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

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

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

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

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

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

really merits a lot of discussion now.

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

MR. BRANSON: Can we hear discussion on this?

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

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

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

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

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

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

protective interest.

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

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

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

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

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

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

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

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

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

MR. HERRING: That takes a little more talking

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Anything else to add on that, Tom?

MR. LEATHERBURY: No, I think I said

everything I could on that.

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

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

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

MR. HERRING: We were concerned that if you

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HERRING: Yes.

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

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

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

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

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

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

MR. HERRING: The difference is in our

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HERRING: Well, yes.

MR. LEATHERBURY: It is just not specified.

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

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

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

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

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

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

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

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

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

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

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

MR. BRANSON: Yes.

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

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

MR. MORRIS: I second that.

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

JUSTICE HECHT: Seconded by the co-chair?

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: It is almost a five/four

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

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

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

MR. DAVIS: Yes.

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

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

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

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

MR. MORRIS: The Legislature directed the Supreme Court.

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

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

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

MR. MORRIS: May I make a statement?

CHAIRMAN SOULES: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: Rusty.

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

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

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

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

MR. DORSANEO: Well, that is a point.

MR. SPIVEY: Isn't that right?

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

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

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

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

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

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

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

MR. LEATHERBURY: That is the law.

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

CHAIRMAN SOULES: John Collins.

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

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

CHAIRMAN SOULES: Frank Branson.

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

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

MR. BRANSON: Pardon?

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

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

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

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

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

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

do it --

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

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

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

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

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

view on it.

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

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

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

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

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

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

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

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

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

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

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

MR. SPIVEY: Damage to reputation.

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

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

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

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

MR. HERRING: No.

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

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

CHAIRMAN SOULES: Pardon?

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

MR. BRANSON: Let me ask this: Could we

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

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

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

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

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

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

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

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

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

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

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

can then balance what they want to.

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

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

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

CHAIRMAN SOULES: Buddy Low.

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

CHAIRMAN SOULES: Steve McConnico.

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

CHAIRMAN SOULES: Join O'Quinn.

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

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

"information concerning matters detrimental."

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

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

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

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

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

MR. O'QUINN: That is better.

MR. EDGAR: Repeat that, please.

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

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

products case would be related, wouldn't it?

CHAIRMAN SOULES: Could be.

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

CHAIRMAN SOULES: All right.

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

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

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

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

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

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

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

MR. HERRING: You mean information concerning matters --

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

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

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

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

Next objective then in this is what?

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

them.

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

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

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

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

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

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

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

JUSTICE DOGGETT: Was your language one extension only.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: Broadus.

MR. SPIVEY: The reporters have all the ink

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

MR. DORSANEO: Forget who the public really is.

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

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

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

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

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

parties or any participant?

MR. RAGLAND: I have a question about that.

CHAIRMAN SOULES: Okay, Tom Ragland.

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

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

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

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

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

right, it is unanimous then.

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

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

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

CHAIRMAN SOULES: Fourteen.

MR. HERRING: All right.

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

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

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

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

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

CHAIRMAN SOULES: Which first?

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

CHAIRMAN SOULES: Okay, let's take those.

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

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

MR. LEATHERBURY: Right.

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

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

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

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

MR. DORSANEO: We just did it this morning.

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

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

MR. LEATHERBURY: Yes, it was changed to this

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

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

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

MR. EDGAR: Yes, that is just wrong.

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

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

they are trying to address there.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DORSANEO: Mr. Chairman.

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: Frankly, I think it would be

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

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

MR. LOW: Let me ask Rusty a question.

CHAIRMAN SOULES: Excuse me just a second,

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

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

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

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

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

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

MR. EDGAR: In this draft.

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

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

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

CHAIRMAN SOULES: It is either that or mandamus.

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

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

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

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

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

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

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

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

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

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

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

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

IN CAMERA

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

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

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

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

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

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

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

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

MR. HERRING: I am sorry?

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

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

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

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

MR. DORSANEO: Ex parte.

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

CHAIRMAN SOULES: Bill Dorsaneo on this in camera point.

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

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

MR. HERRING: I understand.

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

MR. HERRING: I think that is right.

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

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

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

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

MR. DORSANEO: Just imagine how this would go.

The hearing that is ex parte is --

MR. HERRING: It is scarey.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HERRING: I am sorry.

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

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

MR. DORSANEO: Shouldn't do affidavits.

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN SOULES: Yes, Steve McConnico. Excuse me.

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

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

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

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

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

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

MR. HERRING: I don't know.

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

MR. DORSANEO: That has been done.

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

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

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

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

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

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

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

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

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

P R O C E E D I N G S

February 9, 1990

Afternoon Session

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CHAIRMAN SOULES: The document itself may be under seal, but you have still got to prove under cross-examination, don't you, that this was a communication between lawyer and client done confidentially and hasn't been disclosed and so forth.

It seems to me like maybe we can just leave the niceties of how to do that in an effective way to the lawyers and the intellectual property bar, and if we just put it down that the record that they are seeking to protect -- as Franklin pointed out, you don't have in camera hearings, have in camera inspections of the records. Okay, if just the record can be submitted in camera and not -- but hearing, otherwise, has to be public.

The way we wrote that out was on Page 798 we -- Hadley had it broader than that. He also thought maybe some of the hearings should be in camera, and we can discuss that I am sure as well. But the way, if you wanted it just to the record, on Page 798, it would say "however, records may be inspected in camera upon request by any party if the court finds that an open inspection would reveal the information

which is sought to be protected," and it would only be the records then that the court would take in camera and inspect, establishing that that record should be sealed, would be done openly, either by affidavit shared or by testimony in open court. I don't know where whether that creates more problems than it solves. Comments? Tom Davis.

MR. DAVIS: I think Franklin's problem is confusing us. I am now confused.

CHAIRMAN SOULES: That is probably because I am, Tom.

MR. DAVIS: In context, I am having trouble visualizing what kind of documents or information or just what is it that we are trying to seal if we are not talking about discovery. Everybody says we are not talking about discovery, which I assume means we are not eliminating what you may want to get through discovery but you are talking about something else. I have a hard time visualizing just what it is that a lawyer is going to want to protect or where this would come into play. I think it would be helpful if we understood maybe a little more specifically the context that this may arise in.

CHAIRMAN SOULES: Pat had a comment about that.

MR. BEARD: Well, I have never been exposed to a lawyer trying to seal something during the trial of a case.

If you get a protective order, you have an in camera inspection, but the sealing, doesn't it come when the case is over?

MR. DAVIS: But of what?

MR. BEARD: As a practical matter?

MR. DAVIS: What is it we are sealing or what is it we are tying to protect if it is not discovery? That is where I have a problem.

CHAIRMAN SOULES: Well, it could be the evidence, some of the evidence in the case.

MR. HERRING: We have motions for summary judgments, affidavits or attachments. That kind of thing is what they talk about.

MR. JONES: You mean what --

MR. HERRING: Well, before the end of the case, though, a summary judgment motion that has affidavits or exhibits attached, that is one context.

MR. DAVIS: That is not discovery.

MR. HERRING: It may not be. The affidavit, for example, may not have been produced in discovery. I think the question is more or less difficult depending on whether the rule applies to discovery, which I think Lefty is saving for the end of day. That is a nice, juicy issue.

MR. DAVIS: That is simple.

MR. HERRING: Well, I figured you would think

it was simple, Tom, but there might be another view on that.

MR. DAVIS: Not legitimate.

CHAIRMAN SOULES: Where it has come up in our practice is where we will file a motion and somebody will file a response that just has scurilous material in it, something just for the purpose of prejudicing the court, doesn't really have that much to do with the lawsuit, and we jump right on it and try to get that stuff sealed up saying it is irrelevant and doesn't have anything to do with the questions and somebody is going to find it and seal it up, and they nearly always do. And then they look at it and look at it in camera and decide whether or not it has to come out and should be seen by the public, if it has any connection with the cases at all. And that has happened.

MR. DAVIS: I don't see that there is any problem there.

CHAIRMAN SOULES: Well, you represent a party and you file a motion.

MR. DAVIS: No, I mean there isn't any question about that. You aren't going to have the public wanting to see that, you are going to have the newspaper --

CHAIRMAN SOULES: It depends on how profile the case is. This was pretty high profile.

MR. DAVIS: Family cases and divorce and, yes, maybe that -- I am just trying to visualize the context in

which it can arise. I can see family adoption and criminal child abuse cases, things of that kind, but other -- in other litigation, what is it other than discovery? I am just having trouble with it.

MR. HERRING: Well, again, the trade secrets lawyers would say it would be documents that show the trade secrets attached to the motion.

MR. DAVIS: Where somebody sues somebody for infringment of a patent and then you get into a question of -- okay, well, it is a rather limited situation there when you exclude discovery.

CHAIRMAN SOULES: This whole sealing thing is limited. It is just really not very widespread, except when it does happen, it gets a lot of notariety. Of course, obviously, we have to deal with it effectively.

MR. DAVIS: I am trying to know what we are dealing with.

MR. BEARD: You are talking about instances where you seal during the course of a trial. I have never been exposed to that.

MR. HERRING: Well, somebody -- and again, the only one I know of that people come back to is trade secrets and they -- Quincy pulled out a cite that one of the trade secrets lawyers had given us to an ALR annotation which says in suits in equity to enjoin wrongful use or disclosure of

the plaintiff's trade secrets, the courts very generally have adopted the practice of taking evidence in camera where it involved disclosure of the specific nature and details of the plaintiff's trade secret. And there is discussion of it and the case is going both ways all over the country on it in the trade secret context. I don't know the others.

MR. BEARD: I have done that in camera, seal it.

CHAIRMAN SOULES: That is Hadley's position, which is broader than mine, that not only would the record be inspected in camera and perhaps sealed, but also that the evidence could be taken in camera.

MR. BEARD: I have had in camera hearing on trade secrets.

MR. SPARKS (SAN ANGELO): Luke, let me ask you something, and we are talking about (B)(1) under hearings, whether to put in the words in camera or not?

CHAIRMAN SOULES: That is right.

MR. SPARKS (SAN ANGELO): And it would seem to me like if you take Tom's language, which is labeled C in the handout, that doesn't have the in camera language in it, you put it in, you still have the right during the hearing to file for a protective order or to file a motion to consider certain evidence in camera. You still got all the protections there, but the hearing is a public hearing. That

draft seems to be pretty good to me. But by not mentioning it, you are not saying you can't do it. It is just a right that you have in the presentation of evidence or accumulated.

CHAIRMAN SOULES: Well, that may get it if we read the Locke Purnell draft, Tab C, Page 2, (2)(b)(1) I guess is the number here, to be just like any other hearing that if it should become desirable to seek some sort of an in camera proceeding, whatever it may be, do it just like you would in any other context.

MR. SPARKS (SAN ANGELO): Any other hearing you got is what I am saying.

CHAIRMAN SOULES: And that our committee is understanding if we are that (2)(b)(2) about this hearing, that doesn't preclude the court in a sealing hearing from conducting parts of the proceedings in camera as in any other case where circumstances indicate. I mean if that is the concensus of this committee, we make that the legislative history of this, then maybe it is enough, maybe it is not.

MR. SPARKS (SAN ANGELO): If you are wanting to make that legislative history, maybe I ought to rethink my thoughts.

MR. DAVIS: You want to go down in history correct.

MR. JONES: I have never seen before ever quoted deliberations that this committee has ever ruled.

CHAIRMAN SOULES: Judge Spears has written some opinions where he goes back to these proceedings. I think some others too. That just comes to to mind.

JUSTICE HECHT: Doesn't this boil down to somebody wants to file a motion for summary judgment, and they want to attach an affidavit, and the affidavit has something in it that they don't want to be disclosed. They want it sealed, and then they are going to have a hearing on it whether it is sealed or not, and their problem is they want to tell why it is sealed, why it should be sealed. If they tell too much about it, they are going to disclose what the contents are and it wouldn't do any good to seal it. If they don't tell enough about it, they may not meet their burden of proof and it may not get sealed. But how many times is that really going to happen? I have a hard time imagining when they are really --

MR. HERRING: I wouldn't think it would be very many. It is a problem they expressed, and I don't do that full time, so I can't speak to how often. I wouldn't think it would be often.

CHAIRMAN SOULES: Bill Dorsaneo.

MR. DORSANEO: It certainly is an entirely different problem from this overall problem of public access or nondisclosure to the public of information. We are just talking about whether or not somebody can conduct part of the

proceedings without an adversary, and when we are talking about this, we are just talking about to what extent will ex parte communications with the court be permitted as part of the process of determining an issue that is at issue between persons or otherwise adversaries. To me, I can see how the trade secret lawyers would be interested in it, but I don't see how it has much to do, frankly, with the sealing of court records. It is a distinct problem. We are talking about keeping something from your adversary because you don't want them to have it because it will be damaging to you if they have the information, either because it is the same information that you are trying to have determined to be confidential, or because it is generally something you would like to keep secret.

CHAIRMAN SOULES: Hadley.

MR. EDGAR: On the other hand, though, if you are focusing upon the public's -- public access to the court records, I can see how a judge looking at this without some reference to an in camera inspection might be disinclined to conduct an in camera inspection because of the public's right to know, and therefore, it seems to me that perhaps reference to an in camera inspection might clarify in the judge's mind that he or she has the right to conduct an in camera inspection even though he or she may have a right to do it under the discovery rule. But it seems to me that this is

something separate and distinct from discovery and reference to in camera should be provided.

CHAIRMAN SOULES: Well, responding to that, again, I don't -- I am not advocating. A way to fix that is just to say "in camera proceedings may be conducted as in Rule 166(b)(4)," just not get into a lot of -- we have got discovery in camera practice going now and some standards about when it is done and when it is not done, reference back and try to pick that up.

MR. BRANSON: But aren't they really talking about in camera ex parte proceedings as opposed -- I mean from something other than really looking at a document?

CHAIRMAN SOULES: Yes, and that happens in discovery, of course. The judge will listen to a witness answer questions and sometimes let the witness' lawyer be there when the witness answers questions, but not anybody else.

MR. BRANSON: I have never had them do that.

CHAIRMAN SOULES: I have. Okay, do we need to do anything about this in camera? I guess that is really the threshold. We have talked about, I think, most of the considerations. Why don't we decide what we need. We want to do anything about it, whether we are going to just leave the Locke Purnell (2)(b)(1) as it is or --

MR. MORRIS: You are going to have to make one

change for sure.

CHAIRMAN SOULES: All right, what is that, Lefty.

MR. MORRIS: It says "A party seeking sealing shall have the burden of proving compelling need by clear and convincing evidence."

CHAIRMAN SOULES: Well, we have already done that.

MR. MORRIS: That needs to be stricken.

CHAIRMAN SOULES: By a preponderance of the evidence.

MR. MORRIS: Well, let's just strike that. We have already got this worded --

CHAIRMAN SOULES: I got you.

MR. MORRIS: We have set the burden of proof up at the top.

CHAIRMAN SOULES: Take that sentence out.

MR. DAVIS: Luke --

CHAIRMAN SOULES: Yes, sir.

MR. DAVIS: With Edgar's thing, one proposal is just to leave it silent and let the courts assume they have in camera proceeding which they have it in everything else, or as was suggested, make a limited reference to it, let them know they do specifically have it just like they do in other proceedings. I am inclined to see that I can't see

there would be any harm to at least point out that in camera proceedings are available the same as they are in Rule 166, at least remove any doubt in anybody's mind without really getting into the details of how they conduct it or who they listen to or who they don't listen to.

CHAIRMAN SOULES: Why don't we get a consensus on that then. How many feel that we should make reference in (2)(b)(1) to the availability of in camera proceedings? Okay, one, two, three, four, five, six, seven, eight. How many feel that there should be no such reference? Eight to -- one, two, three, four, five, six, seven, eight. Okay, we are going to vote again. Everybody vote this time. Take a position one way or the other. It is a question of we mention in camera in (2)(b)(1) or not mention in camera.

MR. MORRIS: May I say something?

CHAIRMAN SOULES: In the chair's draft, we had written in there that the in camera hearing may be held --

MR. SPARKS (SAN ANGELO): You have got the whole hearing --

MR. MORRIS: I know, hang on a minute -- reveal the information which is sought to be protected. I think that that is the only place where in camera would be appropriate.

In other words, I don't think to go back to a discovery rule over on another rule. I think here we are

talking about sealing, and the place where in camera is appropriate here is where, as Chuck said earlier, you are going to let the cat out of bag in having the hearing.

CHAIRMAN SOULES: Do we mention in camera or not in this (2)(b)(1)? Those who say we should --

MR. JONES: Mr. Chairman.

CHAIRMAN SOULES: Yes, sir.

MR. JONES: I think where everybody is having a problem, at least where I am having my problem, is this phrase or term or whatever we want to call it of an in camera hearing.

Now, as far as I am concerned, there aint no such animal. I have never been to one. Many of you may have.

MR. SPARKS (SAN ANGELO): In camera evidence.

MR. JONES: There are in camera inspections of evidence, but an in camera hearing implies to me that you go hide somewhere, and I don't know who is there or exactly what they do, but everybody is not there, that is for sure. And I just don't think that we ought to be expanding that kind of concept without knowing where we are going. I don't even know whether it is constitutional.

CHAIRMAN SOULES: I am going to take a consensus. It was eight to eight last time. Somebody didn't vote. Everybody please vote this time whether or not we include anything in here about the availability of in camera

proceedings. That is the question. How many feel we should include something in here about the availability of in camera proceedings. One, two, three, four, five, six, seven, eight nine, 10, 11 say to include it. Those opposed to it? I hope that is not 11 again. One, two, three, four, five, six, seven, eight, nine, 10. Okay, 11 to 10. We are going to mention.

MR. DORSANEO: Steve told me he votes with me.

CHAIRMAN SOULES: All right, 11 to 10. We are going to do it. Now let's try to figure out quickly how to do it so we we can get on with this.

MR. DAVIS: I suggest just a broad reference that these proceedings can be held in camera in accordance with the practice under rule so and so.

MR. MORRIS: Let me make a suggestion. I was going to say something like "documents may be reviewed in camera upon request by any party if the court finds that information would be revealed which is sought to be protected." In other words, what you are trying to do is strictly limit to where you don't let the cat out of bag.

MR. EDGAR: Did you use the word record?

MR. MORRIS: I said documents.

MR. HERRING: Court records sought to be sealed.

MR. MORRIS: I came after that colon. I put

"however documents may be reviewed." Can you read back what I read?

MR. DAVIS: It is information sought to be sealed.

MR. HERRING: Why don't we say the court records sought to be sealed because the rule deals with court records, whatever those are.

MR. MORRIS: May be reviewed in camera upon request by any party if the court finds that information would be revealed which is sought to be protected. How about that.

MR. ADAMS: He has already got the power to review something in camera. The court has got power to look at something in camera, doesn't he, any time.

JUSTICE PEEPLES: Why not mention it then.

MR. MORRIS: This is a new proceeding, Gilbert.

MR. EDGAR: Read it again, please.

MR. DAVIS: Somebody can argue that they didn't say anything about it --

CHAIRMAN SOULES: Well, if somebody raises a privileged question at this hearing, doesn't have anything to do with revealing the information sought to be protected. It is a privileged question, attorney/client privilege. Can the Court in one of these hearings conduct in camera

considerations of whether or not there is, in fact, the attorney/client privilege at risk.

MR. JONES: That is raised in privilege when he first got past --

CHAIRMAN SOULES: This is the first time.

MR. JONES: -- getting ready to file a suit.

CHAIRMAN SOULES: This is the first time that it has come up. Isn't in camera proceedings --

MR. MORRIS: It is not going to be the first time, though, is it, Luke?

MR. HERRING: It may.

CHAIRMAN SOULES: I understand hypothetically it is. I don't see the problem with just saying "in camera proceedings may be conducted as provided in 166(b)(4), and that is privilege, trade secret, and it is the same kinds of problems really that we are dealing with here.

MR. ADAMS: I have got a question. Is it going to be, in camera, is he just going to be looking at the court records or is he going to be looking at some affidavit the other party hadn't seen? What is the court going to be looking at when we talk about in camera?

CHAIRMAN SOULES: It would be just like a discovery hearing. If we go up to 166(4).

MR. ADAMS: It is not going to be any lawyers in there.

CHAIRMAN SOULES: May be.

MR. ADAMS: He is going to be looking at something that has been furnished to him by one side that the other side hadn't seen like an affidavit from an engineer or something like that? What is going to happen if it is in camera.

CHAIRMAN SOULES: Judges can, and they do, conduct in camera hearings about every way you can imagine, sometimes both lawyers, sometimes no lawyers. Sometimes a witness.

MR. JONES: How can something become a court record in an in camera proceeding.

CHAIRMAN SOULES: We have voted to put in that in camera proceedings are available. How do we say that? That is what is on the table right now. John O'Quinn.

MR. O'QUINN: I think we ought to say it the way you said it awhile ago. Do you remember what you said?

CHAIRMAN SOULES: I have said it two or three ways, John, awhile ago.

MR. O'QUINN: Well, what I remember you said while ago was that the court can proceed in camera, and then you reference the rule on discovery in camera, you know, in accordance with where that rule is, and it probably needs some language like Lefty had been talking about, you know, if there is some compelling need for that or however you put it.

If it is necessary in order to prevent, you know, the disclosure of their information.

MR. MORRIS: It looks to me like we are not -- this isn't a discovery procedure. I think the problem is is we are creating a whole new procedure or proceeding in Texas, and discovery is over here and you will have your discovery fights and privilege fights over here, but when it comes to whether or not this is going to be sealed, it seems like the only one thing the court at this stage is going to be interested in, and that is whether or not he doesn't want to let the cat out of bag in reviewing it when deciding whether or not to seal it. And why wouldn't he, in this one instance, just review it in camera to determine whether or not it should be sealed in such a manner so it won't reveal the information sought to be protected. I mean I think we are mixing discovery with a sealing hearing.

MR. SPARKS (SAN ANGELO): Lefty, when he has his private in camera hearing and he rules that it is sealed, and I don't think it is going to be sealed, how do I convince an appellate court that he abused a propondance of evidence in sealing this because I don't know what went on at the hearing.

MR. DORSANEO: You don't know what it is.

MR. SPARKS (SAN ANGELO): I don't even know what it is. We are getting into a problem that I think

Franklin points out, you can't have an in camera hearing.

MR. MORRIS: Says the hearing should be held in open court.

CHAIRMAN SOULES: All right, let me propose this: "The Court may conduct in camera proceedings where necessary to prevent disclosure of the record sought to be protected, or the substance of that record."

JUSTICE DOGGETT: I have the same concern as Franklin has about the term in camera proceedings. It is one thing to have an in camera inspection of documents. It is another thing to have a proceeding that is really an ex parte proceeding.

MR. HERRING: Also, let me point out that there isn't going to be any such thing as in camera proceeding if you are going to allow anybody to intervene who wants to because everybody becomes not a member of the public but a party to the proceeding. I would suggest we simply go back -- we can't solve that proceeding problem completely -- we go back to inspection of documents, and we say "the court may conduct an in camera inspection of the court records sought to be sealed before ruling on the motion if the court finds that such an inspection is necessary to avoid revealing the information sought to be protected."

JUSTICE DOGGETT: Good proposal.

MR. JONES: Let's think about that a minute.

It may be we are all fine, if you are going to have the court go look at public records secretly and decide whether to seal it.

MR. HERRING: In most instances, if they are already public records, you are not going to have this come up.

MR. JONES: I thought that was what we were dealing with.

MR. HERRING: This refers to court -- inspection of the court records sought to be sealed.

MR. JONES: Court records are public records.

MR. HERRING: What you are going to have -- and you are right in this sense, Franklin. You may have to have your definition of court records -- and Lefty and I talked about this -- refer not only to what is filed but what is proposed to be filed, such as your motion for summary judgment.

MR. SPARKS (SAN ANGELO): Or has been exchanged but hasn't been filed.

MR. HERRING: That gets into discovery. We are going to address that later.

MR. JONES: Then we are going to go to sealing things that aren't even --

CHAIRMAN SOULES: How about this, the court may conduct an in camera inspection of records.

If anybody has a formal proposal, let's get it on the record. All right, how about this. "The court may conduct an in camera inspection of records where necessary to prevent disclosure of records sought to be protected." Now, that has got it compressed down to the record. That is the only thing he can look at in camera.

MR. DORSANEO: You still haven't defined what in camera means.

CHAIRMAN SOULES: It says the only thing you can do back there is look at a record.

MR. DORSANEO: By himself, by herself, with one set of counsel and not the other counsel, with all counsel but not the public?

MR. MORRIS: It says hearing may be held in open court.

MR. BRANSON: With the exception of the instance when Justice Hecht objected about the summary judgment, I am trying to think of an instance where this would be -- I mean you are trying to to seal something, presumably, the other side has already gotten in discovery, aren't you? You are not trying to seal it from the adversary, you are trying to seal it from the public. Why not let the adversary back there, and why not just give the court the authority to conduct this hearing in his chambers with nobody but the original participants there?

MR. DORSANEO: What the trade secret lawyers really want is an ex parte proceeding, as I understand it. They don't want -- they are calling it in camera. It means I don't want the enemy there, and I don't think that that is even constitutional.

MR. BRANSON: But isn't that really in discovery, Bill? Aren't we to a point now where your opponent has the information?

MR. MORRIS: You probably are.

MR. HERRING: Usually you are, you may not be.

MR. BRANSON: Why hide it from him anymore and conduct something that sounds like star chambers proceeding for those of us who are litigators. Why not let original parties go back in the court's chambers and participate in the legal process and keep the public out of that hearing.

JUSTICE DOGGETT: Because they are intervenors at this point. They are parties, as Chuck said.

MR. BRANSON: But it would solve the problem that we are dealing with to not treat them as an intervenor for the purposes of this hearing.

JUSTICE HECHT: But the problem is none of the parties who were originally in the case may represent the interests of the public parties who are intervenors.

MR. BRANSON: I see.

CHAIRMAN SOULES: Lefty Morris.

MR. MORRIS: Well, what we are talking about is that the judge may look at this data, make look at these documents and review them, Frank. The judge may look at them himself, but the hearing is then going to be held in open court, and at that time, he can make his ruling. If he decides he is going to let them be sealed, he has to do it in such a way as to not reveal the contents. But you can't stop the judge from looking at the documents in camera if he wants to, but I don't think that means he goes back and has an ex parte hearing.

MR. SPARKS (SAN ANGELO): If he seals from right there, I mean it is kind of over.

MR. HERRING: We have in camera inspection of documents now, whatever that means, under the discovery procedures. And generally, in discovery, it means you don't want the other side to see it because you are claiming a privilege and the judge inspects them without the other side being there. And for document inspection, I think we are talking about the same thing.

MR. LOW: You have to describe the document, name and day. It is just not like you don't know what it was. It just doesn't give you the nitty-gritty detail, but you can't just say this is bad and I won't even tell what you it is.

MR. HERRING: That is right.

CHAIRMAN SOULES: We spent a long time designing the in camera routine in 166(b)(4). It is probably still imperfect, but at least it has got some guidelines in it.

MR. BRANSON: What is the argument again against using the previous words in 166(b)?

CHAIRMAN SOULES: Somebody says this is so different from discovery that it shouldn't be done. I don't agree with that, but that is neither here nor there.

MR. MORRIS: We are not in discovery. We are in sealing hearing.

I would like to move we adopt this (B)(1) of Locke Purnell on the hearing with the addition that Luke has just proposed.

In other words, that you have everything that is in here except the part referring to burden of proof, and then you also put in there what Luke has just proposeed.

CHAIRMAN SOULES: I will read it again if you like. It says "The court may conduct an in camera inspection of records where necessary to prevent disclosure of records sought to be protected."

MR. BEARD: Explain this to me. You say that you are going to seal fees. Now, under this practice here, are you going to give a notice and have the records down there in the clerk's office, going to seal it, it is sitting

there. Do you seal it first under this temporary --

CHAIRMAN SOULES: Here is what happens: I file a motion, I am trying to conduct a trial, whatever. My adversary -- say it is in a divorce case -- my adversary comes in and files a pleading with a lot of extraneous stuff that is terribly damaging to my client but really doesn't have anything to do with the lawsuit. Maybe it is a past 15, 20 years ago imprisonment or serious psychological problem that really nobody has thought about in a long time. It is very damaging, and I want that sealed. That is just done for meanness.

I come in, I file a motion for an emergency order of sealing. And I take those up and say look here, Judge. The judge says fine. I am going to seal them on an emergency basis, post your notices. Everybody shows up. The judge has got the record, and we put on evidence that is an event that happened years ago, won't have anything to do with this case. If we convince the judge of that, the other side says, well, when did it occur. We got to tell him when. Maybe the general nature of it, not enough to disclose its contents like these trade secrets people are going to have to do. And finally we get all done, the Judge says, well, I am looking at it and I conclude that it should be sealed permanently. I believe that it is not fair to your client for this stuff to be in the record so the public can find it. They are

using this trial proceeding as a vehicle to cause a lot of problems and this is just leverage. Then if the press wants to review that, they go to the appellate court. They can't see what is in it. They can just say I don't think the hearing was conducted right or what have you or everybody knows it is a lie, the Judge made a mistake. The appellate court opens it up and looks at it, and they either agree or disagree. That is what we are talking about.

MR. BRANSON: This hearing that you are having where you are describing the act --

CHAIRMAN SOULES: That is all open.

MR. BRANSON: -- but not what kind of animal it is. The public shows up --

CHAIRMAN SOULES: They are all in there, that is right. Exactly. But the animal, the fleece is still in the envelope.

MR. McMAINS: Is that like proof in the pudding.

MR. JONES: If I were a journalist, I could make a lot out of that.

MR. LOW: There are a lot of defense lawyers that wish you were a journalist.

CHAIRMAN SOULES: Yes, sir, Hadley.

MR. EDGAR: Move the question.

CHAIRMAN SOULES: Move the question. Okay,

those in favor say "Aye." Opposed?

MR. JONES: Opposed.

CHAIRMAN SOULES: House to one. All right, that passes house to one, as I understand the vote.

MR. MORRIS: Say, Luke, are you going to sandwich that into this rule there where we deleted "A party seeking sealing."

CHAIRMAN SOULES: Is that all right with you to put it there.

MR. MORRIS: I think that is a good place for it.

MR. BEARD: Let me ask you one other question about procedure practice. You are going to say I am going to file this affidavit in connection with motion to summary judgment if you seal it. If you didn't seal it, I am not going to file it. Is that what we do?

MR. JONES: Mr. Beard, you have done voted for that. You can't go back.

MR. BEARD: I didn't say Aye, I didn't say no.

CHAIRMAN SOULES: I think you would file a motion for leave to file a sealed record. If the judge would deny your motion, you wouldn't file it. I mean you have got a vehicle here for doing that.

MR. RAGLAND: Let me ask you this, Luke, in summary judgment context, then is the judge going to rule on

summary judgement based on sealed record that the opposition hasn't seen?

CHAIRMAN SOULES: I don't see how they can because that waives every privilege.

MR. BRANSON: Sure would be hard to have a controverting affidavit.

CHAIRMAN SOULES: Okay, what is the next objective? It is important, let's move on to the next item. What is next?

MR. HERRING: Why don't we go back and add in -- run through the language that Tom and I talked about before he left about the extension of time, the extension of the order, and that would be added on the temporary sealing order. That would be added on the top of Page 3 where it now says the first word is "notice" and then there is a comma. If you struck the rest of that sentence and we are proposing to put in this "and shall expire by its terms within such time after signing not to exceed 14 days as the court fixes, unless within the time so fixed, the order for good cause shown is extended or unless all parties consent that it may be extended semicolon any such extension shall not exceed an additional 14 days."

MR. MORRIS: And then the rest of the rule.

MR. HERRING: The rest of the rule would stay the same. We would go back under the notice provisions and

change the 15 days to 14 days under that paragraph.

MR. EDGAR: Question, Chuck, since the intervenors are now parties, would they also have to agree?

MR. HERRING: Yes. Anyone who has intervened could block and an extension.

MR. DAVIS: It is kind of useless, isn't it?

MR. SPARKS (SAN ANGELO): No, you get an additional 14 days.

MR. DAVIS: If anybody can block it.

MR. BRANSON: Are these intervenors formal intervenors? Have they got to file pleadings in intervention.

MR. DAVIS: Here I am, I came all the way from out of town, I want this heard. I am not going to agree to any extension.

MR. HERRING: We already voted.

MR. SPARKS (SAN ANGELO): If you get the 14 days without any agreement, the court can give you an additional 14 days. To get anything past that, you have to have an agreement.

JUSTICE HECHT: Let's take a vote.

CHAIRMAN SOULES: All right, that is right out of 680, Chuck? Is this parallel to 680?

MR. HERRING: It parallels 680, but the way it works, you can only get one extension and it has got to be

for good cause or everybody agrees. If anybody disagrees, you can't get an extension.

MR. SPARKS (SAN ANGELO): That is not what we voted for earlier. We voted on earlier tracking temporary restraining order Rule 680.

MR. HERRING: I understood we were only going to do one, allow one extension.

CHAIRMAN SOULES: That is what 680 says.

MR. SPARKS (SAN ANGELO): You get something past the original 14 days if there is no objection from any party. That is what TROs say.

MR. BRANSON: Sam, he is saying these intervenors are now the parties.

MR. SPARKS (SAN ANGELO): That is right, and they can certainly stop anything past the 14 days. I understand that.

CHAIRMAN SOULES: Let's see, does this set the time?

MR. JONES: Extension automatically.

MR. HERRING: You don't think that is what it was? That is what Tom and I understood.

MR. SPARKS (SAN ANGELO): I asked Luke specifically is he tracking Rule 680 on TROs because we have judges that get sick. You have got to have the first 14 days upon the court's order and just having a newspaper man come

in and say no, I want to hear it today.

MR. HERRING: That was my original position, but Tom didn't feel you should automatically get it, and I understood this is what we went to and this is what he understood as well. I don't care either way. We are just trying to embody whatever the group wants to do.

CHAIRMAN SOULES: Here is what -- if you use 680 after the word "notice," it would read and "and shall expire by its terms after signing, not to exceed 14 days, and shall expire by its terms not to exceed 14 days after signing as the court fixes, unless within the time so fixed the order for good cause shown is extended for a like period or unless a party gets to them, the order as directed consents that it may be extended for a longer period. The reason for the extension shall be entered of record. No more than one extension may be granted unless subsequent extensions are unopposed." That is all the language of 680. Can we just use that?

MR. HERRING: That is fine with me.

CHAIRMAN SOULES: I know what it means.

MR. SPARKS (SAN ANGELO): That is what we voted on.

MR. HERRING: Tom understood it was something different, and it was his language, but I will be glad to go with that. I prefer that.

MR. SPARKS (SAN ANGELO): I thought we had the finalities of life pointed out here. Just make it where you have to.

CHAIRMAN SOULES: Okay, all in favor say "Aye." Opposed? It is unanimous.

MR. EDGAR: Luke, 680 is says for good cause is extended unless the party against whom the order is directed consents. Do you mean any party consents?

CHAIRMAN SOULES: Hold on just a second. Let me see where that is. Okay.

MR. EDGAR: You have to change that. You just can't just literally adopt 680.

CHAIRMAN SOULES: All right, that is right. "Unless all parties consent," I guess.

MR. EDGAR: "Unless all parties consent that it may be extended for a longer period." And that then would parallel 680.

CHAIRMAN SOULES: "Unless the parties consent that it may be extended for a longer period."

MR. EDGAR: Unless "all" parties.

CHAIRMAN SOULES: Okay, thank you. I appreciate your watching over me there. Okay, what is next?

MR. TINDALL: Look, I have -- are we down to notice? On notice, I notice that the motion must be posted at a place where your open meetings law requires postings.

In my county, that would be difficult. The county administration building is totally separate from the courthouse, and I would suggest that either you post it over there if you want to. I think you have to get a lock and key from those who can get access to the glass bulletin board, and it is very awkward to do that, or they could post at the entrance to the courtroom. You have been through that issue?

MR. HERRING: The problem we got into with the committee was which courtroom, if you have got 13 courtrooms. You could post it on the foreclosure board, but in some cities now we have got thousands of foreclosures. An idea was this would be the cleanest other readily available alternative that people could find to post it. And they will have to make arrangements locally in some areas to allow it, but that is the best we can come up with. You also, of course, have to file it with the Supreme Court clerk.

MR. BISHOP: What is the purpose of sending notice to the Supreme Court clerk and posting it at the Supreme Court?

MR. HERRING: The idea was that the media, most of the which have Austin offices, would be able to find out if there is sealing going on. There were alternative proposals such as that there would be a list filed with the Supreme Court and you would have to send out notice at your own expense to everybody on the list, and that was viewed to

be impractical.

JUSTICE DOGGETT: And so the court could have an idea of how extensive a problem this is and how often it is occurring. These are going to specify the type of case so we will have the tabulation from the clerk on that. It may not be something to keep permanently in the rule, but I think it is a good, again, to give us an idea of how extensive --

MR. TINDALL: It seems to me you are upping the ante. I know in my divorce practice before a client is going to readily march into sealing records, I have got to tell them we have to send it to the Supreme Court of Texas and they are going to publish it there. Every newspaper in the state is going to see it. We have got to take it up in open meetings. That you up the ante so much that you have destroyed any real opportunity for -- should I call it discrete sealing of records in a divorce.

MR. HERRING: I think that was the intent, really, behind this provision.

MR. TINDALL: That is in a child abuse case, we have got to send it to the Supreme Court, got to post a public meeting law. I mean I just think that --

MR. EDGAR: But, Harry, that is only if you seek to seal something. I mean, otherwise, you don't. You don't have to do it in every case.

MR. TINDALL: No, I am saying you have got a

divorce case where lots of confidential information has been out. It is there, sworn inventory, the divorce decree that is very detailed on their assets, and then the client says, hey, is there some way I can keep this from public scrutiny? Yes, but we have got to go post it over at the county commissioners' office, we have got to mail it to the Supreme Court. I just think that that is very unreasonable for matters that don't have some bearing on public interest litigation.

MR. LOW: Would that include a situation like I am talking about, a partnership. The agreement -- they want to seal, both parties do. They agree to it. Even if they agree to it, are they still going to have to file all this stuff?

CHAIRMAN SOULES: We are going to get -- in a little while, we are going to get to some more serious stuff, not anymore more serious maybe than this, but I mean there is a whole nother dose of this. Whenever we decide whether or not discovery is going to be under these same rules -- discovery not filed -- because discovery that is filed is already under this rule, and whether or not settlement agreements not filed are going to be under this rule. We have got to get to those two points later.

MR. LOW: This is not discovery. You agree.

CHAIRMAN SOULES: It is a settlement

agreement.

MR. LOW: This will be a document that is the whole basis of the lawsuit, and both -- and neither side wants anybody else to know about what this partnership was, and they will agree that you could file it and seal it, it would be referred to, parties would have copies and so forth and it would be on record, you know, even before it was introduced as an exhibit. It is not something you have to have discovery. Both sides have it, and they can't seal that unless they --

CHAIRMAN SOULES: No, absolutely not. That is what this does, not unless you post it in Austin and wherever else it is.

MR. TINDALL: Are you open to amendments or suggestions for changes?

CHAIRMAN SOULES: I don't know. I mean --

MR. HERRING: I have been foreclosed. You can propose whatever --

MR. EDGAR: While Harry is mulling that over --

MR. ADAMS: That is going to increase arbitration.

MR. EDGAR: I presume that this is intended to be a simultaneous transmission to the Supreme Court because I can see parties delaying -- it doesn't say anything about

when that has to be filed with the Supreme Court. It just says "shall be filed."

CHAIRMAN SOULES: Hadley, help me find the language that we need to fix.

MR. EDGAR: At the bottom of (b)(2).

MR. COLLINS: It says immediately after posting such notice, Hadley, then you have got to file with the clerk of the court and with the Supreme Court clerk.

MR. EDGAR: All right, all right.

CHAIRMAN SOULES: Okay, where are we now, Lefty? What is next?

MR. MORRIS: Well, on notice, but Chuck said he mentioned it. The only change we had in there was change that 15 days to 14. Did you get that?

CHAIRMAN SOULES: What line is that?

MR. MORRIS: It is down there in the body about six lines, seven lines up. It says "posted at least" -- it has 15 and we are changing it to -- "14 days prior to the hearing." "The written motion in support of the sealing request shall be filed . . . "

CHAIRMAN SOULES: I got you, thank you.

MR. MORRIS: Okay, that needs to be changed.

CHAIRMAN SOULES: Okay, what is the next one.

MR. COLLINS: I have one more question about the very last sentence --

CHAIRMAN SOULES: John Collins.

MR. COLLINS: -- of (b)(2). "The notice shall not be sealed, be maintained and remain open to public inspection." That is at the office of the Supreme Court clerk. Is that correct? If I wanted to go see the notices that have been filed, is that where I go?

MR. HERRING: That is actually --

MR. TINDALL: The notice at the courthouse. I read that, John --

MR. COLLINS: I don't know. Is that -- that is both of them?

MR. HERRING: The way it provides is that when you post your notice with the local clerk, you have to file a verified copy of that notice. So is -- that is going to be in your file -- verified copy in the file -- and then you are going to have a copy at the Supreme Court. Both of those would remain open.

MR. COLLINS: Will the Supreme Court clerk, though, have a book or ledger or something, I assume, that has that in there?

CHAIRMAN SOULES: When does it say that the notice is to be filed?

MR. HERRING: "Immediately after posting such notice, the moving party shall file a verified copy of the posted notice with the clerk of the court," et cetera.

CHAIRMAN SOULES: Okay. Now, if this is going to remain open to public inspection, let me ask Justice Doggett, does the Supreme Court plan to keep these forever or do you mean to just have it open for public inspection in the court where the case is pending?

JUSTICE DOGGETT: Well, I guess it is going to be, until this rule is changed, it is going to be kept indefinitely, just like our other records are kept indefinitely.

CHAIRMAN SOULES: Both places?

JUSTICE DOGGETT: That is right.

MR. HERRING: Yes, the media was concerned that they want to go back and study, you know, malpractice cases or something and they can't find the records and they don't know what has been sealed.

JUSTICE DOGGETT: Thousands of these instead of a few of these, after a year or two, we come back and change the rules.

CHAIRMAN SOULES: I just wanted to be sure that I understood it, we want it both places.

JUSTICE DOGGETT: There is a debate about whether this is such an extensive practice that it deserves attention at all, or the converse, whether it happens so much when doing anything will interfere. We are going to find out.

CHAIRMAN SOULES: Okay, what is next?

MR. RAGLAND: I have a question.

CHAIRMAN SOULES: Tom Ragland.

MR. RAGLAND: Still having problems identifying in my mind how one of these hearings is going to take place, who the players are. If the TV station gets wind of a sealing hearing, may they show up and just sit and listen or may they show up and put on testimony or must they first be intervenors and put on testimony?

CHAIRMAN SOULES: They can do two out of those three things. They can't do the middle one. They can show up and sit and listen. Anybody can. They can intervene and participate in the hearing, but they can't just show up and start participating without intervention.

MR. RAGLAND: They have to be an intervenor before they can get up and make a statement or evidence of that sort?

CHAIRMAN SOULES: They have got to commit themselves by intervention as a party to this matter so that they are before the court as a party for this matter.

MR. RAGLAND: Well, as I understand the concept here, that makes this intervention a matter of right.

CHAIRMAN SOULES: Yes, it is.

MR. RAGLAND: We may need to look at Rule 60 because that doesn't measure up to Rule 60, intervention

rule.

CHAIRMAN SOULES: That is with leave of the court, isn't it?

MR. RAGLAND: Yes, where the existing parties have a right to oppose it and have them kicked out.

MR. McMAINS: You can always intervene, but you don't have a right to stay.

MR. RAGLAND: That is not what I understand this to mean.

MR. McMAINS: I am talking about the ordinary rule. You can intervene, but you just may be subject to being stricken.

CHAIRMAN SOULES: Nobody can get stricken under this rule.

MR. McMAINS: That is a problem. You have a rule that expressly authorizes intervention.

MR. EDGAR: Under Rule 60, the court can only strike you if you don't have some justiciable interest, and it seems to me that what we have done under this rule is to create justiciable interest. So I don't think that is a problem.

CHAIRMAN SOULES: What is next?

MR. MORRIS: Chuck and I were talking that we don't have any problem over here on Page 3 with anything in 4, which is findings, or 5, which is sealing order, or (c),

which is continuing jurisdiction. You have already dealt with (d), and over in (e), which is on Page 4. If there is no problem with that, then we are just going to move that that be adopted, if need be. We weren't sure whether we had already adopted everything unless it is specifically removed, or whether we need to make a record on it.

MR. HERRING: We had some differences in those provisions in our draft, but in our minds, they are not sufficiently significant to take the time to talk about them. If somebody else wants to talk about something in those provisions, that is fine.

MR. MORRIS: If you want us to move the adoption, we will do it.

CHAIRMAN SOULES: I do, except the Chair needs to note on record that we may be coming back to revisit the question of appeal after Rusty and Bill work on it some.

MR. TINDALL: Is somebody on notice? I am concerned about notice.

MR. SPARKS (SAN ANGELO): I have another question, too.

CHAIRMAN SOULES: Let's move --

MR. MORRIS: As far as the housekeeping, what we are doing here, since you have already dealt with appeal, we are just moving that Paragraph 4, Paragraph No. 5 and then (c), which is continuing jurisdiction, and (e) over on

Page 4, be adopted as written.

MR. EDGAR: Question, continuing jurisdiction, is it intended that once this rule is adopted that a party would have the right to go back and look at sealed documents which were sealed prior to the adoption of this rule?

MR. HERRING: The other way to phrase that is whether someone could intervene to try to modify that. Is that what you mean or do you mean --

MR. EDGAR: Yes, I suppose so.

MR. HERRING: That was definitely Tom's intent with this language because I know he told us that.

MR. EDGAR: So that, for example, if somebody made reference to medical malpractice cases, someone wanted to do a study on this, to go back a year from now and look back at sealed records for the last 10 or 15 years?

MR. HERRING: That was his intent.

MR. EDGAR: I understand.

MR. HERRING: I will defer to the expertise of you and Bill, perhaps, on the effective dates and how it works. But that is what Tom Leatherbury wanted to do because the press does want to study issues that they can't get into the files right now to study sometimes, settlements and the like.

CHAIRMAN SOULES: This seems to do that. Are you moving now that this proposed Rule 76(a), Rule 76(a), as

it has been amended through our discussions, be adopted or be recommended by the Supreme Court for adoption.

MR. MORRIS: Well, that we have discussed up to date as indicated by the record, yes. But I mean, in other words, we obviously have more to do.

JUSTICE HECHT: Did you modify the court records section, (a)(3)?

MR. McMAINS: We haven't gotten to that.

MR. HERRING: We haven't gotten to court records because we have to discuss discovery and settlements.

MR. MORRIS: We are saving that for last.

CHAIRMAN SOULES: Is there something wrong with the way this is worded?

Okay, are you moving then that everything that we have talked about in -- excuse me, are you moving now that the proposed Rule of Civil Procedure 76(a) be adopted as we modified in our discussion, save and except, Paragraph 2, (a)(2), court records, which we need to discuss.

MR. MORRIS: We are not quite ready to do that. Let me come at it kind of piecemeal if you don't mine.

All right, what I am really trying to do right now is get into the record that Paragraph 4 on findings, Paragraph 5 on sealing orders, Paragraph (c), continuing jurisdiction, and Paragraph (e), which is no court record shall be withdrawn from public files except as expressly

permitted by specific statute or rules, that those be adopted as drafted in the Locke Purnell version.

CHAIRMAN SOULES: Second.

MR. McCONNICO: Here again, which paragraphs are we looking at?

MR. MORRIS: Steve, I am over on Page 3.

MR. McCONNICO: Right.

MR. MORRIS: And Chuck and I just don't see any real difference between what we have done in this as a matter of substance, findings.

MR. HERRING: That is (B)(4), really.

MR. MORRIS: That is (B)(4). (B)(5), which is sealing order --

MR. SPARKS (SAN ANGELO): Bingo.

MR. MORRIS: (c), which is continuing jurisdiction, and (e), which doesn't have a title.

CHAIRMAN SOULES: Okay, all in favor say "Aye." Opposed?

MR. McCONNICO: Wait just a minute. Can we mark out, since we are dealing with the sealing order, and then again repeat the clear and convincing evidence test which we rejected earlier.

CHAIRMAN SOULES: Where is that --

MR. HERRING: So does findings.

MR. McCONNICO But I mean that is going to be

knocked out?

MR. MORRIS: Yes. Any place where it says clear and convincing evidence is knocked out.

MR. HERRING: All of the references in the rule to clear and convincing need to be changed to preponderance of the evidence.

MR. MORRIS: What we are doing is striking them and we are just setting the burden of proof up at the top where we voted it in.

MR. McCONNICO: So we are not even going to repeat a standard of proof?

MR. MORRIS: No.

CHAIRMAN SOULES: Tell me where to take them out now because that is my job and I want to be sure I do the best I can.

MR. MORRIS: Well, under 4, you see it there under findings, you have clear and convincing evidence down at the bottom line. That needs to be taken out.

CHAIRMAN SOULES: How?

MR. MORRIS: Just by striking it.

MR. HERRING: Strike the words "by clear and convincing evidence" so it just says "has been shown.

MR. EDGAR: That won't quite get it because you are going to have to come back in and say "And the reasons for such findings have been shown."

MR. HERRING: All right, we can add that in.

MR. EDGAR: The sentence wouldn't make any sense unless you change the grammar a little bit.

CHAIRMAN SOULES: That is what I was worried about. Thank you, Hadley.

MR. MORRIS: Then the next on 5 where you are talking about in sealing order, it says down on the third line "shown by clear and convincing evidence." How will that read then, Hadley? Is that all right?

MR. EDGAR: I don't know, I haven't looked at it.

MR. MORRIS: All right.

MR. HERRING: I think we can just say "shown" and put the comma there.

MR. EDGAR: "Has been shown comma."

MR. HERRING: Delete "by clear and convincing evidence."

CHAIRMAN SOULES: Okay, all in favor say "Aye."

MR. RAGLAND: I still have a question.

CHAIRMAN SOULES: I am sorry, Tom.

MR. RAGLAND: This Paragraph 5, the sealing order part, rests with findings of fact and conclusions of law, appears that it requires the trial judge to make those findings at the time he enters the order, which is contrary

to the concept in Rule 296 and those rules. I have got an idea some of the trial judges are not going to be too happy to have to make those formal findings at the time the order is entered.

JUSTICE DOGGETT: When would you have him make it?

MR. RAGLAND: Well, it looks like if it is appropriate, 296, the time table under 296 would be -- you know, it has got to be requested and that sort of thing.

MR. EDGAR: Before you look at that, Justice Doggett, we are proposing that the time limit on 296 that appears in the book you are looking at be extended so it would even be a longer period of time than that.

MR. HERRING: The media was concerned about having all that immediately so they could seek review, whatever the form of review is going to be, as quickly as possible, and that is why they proposed it that way. That is all I can say about why it is in that form.

MR. EDGAR: It seems to me there is a natural byproduct of the expedited time table that is envisioned here, but that that is just going to be a further stumbling block to sealing orders, and which again, I think, carries out the intent of this whole thing to open up some of the records to the public.

MR. MORRIS: I think that is right.

MR. EDGAR: I think that is the intent of it.

MR. MORRIS: I think that is right.

JUSTICE DOGGETT: This is 20 days under your proposal, under your proposed change that you just pointed out.

MR. EDGAR: I have got to look, Judge. I have forgotten now exactly what that time table was.

JUSTICE DOGGETT: That will defeat any opportunity for an expedited appeal.

MR. MORRIS: Well, our motion is still on the floor.

JUSTICE HECHT: Even though civil judges are accustomed to having more time to make findings, criminal judges are making findings when they are required to right on the spot. There is no reason why they shouldn't be required to make them here, or at least the same time as the order. Somebody is obviously going to help prepare it, I would think.

MR. LOW: Judge, that same day within five days?

CHAIRMAN SOULES: It says "findings made at or after the hearing." Those words are there already.

MR. RAGLAND: Does that mean any time for appeal mandamus is expired?

CHAIRMAN SOULES: I don't know.

MR. EDGAR: Justice Doggett, it is really a little longer than that because 296 says that you have to make the request 20 days after the judgment is signed, and then the court has 20 days after that in which to file. And so you would have 40 days, in essence.

JUSTICE DOGGETT: As Buddy was just observing, I don't have any problem in giving some additional time, but I think going a month would defeat the purpose.

MR. EDGAR: But I am just saying that if you typed Rule 296, you are really talking about 40 days rather than a shorter period. That is the only point I was trying to make.

MR. SPARKS: (EL PASO): If you wait too long and the appeal is gone, it is reversible error.

MR. MORRIS: Once again, this isn't after a trial on the merits, this is just an order on a sealing hearing. You are not talking about something that is going to be that complex, more than likely, to have. When you walk over there for your hearing, you know how you are going to want the judge to rule.

MR. LOW: Most judges want a day or two to be sure they have dotted their I's and crossed their T's, not all of them write just like they think. And most of them, you know, they don't want to -- they might make a ruling, but they don't want to just put everything in writing just that

red hot minute.

CHAIRMAN SOULES: Well, if I win this hearing, and as tight as I have got to be about these findings, I want a little time to go over these findings of fact and get them over to His Honor.

MR. BRANSON: Would three days satisfy everybody?

MR. LOW: Suppose it was like you hit a Friday and he is getting ready to go somewhere and he can sign it but, you know, going back to notice.

CHAIRMAN SOULES: Three days for what.

JUSTICE HECHT: Findings and conclusions.

CHAIRMAN SOULES: What portion do we put that?

MR. HERRING: Put it back in 4 because it now says"the court shall make specific on the record findings" up there.

MR. MORRIS: Within three days of the hearing, within three days of the conclusion of the hearing.

MR. McMAINS: Why do you need findings of rule for when you have you got the findings in the sealing orders rule? The sealing order rule requires the findings to be in there.

MR. O'QUINN: Have to be in the order.

MR. HERRING: I think that is because the way they refer to the findings in the order, that is, the sealing

orders rule doesn't say what the finding shall include. And they have that reference in 4. In truth, I think it is again Tom simply trying to be very careful. You could have combined those two.

MR. McMAINS: What I am saying is since he is going to be making the decision, maybe after the hearing, and going to have the findings, why not just have it contemporaneous with the order so you will have one document as to findings in the order. It requires that it be in the order anyway. So why put it two places?

MR. HERRING: I think his intent is that you have it in the order.

MR. MORRIS: I think so, too.

CHAIRMAN SOULES: The sealing order problem -- this has got some more problems. It can be fixed fairly easy. This doesn't differentiate between a written order and a bench order, a rendition from the bench. What would be the -- what problem would it cause if we said "if after considering all the evidence concerning sealing the court records the judge concludes a compelling need as defined herein has been shown, the judge shall, within three days, sign a written order.

MR. McMAINS: It shall include.

CHAIRMAN SOULES: And then the rest of it says what goes in the written order within three days. Is that

all right? The judge shall within three days sign a written order.

MR. MORRIS: But is that going to then specify the findings and the reason automatically?

CHAIRMAN SOULES: And then the rule -- let's see, this, of course, is in the -- this is in the Rules of Civil Procedure. So the rule, if the court adopts a rule that we ask them to on counting time, take Saturdays, Sundays legal holidays out of periods less than five days, and this period would be three days exclusive of Saturdays, Sundays and legal holidays.

JUSTICE HECHT: Three days --

CHAIRMAN SOULES: That you don't have Saturdays and Sundays and legal holidays as periods shorter than five days. It will solve a lot of problems. This would then become three working days. Okay, what else, John?

MR. O'QUINN: In light, Luke, of what you are doing in Paragraph 5 concerning the sealing orders, what is the necessity of Paragraph 4? Isn't that just unnecessary verbage at this point?

CHAIRMAN SOULES: Seems to me it is.

MR. O'QUINN: I would like to make a motion that we remove 4. If there is anything in 4 that you need to add to 5, put it in 5. But I don't think there is. I don't think there is any need for 4.

MR. DONALDSON: If I could speak to that.

MR. HERRING: The only -- go ahead.

MR. DONALDSON: I am David Donaldson, and I also sat on the advisory committee. The reason for having a separate section on findings, it was very important, we felt, that the court should have to specify specific reasons why the record was being sealed. And this separate section makes it clear that those findings need to be made. And someone else pointed out earlier, Paragraph 5 doesn't really go into what should the finding conclude, and Paragraph 4 provides what should the findings conclude.

MR. O'QUINN: We ought to stay off -- No. 4 talks about has to be shown by clear and convincing evidence.

MR. DONALDSON: That has been changed already. That has been taken out.

CHAIRMAN SOULES: Actually, 4 doesn't get at what you are saying there, David. That is just probably a drafting error. It says here "the reason for such findings." I guess the court found because he heard a contested proceeding and decided to rule for sealing. What you really want is the reasons for such sealing, don't you?

MR. HERRING: Well, the idea in 4, it does make specific reference to the findings demonstrating that a compelling need has been shown. And we have that defined before. I think you can move that language, though, down

into 5, couldn't you, David?

MR. McMAINS: Talk about the findings being in the order.

MR. O'QUINN: I don't think we need 4. I think 5 is enough.

MR. HERRING: I think if your concern, David, is to make sure that the findings indicate that, you could move down to where the reference in the middle of Paragraph 5 is to the specific findings and add down there "the specific findings demonstrating that a compelling need has been shown.

MR. DONALDSON: I think that can consolidate it.

CHAIRMAN SOULES: Okay.

MR. MORRIS: What we are trying to do is consolidate it, 4 and 5, without doing any destruction to what was contained in 4 and/or 5. Is that right.

MR. DONALDSON: That is right.

MR. O'QUINN: Correct.

CHAIRMAN SOULES: So we need to move, pardon me, the words findings -- oh, I mean demonstrating --

MR. HERRING: What I would suggest, Luke, is after the word "hearing" in the middle of that Paragraph 5, "the specific findings made at or after the hearing demonstrating that a compelling need has been shown."

CHAIRMAN SOULES: Okay, I am move that

language to that point.

MR. O'QUINN: The only problem with putting it there is the added words tended to define the word hearing rather than the word findings. I think what David wants is that it is the findings demonstrating it, not the hearing that demonstrates it.

MR. HERRING: Well, specific findings -- put it right after the word findings then.

MR. DONALDSON: I think that would be better.

CHAIRMAN SOULES: Okay.

MR. HERRING: And then renumber Paragraph 5 No. 4 and delete 4.

CHAIRMAN SOULES: I think so. All right, so that would be 4 and that is still the last one. Okay, what is next?

MR. MORRIS: Well, I guess have we voted to adopt those things as changed?

CHAIRMAN SOULES: I never have got it to a vote. I called for it several times, but I haven't gotten a vote yet.

MR. MORRIS: We are talking about 4 and 5, which has now been consolidated (B)(4) and (5) which has now been consolidated. We are talking about (c), which is continuing jurisdiction, and we are talking about (e).

CHAIRMAN SOULES: Okay, you move those be

recommended to Supreme Court as modified?

MR. MORRIS: Yes.

CHAIRMAN SOULES: Second.

MR. EDGAR: Second.

CHAIRMAN SOULES: All in favor say "Aye." Opposed?

MR. SPARKS: (EL PASO): No.

CHAIRMAN SOULES: That is house to one.

MR. MORRIS: There is one other thing before we get into the discovery issue. I don't think there was any problem with it. But in Paragraph (2)(b) up at the top of Page 2, there was that first sentence that he said tracked the Open Records Act and that he felt like it should be in here because it makes it apply specific to the judiciary. Where it says "All orders of any nature and all opinions made in the adjudication of the case specifically made public information and should never be sealed," that whole paragraph I move the adoption of all of (b), not just what I read, but the whole thing.

CHAIRMAN SOULES: Discussion?

MR. MORRIS: I am talking about 2 little (b) yes.

CHAIRMAN SOULES: Discusson? All in favor say "Aye."

JUSTICE PEEPLES: What is the opinion made in

the adjudication of a case other than a Court of Appeals or Supreme Court? Certainly, it doesn't include memos in the court of Appeals I mean the -- or the trial court for that matter. I can't believe it.

MR. MORRIS: It says orders.

JUSTICE PEEPLES: It says orders, doesn't it?

MR. McCONNICO: Why don't we just knock out opinions? Is it really necessary?

MR. HERRING: Tom indicated that came from the Open Records Act.

MR. DONALDSON: It is out the of the Open Records Act like that. I understand opinions to be appellate opinions. Sometimes trial courts issue opinions too, written opinions that accompany their orders.

CHAIRMAN SOULES: Any other discussion?

MR. O'QUINN: Question.

CHAIRMAN SOULES: John.

MR. O'QUINN: I want to make sure what we are voting on. We are voting on which paragraphs to be approved?

CHAIRMAN SOULES: 2(b) on Page 2 of Tab C.

MR. HERRING: No, we are voting on (b), just (b). The way it is divided, it starts with (a). You have got 1 and 2 are under (a), and then you go to (b). We are just voting on that (b).

CHAIRMAN SOULES: We are voting on the opening

paragraph of (b).

MR. HERRING: On the opening paragraph of (b), not the subdivisions, just that little old paragraph.

MR. SPARKS (SAN ANGELO): Second that motion.

CHAIRMAN SOULES: All in favor say "Aye." Opposed? Carries unanimous. Next?

MR. MORRIS: Okay, I need for you to each look at the two drafts, the co-chair draft and the Locke Purnell draft I am going to call it. And you will see two different ways that it has been handled regarding to the specific or protectible interests.

In other words, in the Locke Purnell draft that we have just been working from, they just say compelling need means the existence of a specific interest which the administration of justice is substantial enough, and it never defines what those specific interests are.

MR. EDGAR: Where is that language in Locke Purnell.

MR. MORRIS: That is on Page 1.

MR. HERRING: He is talking about the first sentence in the rule.

MR. MORRIS: Now, if you will look at the co-chairs' proposed rule, a second paragraph was set up there on the front page that defines some of the protectible interests. Do you see that, Hadley?

MR. EDGAR: Yes, I got you.

MR. MORRIS: This is where we specifically tried to put in trade secrets. We specifically put in things that would make sure that the family lawyers were more comfortable with it. We got -- we don't know what we put in when we had constitutional rights. We don't know what we are talking about, but it probably sounded good. And I don't -- other than right of privacy, we don't have any idea what is in that grab bag on (2)(a). So what we need to decide here, what the committee needs to decide is whether to leave to the courts to determine under the draft we are working on on a case-by-case basis what specific interest it is that may override the presumption of open records, or will it be helpful to the courts and to lawyers to define down in here without limiting some protectible interest.

Probably the argument against doing this, putting in this protectible interests is we don't want there to be an inference that if you automatically have maybe, let's say, trade secret, that then there could just never be a compelling need that was strong enough to ever overcome it.

On the other hand, Steve McConnico said to me earlier the thing he liked about having these specific things in here was we are cutting new ground and it does give some specific examples for courts to look at. But I think if we are going to do that, we need to make plain that this is not

all that there is there.

So with that explanation, you are just going to have to decide for yourself which one of those you like. It is a matter of style because probably it is all going to be about the same.

MR. McMAINS: The problem is, I think it is a misnomer to call it a definition.

MR. HERRING: It is examples is really what it is.

MR. McMAINS: It is kind of -- these are some of the things we can think of, but it is not --

MR. HERRING: And what it was, we didn't think of them. Those are the areas that we got hammered on the most in the hearings.

MR. McMAINS: These are the people who bitched.

MR. HERRING: Exactly.

MR. MORRIS: What even concerns me is under (2)(a), I don't know what I am talking about.

MR. McMAINS: That was the ACLU that voted you --

MR. EDGAR: It seems to me coming back to what Steve said that you may not know what you are talking about there, but at least it gives a trial judge more guidance than just saying "which in the administration of justice is

substantial enough to override a presumption." It seems to me that it does give some guidance, and since we are plowing new ground, it would be better to be a little more specific than not.

MR. MORRIS: Let's look here a minute, Hadley. Once again, I have already confessed my ignorance. When it says "but not limited to privileges," nearly everything that you may want to unseal probably is going to deal with some privilege, and by specifically putting that word in there, are you saying this has special significance which makes it where it is more prone to override the compelling need because I don't think that is the intent, and that is really one of the reasons I went to go over that other draft this morning because I am not sure what we are doing there.

MR. McMAINS: Besides which you have got -- under this compelling need definition, it talks about, that we started off with, it talks about a specific interest of the person or entity sought to be protected.

MR. MORRIS: Right.

MR. McMAINS: And then you just defined it in such a way that it isn't specific anyway. Then we make findings that requires that it be specific. So you have got to make something up each time you get to an order anyway that is more specific than even just referencing whatever the

category is. I really don't see that adding those categories, especially with a totally open end, does anything.

MR. MORRIS: Well, you know, I can understand, just to make sure that the trade secret people aren't scared to death, I can even understand where you may have some child that has been sexually molested. I can see using those examples. I get concerned that I don't know what I am doing other than that and I don't know if this Committee knows what we are doing.

MR. DAVIS: I second.

MR. HERRING: Well, I went back and forth on this, and David Perry had a protectible interest category. David Chamberlain did. And they were kind of on opposite sides on most of the issues. I think I end up where we probably shouldn't try to list it. I think there is some danger that, number one, we don't know what some of this means, and number two, that we may be constricting it even though we say we are not, we may have that affect.

MR. McMAINS: If you have identified certain categories as being protectible interests, particularly even for purposes of this one, it may have accorded them legal standing in another context that make assertions that the court is not all that prepared to create privileges or rights or whatever for other purposes such as moving them back into

the discovery rules and stuff. I mean, you know, it is kind of, well, I have a constitutional right to make a gas station blow up or whatever.

MR. MORRIS: I move that we strike the protectible interest part. It is not included. I just move adoption of this portion of the Locke Purnell as drafted by Locke Purnell that does not have the protectible interest definitions or examples in it.

MR. SPARKS (SAN ANGELO): I will second that motion.

CHAIRMAN SOULES: Where does the Locke Purnell standard -- where is it?

MR. McMAINS: It says specific interest.

MR. MORRIS: We are just adopting (a)(1) is all we are doing. We are adopting (a)(1). I move the adoption of (a)(1).

CHAIRMAN SOULES: Second.

UNIDENTIFIED: I will second.

CHAIRMAN SOULES: All in favor say "Aye." Opposed?

MR. McCONNICO: Nay.

MR. SPARKS (SAN ANGELO): Did we just adopt (a)(1), little (a), (b), (c) and (d) as changed earlier through all of our discussions?

CHAIRMAN SOULES: Yes, that completes (a),

(a)(1). That complete (a)(1). Okay, next?

MR. MORRIS: We are down to the hard part.

Court Records

MR. HERRING: He is going to get some water, which shows you what an intelligent co-chair he is. Court records. There are really two issues, the definition we have of court records. Let me just read it out so we will know what we are dealing with right now the way it is written in the McElhaney version. It is paragraph (a)(2), bottom of the first page, excuse me, Locke Purnell, bottom of the first page, court records:

"Purposes of this rule: The term court records shall include all documents and records of any nature filed in connection with any matter before any civil court in the state of Texas. This rule shall not apply to materials simply exchanged between the parties, or to discovery made by a party pursuant to a discovery request and not filed with the court, or to documents filed with the court in camera solely for the purpose of obtaining a ruling on the discoverability of such documents."

We have here -- Lefty has a draft of a different

version of court records that does two things, number one, it adds in the definition of court records, discovery, and the results of discovery. And this would be discovery and the results of discovery that are not filed with record. And then number two, the draft that he has that we will make him pull out when he gets back also refers to settlements.

Let's talk about the discovery first of all, if we can, and let me kind of give you the arguments pro and con and the different ways of approaching it that were brought before our subcommittee.

There, basically, were two approaches. If you wanted to put discovery in here, there are two approaches to doing it. Number one was to have this language added in the definition of court records that simply includes a reference to discovery and the results of discovery. That is one way to do it.

Number two, the second way is to go back into our other rules which no longer require the filing of discovery materials and insert it in those rules, rules dealing with interrogatories and the like.

Now, the arguments -- first of all, let me just mention the arguments in favor of it that we heard the most. People said, look, discovery would already be a court record under this definition if we still filed it as we used to file it in Texas until, I guess, the 1988 changes, which is when

we didn't file it. We stopped filing it, primarily, for convenience of the clerks' offices because we were burying them in paper was the idea, and if we hadn't made that change for the convenience, it would be filed and it would be a court record within this definition.

Secondly, they said a lot of the material that is really important say that might show a public hazard comes out in discovery. And unless that is a court record and therefore there is going to be a presumption of public access, that material is going to be hidden from the public. And that is where the real nuggets lie is in discovery materials. So that ought to be included. And the public interest groups and plaintiffs' lawyers certainly talked about that.

And the third thing they said was look, you have got to keep those discovery documents anyway as an attorney. You don't throw them away, you keep them in your office. You have to keep them in your office as a practical matter. So why not have access to them?

All right, if you include discovery within the definition of court records, but you don't require discovery materials to be filed with the clerk's office, then what does that mean? That means they are not sealed, but to have any meaningful access, the public has to be able to come in to the law office and look at the discovery records. That means

the opponents or objectors to that approach said that means that you have got to have a clean copy of your file that you keep in a conference room in a case that anybody is interested in seeing so the public can come in. You have got to have certain hours when the public could come through your office to look at it. You have got to spend a bunch of time and money doing that. You have logistical and cost factors that you shouldn't have to confront in dealing with discovery if you are going to consider it to be a court record but you are not going to have it filed in the court. That is a practical objection, obviously, to defining discovery within court records.

If you take the other approach and you go back and you require us now to file the discovery with the court -- with the clerk -- you are going to have the clerks of the state of Texas come out and shoot us all because the requests for production of documents and the responses get so voluminous that they can't afford to keep them anymore, and that is one reason we changed the rule to not have them filed.

Those are on a practical level the objections to those two different ways to trying to include discovery in the definition of court records. Beyond that, the people who -- and Tom Leatherbury was one who objected to including discovery -- point out that historically, if you look at the

cases, if you look at the Seattle Times v. Rhinehart decision of the United States Supreme Court in 1984, the courts traditionally have treated discovery documents as different from, qualitatively different from other records or court records, and have not accorded the public access to those records.

And they have -- well, Seattle Times V. Rhinehart says "Pretrial depositions and interrogatories are not public components of a civil trial. Restrictions placed on discovered but not yet admitted information are not a restriction on traditionally public sources of information." And they discuss that we didn't really have the current discovery procedures until the 1983 amendments of the federal rules and the like, and really try to draw the legal distinction that there is historically in the law a qualitative difference in discovery versus other records.

In kind of short form, those are the arguments and alternatives. Lefty, you may want to pass around the language that you had.

MR. BRANSON: The context that most of us run into is the discovery has already been procured and may be -- and the court tries to seal it and the case is closed. Now that is really not addressed in the problem you just called up.

MR. HERRING: Right, and you remind me of one

other thing, and that is if we are going to deal with discovery, we need to change Rule 166(b)(5)(c), which right now specifically provides a lesser standard than what our rule on sealing has, that is, it provides that -- or allows the protective orders ordering that "for good cause shown, results of discovery be sealed or otherwise adequately protected." So we are going to have to pull that provision out of Rule 166(b)(5) or change it or refer all sealing back to this rule if we want to address discovery.

MR. BRANSON: The very same argument that mandates the public have access to court documents certainly mandates that other litigants have access to discovery previously procured in lawsuits. And it is not -- I can see no distinction at all between the two, particularly when you deal with prevention for health and safety, which you have already.

MR. HERRING: I hope we will get more discussion than that. But I think I have pretty well stated as well as I can the two positions as they were presented to the committee.

MR. MORRIS: That is right, and you know, there has been some thought, and Chuck and I worked to try to find some middle ground where, upon a motion being filed to seal -- that then at that time the documents are moved to the courthouse.

In other words, there has got to be something between the two poles. You either have to make the clerks start taking it all again or people have to come to your office.

MR. BRANSON: Let me ask this: Could we address it in the manner -- in this manner and say that when a party files asking to have discovery sealed, then that party has to jump through the loops we have already set up. Would that be possible.

MR. DAVIS: That would include attaching the discovery that he wants sealed.

MR. BRANSON: Pardon?

MR. DAVIS: That would include in his motion attaching the discovery that he wants sealed because you only have to file it on those very rare occasions where they try to get it sealed by filing everything.

MR. BRANSON: And then they would have to meet the burden that we put in on the original section. Does that sound reasonable to you-all.

MR. EDGAR: Well, let me raise a point. Am I hearing that you are saying that lawyers today have enough space in their offices that they can keep these discovery records indefinitely?

MR. BRANSON: In truth and in fact, most of us keep them.

MR. EDGAR: Then you do have a enough space?

MR. BRANSON: If you don't have any space, you rent it out at a warehouse.

MR. EDGAR: Then if you don't have to do it, but you do it because you want to, then there isn't any prohibition against voluntary destruction. So as a practical matter, it may not be available if someone wants it. Am I correct? Is that a logical conclusion?

I mean it is unlike a court record where the courts are required to keep those records indefinitely. So it really stands on somewhat of a different footing, it seems to me, and you need to deal with that problem also if you approach it from that vantage point.

MR. BRANSON: We are really dealing with two problems. One is the problem if someone comes in and says five years after a case is settled, I need discovery in that lawsuit. That is one problem.

The other problem is where a party at the close of a lawsuit says there is some very damaging material that was produced in this lawsuit, and it would really be sensitive to me for it to not be sealed. And I think we can address the latter problem fairly simply by merely including that in the prerequisites we have set heretofor. How we cover maintaining the documents for a period of time is a different problem, and we may have to address it separately. Could we

first address how we want to deal with it when there is a motion to seal it at the close of the case or after it is produced in the case.

CHAIRMAN SOULES: Isn't there a threshold question, though, is it even available. I mean I don't want to be -- if I were a medical malpractice lawyer of Frank Branson's stature and had done the quality of work that you have done and discovery that you have done over the years -- and it has been superb. The results are plain. I don't want to be deposed three or four days a week by lawyers that can't do their work as well and have my discovery product that is in my files discovered, plainly relevant, maybe about the same doctor. I mean we are going to become witnesses now. Our law offices are going to be the targets of records, depositions on written interrogatories for records.

MR. BRANSON: Those are chances that I am willing to take. We may have to determine how to calculate an hourly wage for it.

CHAIRMAN SOULES: If that is the way it goes. The second point that we need to address too is fair trial, free press. The Houston Chronicle vs. Hardy sealed the discovery -- all the discovery in that case ongoing because the press was getting the discovery and publicizing it widely, and the judge determined that if that continued over the life of the discovery in that nuclear power plant case,

they wouldn't be able to pick a jury. The jurors would all be contaminated by the press.

MR. SPARKS (SAN ANGELO): That analogy is what our big problem is today really discovery you have gotten but it is under a protective order.

In other words, you have got it for this guy. You conclude that case by whatever reason -- the jury trial is over, whatever. You have got that in your office, it is under a protective order. Can you then disseminate it to other people? Let's say that PCBs were being dumped down here in the water system, and it is, you know, the public needs to know that this is going on and you have got it in your record through a protective order. Can you disseminate that information? And I think what the consensus I am hearing is yes you can unless they file a sealing motion at the conclusion of the case.

MR. SPARKS: (EL PASO): I don't know if I agree with that. I don't think the protective order just dissolves with the dismissal or the judgment, and I am thinking of something not as health-wise. It seemed like every case that I have for a lawyer or a doctor, the first thing that comes in is gross negligence and they want to know the financial worth and that usually goes through a protective order, and that is not to be disclosed until the time of of trial or at the right time of trial except to an

expert or whatnot. And when the case is over, I don't see any public interest in disseminating the defendant's financial statement to anybody else. The protective order seems to me continues on. You don't go in -- you would be dumb to go in and try to get it sealed if you have to go through these hurdles, but it is not anything that you are going to disclose or give to the media or the enemies of the defendant or, you know, competetive plaintiffs lawyers.

MR. SPARKS (SAN ANGELO): You shouldn't, but if it is information that affects the public's health or safety, then it should not be locked up under a continuing protective order. I think that is what I am saying in the case of cancer causing agents that are being dumped in a toxic --

MR. SPIVEY: There is a whole -- another area that touches right on this that doesn't have a thing to do with public health, and that is the sharing of discovery, and all of us, plaintiffs and defendants, try to get in touch with groups that share -- collect and share that information. Then you can become members of those groups for X dollars. And one of the purposes of these groups is to save thousands and thousands of dollars in discovery and to make available vast amounts of information that have been recovered by multiple people around the country. And there is a real policy in the courts to encourage the sharing of that

information, and I think we can, if we are not careful, we can participate in trying to draft the rule that would run contrary to that policy in the efforts and clear holding in court in that respect.

I did a paper on shared discovery, and if any of you haven't read this book by Brother Harry, Confidentiality Orders, it is a gold mine of information regardless of which side of the bar you are on, about -- it contains a court's attitude, courts right here in Texas, attitudes, and in fact, in Judge Dibrell and his handling of the case -- what is that -- Yamahas, no, American Honda, the American Honda case, American Honda vs. Dibrell, set out the guidelines for protecting the trade secrets and encouraging discovery and the sharing of discovery and set out guidelines for sharing of discovery. I sure would hate to see us by an afternoon's casual deliberations set back a lot of fine court opinions that have come out in that respect.

CHAIRMAN SOULES: Tom Davis, then, David, I will get you.

MR. DAVIS: I would like to analyze with you-alls' help is really, in context, what are we talking about or discussing here? We have adopted rules for the sealing of various documents, information, in other words, keeping information away from people, whoever they might be. We have got those rules for that.

Now, the question is, as I see it, is in what situations are those rules going to apply? And particularly, we are aiming on discovery. I see, one, you asked for some documents. I say, okay, I will give them to you but I want them sealed. That is one situation.

Another situation is you won't give them to me, but if you are, you won't do it until they are sealed and then we have to go and get the court to hear it.

Another situation is that I will give you these documents that the court orders me to give you these documents, but at the end of the trial, you have got to give them all back or destroy them. That is another situation. And I think it is what we have before us as to how do these procedures apply to those situations? It seems to me that what we are talking about is here are the rules that if you want some information or some documents sealed or protected from other people, then here is what you have to do in order to have that done, and that would apply whether it is discovery that you haven't given yet, if it is discovery you have given. In all of those situations it would apply at the end of the trial.

Now, I don't see how that has anything to do with how long I keep my records. If they haven't been sealed, if I have them, I guess they are available. If I don't have them, they are not. The rules we have set up here haven't

said how long you have to keep records. We are assuming the records are available. They are here and someone is asking that they be sealed. So I don't know that is an issue that we need to be bothered with.

The issue is is do we want those that want to keep information away from other groups of people, do we want them to have to abide by these same rules that we have set up for others that want information kept from other people. And I think that is the issue, and if it is not, then I would like at least to decide what it is we are trying to decide. That that is the way I see it.

CHAIRMAN SOULES: David, I said I would recognize you next. David Donaldson.

MR. DONALDSON: I appreciate it. Let me try to put this in context. One of the questions is do we want to -- what do we want to happen with the court records, the records that are actually on file with the court.

The main focus we have had so far in this procedure is letting the public observe what is happening in their courts, the courts that they pay for. That is one focus.

Then there is the second focus of do we, when we get into a litigation of plaintiffs' products litigation and we discover independent evidence that may or may not get into court, do we want to be able to disseminate that information?

The position that we have been taking -- and I have

been dealing with Tom Leatherbury on this too -- is that let's deal with the court records issue and the court vis-a-vis its function as the public's entity, the public's interest in finding out what is happening in its courts, and solve that problem.

The court records that we are talking about in that instance are the ones that are actually filed at the courthouse, the ones that the clerks maintain, the ones that they will continue to have on file and available to the public.

Now, it may be that you would not want to have a separate rule on discovery. And I think that is an issue that we ought to look at. But I think we ought to accomplish what we can accomplish with this court records rule and then vote in a separate proceeding on a discovery rule, maybe changing Rule 166(d) so that protective orders that are entered cannot prevent the sharing of discovery or the disclosure of matters when they affect the public health or public administration. But do what you can do with court records, the ones that are actually on file with the court, and that is the focus that I hope that you take in this one.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Along the line of that last solution, if you put -- if you stop the clock running on protective orders that are issued during the course of

litigation, at the termination of the litigation, effective orders is gone unless there is compliance with this rule which would require then -- and then require basically that in order to secure an extension of any protective order that has previously been issued, which most of the time that is what you are talking about is something that is already either by agreement or by actual entry of something. Won't that, by making them comply with the rule, they would then have to file the documents, that is, require them to file any documents they wish -- that anybody wishes to have protected beyond, and you go through the process then. That gets the records on file in the court and it makes fisher cut bait at that time, and as to anything else, no protective order runs beyond that day, and you know, at that point, it is a question of you getting all the information you want from anybody. Can't you do that.

MR. DAVIS: Well, that is a good solution for part of it, but how about this protective order while the two or three or four or five years that this case is going on that this information cannot be shared with others without having gone through some procedure such as we adopted here.

MR. McMAINS: I don't think we have a remedy for that anyway, though, do we?

MR. DAVIS: If we make the discovery subject to this rule before it is kept confidential or sealed or you

can't give it to somebody, you have got to go through these steps before you can keep me from giving it to Sam.

MR. SPARKS (SAN ANGELO): Let's change the definition of the protective orders.

MR. McMAINS: What I am saying is, you are using this rule to open up -- to reopen up the protective order rule is the problem with that.

MR. DAVIS: Making it subject to what we have done here.

MR. McMAINS: I know. I mean that means --

MR. DAVIS: That is exactly right. You got it right on the head.

MR. BRANSON: All you are doing is saying the same theory that applies to protective orders at any stage on any matter applies to discovery also, and certainly if it is good in the one sense, it is good in the other.

MR. DAVIS: It is no different. If they can show these things, then they got a right not to give them to somebody. If they can't, they have no right to keep it secret.

MR. McMAINS: All I am saying is you can't ignore, if you are talking about pending litigation, pending issues productively, particularly ones that were done by agreement.

MR. DAVIS: I got another solution to that

too.

MR. McMAINS: The problem with that is that a lot of times, obviously, it is easier to get it if they agree to it, if we agree do it, but if that doesn't mean that somebody else can't get -- then somebody else can just kind of start a proceeding and subpoena to you or whatever, this sealing process has to be complied with in order to conclude other access to, then that really makes it real chancy for anybody to enter into an agreed protective order.

MR. BRANSON: That is what it is intended to do.

MR. DAVIS: That is another subject. I think it ought to be unethical to do it.

MR. McMAINS: That, to me, I mean I think that when you get to the point you are interfering with the litigation with which the discovery is taking places -- the progress of that or in any way stifling that.

MR. DAVIS: You are not interfering, you are just putting more restrictions on what they can keep secret. Even now they are going before a Court and everybody has got their own rules and everybody has got their own standards and the judge will enter the order here, now we have sets of some pretty tough standards before you can keep information from other people, and I don't know why information you obtain during the course of a trial is any different than any of

those other examples that we went through, the patent cases or anything else.

MR. BRANSON: Unless you can meet the standard you have set out in the other section that allows the press access to it, why should you be able to enter into a protective order? I mean if you can meet those standards, then there may be a reason for it. But if you can't meet those standards, why should we get to hide evidence?

MR. McMAINS: It is not a question of being able to hide evidence, it is a question of whether or not the discovery rules and whether or not we are going to make the discovery rules such that we don't encourage any kind of voluntary cooperation if that is possible.

MR. BRANSON: The Legislature has mandated we address the problem, as far as the problem.

CHAIRMAN SOULES: Steve.

MR. McCONNICO: What we are doing now is obvious we are backing in from this problem of what type of -- what is the press and what they should be able to get to, and if we are going all the over 166(b) and what the parties among themselves can agree to to expedite discovery and expedite the movement of the case. I think they are two completely different matters. We are also under -- the Supreme Court says they want the parties to cooperate and reach agreements, make agreements among themselves, do

anything they can to expedite the movement of the case.

Now, if we are going to put discovery -- if we are just going to mark out 166(b) and say this is going to be our discovery rule, it isn't going to work because then we are going to have to have all these hearings for every type of discovery agreement that anyone enters into. And I don't think that is what we want to do. I think that just complicates matters more. We have been here for four hours today, and it is obviously no criticism here because this is very difficult, but to expect the bar to be able to operate with what we are discussing for this new rule for 166(b) is impossible. That won't work.

MR. BRANSON: Steve, why is a litigant any much less the public than the press? That is what we are saying if we restrict it. I mean a litigant is entitled to the same public access as the press should be.

MR. McCONNICO: I am not saying people shouldn't have access. What Broadus brought up first, I think we should have access to depositions that are taken, and people do today. Every time I take an expert's deposition, either side of the docket, I get on a 1-800 number and I get every deposition he has taken. That is not going to change because everyone is a member of those groups and are still going to supply it. We are not impacting on that at all. The only thing that we are talking about here

is making it restrictions where everything that we do during a discovery hearing and every agreement that I reach with you here on the other side, I have to go to the court and I have to jump through every hoop that we have talked about under this new rule, and we can't do that.

MR. LOW: If you do that in discovery, you just -- it just cuts out agreements. I had a case with Texaco, they are going to give me this investigation. There is no public interest. Limitations run and everything, they don't want it out. I make certain agreements, both sides that we enter that we won't give it out. We get along with the litigation and you could always argue a case involved health or safety and, you know, that is pretty easy, but, Lord, that would make so easy -- had about two hours of phone calls when I could have made it in maybe two months. I consider I don't disagree with Frank's philosophy.

MR. BRANSON: What about where you had to drag it out?

MR. DAVIS: Don't mix up what you do by agreement and what they are trying to force you to do.

MR. BRANSON: Let's say you had to drag it out of the other side and now you drag it out and it is out there and now they want to hide it again.

MR. LOW: I agree with you there. But I am just saying that I have a fine -- I have trouble drawing the

line that cases say you got to submit a case a certain way. The lawyers can agree. Helm and I agree a case is wide open, argue anything. That is a violation of every rule. I mean, you know, you can try a case the way you want to. You ought to be able to make an agreement on something.

MR. BRANSON: Here is what happens: You get to the close of the lawsuit, and the manufacturer says okay, you have got all this stuff and we will pay your demand, but we will only do it if you agree to seal the documents. Now, all of the sudden, you are in a conflict with your client's position and in a conflict with the public's position on safety and welfare, and lawyers shouldn't have to be put in that position. That ought to be discovered.

CHAIRMAN SOULES: Hold it. Wait a minute. Now we have too many people talking. The court reporter can't get the dialogue. Who is next? Rusty.

MR. McMAINS: But that is the point I was making. To that extent, to the extent something is not subject to a protective order by agreement or otherwise, you are able to share that information anyway.

When there is a protective order issued through the life of that litigation, all your remedies and all the litigant's remedies that is involved in that is right there and it is under 166(b). Now, when that is over, all I am saying is if you terminate the effective date of the

protective order at the date of the hearing, at the date of the determination of the case, and then then make -- if they want that to go beyond the date of the case, when the case is over, if the defendant wants it to go, they have got -- if they have got to go then through this procedure, they would have to file it in order to extend it. I mean all you have to do 166(b) is just say the protective order ends when the case ends.

MR. BRANSON: Why shouldn't they, in order to get the protective order, Rusty, you have to jump through these hoops in the first places unless they can do it by agreement.

MR. SPARKS (SAN ANGELO): Luke.

CHAIRMAN SOULES: Wait a minute. That is a very interesting point unless they can do it by agreement. This procedure permits no agreement whatsoever. You must have a hearing and you must post it in Austin.

MR. DAVIS: We can do an exception for discovery on that.

MR. SPARKS (SAN ANGELO): I have got a bigger problem than all the of us are touching here. Now, I have had a case where some very dangerous health things were involved, okay, and I settled that case because they offered a lot of money and I asked my clients, I represent you, you hired me, you want to take this settlement or not. The

clients said yes, we do. But you have got an obligation to the courts. We are officers of the court. We have got an obligation to the society we live in, and there are things going on that are going to kill people and yet by agreement you are telling me that if I go drag it out of them, then we have got some kind of sealing. But if I agree to it, then the public has to keep dying. I mean I have got a larger conflict with the philosophy of what I owe to the community I live in. Do you understand? I am having problems with that, and I really would like to see a rule passed that just says any agreement between two people to seal a document is invalid. Only a court can seal records. Is that making any sense?

CHAIRMAN SOULES: Sure.

MR. SPARKS (SAN ANGELO): I don't care if it is a settlement or protected discovery or agreed discovery. We have got an obligation to our fellow man we live with, and if we get down thinking so much in narrow scope that we are willing to see people die to get money, we are no better than Ford Pinto saying it is cheaper to burn them than to retool. I think we have got to think about this seriously in a broader aspect than just discovery versus sealing.

MR. McMAINS: Sam, what I am talking about --

MR. SPARKS (SAN ANGELO): I agree with you, concept, mechanical --

MR. McMAINS: Sam, the problem we have got is, who is going to keep these records forever? How do they get there? And the point is that the person who has the interest in keeping the information consealed --

MR. SPARKS (SAN ANGELO): I agree with you.

MR. McMAINS: -- is the person who beyond the life of the case -- because that is really the only discovery privilege you have is relating to that litigation. That is one of the -- you know, the other issues deal with all the protective orders anyway is for the purposes of that litigation. Now, if you produce it in connection with another piece of litigation, it is not privileged anyway. So, you know, in terms of a lot of investigations and stuff. So all I am saying is basically taking it in the same context. When the case is over and that defendant wanted to pay you a lot of money to keep you quiet, if you had this procedure in place, you would say I can't do that because the protective orders --

MR. SPARKS (SAN ANGELO): I agree with you.

CHAIRMAN SOULES: Let Rusty finish.

MR. SPARKS (SAN ANGELO): You have got to file a sealing to extend it.

MR. McMAINS: To keep a protective order beyond, whether by agreement or otherwise, beyond the life of the litigation, you have to file it as -- you can file it

in camera just like we have already got the provisions for, but you have got to file it and then move to seal it and jump through all the hoops, and that way you don't have to worry about sealing all discovery because there is not but just a few things that most anybody doesn't want out anyway. But you make that one fix in 166(b) where the protective order ends at the life of the litigation, that encourages all the agreements you want to up to the time of the litigation, and then thereafter it is the responsibility of whoever wants the records kept quiet, whether it is a doctor who doesn't want it to talk about 32 adultery examples in cases of divorce, or what.

MR. SPARKS (SAN ANGELO): Someone's financial statement, whatever.

MR. McMAINS: Whatever, it doesn't matter. He has to go and show and file it and then you have got it in the courthouse, but it ain't all that much, and that is just something that is going to have to happen.

MR. O'QUINN: Question.

CHAIRMAN SOULES: Join O'Quinn has the floor.

MR. O'QUINN: Rusty, what would you put in this rule to do what you just said?

MR. McMAINS: First of all, in the protective order in 166(b) -- and I would define -- and I would just put in 166 the -- we take out the part over here which says that

discovery and results of discovery.

MR. O'QUINN: Take that out of the proposed rule?

MR. McMAINS: Take it out of here which says it doesn't apply because it does apply by definition as a filed record, you see. And so if all you say in the 166(b) is that in order to continue a protective order beyond the life of the litigation, then the documents in which protection are sought, or whether achieved by agreement, must be filed and, you know, must be filed period. Just stop right there. All of the sudden it meets the definition of court records, okay, and at that point, it is filed. If they want the protective order, if they didn't do that, then it is not filed.

MR. O'QUINN: Fine. Would you be willing to add one more sentence in light of what Brother Sparks said that any agreements between parties --

MR. McMAINS: For the destruction of documents.

MR. O'QUINN: Yes, the destruction or secreting of documents, whatever the word, the problems that he had is invalid.

JUSTICE DOGGETT: There is language on that, John, in the D tab of what you have. There is "No court shall make or enforce any order or agreement, civil

agreements, restricting public access."

MR. O'QUINN: Something like either what Justice Doggett just said. Would you be willing to add that?

MR. McMAINS: Sure. I don't have a problem with that. I mean I think it is the same spirit of the rule that you ought not to be given something on the idea that you will read it and then destroy it.

MR. O'QUINN: Does that satisfy the concern of somebody, Rusty, does that satisfy the concern of somebody that they are going to have to maintain a file in their office so people can come trooping through there decades and decades --

MR. McMAINS: The litigation is over, the litigation. Then protective orders, all protective -- there is no such thing as a protective order. It doesn't apply anywhere.

MR. O'QUINN: All right, so you are saying during the time of the litigation --

MR. McMAINS: If the defendant is worried about the information getting out after the litigation is about to conclude, whether by trial or whatever, it didn't come out in the trial or something, then he is going to have to jump through these hoops, the protective order expires by its very terms when that judgement is entered.

MR. O'QUINN: He would have to file the

documents in question with the court so they would be available there --

MR. McMAINS: And at that point, they would become subject to the rules.

MR. O'QUINN: And thereby available to interested other parties to deal with the court rather than trouble the lawyers.

MR. DAVIS: How long do you keep the records?

CHAIRMAN SOULES: Let's try to get a concensus on, I guess, the threshold question. How many feel that parties should be able to reach agreements and have the court sign protective orders in a pending case outside of the purview of this sealed document standard.

MR. COLLINS: I would like to amend that, Luke. And let's really get to the guts of this thing. We have been dancing around the maypole bush here now since 8:30 this morning and really, the real question is are we going to bring discovery documents within the definition of Court records. And I think we ought to see if we can reach a concensus on that issue because that is the guts of it right there. The rest of it is mechanical. If we can reach an agreement on that, the rest is mechanical concerning agreements, concerning how long we maintain it, those things, because in my opinion, if you don't include discovery documents in this definition, it is a sham on the public, the

press and the media because, otherwise, all you have is a plaintiff's original petitions, the defendant's answers and special exceptions. You know, big deal. That is nothing. And this whole structure is for naught if you don't include discovery in the definition of court records.

CHAIRMAN SOULES: I think there is a --

MR. COLLINS: I would like to see if we can reach a concensus on that.

CHAIRMAN SOULES: I think there is a division between, though, between whether discovery can be protected pending a case until it is over with, and then whether it should thereafter not be protected, continue to be protected. That is what I am trying to find out is are we going to write one rule that deals with discovery without differentiating between whether the case is pending or over with, or are we going to try to treat those as two different circumstances. And I think we have got to know that.

MR. BRANSON: Luke, can't you address the threshold question John presented and then go back and carve out exceptions for pending litigation and for agreements or whatever?

CHAIRMAN SOULES: You come up here and take the vote. All I am trying to do is get it organized somehow.

MR. DAVIS: I have a motion. John, make a motion.

MR. COLLINS: I would move that we include discovery documents of all kinds within the definition of court records as found in Paragraph 2, the definition of court records.

MR. BRANSON: Second.

MR. DAVIS: Second.

CHAIRMAN SOULES: Made and seconded. Any discussion?

MR. O'QUINN: Just a point of clarification. Is the point of your motion, John, that with respect to what we now call protective orders during the discovery process where the defendant or some party seeks a protective order that if they give something up in discovery it can't be disclosed, it is the spirit and the point of your motion that that whole procedure be now covered by this new rule.

MR. COLLINS: That is correct.

CHAIRMAN SOULES: Any discussion?

MR. McCONNICO: Just another clarification. But we are not voting under your proposal as to whether or not that is binding on the parties to making an agreement during the trial itself?

MR. COLLINS: That is correct. That agreement is another separate subject matter that we can talk about in trying to iron out those problems.

MR. O'QUINN: We are just saying where the

parties can't reach agreement and they are going to go to the court to get the Court to make the decision, whether the decision is during the trial when discovery is going on, or whether the decision is to deal with what happened after the case is over. It is all covered by this rule.

MR. COLLINS: That is correct.

CHAIRMAN SOULES: That won't work. This rule doesn't permit that. This rule says that David Donaldson, even though O'Quinn and McConnico have agreed to whatever about discovery -- it has to be discovery, and I don't know what the voluntary exchange of information is. I don't know if that is discovery or not.

MR. O'QUINN: Let me amend your statement. He could include that he is going to pay my client a bunch of money if my client keeps his mouth shut after the lawsuit is done, too. So it can include those kind of agreements.

CHAIRMAN SOULES: All those kinds of agreements, David Donaldson could come in and say, O'Quinn, I want to know the deal. And he has a right to get it unless you have asked the court it seal your agreement.

MR. O'QUINN: Because you are saying this rule, as written, does not permit agreements.

CHAIRMAN SOULES: Does not permit agreements.

MR. COLLINS: I agree. As drafted, that is correct.

MR. DAVIS: That doesn't mean we can't add that to it later.

MR. BRANSON: It is the concept of whether you want to adopt the rule and then go back and carve out exceptions for agreements.

MR. O'QUINN: His motion is not to prove the rule is written and apply it to discovery. I perceive John's motion to be do we want to have a rule -- let's get a concensus -- do we want to have a rule that says absent agreement, in other words, take that part out of here if you can't have an agreement, absent agreement, do we use these procedures to decide secrecy during discovery and even after trial is over? Is that about right, John.

MR. COLLINS: Well, not really. My motion from the philosophy standpoint includes all discovery materials in the definition of court records. Then if this committee so chooses, we can go back and make certain exceptions or agreements or whatever we want to. But just from a philosophical standpoint, that is the thrust of my motion.

CHAIRMAN SOULES: Anymore discussion?

MR. O'QUINN: Can we have any brief discussion on his point?

CHAIRMAN SOULES: Sure. That is what we want to do.

MR. O'QUINN: As I understand John's motion, I strongly favor it, because I think it is very important that we confront the fact that protective orders and things of that nature impact on more than just the litigants and can result in very important information being bottled up and sealed which needs to be -- the public needs to have access to, and I think that is very important at all times. And we need to confront that and come up with some rules that are workable to do that. And while it may be easy to have a situation where lawyers can just willie-nillie agree to these things or just let courts enter them, I don't think that is a good practice. I think it is bad public policy, and I think there has been a lot written about it, and I think we have got to confront it. I am very much moved, for example, by Sam Sparks' example about it. And I favor very much what John Collins just moved to do.

CHAIRMAN SOULES: Any further discussion? Okay, all in favor say "Aye." Opposed?

MR. SPARKS (EL PASO): No.

CHAIRMAN SOULES: One dissent.

MR. O'QUINN: The other Sam Sparks.

MR. SPIVEY: Don't tell which Sam Sparks.

MR. SPARKS (SAN ANGELO): That is like a co-chair going against his own motion.

MR. McCONNICO: Luke, do you want to put the

next one on the floor about reaching the agreements during the lawsuit? That seems to be the next point.

CHAIRMAN SOULES: All right, does anybody have a motion? Do you want to make a motion?

MR. McCONNICO: Yes, I move that the parties during the pendency of the lawsuit can agree that certain records are privileged, not disclosable, whatever, not subject to this provision. I don't know what the rule number is now.

MR. O'QUINN: It doesn't have one right now.

MR. McCONNICO: 76(a).

MR. SPARKS (SAN ANGELO): My problem -- and I agree with you. It is so much easier to facilitate the handling of my case, I promise you. And I do think I am the most agreeable lawyer you have ever met. You don't have to notice me for a deposition or anything. I will give you my file, I don't care. My problem is this: I have got a case pending right now that deals with ethylene oxide. I am not under a protective order, okay -- where they are using ethylene oxide to steralize Johnson & Johnson sutures and needles and products out of San Angelo. And that stuff is leaking in that plant. The problem is like asbestos. The people aren't going to start dying until 10 or 15 years later. That case is pending. It has been going on.

If they come to me and say, Sam, look, here is the

material. We are killing them left and right. They aren't going to die for 15 years, but I am going to give it to you by agreement. Now, all of the sudden, I am participating to the the harm to these other people to my client's interest, and really to my own financial interest because I am going to get hired by those other people that start dying later on, that as a matter of public policy what is right and wrong and what I owe to my fellow man, Steve. I shouldn't be required to bottle it up simply because it is given to me by agreement. That is wrong. It is not right.

MR. LOW: You don't have to agree to it, though, Sam, if it is an agreement.

MR. SPARKS (SAN ANGELO): I wasn't going to. Okay, we won't give it to you, Sam. And then I can't prove my client's case.

MR. LOW: Not every case is like that.

MR. SPARKS (SAN ANGELO): My problem is not with the rules you are talking about, it is philosophically in a much broader sense.

MR. BRANSON: If you require them, though, to jump through these hoops, if you say, okay, I won't agree to it, you have got to go through these hoops to get it protected by protective order, you are got to get it through the normal discovery channels, and it is not going to be protected.

MR. SPARKS (SAN ANGELO): Perhaps.

CHAIRMAN SOULES: Steve McConnico.

MR. BRANSON: In that instance, it certainly has --

MR. SPARKS (SAN ANGELO): Perhaps they know exactly, Frank, and I don't.

CHAIRMAN SOULES: Steve has got the floor.

MR. McCONNICO: I was just going to reflect what Buddy and Frank just said. You are going to get that under 166(b) anyway. You are going to get it. You do not have to enter into any agreement at all. But if there is one thing that has been clear since we changed 166(b), and which has been a consistent complaint, is we are having too many hearings. They have made the bar too much adversaries to one another, we are wasting too much time in discovery, and if we have to everytime I reach an agreement with another attorney, and I cannot reach an agreement if we transplant this Rule 166(b) literally -- and I don't think I am exaggerating -- we are about to triple the number of hearings and time discovery takes, and we have got to be careful to say bad facts make bad law. What you are saying is a very exceptional situation. I think it could be handled very easily by not making the agreement or you could get the material anyway under 166(b). We have got to be able to let the attorneys agree among themselves as to how they are going

to conduct discovery.

MR. SPARKS (SAN ANGELO): That is a valid point.

MR. DONALDSON: Let me interject again. The immediate concern that those agreements, if they are done in the discovery context, is consistent with the way we practice now. But if it is done in the context where everything that we talk about this issue we are going to keep it private between the parties, including hearings, and we tell the judge, Judge, we have agreed we are going to keep this private, and the judge says okay, we will close the courtroom, okay, all these records are sealed. I have a real concern about that. Our focus is at least don't back up. The procedure now normally is that court records are available. By creating a difficult process in order to protect discovery materials, don't cause that to lead to even more records being sealed.

MR. DAVIS: What is the motion?

CHAIRMAN SOULES: I don't know.

MR. MORRIS: We don't have a motion on the floor.

MR. SPARKS (SAN ANGELO): You didn't make a motion, did you?

MR. McCONNICO: No, I just said let's discuss it. I think the motion -- of course, now we are all kind of

confused as to where we are as to whether or not -- I don't even know if a motion needs to be made. I guess it does in light of what John said last time.

MR. MORRIS: We still don't have language. We voted on a concept.

MR. COLLINS: I have got language now.

MR. SPARKS (SAN ANGELO): Steve, on concept, what you and I are talking about --

MR. McCONNICO: Right.

MR. SPARKS (SAN ANGELO): -- I can certainly see in the practice of law where we get bogged down in hearing after hearing after hearing. I mean I am finally put in a position where I say I won't agree to it, don't give me any information. You understand, I don't want to be put in that position. That is not representing my client. I can see the concept you are coming from on that. At the same time, when you are talking about discovery that is exchanged by agreement, are you including agreements to conclude the case, settlements? Or are are you just talking about discovery.

MR. MCCONNICO: We are talking about settlement. I think -- we are talking about discovery. I think settlement is a different issue.

MR. SPARKS (SAN ANGELO): I will back off.

MR. DAVIS: Luke, I move the adoption of the

definition of court records (a)(3) that has been distributed, and I will read it: "For purposes of this rule, the term court records shall include all documents and records filed of record and discovery and the results of discovery whether or not filed of record in connection with any matter before any civil court in the state of Texas. The term court records also includes settlement agreements."

MR. MORRIS: You need to stop at that last period.

MR. DAVIS: That part first.

MR. MORRIS: After you said state of Texas period.

MR. DAVIS: State of Texas period. I move the adoption of that as an amendment to Rule 76(a).

MR. BRANSON: Second.

MR. McMAINS: Can you read it? I am sorry. Can you read it.

CHAIRMAN SOULES: It has already been. May I have a clarification on it? You intend then to make the protective order practice and discovery govern -- to have that governed by Rule 76(a).

MR. DAVIS: I think that would be the effect of it.

CHAIRMAN SOULES: Any confidentiality order has got to go through the 76(a) process.

MR. DAVIS: Right. Discovery is a public document, or a court record, I am sorry.

CHAIRMAN SOULES: We are not going to kill the goose that laid the golden egg when we do this, are we? We are increasing litigation big time.

MR. McCONNICO: That is my problem.

MR. COLLINS: I think we are reducing litigtion.

MR. DAVIS: I think trying to seal information only increases. The problem is if they will tell you the truth and give it to you and not try to hide it, we wouldn't have this problem.

MR. BRANSON: You may have a hearing, but by having that hearing, you are stopping four years of unnecessary discovery process in another case.

CHAIRMAN SOULES: My work is business work, and I don't have these ongoing same experiences you-all have. And this is going to be devastating to my work.

MR. O'QUINN: It can only come up when somebody wants to seal your records.

CHAIRMAN SOULES: They always want to seal their general ledgers and their sales records and their formulas, the thing -- now, they have got to show them to the judge whenever you are in one of these business disputes, but they want all that kept confidential. I mean they have got

to show them to the experts, lost profits and all that sort of thing. This is going to put highly confidential commercial business information of close corporate entities out in public unless there is a 76(a) proceeding in the case everytime a protective order is sought. I mean if we are going to lay that burden on the process, I just don't want to do it without people here recognizing that is what we are doing.

MR. DAVIS: I don't think we will have that problem because there is not going to be that many people that want to jump through the hoops because it is not that important. It is going to be the exceptional situation where you have something of extreme importance, and if you do, it is justified and it ought to be sealed. But it will stop this frivolous stuff of every time you turn around every single thing that they produce is privileged and confidential and everything else, and the protection orders are being granted right and left. And I think we have got to stop it or at least let the Supreme Court know that at least the majority of this group would like to stop it.

MR. MORRIS: We have got a motion and a second.

CHAIRMAN SOULES: Okay, motion made and seconded. Discussion? Motion has been made and seconded that first sentence of (a)(3) be recommend to the Supreme

Court for adoption. Sam Sparks.

MR. MORRIS: No, this -- it should be under 2.

MR. COLLINS: It should be (a)(2).

MR. DAVIS: Tell me where it goes.

MR. COLLINS: Locke Purnell draft (a)(2).

MR. MORRIS: What it is is your definition of court records which is (a)(2).

CHAIRMAN SOULES: It is labeled (a)(3). (A)(2).

MR. MORRIS: It is labeled (a)(3). I am sorry. You will pardon my error, I am sure.

CHAIRMAN SOULES: It wasn't your error. Is there discussion on this? Okay, let's let her change paper and then we will get into the discussion.

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

CHAIRMAN SOULES: All right, come to order. And Hadley has the floor.

MR. EDGAR: I would just like to ask the drafter of (a)(2) what is the difference between discovery and the results of discovery?

MR. HERRING: That language -- I won't claim to be the drafter -- but I think that language came out of 166(b) which in 5(c) refers to results of discovery and of the -- I understand that the thought was that discovery is a little different than results of discovery. Results might just be the responses. Discovery might include the interrogatories.

MR. DAVIS: Answers to a question on deposition.

MR. BRANSON: Is there any disadvantage, Hadley, to include both?

MR. MORRIS: No, there is not.

MR. EDGAR: I just have a question about whether there is any difference between them and why be redundant.

MR. HERRING: The reason is to be consistent with Rule 166(b)(5), which is the terminology it uses, recognizing it is going to have to be amended now.

MR. BRANSON: And discovery might be what animal was it and the results might be a name.

MR. HERRING: Yes.

CHAIRMAN SOULES: Both terms are used in Section 5 of 166(b).

MR. BRANSON: Call the question, Mr. Chairman.

MR. MORRIS: Let's vote.

MR. EDGAR: I don't see where it is found.

CHAIRMAN SOULES: Tom had his hand up.

MR. COLLINS: 166(b)(5)(c), Hadley, talks about ordering that for good cause shown results of discovery be sealed or otherwise adequately protected.

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

MR. SPARKS: (EL PASO): I want to echo Steven. I see the handwriting on the wall. You know, we are talking about a group of people in here who have some pretty good lawsuits, big lawsuits and have some valid points, but the bulk of the docket are not these types of cases.

Our discovery rules now are liberal. Among other things, they allow a lot personal information that usually is not admissible. A lot of information that if now is going to become public record, you are going to get a lot more objections, you are going to get a lot more court hearings. I just foresee lots of problems from a defense standpoint. You are just going to doubling and tripling the discovery because everything is going to be at the courthouse rather than on agreement because your clients do not wish that personal information -- I am not talking about saving people or harming people from a plant, I am talking about just motion to produce personnel files. And you figure out what kind of litigation we are talking about, and you are going to

find that people are going to start objecting to it because they can't come through the loopholes, and at the end of the lawsuit, when you tell people that that is public record, you are just going to -- you are doubling and tripling your efforts, and this is -- to me, it is making big reversal on the liberal discovery and the way we have been able to move discovery, and it is a mistake.

CHAIRMAN SOULES: Is there anybody here who does much family law? Harry is not here and Ken is not here. I would assume this is going to put them in apoplexy.

Now, then, the parties' discovery disclosures are public for all time, open to the press, unless they get them sealed by notice through the Supreme Court clerk's office and so forth. I mean that is what we are doing.

MR. LOW: You can't do it just because you are embarrassed.

MR. McCONNICO: Luke, could I add something?

CHAIRMAN SOULES: Yes, Steve.

MR. McCONNICO: We don't have anybody also here from the trade secret area. I do some oil and gas litigation, and there is never a piece of discovery that is filed in oil and gas litigation that deals with any petroleum engineering, geology, future reservoir projections, that has not had a lot of time and a lot of expertise gone into it that those people don't want their competitors to know the

operators of the offsetting leases. And to say that Exxon, who I don't represent and am usually opposed to, has to jump through all of these hoops because I represent some royalty owner, and then we are going to put that onto the burden of the district court in Chambers County or wherever where most of those cases are, and they are mostly in front of rural district court judges who are not used to having special masters that are petroleum engineers. It is going to be an unbelievable burden, and those are the facts the way that type of litigation is done. And I am afraid that we are not looking at the big picture and we are looking at just a few precise cases -- personal injury cases that have a large affect upon the general health of the public, and we are doing a rule that affects those, but we are not thinking about what affect this is going to have and impact on other areas of litigation like family law, commercial law. And I am totally in sympathy with what Sam has said, and everyone else here says that we need to protect the health of the public and environmental-type cases. But I think we need to be very careful in doing that so we just don't cause this ripple effect that is going to have a tremendous economic burden on the litigation in the state in every other area.

MR. BEARD: Let me say my personal feeling is court records is something that is filed with the court, and I am much opposed to having us in charge of court records

other than the depositions in the course of the trial. You know, how long we going to keep all these things?

MR. DAVIS: Nothing in there says you have to keep anything.

MR. SPIVEY: Wait a minute. Aren't you-all talking about -- you are declaring these matters court records. They don't cease to be court records when that case is over, and five years from now I decide to get rid of them and I discard them. Somebody comes along and says I destroyed public records?

MR. DAVIS: Yes.

CHAIRMAN SOULES: Yes, that is right.

MR. COLLINS: That is the way it is right now, gentlemen, because we did not address that problem when we switched the filing from the clerks back to the lawyers. We didn't address that issue then so it is the same thing right now.

CHAIRMAN SOULES: It was addressed in the Seattle Times case and it is not court records. Those are not court records. Discovery is not a court record unless we make it a court record in this rule, and we have.

MR. DAVIS: Would it be made a court record for the purpose of this rule?

CHAIRMAN SOULES: Well, it is made a court record period.

MR. DAVIS: And not a court record in that you have got to retain them and keep them and have access to the public on --

MR. HERRING: Well, the public citizen votes, that interest group that showed up, the public citizens group, specifically argued that if we adopt this, they are going to have the right to access --

MR. DAVIS: If we let them.

MR. HERRING: Well, they said they are going to have the right to access because it then becomes a court record, and, you know, how they enforce it and what your rights are to keep them out of your office, or whatever, become issues to deal with. But their expectation is that they could use this whether they are right or wrong.

MR. BRANSON: Why don't we just pass the rule and then say we don't have to keep them in a subsection.

MR. DAVIS: You say they are court records only for the purpose of this rule and it doesn't have anything to do with how long you keep them anymore than the rule of not filing interrogatories with the clerk tells you how long you have to keep something. And if you don't have them -- if you have them, then I guess they are entitled to see them, but if you don't have them, there is nothing there that says how long you got to keep them.

MR. HERRING: But they are entitled to see

them when and if --

MR. DAVIS: If they exist.

MR. HERRING: If you have them and they are in your office, they are entitled to see them. Is that 8 to 5? You have got to have them in a separate room. You don't want to have work product mixed in. You want to have a clean copy of those. Do you have to do that in every case?

MR. DAVIS: I don't worry about that. Let them -- I don't think they are going to flood me with requests.

CHAIRMAN SOULES: Judge Peeples.

JUSTICE PEEPLES: I am like everybody in the room except for one or two. I voted for John Collins' motion.

We need to remember something, though, we are cutting new ground on this. And when you do that, it is hard to see the ramifications. And then lately we have started talking about making what I think are probably going to be major changes in the way discovery happens, and I just, frankly, think that we don't have the vision to foresee how this is going to impact everything. You know, we are all, I think, thinking in terms of product liability cases and then I did a lot of family law as a district judge, and there is a lot of it, and I, frankly, don't know how all of this is going to impact that. There are all kinds of -- lots of

litigation out there that is not personal injury. Gosh, the unforseen impact on dockets, if some of this happens, I am just not sure that we can think it out in 30 minutes or two hours here. I mean it could have major impact.

MR. BEARD: I don't think we should ever have to let the public have access to our files. If they come in and we have to produce it and put them in a conference room and all to look at it.

MR. DAVIS: That is not the purpose of this provision. This rule and this rule is how do you seal information.

MR. BEARD: You have got correlate it, Tom. What is the next step? If I got a court record in the sense that I am going to have to give it to the --

MR. COLLINS: You have got court records now, Pat.

MR. DAVIS: You have interrogatories and depositions.

CHAIRMAN SOULES: Those are not court records.

MR. BEARD: I don't consider them court records.

MR. COLLINS: I would sure like to see somebody try and destroy one of them. I think I know what the court would rule on that.

MR. BEARD: I consider it a court record, but

if somebody comes in to see it, I am not going to let them have it.

MR. LOW: I had a trust case that involved -- the news media was constantly wanting to know certain things. And we had to answer interrogatories and discovery. I would spend half my time -- I can't see those people. I am trying to get ready, and they say they are public records. I have got to watch them. I have only got one copy, maybe they may steal one. We have got 50 boxes -- more than 50 -- about 500 boxes. How could I handle that if they have a right to come into my office and look at that? I just have to stop getting ready for trial and sit down with them. That is a problem.

CHAIRMAN SOULES: Does anybody have anything new on this that they want to bring to the discussion before we vote? Justice Doggett.

JUSTICE DOGGETT: Go ahead, Rusty.

MR. McMAINS: Well, perhaps I, as usual, didn't make what I was trying to make as clear in terms of where I was trying to make the changes to cover what I thought were basically all of the concerns. But if you took the rule that he has and divide it into essentially the two different segments so that when you get where the underlying parts where it says records filed with records in discovery and the results of discovery filed of record, but does not include discovery and the results of discovery not filed of

record in a pending case, then move to 166(b) in the protective orders and say that no protective order shall extend -- no protective order or agreement relating to protecting disclosure -- shall extend beyond the signing of a final judgment or dispositive order without filing the discovery or results of discovery with the clerk of the court and complying with whatever this rule number is. That takes pending cases out, it keeps discovery where it is and puts the burden on the party that wants to keep the wraps on beyond the litigation on the party who wants to do it and puts them through these hoops, then, at that time, and puts the burden on the clerk to take it. Just with -- just those changes. And all that does is just -- and it eliminates all those problems about whose office is what and who gets into whose office.

MR. BRANSON: John, would you accept that as an amendment.

MR. COLLINS: I am listening.

MR. McMAINS: These are two combinations. That is what I was trying to talk about is just to say there is no protective order or agreement relating to protection shall ever extend beyond the life of litigation without filing what it is you want to protect and meeting the burden under this rule. Now, if you -- and then if you filed it of record, it is already here. It is already covered by the

definition.

MR. DAVIS: So far so good. But how about information during the course of a five-year trial?

MR. McMAINS: You mean five years discovery?

MR. DAVIS: Yes, I mean the trial --

MR. McMAINS: That is why I say that is the only place -- I understand, and that is what I am saying. That is the only thing that that doesn't fix, and I just --

MR. SPARKS (SAN ANGELO): To solve my one problem, could I go with you with the exception of saying except for those things affecting public health or safety? I think we have got to quit killing our fellow men. The more it happens, the more I get hired, Rusty. But we really ought to think bigger than just our practice of law.

MR. McCONNICO: But then I think, Sam, we get back to where we did our discussing in the first place. Let's be honest. We are not going to agree to anything that kills anybody. I am not, you are not either. And that is not going to -- I mean we are not going to enter into those agreements, and even if they are, you still have 166(b) that all that information is going to be discoverable anyway.

MR. SPARKS (SAN ANGELO): I backed off of the agreement, okay.

MR. McMAINS: What about making an additional change to 166(b) to merely provide that a party to a

protective agreement may move the court for relief from the protected agreement. Now, if it is an order, then you have already gone through the contest anyway, so the judge will have told you to shut up, and you are then going to be running in violation of the court. So you can move for relief from a protected agreement in the event that disclosure of the information beyond the bounds of the agreement is necessary in the judgment of the court for the health and welfare of the public.

Now, that puts the judge as the one who will determine it. It puts the standard at some kind that he has determined that it is necessary, puts it in a protective context where you have mandamus remedies in the event you don't have it, but it keeps all of that.

Now, the only problem that doesn't say, it still doesn't solve Tom's problem of he wants, you know, Dave Perry is in the course of discovery on some stuff, and he wants it and they have agreed to a protective order and he can't give it to you. It doesn't solve that problem. But if you have solved that problem, you create so many more mechanical problems by making us either file everything with the clerk, which we have already backed off of.

MR. SPARKS (SAN ANGELO): Which is not fileable. You couldn't even file it.

MR. McMAINS: That is right. Or you have to

keep it in your office, you know, you have to make it access to the news media and everybody else through this stuff, and you don't need anybody else in your business while you are litigating for your client. I don't care, with all due respect for Tom, if I don't want him in my office messing around in my files, I don't want him in my office, and I ought to not have to let them do that. And that is --

MR. SPARKS (SAN ANGELO): That is what Buddy was saying. Reiterate again what you propose to do.

MR. McMAINS: The proposed amendment would merely track this amendment that was proposed by -- I think Lefty circulated it -- which says "For the purposes of this rule, the term court record shall include all documents and records filed of record" which, actually, once you comply with this, you have done that anyway. But in order to make it clear and discovery -- and the results of discovery filed of record, go ahead and distinguish it although I think once it is filed of record, it is a record. That may be redundant. But just distinguish -- but does not include discovery and the results of discovery not filed of record in a pending case.

Then go to the protective order rule over here, 166(b), and you add another section which is just -- I put in just Section D under the protective order rule which would say "no protective order or agreement relating to protecting

disclosure shall extend beyond the signing of a final judgment or dispositive order without filing the discovery or results of discovery with the clerk of the court and complying with rule" -- whatever this rule is.

MR. SPARKS (SAN ANGELO): 76(a).

MR. McCONNICO: Rusty, read that proposed language 166(b).

MR. McMAINS: Okay, "No protective order or agreement relating to protecting disclosure" -- now, if you want to put discovery or the results of discovery -- I just, it sounded cumbersome -- "shall extend beyond the signing of a final judgment or dispositive order without filing the discovery or results of discovery with the clerk of the court and complying with Rule 76(a).

MR. DAVIS: When do you have a final judgment?

MR. McMAINS: Well, the final judgment rule says when it is signed, actually.

MR. DAVIS: I know. When it is signed or after the appeal is over?

MR. McMAINS: No, well, yes, the rule on final judgments is when it is signed.

JUSTICE DOGGETT: Would that cover a nonsuit?

MR. McMAINS: Yes, that is what the dispositive order would be designed to deal with, a nonsuit or any kind of --

MR. BEARD: Let me ask you, Rusty, would that mean the parties could not agree to destroy the discovery prior to --

MR. McCONNICO: Parties could never destroy.

MR. BEARD: Why can't they?

MR. McMAINS: You know, it is not addressed explicitly, what John's concern was. We didn't add the other language.

MR. SPARKS (SAN ANGELO): The only thing we have not covered -- there is that -- but the other thing is pending litigation where you have discovery by agreement on protective orders.

JUSTICE DOGGETT: If you have a serious toxic waste problem, can you provide that information to the local health department so they can do something about it or can you provide it to an attorney who has a similar case involving the same toxic substance? And it doesn't really solve that really.

MR. McMAINS: No, I am just saying you add another section for that. That is what I was telling him that I didn't find any offense and I didn't think that even Steve with his comments had any. That procedure there is to simply add a new Section E which says that "a party" -- or the attorney for the party -- "may move the court for relief from a protective order, whether issued by order of the court

or by an agreement, to permit disclosure of information obtained in discovery that is necessary to be disclosed for the protection of the public health and welfare by the court." I mean you move court for that relief.

JUSTICE DOGGETT: Would that permit a citizens' group to intervene in a personal injury case in a toxic waste dump to get that information to protect the parties?

MR. McMAINS: Probably. Once they intervene, they would be a party. If they intervened, they were a party, they were denied access to the same information. You know, the first thing they would do is probably resist dealing with the agreement, and then the question of whether or not the agreement, you know, so that then they would have to be opposed by the court, which basically is the same thing as going to the court and asking for relief.

MR. COLLINS: Rusty, you are starting from a different presumption, namely, that all discovery is closed unless the judge orders it open. My proposal and the language that Tom has suggested has a different premise, namely, that all documents are open unless the court makes a specific finding that they should be closed. And that is my only objection to your proposal.

MR. McMAINS: It is true that what I am assuming is that there is some kind of an agreement for

protection or that there is protection.

MR. COLLINS: Let me stop you right there. What I would like to do is to have a vote on this language and then let's discuss agreements because I think that is a legitimate area to talk about how to handle discovery agreements between the parties to reduce hearings, to reduce time and expense, and at the same time allow the public access to those documents which are legitimate and which are important.

MR. McMAINS: But the driving source of the controversy here is precisely home mechanics. It is not the issue of agreement or nonagreement. It is the issue of pending versus over. There is a difference between it being pending and when it is over. When it is pending, I want people out of my office. I may not want him there. He may be trying to run a case out from under me. I don't want people in my office when I don't want them there.

CHAIRMAN SOULES: Justice Doggett has the floor, please.

JUSTICE DOGGETT: One solution, of course, is just to file it at the courthouse, and there is a procedure for filing at the courthouse, and then you don't have to worry about them being at your office because during most of your legal practice, and even most of mine, that is the way it was done up until the time that the rule was changed to

provide discovery wouldn't be filed. And it didn't create a lot of problems for people to go to the courthouse and get that information. So there is an alternative way to avoid the problem.

MR. LOW: This is discovery now instead of a folder. Now, you are talking about there wasn't -- the clerk didn't have enough in that antitrust case we had. They didn't have -- the clerk's office couldn't hold every document. I mean, you know, what are you going to do if you say -- how do you file that? Where you going file it? Who has room?

MR. DAVIS: What price we pay for the clerk's problems.

MR. LOW: I don't know that is a problem, but say, okay, I want them filed. They say, well, it is going out the window down here when it gets full. I don't know whose problem it is, but it is a problem when you get boxes of stuff and you say, well, I will file it, and they say they are not going to do it, what are you going to do?

MR. BEARD: I don't want the public coming into my files before or after litigation and so we have to have a place where we can put it.

MR. SPARKS (SAN ANGELO): But I think Rusty's deal took care of Pat's complaint, didn't it.

MR. McMAINS: It took care of his complaint

because in order to protect it you have got to file it.

CHAIRMAN SOULES: Well, there has never been a second to the amendment and I don't have it written down really enough to read it back.

MR. SPARKS (SAN ANGELO): John has still got this pending.

CHAIRMAN SOULES: I know, but there was a motion to amend it. Is there any second to that motion?

MR. McCONNICO: I will second Rusty's, if that is what is here. I don't know what is on the floor.

CHAIRMAN SOULES: I believe that is what Rusty -- did you have --

MR. COLLINS: I haven't seen Rusty's, so I don't know what it is.

JUSTICE HECHT: Here it is right here.

MR. McMAINS: All I did was distinguish between discovery, really, in a pending case. The only discovery in a pending case that I had that was discloseable or that was subject to this rule regarding sealing is filed discovery, and it is filed discovery in a pending case, still a file of record, and it is part of a court record.

MR. DAVIS: 76(a) applies after final judgment as defined and not before.

MR. McMAINS: Then I just took out discovery in a pending case from the definition.

CHAIRMAN SOULES: Okay, here is Rusty's proposed amendment, and then he will deal with it. He proposes to deal with discovery differently in the new 166(b)(5)(d) and (e), and it is (d) and (e) that I don't have written down very well, but I got what you put down on (a)(2). And that was to strike the words "whether or not" that appear in the forth line and then add "after the state of Texas but does not" -- these words -- "but does not include discovery and the results of discovery in a pending case."

MR. COLLINS: Say that one more time, Luke.

CHAIRMAN SOULES: Let's go ahead and doctor it, and then I will read the whole thing.

MR. McMAINS: I am sorry, the results of discovery not filed of record in a pending case -- "but does not include discovery and results of discovery not filed of record in a pending case." Otherwise it is --

CHAIRMAN SOULES: Okay, so doctoring (a)(2) first, we would take out the words "whether or not," the first three words of the fourth line. I mean that is what this amendment proposes to do. And then add after the word "Texas" in the fifth line these words, "but does not include discovery and the results of discovery not filed of record in a pending case." If that is not an acceptable amendment to the main motion then I guess we need to vote on the

amendment.

MR. McMAINS: It is not acceptable in and of itself because it really is in combination with the others.

CHAIRMAN SOULES: If this passes, we would have to deal with discovery someplace else.

MR. McCONNICO: 166(b) proposal there.

MR. McMAINS: I can deal with all of that, fix all of the mechanics problemls, I think, by the combination of that plus the two sections to 166(b), which is a collection --

CHAIRMAN SOULES: Okay, any further discussion on the amendment? Essentially, it has been the same discussion all along. Anything new on that? Okay, on the amendment, those in favor, show by hands.

MR. COLLINS: If you don't mind, just read the full amendment. I still am not sure I have it all.

CHAIRMAN SOULES: Good idea. This would be the first sentence as amended if it passed.

"For purposes of this rule, the term court records shall include all documents and records filed of record, and discovery and the results of discovery filed of record in connection with any matter before any civil court in the state of Texas, but does not include discovery and the results of discovery not filed of record in a

pending case."

MR. COLLINS: I am not sure that makes too much sense.

MR. HERRING: Why don't you read it one more time.

CHAIRMAN SOULES: "For purposes of this rule, the term court record shall include all documents and records filed of record, and discovery and the results of discovery filed of record in connection with any matter before any civil court in the state of Texas, but does not include discovery and the results of discovery not filed of record in a pending case."

MR. EDGAR: What does the clause after state of Texas you just read add to what you read before that?

MR. McMAINS: Yes, I didn't --

MR. EDGAR: It seems if you just strike out the whether or not, you have taken care of it without adding that last clause or phrase or whatever it is.

CHAIRMAN SOULES: That is not my amendment.

MR. McMAINS: You mean just don't talk about the fact you are not dealing with pending cases or with unfiled discovery?

MR. SPIVEY: He said just knock out "whether or not" and leave it as is.

MR. EDGAR: Just eliminate the "whether or not," and haven't you taken care of what you are trying to achieve?

MR. McMAINS: Well, except that his argument is that it is a court record if it is in your possession. I realize that is not what our definition of court records is.

MR. EDGAR: Well, but you just said that it --

MR. McMAINS: "Filed of record." I mean his position is that if it is filed of record --

MR. EDGAR: -- isn't that right?

MR. McMAINS: See, the problem is, there is a difference in this language of court record. Going back to the other rule, it would work, going back to the original one because they talk about court records as being things filed with the clerk. Now, that is a limitation on what is filed. This one actually doesn't have such a limitation is the only reason I was trying to make it clear.

CHAIRMAN SOULES: Well, we have really got three things. Let me see if I can get three concepts.

All right, there are three different things. We have got discovery in a concluded case whether or not it is of record -- right? We are trying to deal with three different things. The first is discovery whether or not it is filed of record in a concluded case, then we have got discovery filed of record in a pending case, and then we have

got discovery not filed of record in a pending case because in a concluding case -- okay, so for purposes of this rule, court records -- this is, as I understand, the direction of the amendment.

> "Court records shall include all records filed of record and discovery and the results of discovery, whether or not filed of record in a concluded case, plus discovery filed of record in a pending case, but does not include discovery not filed of record in a pending case."

MR. DAVIS: His amendment does that.

CHAIRMAN SOULES: That is right, that is his amendment. Is that right, Rusty?

MR. McMAINS: Yes.

MR. BRANSON: Is that acceptable to you?

MR. COLLINS: No, it is not.

MR. McMAINS: My proposal, of course, includes the modifications for the discovery rule.

CHAIRMAN SOULES: And then you would go back and say that protective orders terminate when the case concludes?

MR. McMAINS: Yes. No protective order shall extend beyond -- no protective order or agreement relating to protecting disclosure shall extend beyond the signing of the final judgment or dispositive order without filing the

discovery or results of discovery with the clerk of the court and complying with Rule 76(a).

MR. SPARKS (SAN ANGELO): If you want to keep it protected, get it sealed.

MR. McMAINS: No protective order or agreement to protect will ever extend beyond the life of the case.

MR. SPARKS (SAN ANGELO): If you want it to go further, get it sealed.

MR. DAVIS: During the life of the case, it can't be protected without going through 76(a).

MR. McMAINS: Correct, with one exception I was attempting to write which was the R part to cover him.

CHAIRMAN SOULES: Public safety and public health.

MR. McMAINS: Yes, which I --

CHAIRMAN SOULES: Okay, all these concepts are together. So when we vote on this amendment up or down, if it is -- sir?

MR. SPIVEY: Could we take about a five or 10-minute recess and let's get that typed up and look at it because this is a rather important amendment.

CHAIRMAN SOULES: Sure. If you will write it down, I will have Holly type it up and we will print it and put copies around.

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

CHAIRMAN SOULES: Okay, this is 166(b)(5)(d) and (e) that Rusty proposes if we exempt from new 76(a) discovery in a pending case.

MR. McMAINS: Mr. Chairman, I, over the break talked, with John who has refused to accept my amendment to this resolution, but so -- his motion was already seconded when I interjected this. Why don't we vote on his, you know, if we beat that, then we can go to mine. Or if we pass it, then I will try and amend it again or something.

CHAIRMAN SOULES: Hold it just a minute and I will print your amendment so that everybody can look at that. We will have it printed.

MR. McMAINS: I, frankly, don't think that John cares about it.

CHAIRMAN SOULES: We will just vote on John's, save us the time, I guess.

JUSTICE PEEPLES: Can I say this: You know, we are proposing, by taking on discovery, proposing to take major -- make major change in the way discovery happens in Texas, and I just, I cannot, in good conscience, not speak out. That kind of change shouldn't happen on the basis of an afternoon's discussion.

Now, we have got a proposal from a subcommitee and I was on it, I was at one meeting. I missed another one, but there was all kinds of people that talked about these provisions, and I think it is a good product. Sometimes reform takes places one step at a time, and you are mistaken when you try to take many steps at once.

I think we ought to search our souls and decide whether to approve, basically, Locke Purnell and so forth without going on to discovery. Maybe let's take that step, and then if a year from now or later on we want to change discovery, we can do it having thought about it, but I think it is irresponsible of a committee with this much responsibility to make significant changes -- not just in sealed records but in the way discovery happens -- on the basis of one afternoon's discussion.

We really haven't thought this out the way we ought to, and I haven't heard a good answer to what I think it was Luke and McConnico said, that if you increase the stakes, once something is discovered, if the stakes are increased, you are going to make people fight a lot harder over what is discovered in the first place on the front end. And I have not heard a good answer from anybody about that. And I think we need to -- I am not moving to reconsider the decision to go into discovery, but I think we might want to think about that. I really do. Now, maybe I am the only one, but I just

cannot sit back and have us make this tremendous change in discovery on the basis of just a couple of three hours of discussion. I think it is irresponsible, I really do. That is it.

MR. EDGAR: While Holly is completing that, I sat here and, really, I haven't any ax to grind one way or the other because I am not involved in it at all. But I second Judge Peeples' concern here that I -- and I wholeheartedly agree with the philosophy that San Angelo Sam has expressed that the public concern, the helth and safety area, these things are very, very important. I am personally concerned that parties should not helter-skelter be able to agree to keep things secret when the public has a right to know.

But again, it seems to me that we frequently make decisions without full and fair and long studied consideration, and I am afraid that that is about what we are getting ready to do if we vote to include discovery as part of court records, and I agree that we should wait and think about this, go ahead and adopt the proposal that has been presented to us, study this some more, and then later on make the decision about whether discovery should be included.

CHAIRMAN SOULES: Elaine.

MS. CARLSON: I think I share the sentiments of Judge Peeples and Professor Edgar has expressed. I also

think there is something else to be considered, and that is when we have represented to the public that there is an opportunity for input from the bench or bar on the changes that are on the table, and this is a major modification. The implications are far-reaching in discovery, and we haven't had comment that and we have in other matters. I would also like to say I think a lot of what has been said seems to have sound philosophical root in the product liability, personal injury or environmental concerns. But I, too, share concerns in other kinds of litigation and the effect that this proposal would have in those other areas.

CHAIRMAN SOULES: Chuck, go ahead.

MR. HERRING: Let me just echo that because I don't want to do the job that I guess we were supposed to do and sit and do all the -- we have kind of been through this before, Lefty and I, repeatedly. I mean we have heard almost everything that we have heard today, except we don't really have anybody here from the intellectual property bar, and if you got the mailout that we did and you look under Tab I, you will find letter after letter after letter from the chairman of the intellectual property section of the state bar and from other practitioners who say if you do this, it may make sense -- a lot of sense -- and be the thing to do in some context, but if you do it in their practice, you are going to revolutionize their practice, and the revolution is going to

be one of increased litigation costs and increased numbers of hearings because they are going to be at the courthouse all the time because they are dealing with trade secrets, which trade secrets inherently, and I don't think that is the abuse John even wants to address, but I think that is a problem, and I am very reluctant to change somebody else's practice of law in a major, major way without really them having an impact on it at this point. I just want to make sure you know that that is their sentiment and they are going go to go through the roof if we do it this way without giving them some kind of relief on this. I just I want to make sure we have expressed that as clearly as we can.

MR. McMAINS: That is true with everything we passed so far, right?

MR. HERRING: More so with this, I mean the discovery. If you are going into discovery, that is a -- that is something, they are, they are just extremely intense on, and I think you put them at the courthouse every week in their practice, and they are going to be billing their clients for that, you are going to be increasing the cost of what they do for a living.

MR. DAVIS: Chuck, all these bad things that are going to happen, how do we know this?

MR. HERRING: I don't. I mean I don't -- I tried two trade secrets cases and have had had problems with

it, but I don't do it day in and day out as a steady living and a steady diet. And that is the problem, nobody else here does. And I just --

MR. JONES: What about Luke Soules, doesn't he?

MR. HERRING: No, Luke can talk to that.

MR. JONES: Steve?

MR. McCONNICO: Franklin, I don't do any trade secrets. The only involvement I have with anything that would impact on this is oil and gas, and I can tell you if any of your discovery where you go and you get someone else's logs, which they keep in highest confidence, or if you go and you get your petroleum, their reservoir analysis, which they keep in highest confidence, and then you -- and even at the Railroad Commission they have special procedures where reservoir engineers can see those and the other side cannot see them, and they have it set up there right now where they protect that. And if you get it where you cannot protect any of that information without going through all of the procedures that we have outlined earlier today, every oil and gas case that I can imagine being tried where you have either damage to a reservoir, drainage from that reservoir, or whatever, you are going to have to go through every one of the procedures that we have discussed here, and that is going to add a lot of expense and time. That is the only exposure

I have had to it.

MR. DAVIS: We are only referring to discovery that are discoverable. I mean those things that are protected and nondiscoverable have no application to that here.

MR. McCONNICO: But they are all discoverable. You can't try a reservoir damage case and say my reservoir has been damaged this amount showing what your reserves are. They are obviously going to be discoverable. What you try to do is to keep everyone else that is not involved in that litigation that has offsetting leases from finding all that information out because you have spent hundred of thousands of dollars sometimes collecting that information.

MR. DAVIS: That may be a reason for nondiscoverable, but if it is discoverable, then it is at least according to whatever studies and everything we are doing here. It should be public knowledge if the public wants it. I think we are --

MR. McCONNICO: We are not dealing with health, you know. That has no impact on the health of the public or anything like that.

MR. DAVIS: I just can't see a swarm of newspaper reporters and cameras suddenly coming in to everybody's office as soon as we pass this thing here.

MR. McCONNICO: You won't be.

MR. DAVIS: You are looking at extreme situations that are going to very rarely occur.

MR. McCONNICO: Newspaper people won't come. People that will come will be attorneys, other petroleum engineers and other geologists. Newspapers could care less.

MR. DAVIS: Well, maybe you can get an exclusion.

MR. McCONNICO: The problem is, you have got to make an exclusion for every type of practice that impacts on. I don't know anything about patents or trademarks.

CHAIRMAN SOULES: Well, of course -- Buddy Low. Excuse me.

MR. LOW: I tend to agree that it is a pretty good bite, however, we can't just cut it off there because we have got to state whether it does pertain to discovery or not.

In other words, if we just take the report and say it passed and it is open, it wouldn't pertain to discovery unless we so state because we have got to give a definition. I tend to like what Rusty said and I tend to agree with it, but I also know there is a lot I don't know about it and perhaps need further study, and maybe we could make some recommendations to a subcommittee to consider what Rusty says.

CHAIRMAN SOULES: What the newspapers through

their lawyers, the media lawyers, who have been in this fight for a long time, and the subcommittee that had held three full days of public hearings and heard everybody that wanted to come, and then another day where there was several hours of testimony before the Supreme Court down in the courtroom. What they all came up with and brought here was a rule that covered records filed in courts did not cover discovery at all.

MR. LOW: But see we have to define so that that draft doesn't include that if that is what we plan to do.

CHAIRMAN SOULES: They brought to us drafts that clearly did not include discovery.

MR. MORRIS: Luke, what if -- I mean I have heard Hadley and Elaine and Steve and everyone saying that the Tort cases or environment case or something like that is different, but what if we said, for purposes of this rule, "the term court records shall include all documents and records filed of record" and this is not artful wording, but then -- "and discovery and the results of discovery, whether or not filed of record pertaining to public health or safety out of the administration of public office." So that we are not getting off into some field where we accidently bump into something that we are not wanting to get into. In other words, we are just limiting the discovery that would have

knowledge of public health or safety or public administration.

CHAIRMAN SOULES: Steve.

MR. McCONNICO: Well, again, and it is kind of echoing what Chuck said. The problem that I see getting into that -- and I know absolutely nothing about patent and trademarks, don't know anything, but I do know that it seems that a lot of that is done in the health field. Then we get into somebody is trying to get a patent on a special vial, medical prosthesis, or some type of new drug or whatever. That has to do with health and science, that has to do with public welfare. And I think maybe what we are doing is we are stepping into another swamp that none of us here are really very familiar with, and we are trying to make a rule something that could have a lot of impact that we can't foresee. Do you understand what I am saying?

CHAIRMAN SOULES: Broadus Spivey.

MR. SPIVEY: I have been persuaded again by Luke. It appears to me that this has been studied, and studied thoroughly. Number one, I, personally, have a lot of reservations about it, but number two, addressing your problem whether it goes to health or what you are really talking about, (inaudible) or ideas. We are not -- we can't assume that either the Supreme Court is going to operate in a vaccuum or that a trial court is going to operate in a

vaccuum when it is confronted with an issue. If an issue has significant enough concerns about confidentiality that it ought to be brought before the judge, we have got -- there is a vehicle in this to do that.

What I am concerned about here is we are sitting here assuming that we have got a lot more power than we do. We are an advisory group. My recommendation is that we go back to the basics, as Willie and Wayland say, and take this -- what is it called -- take the Locke Purnell and then we will see what their firm does with that, by the way -- take the Locke Purnell idea, put the amendment that is talking about that is essential on it, get it on there and get it to the Supreme Court, let them mull it over, then we can blame Judge Hecht and Judge Doggett and the rest of the judges. But about all we can do is argue this. Our argument is of record. They have got to sense of our concerns about it. They know that there are other people that are concerned, and they can build into the rules special provisions if they want to. But I sure hate to be a, number one, negative influence, and number two, we have got a legislative mandate that we are looking down the throat of. I would rather take the study that has been done in the Locke Purnell revision than my own ideas of what is right. I recommend that we get it on the road and get it on up to the Supreme Court.

MR. McCONNICO: I agree with that with the changes we made in the Locke Purnell version this morning.

MR. BRANSON: You are not telling us the Supreme Court can change what we recommend?

CHAIRMAN SOULES: Sam Sparks.

MR. SPARKS (SAN ANGELO): You can call me El Paso Sam too, if you want to. I have got an office out there too. Down in Luckenbach too.

Let me tell you one of the problems that I have got that I see here. We are an advisory committee. Whatever we advise the Supreme Court doesn't mean it is going to get passed. They do that. We advise. We are in a position where we have got a legislative mandate. We are existing in a time and a place where the legal profession, and not just plaintiff lawyers, the legal profession is probably in its lowest esteem that it has ever been. One of the reasons is we hide things from the public that are not privileged to what should be public information. We don't really have open documents. We have been told do something with the sealing of documents, and we have got an extreme problem with it in the area of public health and safety because what plaintiffs lawyers are getting accused of is having information that is killing people, not divulging it so more people can get killed so they can have more cases. And I want to go on the record that I am in favor of doing away with that. I think

we owe an obligation to the community and society we live in to protect them from known harm somewhere down the road, and we are not meeting our obligation by stepping out on the edge of what is right and wrong and telling the Supreme Court how we feel about it if we duck and dodge and say, "Well, it is going to make my practice a little harder. I am going to have to work at discovery a little more." I think we are making a serious mistake, to ourselves, to our profession, and to the society we live in, if we don't recognize a responsibility and step out and tell the Supreme Court this is what we think at least when public health and safety is involved. And we better think about it pretty seriously before we dodge it. That is my feeling.

MR. BRANSON: Sam, you ought to pass the hat after this.

MR. DAVIS: Have a vote.

MR. SPARKS (SAN ANGELO): Well, I am not going to have any cases.

MR. SPIVEY: Before somebody else goes into a long-winded tyrade, why don't we vote?

CHAIRMAN SOULES: What are we going to vote on, whether we put discovery in or not put discovery in.

MR. McMAINS: That is John's --

MR. DAVIS: The motion before us is the adoption of this (2)(a)(2).

CHAIRMAN SOULES: Okay.

CHAIRMAN SOULES: All in favor show hands. One, two, three, four, five, six, seven. Opposed, show hands. One, two, three, four, five, six, seven, eight, nine, 10, 11. It fails 11 to seven.

MR. DAVIS: Now we have the amendment, McMains' proposed amendment.

JUSTICE PEEPLES: Luke, I want to move to table until some time further the extension of the sealed records Locke Purnell proposal to discovery.

CHAIRMAN SOULES: Motion tabled, seconded. Not available. Those in favor say "Aye." Opposed? All right, I will have to see a show of hands on that. Let me see a show of hands on that. Those who are in favor of tabling the question of discovery in new 76(a) for further discussion.

MR. DAVIS: In effect, what you are doing is you are adopting their proposal that says that discovery is not in there.

CHAIRMAN SOULES: Not debatable. I need a show of hands. Show of hands. How many agree to table? One, two, three, four, five, six, seven, eight, nine, 10, 11. Those who oppose the motion to table. One, two, three, four, five, six, seven, eight, nine. Motion to table carries 11 to nine. And that then takes care of Rusty's motions

except to deliver them to Steve McConnico's subcommittee for work and development, and if you will be a special member ever that subcommittee, Rusty, I will appreciate.

MR. SPARKS (SAN ANGELO): We had already passed one motion, Luke, that was to the effect that the discovery was included. Now, can you table something that has already been passed? I don't know parliamentary procedure.

CHAIRMAN SOULES: We have got another important part of this, though, that is in the legislative mandate. The legislative mandate is silent on discovery. The legislative mandate is expressed on settlements, and we need to get that done today because I know the committee has voted to adjourn tomorrow at noon. That is going to be pretty hard to do because that means our 1989 work product will never get a final pass. And I guess we won't have a report for the Court after working for a year because we can't get that done in three or four hours in the morning. So unless you are willing to stay here all day tomorrow, we are not going to have a report to the Supreme Court on a hard year's work.

MR. BRANSON: Mr. Chairman, I think we voted on that this morning.

CHAIRMAN SOULES: You did. I would like to persuade you to change your mind and work with us tomorrow to

help get a report to the Court because we can't get one any other way.

MR. BRANSON: It was a unanimous vote this morning.

CHAIRMAN SOUERS: Well, it was not a unanimous vote. There have already been some people that expressed to me that they saw they were beat and didn't vote. Anyway settlements. The Court needs our help. We have a responsibility when we sit on this Committee to do our work for the court, and they want this out -- they want this back by Friday, two weeks from today. I am going to do everything I can to meet that choice whether anybody else does or not. That is my job as chairman. I want it on the record. And I will send a report from the Chair on what I think should be done with public comment, whether I have your help or not, whether -- if I do not have your help. If I have your help, I will send to the court a report from the Committee. But I will have a report to the court two weeks from today, as I have been asked to do.

Okay, next is settlement.

MR. JONES: What time do you propose to adjourn tonight?

CHAIRMAN SOUERS: When we get done with this settlement discussion is when we are going to adjourn.

MR. McMAINS: I move we exclude settlements.

CHAIRMAN SOULES: Now, that is a way to deal with it. I don't mean that facetiously. I mean I think that addresses the legislative mandate to discuss it and decide whether or not to include.

We have got settlement agreements filed of record. I think there are three kinds of settlement agreements. This came up in the hearing. Settlement agreements not filed of record reached contractually between the parties where the case ends with a judgment that doesn't even speak to there being a settlement agreement, nonsuit, take nothing, whatever. So that is just a contractual settlement agreement with private releases, not brought to the court's consideration.

Second is a settlement agreement which gets court activity approval made the judgment of the court, whatever those recitations are, where it really is not placed in the file.

MR. SPARKS (SAN ANGELO): Premises.

CHAIRMAN SOULES: It is a side deal, but the Court, in its order, speaks about it. It says the parties have settled the case, the court approves the settlement and dismisses with prejudice, or something else, something like that. There is something else something like that.

And then there is the settlement agreement that gets filed of record and gets acted on somehow. The 76(a) as

we passed it here already takes care of the last one where that agreements itself in full text is filed of record or some memorandum of it, then a memorandum. But we have not addressed a situation where the agreement is not filed of record, either discussed by the court, or you can't find anything about it. Those are the two things that we need to bring up. Rusty -- there may be something more than that.

MR. McMAINS: The thing is that I don't agree that we were really voting on whether or not settlement agreements filed of record should be included.

CHAIRMAN SOULES: Well, they are.

MR. McMAINS: I understand -- well, I understand that until we take them out.

CHAIRMAN SOULES: Okay.

MR. McMAINS: The point is that they can be taken out real easily.

CHAIRMAN SOULES: Yes, true.

MR. McMAINS: And of having to comply with this rule. And there are numerous problems with regards to the sealing, or inability to seal with any kind of ease, settlements that I think are of much more consequence than most of it.

CHAIRMAN SOULES: Chuck, do you and Lefty have a report of some kind on this point?

MR. HERRING: Tell you what, there is a draft

circulating around here that just refers to it. The discussion in the committee was there was presentation from a number of plaintiffs lawyers who said, look, you know, we agreed to seal settlement agreements because we settled for an amount and we are not in a negotiating position at that point with our client, vis-a-vis the defendant, to agree not to conceal or have confidential certain settlements agreements or terms.

There was a competing body that argued that part of the policy of the law is to encourage settlements, and we need to do that, and if you can't have private parties contracting privately to agree not to disclose settlement agreements, you are going to discourage settlements. You are going to make it hard to settle the small cases that maybe other nuisance cases or small settlement cases a defendant can afford to settle if they are not going to have everybody else come out of the woodwork to file a similar but basically frivolous case against them. And there are lots of other reasons people talked about as to when they have used settlements in the past, and I think there was a pretty good debate on the issue, but we concluded that settlement agreements, at least those that are not filed, were not included, should not be included.

Initially, when Tom and John McElhaney drew up the rule, the first draft, they understood the settlement

agreements that were not filed would not be covered. And Representative Orlando Garcia, who authored the bill, came and said to us it just wasn't clear or maybe they should be included. It wasn't just an absolute no you don't have them in there. So he kind of left the issue open from his own individual legislative intent perspective, whatever that is worth.

The language of the statute, as you see, is not entirely unambiguous. It says,

"The records in a civil case, including settlements, should be sealed."

That is what you are supposed to determine the rule for. Well, are they records in a civil case to start off with if they are not filed? That is pretty much the input we have got, I guess. Lefty, do you have anything to add?

MR. MORRIS: I think that is about it.

CHAIRMAN SOULES: Okay, nothing else, Lefty, on that. Frank.

MR. BRANSON: The argument that it encourages settlement of frivolous lawsuits, I find disquieting as a plaintiffs lawyers. Frivolous lawsuits -- we passed a rule here to discourage filing frivolous lawsuits. There are penalties in the rules now for the defendant to come forward when frivolous lawsuits are filed. I don't want to do anything to encourage them, and people who are filing them

ought to have to try the things. And to not address settlements when we are addressing so much other public need would really be abandoning our duties and responsibilities here.

If products or other matters are injuring people and maiming people and killing people and manufacturers are acknowledging that by way of compromise settlements, then that should be known to the rest of the public who may well be buying that product, or who may well be injured by that product and not know about it -- about the cause of their injury. Or if it is a physician who has a drug or alcohol problem who is injuring it, that should be known too so his patients can avoid treatment by that physician until he gets treatment or she gets treatment. And the efforts by the defense -- I won't say the defense bar -- but the defense community, the manufacturers and the medical community, to quiet the plaintiffs who they have been injured by buying their (inaudible), historically puts the plaintiffs lawyer in exactly the same ethical conflict that Sam Sparks was describing earlier. All such agreements, in my opinion, should be void as against public policy. And I think there is absolutely no reason to exclude them from the conduct of this Committee or the actions of the Supreme Court.

MR. DAVIS: Luke.

CHAIRMAN SOULES: Tom Davis.

MR. DAVIS: I move that we add to, as Paragraph (a)(2), I believe we decided on the Purnell draft, the following language under Court record.

"For purposes of this rule, the term court records includes settlement agreements whether or not filed of record."

MR. BRANSON: Second.

CHAIRMAN SOULES: Okay, a motion has been made and seconded. Discussion.

MR. McCONNICO: Could I hear it again? I am sorry.

CHAIRMAN SOULES: The motion is that --

MR. DAVIS: "The term court records includes settlement agreements whether or not filed of record."

CHAIRMAN SOULES: Discussion.

MR. LOW: I have one question.

CHAIRMAN SOULES: Everybody have the motion in their mind? It has been made and seconded. Buddy Low.

MR. LOW: I have a question. There is a difference in saying I have never entered in one where I didn't say they settled, they paid me. The thing is how much. You know, and I have had a number -- I don't have a lot of big clients or anything, but I have had a number of them that did not want somebody knowing how much money they got, so insurance people, salesmen, real estate people would

be hounding them. So it works the other way around. I just settled one the other day, and they don't want nobody to know what they got. And I just feel they ought to have that privacy.

MR. McMAINS: You also have divorce cases, paternity suits and judgments, agreements. There are all kinds of agreements that are entered into, and one of the greatest problems in a lot of the commercial area, if you are dealing with publicly-traded corporations is when it is that you are talking about this thing applying because basically what you are doing is putting in another step of going and getting a temporary sealing order. And the problem is, once you do that, you have got to put notice of something. What is your temporary sealing order, when you have got a proposed judgment? You are not sure that the judge is going to sign off on to it. You have got to propose settlement in an SEC traded trade case, and you are not ready to disclose it. I have had that come up three times this year, and we don't even tell the judge why we are postponing a particular proceeding while we are working on the settlement documents because it cannot -- because their SEC lawyers have told them they are in serious jeopardy even if it leaks out through him.

There are enumerable reasons to seal settlement documents, and when the parties agree to seal settlement

documents to the extent that they should have the power to do so, in terms of amounts, whether they are amounts paid, the fact of settlement, is a different issue.

Now, I have a problem with the idea of you got an order saying the case is settled. That ought to be known. People ought to be able to know that when the order itself is actually entered. But the agreement itself may well have a lot of things in it that there is just absolutely no reason to be jumping through these hoops. And that is in 90 percent of the cases other than personal injury is absolutely true, and not just at the insistence of defendants. It is at the insistence of 90 percent of my clients on the plaintiff's side in the non-PI hearings. And I just -- I feel that is a very, very serious error to make you jump through these hoops with regards to trying to resolve something amicably by a settlement and you run afoul of so many different problems.

I think, in fact, that there may well be a legality problem with the federal law in some of it with regards to the SEC and certain other proceedings. You can violate consent decrees or with regards to certain disclosures and things. There are just enumerable hassles here.

And the notion that, well, then just don't file it of record, that will fix. Of course, they are usurping that by saying, well, you can go get anybody's settlement, go find out what all is in it. It doesn't make any difference. Just

go ask for it, which, again, invades my office trying to find out what my settlement agreements are and how I structured them and how my particular work product is done so that they don't have to go through the hassle of drafting. They can go find somebody else who has done it and did it a particular way and they worked it and it worked for them, And so you can just go see somebody else's work product. Well, that is hogwash, and I don't see that there is absolutely any interest whatsoever that either the press, or certainly that any other lawyers had, with regards to knowing the details of any particular settlement agreements. I do not think that is at the same level with with regards to public disclosure.

CHAIRMAN SOULES: Sam Sparks-El Paso.

MR. SPARKS (EL PASO): You know, there are a lot of reasons to settle. Sometimes it is not totally on the merits of the plaintiff's case. You can have two cases going on at the same part of the country and you can't get the witnesses. There are just lots of reasons that you end up settling the case. It may mean the difference of paying a certain amount of money. And all that doesn't go into a settlement agreement. And the silliest things I have seen in the last couple of years, particularly in the medical malpractice cases, are summary judgments which are not anymore valid than a man in the moon when you get an agreed summary judgment entered and take a little release for there

not to be an appeal to avoid that, or you take some long judgment that the doctor never did do anything wrong but the insurance company wants to pay and that type of thing. And I don't think you get the true picture in settlement agreements anyway. I don't see that just getting the settlement agreement is going to be of any public benefit. I agree with Rusty. I don't see the applicability to settlement agreements.

MR. MORRIS: Luke, I am back to where I was a little earlier. It seems to me like what we are really trying to deal with is settlement agreements that restrict public access to information pertained in matters of public health or safety or malfeasance in office, just for lack of a better word.

I mean it seems to me like that that is where, as a matter of public policy, we shouldn't be a party to sealing up information as to how much or somebody's paternity things or any of that information, I agree with you, Russ, but I think that we need to deal with -- and I think -- because I don't think we did it, and I am disappointed, frankly, with what we ended up doing a minute ago on discovery because I don't think we did the right thing with regard to public health and safety and the administration of public office. And I think we ought to let the Supreme Court -- at least give them the recommendation. They may decide they don't

agree with us. But at least give them the recommendation that on settlement agreements that will restrict public access to matters pertaining to public health or safety, the administration of public office, that that is something that we should recommend an action that they take. Because I think that is really the evil we are trying to get to. We are trying to not hide things that are learned in the peoples' courts that could hurt them. And we ought to not even be the least bit bashful about just recommending that to the Court. But as far as opening up our offices into private things involving private litigants or oil companies that are private matters, the hard work they have done for years, that they ought to be entitled to just by getting in litigation. Sometimes you can't help it, you get sued. That shouldn't mean it exposes all your stuff. But we need to cut with a razor and excise the evil and deal with it. And I think we ought to do it right here on settlements.

UNIDENTIFIED SPEAKER: Was that an amendment?

MR. MORRIS: Well, I didn't -- what is the motion?

MR. DAVIS: The motion was the term court records can include settlement agreements whether or not filed of record.

MR. MORRIS: Well, okay, then, "that restrict public access to information pertaining to matters of public

health or safety or the administration of public office."

MR. DAVIS: Accept the amendment.

MR. EDGAR: You mean "and" rather than "or."

MR. MORRIS: Okay, "and." Those are two things that we ought not be able to hide.

MR. McMAINS: You are talking about whether those are filed of record or not?

MR. MORRIS: Yes.

MR. McMAINS: I am not sure, though, that in this context because of what has been done, you then go back to the mechanical problem. What do you do with the ones that ain't in the record?

MR. MORRIS: Well, there has got to be a mechanism where it -- let's say that, you know, the Dallas Morning News or the Austin American-Statesman decides that they want to invoke this rule that we are working on, then we can surely come up with a mechanism where those documents are transmitted to the court to be reviewed -- they are going to be reviewed in the hearing by the court anyway. They are going to be taken over there for the judge to look at before the determination is made, Russ. That isn't -- I don't want people trucking through my office, but that is no reason to hide from a responsibility that we have on these two important areas.

MR. BEARD: If the settlement agreement just

says they are going to pay a million dollars --

MR. MORRIS: If you want to exclude sums, let's just specifically say "excluding sums of money."

MR. BEARD: Let me make sure. I am agreeing to do certain corrective matters, or what is it you want to --

MR. MORRIS: Okay, all I am doing is this: And I think that that is all that this this says. It doesn't say they know how much -- how much money, it doesn't say they get to know something about paternity. It just says on matters that -- where the settlement restricts public access to information pertaining to public health or safety of the administration of public office.

MR. McMAINS: No. My question, though, is does that put a duty upon the trial judge before entering -- let's say that the parties are both adults, they are both entering an out of court settlement. Would the agreement being out of court to tendering to the judge a document that only reflects a dismissal or taking nothing or whatever. Does this impose a duty on the judge to find out whether or not --

MR. MORRIS: I don't think so. I don't envision it that way. I have thought it through, but, to me, it doesn't. But what it does allow us to do is to hide something that is clearly in this vital, significant, you

know, area, these two areas.

MR. McMAINS: Well, I am just thinking about in terms of the judges, though, if, you know, the power of the press, because if there is some controversial figure that has been indicted or whatever and they have some kind of -- or, you know, there is something going on, accused of stealing and done in a civil context and they go and solve the thing with a take nothing judgment, the judge doesn't find out what the deal is. The press over there goes to the judge and says, well, what is the deal, and the judge says, well, I don't know, it is none of my business. He is liable to get pretty well reemed by the press just --

MR. MORRIS: We are not changing the settlement procedure.

CHAIRMAN SOULES: But this is whether or not filed of record, right? Let me see if I have got it. You are saying -- is this the essence of it -- that the rule about sealing court records shall not apply to settlement agreements, except settlement agreements made in cases involving public health and safety or malfeasance in public office, whether or not filed of record.

MR. MORRIS: Yes. That is not exactly how I would ultimately end up wanting to word it, but that is what I am saying.

CHAIRMAN SOULES: Okay. That is open to

discussion. That is the motion.

MR. MORRIS: That is my amendment.

MR. DAVIS: Amendment is acceptable to replace the original motion.

JUSTICE PEEPLES: If there is an argument against that, I would like to hear it.

MR. DAVIS: Just a minute, you may.

CHAIRMAN SOULES: Steve McConnico and then Bill.

MR. McCONNICO: I don't have an argument against it, but I don't know if we are talking about something that really isn't a problem because Rule 166(b), I guess now we are saying the parties can't ever agree to it and it is separate, but Rule 166(b) as it is now you can discover all settlement agreements. There is no question that they are discoverable. And 166(b), I don't know if that doesn't solve our problem with it being its present status.

MR. MORRIS: We just got through for one thing voting that discoverable stuff doesn't matter.

MR. McCONNICO: Well, doesn't come under this, and that is what I am saying because under Rule 166(b) -- where this is going to come up is you want to see all of the settlement agreements that GM has entered into in a like case, right? That is where it is going to come up. Okay, under 166(b) that says you can discover those settlement

agreements. Now, if the parties say this is confidential and it is between us and no one else, I don't know if they can get around that by 166(b) saying they are discoverable because parties can't agree to make something nondiscoverable. You understand what I am saying?

MR. DAVIS: It can be discoverable and still protected.

MR. SPARKS (SAN ANGELO): How about the situation where somebody comes to me and they said they are going to pay you a million dollars but you have to give the money back if you ever tell what you got it for -- cancer causing agent, something of that nature. I am talking about public health and safety. They got a problem, they just don't want anybody else to know about it so they don't ever want to have to pay. So you go to your client and you say this is the deal they have made, you know, pretty good sum for what you have got wrong with you. But you have got to promise to keep it quiet because that really is what we are talking about should we make void those type of settlements.

MR. McCONNICO: And I don't have any problem with those being void. All I am saying is then you get back to what Sam Sparks was talking about earlier, from El Paso, they are going to structure and draft settlement agreements where they are really meaningless. So all you are going to

discover is settlement documents that are full of a bunch of meaning rhetoric.

MR. SPARKS (SAN ANGELO): But when a newspaper reporter walks into my office and says, you know, we have discovered you settled here for something, now what did you settle for? Well, they were causing cancer out here and they paid a million dollars for it because they really got a problem. The public ought to know about it. I don't want to have to pay the money back to them.

MR. McCONNICO: That is the point we are talking about.

MR. McMAINS: You would agree as long as you get to keep the money.

MR. SPARKS (SAN ANGELO): I think this is the public's access to information that is safety and health. It is hurting them out there, Steve. That was the whole point about the discovery rules too.

MR. McCONNICO: I think you can solve that without saying that all of these have to be filed of record and they are all part of the record in the case, completely discoverable by anybody who comes by us.

CHAIRMAN SOULES: Bill Dorsaneo. He had something to respond, I think.

MR. DORSANEO: It is really a small point if you end up saying that what we are concerned about is

concealing information, then the information isn't -- is that what you are after?

MR. MORRIS: Yes, only the information that is of a public nature, Bill.

MR. DORSANEO: But it won't be in the settlement agreement. So you are back to discovery, effectively.

MR. MORRIS: I said "restricting public access." Of course, sometimes in a settlement agreement, you do make as part -- if it is not in writing somewhere, I guess then there is no restriction on you, but I think that the Supreme Court should be able to tell the lawyers of the state you are operating under the courts paid for by the peoples' taxes that we are not going to let you restrict public access to these two vital areas of information.

MR. DORSANEO: All I am saying is that is not going to be in the settlement agreements.

MR. O'QUINN: The answer to that is is what they make us agree to, Bill.

MR. SPARKS (SAN ANGELO): That is right.

MR. O'QUINN: Not only will we not let them read the four corners of the documents, but we won't even talk to them about what happened.

MR. MORRIS: Right.

MR. O'QUINN: Is trying to get to both points,

I think.

MR. SPARKS (SAN ANGELO): Any agreement that restricts public access to these areas is void.

MR. MORRIS: It doesn't say it is void. That is not the issue.

CHAIRMAN SOULES: Lefty, read me your words again slow so I can write them down here. Here is the proposition. All right, the proposition is --

MR. MORRIS: "The term court records also includes settlement agreements whether or not" --

CHAIRMAN SOULES: Hold it right there.

MR. MORRIS: -- "filed of record" --.

CHAIRMAN SOULES: Okay.

MR. MORRIS: -- "which restricts public access to information" -- make that "matters" -- "to matters concerning public health or safety or to information concerning the administration of public office."

MR. McMAINS: I have a question.

CHAIRMAN SOULES: Okay, what is the question?

MR. McMAINS: One verifying question. Is the function of this proposal and amendment to make settlement agreements otherwise not discoverable?

MR. MORRIS: Yes. No, not -- we are not dealing with discovery here. We are dealing with --

MR. McMAINS: I don't mean discoverable, I

mean subject to this rule. What I am getting at is you say that court records mean -- court records already is defined to cover filed settlement documents. It is filed settlement documents, in part, that I want to seal. So you have got to take them out. You have got one step further to go if you are going to cover -- if you are going to put that in but take the filed settlement documents out.

MR. MORRIS: Well, I don't think you are -- in other words, I just said "whether or not filed" in my defintion, and which would mean that is the new definition as pertaining to the settlements of what court records --

CHAIRMAN SOULES: May we add this sentence, Rusty, may we add this sentence to meet your concern and will Lefty accept it. We will just expressly say "otherwise, the term court records does not include settlement agreements whether or not filed of record."

MR. MORRIS: Yes.

CHAIRMAN SOULES: That is okay.

MR. MORRIS: That is what I am trying to get.

MR. McMAINS: That is what I thought you were getting at, but it is not --

MR. BRANSON: How is that again? I didn't follow you.

CHAIRMAN SOULES: All right, if --

"the term court record also includes

settlement agreements, whether or not filed of record, which restrict public access to matters concerning public health and safety, or to information concerning the administration of public office; otherwise, the term court record does not include settlement agreements whether or not filed of record," is the whole text.

MR. MORRIS: I think that is fine.

CHAIRMAN SOULES: Okay, any opposition to that?

MR. SPARKS (SAN ANGELO): Aren't you trying to say the term does not include settlement agreements excpet those affecting public health and safety, which --

CHAIRMAN SOULES: I will have Holly type this tomorrow, and if we want to reverse the grammar -- all right, is the consensus that we do it this way or not.

MR. TINDALL: A more forecful way of saying it, it does not include, unless it affects public health and safety.

MR. BRANSON: We are talking now about settlement agreements where, historically, the defendant has said okay, I am going to pay this amount of money, and the plaintiff has said, okay, I will take it and will not disseminate the information."

CHAIRMAN SOULES: Yes.

MR. BRANSON: We are not doing anything, I hope -- and let me make sure I understand it, that would encourage a defendant to be able to come in and ask a court to seal this settlement, or the amount of it or anything about it, without the plaintiff's agreement. Is that correct?

CHAIRMAN SOULES: That is correct.

JUSTICE PEEPLES: We are talking about the document itself or something more?

CHAIRMAN SOULES: We are saying that an agreement.

JUSTICE PEEPLES: I mean the real document that has the terms.

CHAIRMAN SOULES: That is not the end of it.

JUSTICE PEEPLES: Okay.

CHAIRMAN SOULES: If the document -- the document may be discoverable, or may not be sealed, but also the any agreement -- that is right, any -- we are talking about a record, okay, you can't seal a record -- you can't seal a record that restricts access to information that includes an agreement that restricts access to information about these things.

MR. MORRIS: Those two things.

CHAIRMAN SOULES: Okay, any opposition to that? All right, that will stand then passed by unanimity,

if we want to reverse the orders so that it says it doesn't include settlement agreements except these -- we will work that out tomorrow with subcommittee and get it in the draft.

We will stand then adjourned until 8:30 unless you-all want to start at 8 or 7:30 -- what time do you want to start? Right o'clock.

(At this time the hearing recessed at 5:40 p.m., to reconvene on Saturday, February 10th, 1990, at 8 o'clock a.m.)