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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 20, 1995

(MORNING SESSION)

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Taken before D'Lois Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of January, A.D., 1995, between the hours of 8:35 o'clock a.m. and 12:20 p.m. at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

JANUARY 20, 1995 MEETING

MEMBERS PRESENT:

Luther H. Soules III
Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Michael Gallagher
Anne Gardner
Mike Hatchell
Tommy Jacks
Franklin Jones, Jr.
Thomas Leatherbury
Harriett Miers
Paula Sweeney

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
David B. Jackson
Hon. Doris Lange
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Kenneth Law
Doyle Curry
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
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PROFESSOR DORSANEO: I'm going to go ahead and call the meeting to order. The Chair is occupied this morning with a CLE presentation, so I am going to be the chair for the appellate rules part of this, which I hope we can bring to a close fairly rapidly.

We had intended to have two handouts for you, but only one of them has been completely Xeroxed as of this moment. So we will work from that one until the other one gets here. The one that I am talking about that you have in front of you is the redrafted cumulative report dated January 19, 1995.

HONORABLE C. A. GUITTARD: What about this other one? Is it handed out?

PROFESSOR DORSANEO: Not here yet.

HONORABLE C. A. GUITTARD: Not here.

PROFESSOR DORSANEO: We have to cover this morning, and I hope quickly this morning, some things that we talked about at length previously and some things that we haven't given full committee treatment that the combined committees on appellate rules

were directed to draft at the last Supreme Court Advisory meeting. We will start out with those matters that haven't been previously considered in any draft form and see how we can proceed with respect to them. The first one is in Rule 5, computation of time on page --

HONORABLE C. A. GUITTARD: Four.

PROFESSOR DORSANEO: -- 5. Rule 5 begins on page 4, but on page 5 of the cumulative report you will see a provision concerning bankruptcy. The concept is a simple one. Basically if any party to the trial court's final judgment has filed a petition in bankruptcy our Texas Appellate Rules are recommended to provide that all time periods are suspended until the appellate court reinstates the case. The first sentence of 5(g), there is a companion Rule 19. The first sentence of Rule 5(g) provides simply that the filing of bankruptcy suspends everything until the court reinstates the case or a severance is ordered as provided in Rule 19(g)(6), which we will get to in a minute.

The suspension operates as provided in the second sentence. The reinstatement starts the clock all over again, and the period that we would be concerned with runs for the entire period such that if there was a 30-day time period to do something once the case is reinstated there is a 30-day time period to do that. Not some shorter period depending upon some more complicated calculation.

Pursuant to Rusty McMains' suggestion we have a third sentence in this 5(g) providing that if somebody files something during the period of suspension it's deemed to be filed after the suspension period is eliminated by the order of reinstatement or severance, and in an effort to be completely clear the sentence also provides it's not considered to be ineffective merely because it was filed during the suspension period or prematurely.

Now, this possibly runs into some bankruptcy difficulty, but we think that it does not. We think it would be appropriate for the Texas Supreme Court to say that it counts as of the time when the Texas courts are authorized to act, regardless of whether

it was filed prematurely during the period of suspension during which period it had no effect. Okay.

The second paragraph talks about notice or suggestions of bankruptcy. It doesn't fit neatly in this Appellate Rule 5, but it didn't fit neatly in Appellate Rule 19 either, and this is just simply in there such that someone will give the court notice that there is a bankruptcy, and what it contains is, you know, self-explanatory. Now, when you flip over to 19 --

HONORABLE C. A. GUITTARD: Just a minute, Bill.

PROFESSOR DORSANEO: Yeah.

HONORABLE C. A. GUITTARD: This 5(g), it seems to apply only where you have a voluntary petition. Does it not also apply for an involuntary petition or when a creditor has filed bankruptcy?

PROFESSOR DORSANEO: I guess we probably should say if the case in an appellate court involves a party who has filed or against whom a bankruptcy petition --

HONORABLE C. A. GUITTARD:

Yeah.

PROFESSOR DORSANEO: -- has been filed. That's a glitch. We need to clear that up to make sure it applies to both voluntary and involuntary petitions.

HONORABLE C. A. GUITTARD: Yeah.

PROFESSOR DORSANEO: We can do that. Now, 19, embraces the same concept that --

HONORABLE C. A. GUITTARD: 19(g)(6)?

PROFESSOR DORSANEO: -- is in 5. If you will look on page 15 to 19(g)(6), it's self-explanatory. In a case that's suspended under Rule 5(g), any party may move the court of appeals to reinstate the appeal, and there are basically three circumstances for doing that. The stay is expired under federal law, the stay has been lifted by the bankruptcy court, or the motion to reinstate can be simply based on the ground that the appeal actually has not been stayed under federal law; and that involves a lot of complex issues of federal law as to whether or

not there is a stay or there isn't a stay, and we finessed those by not dealing with them.

Okay. The rest is mechanical except for the reference to severance, which is slightly more substantive in a case decided by the Texas Supreme Court. The Hood case that's in the notes following Appellate Rule 5's draft on page 5, there is a strong suggestion that there can be a severing out of the bankrupt party, and this will solve most difficulties. This rule provides in addition to the concept of reinstatement as a general concept that any party to the appeal other than the bankrupt party may move to severe the appeal with respect to the bankrupt party and to reinstate the appeal with respect to the other parties.

With respect to the severance motion the combined committee concluded that this motion needs to show that the case is severable and that proceeding with the appeal will not adversely affect the bankrupt party or the bankruptcy estate. So we would be talking about both Texas law and federal law. So the combined committee has been through this. When I say combined committee I mean the State

Bar of Texas Section Committee and the subcommittee of the SCAC, and I move the adoption of paragraphs 5(g) and 19(g)(6). Discussion?

MS. BARON: Bill, I just ask for one clarification. I think reading (g), 5(g), it's unclear that it begins on the date the petition is filed, that the time of suspension begins on that date. I know it's implicit, but I'm not sure it's stated. You could argue that it would stem from the time of notice, which I know doesn't work with a bankruptcy stay.

PROFESSOR DORSANEO: Okay. So you would recommend that we add after the word "suspended" in the third line --

MS. BARON: Yes.

PROFESSOR DORSANEO: -- "from the date the petition is filed."

MS. BARON: Yes. Uh-huh.

PROFESSOR DORSANEO: We will accept that.

HONORABLE C. A. GUITTARD: Okay.

PROFESSOR DORSANEO: Any other

discussion? Rusty.

MR. MCMAINS: I recognize that these are the, quote, "appellate rules," but what our rule says is "if a case in an appellate court." So is this confined to once the appeal is perfected? That is to say it is actually in the appellate court, that it -- has the record been filed or --

PROFESSOR DORSANEO: Well, I would interpret it from the date that the appeal was perfected even though nothing is --

MR. MCMAINS: Yeah. The problem is it says "in cases in an appellate court," and that's kind of a nebulous term. I really hadn't thought about it at the time because in truth and in fact the appellate courts don't know it exists until somebody files something in the appellate.

HONORABLE C. A. GUITTARD: The question is does it suspend the time for filing a notice of appeal?

MR. MCMAINS: That's correct. Well, that's an issue, too, because it talks about -- it says, "any period specified in these rules for commencing or continuing an

appeal."

PROFESSOR DORSANEO: Uh-huh.

MR. MCMAINS: But it starts from the first part saying, "if a case in an appellate court involves the party." So this rule actually in substance contemplates that you ain't there yet but you're going there.

PROFESSOR DORSANEO: We are just going to take out the words "in an appellate court." Now, I just took them out. They're gone. They shouldn't have been there. If we are going to talk about commencing or continuing an appeal we don't need those words.

Now, the larger issue we are going to -- Judge Guittard has made up a list, which we are not going to pass out here today, of all of the rules that we have been dealing with in the appellate rules that need companion rules or that might need companion rules in the civil procedure rules, and this is one of them.

HONORABLE C. A. GUITTARD: There might even be a feasible general rules that apply to both.

PROFESSOR DORSANEO: Yes.

HONORABLE C. A. GUITTARD: Including service and the bankruptcy and a number of other rules, computation of time, for instance, that might apply to both, have a section like that, and then have separate trial and appellate rules, but that's to be considered later.

PROFESSOR DORSANEO: Which would look quite a bit like what we used to have.

MR. MCMAINS: Well, the problem, though, that once you take out "the appellate court" your suspension doesn't -- I mean, everything that you do to get out of the suspension or whatever appears to be directed to the appellate court. Now, if you're saying that you're entitled to file this in the trial court, as I think is what you're trying to say, before you actually even have to commence an appeal why is it that you have to -- how can you go to an appellate court before an appeal has been perfected in order to avoid the suspension?

MS. BARON: Well, Rusty, you

already do go to the appellate court before the appeal is perfected if you need an extension of time on your statement of facts or your transcript. I guess --

MR. MCMAINS: I'm talking about the notice of appeal.

MS. BARON: The notice to begin with?

MR. MCMAINS: Yeah. This rule covers, it says, "All times specified in these rules for commencing," right?

MS. BARON: Well, I think --

MR. MCMAINS: "Or continuing an appeal," and you commence an appeal with an action in the trial court with the act of perfecting, and until that's done I don't think that the appellate court has any jurisdiction to issue an order.

HONORABLE C. A. GUITTARD: Unless we say so.

PROFESSOR DORSANEO: Well, the Judge just said, "unless we say so."

MS. BARON: Right. I mean, would the appellate court have jurisdiction to give you additional time to file your notice

of appeal if you filed a motion for extension on that, or would you take -- is there no such thing?

MR. MCMAINS: Yes. There is a motion for extension on filing a late notice of appeal.

MS. BARON: Well, I mean, this is like a motion for extension of time. It's a motion for extension of time because there is bankruptcy. I mean, I don't know why there is necessarily jurisdictional problems.

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest that if the suspension takes place under the rule that it takes place even though the appellate court has no jurisdiction to declare so, so that if a notice of appeal is filed out of time but if the rule is applied, it would be within time. Then the party filing the notice of appeal or any other party could file this suggestion of bankruptcy and the appeal, notice of appeal, would be considered in time. So I don't see any problem here.

PROFESSOR DORSANEO: Does that answer your question?

MR. MCMAINS: Well --

PROFESSOR DORSANEO: We have to articulate it.

MR. MCMAINS: I mean, I think we drafted this rule with the expectation that the case was perfected, to me.

HONORABLE C. A. GUITTARD: Not necessarily.

MR. MCMAINS: And I realize that there is a parallel rule, and we are going to have to deal with the rule in the trial courts, but one thing that we have and that our jurisprudence distinguishes is the mere fact that you have perfected the appeal does not mean that you have -- because you can do so early, does not mean the trial court has divested jurisdiction, and clearly I think what we are intending to do and a parallel provision would intend to do is basically give the trial court the -- because we are talking about probably suspending its plenary power as well.

HONORABLE C. A. GUITTARD: Well, the trial court doesn't have to act because, as I said, if the period is extended

because of this rule you can file your notice of appeal, and the appellate court can then act.

MR. MCMAINS: Okay. I am not talking now just about perfecting the appeal. I am talking about the plenary power issue of the trial court.

HONORABLE C. A. GUITTARD: Well, that's a matter to be put in the parallel trial rule.

MR. MCMAINS: Yes. But what you're saying is the procedure that we are trying to devise, this appears to say that even before you have commenced an appeal that it is the appellate court that will tell the trial court that it has jurisdiction, and I don't know that that's the office of the appellate court to tell the trial court whether it has or doesn't have jurisdiction or order of suspension of the periods of time that we are talking about.

HONORABLE C. A. GUITTARD: The trial court doesn't order a suspension. The appellate court doesn't order a suspension. The suspension takes place automatically.

PROFESSOR DORSANEO: And what's suspended is the --

MR. MCMAINS: But I'm not talking about -- let's not talk about ordering a suspension. How does the trial court know that it or determine that it does have jurisdiction to continue considering, for instance, a motion for new trial?

HONORABLE C. A. GUITTARD: Well, that's up to the trial court's rules.

PROFESSOR DORSANEO: What you're saying is we need to draft a trial court rule before we can vote on this, we can consider that, and go on to the next rule. We don't need this rule in here at all in order to get the appellate rules project done, and I don't want to spend more than about two or three more minutes on it. I want to decide either to do it, to draft a trial court rule and come back later and try to get it all sorted out, or to do nothing at all because we do need to get to the discovery rules.

Now, these are all good points that people have made, and we are not going to be able to get all the ins and outs of what

happens in the trial court worked out until we draft the trial court rules. All this is intended to do is to be, frankly, a little better than the local rules that have been adopted by some courts like the Dallas court and to advance the ball a little bit. Not that the Dallas court rule is bad. We used it as a model. So what's your pleasure?

MS. BARON: I move we adopt it. In Austin if you -- the court takes the view that the time periods are still running even though they refuse to file things, which is an impossibility.

PROFESSOR DORSANEO: Hmmm. Well, the only suggestion I would make in addition to based on Rusty's, you know, sound comments, we perhaps ought to say in the second paragraph where you file this notice or suggestion of bankruptcy, and until we draft a trial court rule I am going to say -- I would prefer to say you file it in the trial court and in the court of appeals. Both in the trial court and in the appellate court.

HONORABLE C. A. GUITTARD: We can talk about that later.

PROFESSOR DORSANEO: Huh?

HONORABLE C. A. GUITTARD: We can talk about that later.

HONORABLE SARAH DUNCAN: Just go ahead and stick it in.

PROFESSOR DORSANEO: Huh?

HONORABLE SARAH DUNCAN: There are going to be instances where the trial court does have jurisdiction even though an appeal has been perfected.

HONORABLE C. A. GUITTARD: Sure.

HONORABLE SARAH DUNCAN: So let's just file it in both. I mean, it can't be more than two pages.

PROFESSOR DORSANEO: Yeah. Right.

HONORABLE SARAH DUNCAN: Actually it could be but...

MR. HUNT: What would be wrong with 19(6) simply saying "move the court having jurisdiction"?

PROFESSOR DORSANEO: Well, because both courts will have jurisdiction.

MR. HUNT: Well, potentially.

PROFESSOR DORSANEO: And that involves a lot of complex thinking. Why should we bother? Why not just file them both places?

MR. HUNT: Yeah.

PROFESSOR DORSANEO: And let everybody figure out what all that means.

MR. MCMAINS: Well, see, I don't -- what I was really getting at is and what you're saying the way this rule operates now -- and I understand what you're saying is that if we file in the appellate court that we have suspended jurisdiction of the trial court automatically until the court of appeals orders otherwise.

PROFESSOR DORSANEO: No. It doesn't say that at all. It says in the first sentence, "All time periods specified in these rules for commencing or continuing an appeal are suspended." Anything that's going on in the trial court is up to some other law. It may or may not be stayed under federal law. The assumption that most trial courts make, I think, is that they are stayed.

MR. MCMAINS: Well, the time

periods, the way that you determine the commencement of any of the time periods for doing the appeal is by what's going on in the trial court, and so when you say that it's "suspended until" then I guess you are doing just that because what you're saying is you have automatically extended the trial court's jurisdiction.

HONORABLE C. A. GUITTARD: That's right.

PROFESSOR DORSANEO: No. But the trial court's jurisdiction timetable is not dependent. The two timetables run simultaneously. They are not dependent timetables.

HONORABLE C. A. GUITTARD: You are not extending the time for the trial court to act because the trial court doesn't have to act. You are simply extending the period.

PROFESSOR DORSANEO: It only is going to affect the trial court in some sense of an appellate timetable theoretically being applicable before a judgment, which is purely theoretical, and I'm thinking of a case where there is a judgment, and the more normal case

will be the case where somebody doesn't perfect the appeal, in my experience. That will be the case that will be the most problematic. It won't be an appeal that's been filed and then there will be a bankruptcy. The bankruptcy will occur right after the judgment. Huh?

And under this rule there is nothing suspended in the trial court at all by this rule, but the appellate timetable is suspended until the court of appeals says, "Go," and that's the whole concept.

Let's vote. All those in favor. Against? Okay. I didn't get the number of votes, but it was unanimous in terms of the number of people voting.

All right. I'm going to ask Judge Guittard to talk about the next one, and I believe now we have the separate handout if everybody has one. It may make it a little easier to follow. It is on page 3 of the separate handout. Rule 18, duties of appellate court clerk, and on the main January 19th report it's on page 13. Judge.

HONORABLE C. A. GUITTARD: Look

on this page 3 of the supplemental handout Rule 18. I think we have already passed on subdivision (a). Subdivision (6), the problem there is the present rule says the clerk is not authorized to allow papers to be taken from his office without an agreement or order and that after the case is finally disposed of the papers shall not be taken from the clerk's office. Now, that has caused some problems in some cases. After the case is over in the appellate court there may be some cases in which it may be important to take the transcript down to the trial court for some sort of evidentiary reason, or it may be you want to use those papers in the same appellate court to -- instead of reproducing them for a subsequent appeal or something like that, so that there is no real sense in saying that the papers shall not be taken out of the clerk's office after the decision, after the case is disposed of.

So subdivision (6) would strike out the language of the present rule and say in effect -- and say, as shown here, subdivision (6), "after its decision" and that is whether

or not it's disposed of finally or not as if that would apply either in a time when an application of writ of error might be prepared or after disposition. "After its decision the appellate court or one of its justices may allow papers to be withdrawn from the clerk's office on written agreement of the parties or on motions showing reasonable grounds. The order permitting withdrawal shall include such directions and conditions as may be required to ensure preservation and return of the papers withdrawn."

Subdivision (7) is a -- comes from rule, what? Rule 14, I believe it is, which says the duty of the clerk to account, and the reason for putting it here is because this is a general rule, 18, duties of the appellate court clerk. So it makes sense to put the duty of the clerk to account in this same rule. So that's added. Now, so the caption of subdivision (7) has been omitted. It should read as does Rule 14, "Clerk's duty to account," and the first sentence there, "Transcripts and other papers in cases finally disposed of shall not be taken from the

clerk's office." That's out. Strike that.

HONORABLE SARAH DUNCAN: That first sentence?

HONORABLE C. A. GUITTARD: Yeah. That first sentence is not applicable. So that's the recommendation of the combined committee, and I move its adoption.

PROFESSOR DORSANEO: Discussion? All those in favor please raise your hand. All those opposed? It's approved. We have already done 19 so that takes us to 22.

Now, public access to appellate court records. Of course, you are familiar with the Rule 76(a). There is no companion appellate rule. Tom Leatherbury who was involved in the drafting of 76(a), at least preliminary drafts of it, recommended to the Supreme Court Advisory Committee that we have a companion appellate rule. It's not altogether clear that we need a companion appellate rule, but we were directed to draft one, and we did.

Now, this rule is a relatively simple rule in most respects. The first thing it says is that opinions and final judgments and

orders made by an appellate court are subject to public access, and that's it. Period. Okay. With respect to court records the matter is a little more complicated in this draft. The idea is that everything filed or presented for filing in an appellate court, okay, is in play for consideration as to there being public access or not to it and subject to the following exceptions: Public access is restricted by law, the documents were ordered sealed by the trial judge, or there was some other order restricting access to them by the trial court.

The third one, the documents, papers have been filed with the trial court or in an appellate court in camera for the purpose of obtaining a ruling on the discoverability of the documents. Now, this third one, to talk about it here for a second, wouldn't really be necessary because the second one would cover it. All right. Except for the fact that it's not completely clear in our jurisprudence that you must file something in camera in the trial court in order to claim that it is not discoverable in an appellate proceeding where

that issue is being evaluated.

There are cases where things were not filed in camera in the trial court but they are filed for the first time in camera in the appellate court, whether those cases are cases reflecting good procedure or even procedure that's available we are not taking a position on, but we are recognizing that they exist here. Then fourth one, which is perhaps more problematic, these are documents that have not been sealed in the trial court. They are not subject to paragraph 3, but public access to them ought to be restricted because of their character, and the standard in (a) and (b) is the same standard in Rule 76(a). The interest advanced is a specific, serious, and substantial interest that outweighs any probable adverse effect, with a little extra kicker in (b). "If public access is to be denied, no less restrictive means than sealing the records will adequately and effectively protect the specific interest asserted."

Okay. Just talking generally this gives the appellate court some opportunity to consider whether something should be sealed

even though the trial court has never done anything, okay, with respect to the matter. If that's done, the appellate court may refer any motion to the trial court with instructions to hear evidence and grant relief as may be appropriate. The appellate court may also instruct the trial court to make findings and report them with recommendations to the appellate court.

So in most respects this rule tries to be as consistent as it can be with 76(a). One major conceptual difference is actually, I think, a flaw with 76(a). It defines some things as being filed as not being court records, which no doubt makes the clerks' business somewhat difficult, when you have to evaluate which things in the records are records to begin with. So the committee moves the adoption of this rule for inclusion in the appellate rules. Joe.

MR. LATTING: I'm just thinking.

PROFESSOR DORSANEO: All right.

MR. BABCOCK: I have got a question, Bill. Chip Babcock. What

circumstance would exist where a document piece of evidence and exhibit would be admitted into public record in the trial court and thereafter would be appropriate for sealing in the appellate court? I mean, once it's in the public record, you know, the cat's out of the bag so to speak. How could there ever be a circumstance where something that has been admitted into evidence without being sealed, been relied upon by the fact finder in some fashion to render his or her decision, I don't see why (4) should be in here. I don't see any circumstance where (4) would be appropriate.

MR. LATTING: I have got an answer to that one. That was one of the things I was thinking about because maybe the cat was out of the bag, but nobody knew it was out of the bag and no damage has been done, and it's time to get it back in the bag. For example, you have some very highly sensitive piece of trade secret information that was introduced in the trial court and relied on, but no one realized that it was there, and then at some point to the horror of one of the

litigants he realizes that this is in the public record, and now it's in the appellate court and wants to protect it. That would be one situation.

HONRABLE ANN COCHRAN: Well, but I mean, it would still be down in the trial court, too. You would still have to go -- if you really wanted to put it back in the bag, you would have to go back to the trial court, too. It's not like the only copy of that exhibit is going to the court of appeals. So you would still be back to the first scenario.

MR. BABCOCK: And it seems to me that it's the trial court that is the more appropriate place for that issue to be raised.

HONORABLE ANN COCHRAN: Uh-huh.

PROFESSOR DORSANEO: Well, actually that's the way it would probably work here; although, I understand exactly what you're saying. I mean, this rule was drafted more when I drafted it from the standpoint of being a rule that clerks could use to decide, you know, whether they are supposed to show something to somebody who shows up and says,

"I want to see it."

MR. LATTING: Bill, a concern I have about this is that 76(a) got so much -- there was so much discussion and controversy about it I would feel more comfortable before we pass this if we have time to hear from -- or to advertise our interest in this and to request from the Bar any comments that interested parties might have because I'm just not sure what the stakes are here.

PROFESSOR DORSANEO: Are you moving to table?

MR. LATTING: Yeah. I would feel better about that. Unless we're just sure that this is routine. I'm not sure what we are doing exactly, and I am afraid of the law of unintended consequences.

MR. BABCOCK: Well, I don't think what we are doing here, with the exception of (b)(4), is dramatic at all. I think 76(a), certain features of most of it is constitutionally compelled, and I think (a), (b), (1), (2), and (3) probably is too. There is certainly nothing controversial about

saying opinions, judgments, and orders are always public records because they are. I mean, there is no question about that, and it seems to me that all you're doing is in (b) giving an appellate court, not the clerk but the court, some opportunity to review under a certain standard whether something ought to be sealed.

PROFESSOR DORSANEO: Uh-huh. Well, if Joe has withdrawn his motion to table, you know, we could do (1), (2), (3), you know, (1), (2), or (3), and it will work fine as a rule that addresses almost all of the issues.

MR. HERRING: What happens -- and maybe Chip could answer. What happens if someone files a motion on appeal, and there are documents that should be sealed in that connection, and respondent wants them -- I mean, what covers it if you delete (4)?

MR. BABCOCK: There is a motion that is --

MR. HERRING: A motion that has something attached to it that the opposing party feels should be sealed, how is it

handled if you delete (4)?

MR. BABCOCK: Well, it seems to me its handled by (3), the documents, papers or other items have been filed in the trial court or in an appellate court in camera for the purpose of obtaining a ruling.

MR. HERRING: No. They didn't file it. The movant didn't want it sealed, didn't file it in camera. The respondent party is who wants it sealed.

MS. BARON: Bill?

PROFESSOR DORSANEO: Uh-huh.

MS. BARON: This has actually happened in the Wells vs. Kirk case. The videotapes, someone filed a public notice saying, "We want to check them out and copy them," and what happened was that the court gave the parties an opportunity to go to the trial court on a motion to seal, and I think that would probably be the better procedure.

MR. BABCOCK: Yeah. Procedurally that's how it ought to work.

MS. BARON: If you're going to have an evidentiary hearing, the appellate court really can't do it.

MR. HERRING: Of course, the Texas Supreme Court has entered emergency sealing orders on occasion outside of 76(a).

MS. BARON: Well, in a mandamus action is what you're saying.

MR. LATTING: Bill, can you think of any heart groups that are likely to be against this rule?

PROFESSOR DORSANEO: Yeah. I think any of the newspapers are against any sealing rule of any kind.

MR. LATTING: Then I want to make a motion to table then. I want to give the opposition time to articulate its opposition.

HONORABLE C. A. GUITTARD: Wouldn't Charles Babcock be in a position to do that?

MR. BABCOCK: Yeah. I think I can articulate the media's response to this. The media was very involved, and Tom Leatherbury was and I was, too, in 76(a), and I think the media would have no objections to (a), (b), (1), (2), and (3); and frankly, on (4) if we can think of circumstances where

there may be a need for it, then fine; but I just question whether or not that's ever going to come up; and as Ann says, the appropriate place for it to be resolved is in the trial court which it ordinarily is, always is.

MR. HERRING: Well, I'm not sure I agree with that, though. What if you have a motion that's filed on appeal and it does not deal with the trial court issue, it deals with an appellate issue, and there is attached to the motion something that the other side wants to be sealed. Are we going to send that back down to the trial court to have some kind of hearing about whether that document filed only with respect to the appellate record should be sealed?

MS. BARON: Well, I think you're talking about --

HONORABLE ANN COCHRAN: Well, it seems to me that whether -- you know, I mean, clearly (1), (2), and (3) are okay. The question is just what to do about the other one. If instead of (4), which I think does have problems because it doesn't give the same -- (4) is not the same standard as 76(a)

for the trial court to do nothing. That's where if we're going to start having a new standard, we are going to have to redo the whole 76(a) side. If instead of (4) we had a paragraph that said that, you know, if there is a motion to, you know, seal something that -- or to deny public access to something that was never presented in the trial court, that the appellate court can either specifically remand that issue to the trial court for a Rule 76(a) hearing, and all of the Rule 76 will apply, or the appellate court can decide to hold that hearing itself. I mean, so leave the question of the propriety of who to hear it as long as we don't start trying to rewrite 76(a). That's where the problem is.

MR. LATTING: That's what bothers me.

HONORABLE ANN COCHRAN: So if you say in (4) in this instance if something happens that the trial court never had an opportunity to see the document, and then the appellate court can decide whether the trial court or the appellate court is the appropriate forum for the hearing, but as long

as the hearing will then incorporate all the provisions of 76(a) then I don't think we would have to refight anything.

MR. BABCOCK: Yeah. I think that makes sense.

PROFESSOR DORSANEO: How is the standard different in (4)?

HONORABLE ANN COCHRAN: Well, you don't have all of the language about the presumption of openness that I know that people with all the first amendment concerns and, you know, access to the courts concerns really fought for every word of that, and every word that's in 76(a) that's not in (4) is going to be litigated from here to kingdom come.

MR. MCMAINS: There is actually a procedure, is there not, in 76(a) for --

HONORABLE ANN COCHRAN: Uh-huh. There is a whole procedure --

MR. HERRING: Not all of that procedure is going to be applicable if the appellate court holds the hearing.

MR. MCMAINS: Well, that's what I was --

HONORABLE ANN COCHRAN: I think they have to give notice. I think they have to post and all that.

MR. HERRING: You well may want them to, but you can't do it if you leave that rule. It doesn't translate exactly because it's in the trial court. It doesn't refer to the court of appeals. You need to make appropriate changes just for the court's --

HONORABLE ANN COCHRAN: Or at least just say that references to the trial court --

MR. HERRING: Yeah. Something like that.

HONORABLE ANN COCHRAN: -- can mean if the appellate court wants to hold the hearing itself. I mean, you could do it without having to reiterate the entire rule.

PROFESSOR DORSANEO: Well, we can't probably draft it here. So let's decide whether we are going to do (1), (2), and (3). (1), (2), (3), you know, (4) seems to be drawing a lot of criticism, understandably, or go back to the drawing board on this.

MR. LATTING: I don't know how

to put this, whether it's a motion to table or just an observation, but it seems to me that before we depart at all substantively from Rule 76 --

PROFESSOR DORSANEO: (a).

MR. LATTING: -- (a), that we ought to think through that very carefully, and so I think that this rule either ought to be as best we can make it an appropriate appellate version of Rule 76(a) without any substantive change. I don't think we ought to pass part of it and --

PROFESSOR DORSANEO: Well, there is in my view no substantive change except Judge Cochran's remarks are accurate that it doesn't use exactly the same language, and it's not as detailed. If you tried to incorporate Rule 76(a) the way it is written into the appellate rules, I would be in favor of it not being here at all because it's a terribly drafted rule, and it needs to be redrafted, and that's where the work needs to be done, and this is much better. Okay. But, you know, that is the rule. So...

MR. YELENOSKY: But if we are

going to draft it better here then we can draft it better there. They should conform to one another. So why can't we just reference 76(a), and if we change 76(a), fine.

MR. LATTING: That's fine. That's my feeling of what we should do so we don't have -- because, as Ann says, if you have different language in the two courts you know that there is going to be -- they are going to say they didn't do it just because they were lazy when, in fact --

HONORABLE ANN COCHRAN: I mean, they are going to say they did this because they agreed with us the way we wished 76(a) to be written.

MR. LATTING: That's right. That's right.

PROFESSOR DORSANEO: Well, let's decide what to do here. Somebody move something.

HONORABLE C. A. GUITTARD: I move that we adopt the rule with (b)(1), (2), and (3), reserve (4) for further study, and that this rule as other appellate rules be coordinated with the trial rules, along with

others.

MR. BABCOCK: Second that motion.

PROFESSOR DORSANEO: Now, let me ask you, Judge, do we need (c) if we do that, public access restricted by law?

HONORABLE SARAH DUNCAN: We still need (c).

PROFESSOR DORSANEO: Ordered sealed and filed?

HONORABLE SARAH DUNCAN: I think we still need (c).

PROFESSOR DORSANEO: Still need (c)?

HONORABLE SARAH DUNCAN: We haven't foreclosed a party's ability to file a motion to seal, and if it were referred back to the trial court for an evidentiary hearing, one would assume they would follow 76(a).

PROFESSOR DORSANEO: All right.

HONORABLE SARAH DUNCAN: But we at least need the opportunity to --

HONORABLE ANN COCHRAN: I think the only problem with (c) as it's written now is it says, you know, "with instructions to

hear evidence and grant relief as may be appropriate," which opens up the whole bag of worms about is this just sort of a -- you know, however you feel like deciding it, or I mean, that implicates 76(a). If you just say "as appropriate" that takes away all the procedural safeguards of 76(a).

PROFESSOR DORSANEO: Well, how about if we do this. How about if we just say, "An appellate court may refer any motion to seal court records to the trial court," and I am reluctant to say, "in accordance with Civil Procedure Rule 76(a)," but after I go read it that might work. Huh?

HONORABLE ANN COCHRAN: Yeah.

MR. HERRING: Yeah.

PROFESSOR DORSANEO: All right. All those in favor?

MR. LATTING: Question. As I understand it, what we are doing here is we are not passing this rule. We are passing it with the proviso that our business is unfinished with it. This is just part of it we are addressing and with the explicit --

PROFESSOR DORSANEO: We are

passing (a), (1), (2), (3), leaving out (4), and changing (c) to refer back to the trial court.

MR. LATTING: Well, that's not quite what -- that doesn't quite get me there. Are we also saying that until we deal with the question of (4) that our business with this rule is not finished?

PROFESSOR DORSANEO: We are saying that, but it's going into the book because nothing is ever finished.

MR. LATTING: The spirit that I -- well, all right. I mean --

PROFESSOR DORSANEO: Well, let's vote.

MR. HERRING: Well, no. Let's be clear. Joe's got a good point. Are you saying we are going to adopt a rule that just has three parts, and we are not going to deal with the fourth part? I understood the judge to say we are going to study the fourth part and then there will be a recommendation that comes back, and we will deal with the remainder of the rule.

HONORABLE SARAH DUNCAN: I

don't think we have time to do that. It's my understanding that the Supreme Court wants this report in January, and I heard the other day that they may even go into effect September 1st. So we don't have -- we don't have additional time, I don't think, insofar as getting these into the rules that will be before the Supreme Court.

PROFESSOR DORSANEO: Well, let's do this. Let's take a vote. How many think that (4) needs to be taken out along with the language in (c) that talks about hearings and findings and findings of fact? All of those please raise your --

HONORABLE ANN COCHRAN: Hold on.

MR. HERRING: Wait a minute now. What are you saying? You are going to have a rule that just has the first three parts and deletes (4) and deletes (c) completely and has no provision on that?

PROFESSOR DORSANEO: For now. Yeah.

HONORABLE SARAH DUNCAN: No. Wait. You are going to leave the first

sentence of (c), aren't you?

PROFESSOR DORSANEO: Yes. The first sentence of (c) but the part about evidence and findings --

HONORABLE ANN COCHRAN: Without any -- you mean leave first sentence (c) in or not?

PROFESSOR DORSANEO: Leave the first line of (c). "An appellate court may refer any motion to seal court records to the trial court." With or without "in accordance with Civil Procedure Rule 76(a)."

HONORABLE ANN COCHRAN: It would say that, "with or without"?

PROFESSOR DORSANEO: No.

HONORABLE ANN COCHRAN: I mean, it would be trial court, period, with nothing about what the procedure would be if they didn't?

PROFESSOR DORSANEO: Or if we go back and look, and I think we could all do it. Look at 76(a) and say, yeah, they will do -- what the trial court will do is 76(a), which is probably right.

HONORABLE ANN COCHRAN: Yeah.

MS. BARON: Yes.

PROFESSOR DORSANEO: And they can refer to that.

MR. LATTING: Well, this sounds to me like we are voting on a DC-7, and we are going to decide whether or not to deal with the landing gear at some point in the future, and I don't think it ought to be taking off before we do that because we are not through with this rule.

PROFESSOR DORSANEO: All right. But the thing is the more appropriate analogy is we have something already in the air, and we are going to decide whether it's going to crash or if it's going to land some of the -- crash all of the time or land some of the time.

MR. YELENOSKY: We have before sent things back to subcommittee saying make this conform to the Rules of Civil Procedure.

PROFESSOR DORSANEO: Okay. Joe, I will entertain your motion to table now. Do you move to table?

MR. LATTING: Yes. I move to table.

PROFESSOR DORSANEO: All of those in favor?

HONORABLE ANN COCHRAN: What are we tabling? The whole thing?

PROFESSOR DORSANEO: The whole thing.

MR. LATTING: Yeah. I'm going to vote for my own motion.

MR. HERRING: What are you waiting for? A vote?

PROFESSOR DORSANEO: Yeah. All those in favor of putting this off until later.

HONORABLE C. A. GUITTARD: The whole thing.

PROFESSOR DORSANEO: The whole thing. Raise your hand. Okay. All those opposed? Okay. Keep talking.

HONORABLE ANN COCHRAN: Well, I mean, I think the one thing we didn't vote about is, you know, who's in favor of, you know, spending 20 minutes to see if we can fix it now. I mean, I don't think it -- it might not turn out to be that complicated.

PROFESSOR DORSANEO: Steve.

MR. YELENOSKY: I just move that we write it with reference back to 76(a), and if people want to battle about 76(a), we battle about that. So I move that we adopt it, I guess, the first parts that we are not arguing about, and the part that we are arguing about, that it refer as the judge suggested back to 76(a) either to be determined by the trial court or the appellate court.

HONORABLE ANN COCHRAN: If I could, I think, make precise what I think your motion is.

MR. YELENOSKY: Okay.

HONORABLE ANN COCHRAN: It's that we adopt everything through (b)(3), delete (4), and then (5), we would delete the words "as may be appropriate" and substitute the phrase "in accordance with Rule 76(a), Texas Rules of Civil Procedure."

PROFESSOR DORSANEO: And delete the last sentence, too?

HONORABLE ANN COCHRAN: Yes.

MR. HERRING: Well, of course, then we have a rule that is more restrictive

than 76(a) which allows the sealing of court records if there is a specific, serious, and substantial interest which clearly outweighs, et cetera.

HONORABLE ANN COCHRAN: This would be deleting (4) altogether.

MR. HERRING: I understand. So we now have a rule that is more restrictive than 76(a).

MR. BABCOCK: Why?

MR. HERRING: Because 76(a) allows the sealing of court records if there is a specific, serious, and substantial interest which clearly outweighs the presumption of openness, et cetera. We don't have a provision like that at all. So now we have written a rule that's inconsistent with 76(a). Further, we don't have a procedure if we do it this way that tells you how to do it if it's on appeal. We say you may refer it back to the trial court, but we don't say how an appellate court handles it. Does the appellate court -- or do you have to go through the notice provisions of paragraph 3 of 76(a) or not? Do you have the hearing and

intervention procedures of 76(a) applicable if an appellate court has the hearing? We have just kind of left that up in space. We have no answer.

MR. BABCOCK: What if -- Chuck, would it solve your problem if in (c) -- and I'm thinking outloud here, but would it solve your problem if (c) said, "An appellate court may refer any motion to seal court records to the trial court in accordance with Rule 76(a) or may itself determine any motion to seal court records in accordance with Rule 76(a)"?

MR. HERRING: That might help, but I'm not sure, and like Bill I haven't had the time to go back and see exactly how you would do it. Are we going to have a notice that is posted at the county courthouse? Are we going to have a hearing in open court, allow intervention in the appellate court for that purpose, and have the time and place of the hearing in the notice?

HONORABLE ANN COCHRAN: Uh-huh.

MR. HERRING: Are we going to have all of those provisions applicable to the appellate court hearing?

MR. BABCOCK: Yeah.

HONORABLE ANN COCHRAN: Uh-huh.

MR. YELENOSKY: Well, let me answer that since it's my motion. I guess, yes. I think the proposal is and the reason for the proposal is if we don't do that, I think we have a real -- we need to give an opportunity for the opposition to make -- have the very same fight they would have over 76(a).

PROFESSOR DORSANEO: Why? If this stuff is all in the trial court all I'm trying to do here is protect --

MR. HERRING: Some of it's not.

MR. YELENOSKY: Well, some of it's not, and Chuck's pointed that out.

MS. BARON: In an original proceeding I think is what Chuck's talking about.

MR. BABCOCK: And Chuck, I mean, I suppose there could be circumstances, but the reasons that drive 76(a) are no less compelling in an appellate court than they are in the trial court. We are talking about materials that are being presented to a

governmental body where the governmental body is being asked to make a decision based on those materials, and if those materials are going to be sealed, then there has to be very strict procedures and standards by which they are sealed, and people like the media or public citizens groups or anybody else who has an interest in that decision-making process ought to have a right to come in and be heard.

PROFESSOR DORSANEO: I would still like to know what we are talking about. If it's -- 76(a) talks about things being court records that are not filed. Okay. That's where the fight is about largely.

MR. BABCOCK: We are talking about unfiled discovery is where the fight is in 76(a).

PROFESSOR DORSANEO: Unfiled discovery meaning unfiled, I didn't get that discovery, normally. Right?

MR. BABCOCK: No.

HONORABLE ANN COCHRAN: Not always. No.

MR. LATTING: No. No.

MR. BABCOCK: Usually not.

Usually not, but anyway that is rarely going to be at issue in the appellate court. In fact, I can't imagine it would ever be an issue in the appellate court.

MR. MCMAINS: But you have a --

HONORABLE SARAH DUNCAN: Well, I can actually imagine where it would be.

MR. HERRING: I don't disagree we ought to have a procedure that's consistent, but are we really going to have to post a notice that says what time the court of appeals hearing is going to be, a public hearing is going to be, and the place where the hearing is going to be? Are appellate courts set up to do that right now? So before you file your motion you could have a notice that you have obtained an evidentiary hearing setting in the appellate court for a 76(a) hearing. If we are going to do that to the appellate court, that's okay, but it seems to me we ought to think about whether that procedure translates precisely from what we would have to do in the trial court to what we would have to do in the appellate court.

HONORABLE ANN COCHRAN: I think

that at this point in time, I mean, those notice provisions are so -- I mean, Rule 76(a) rotates around the public notice and opportunity that will be in the provisions, that if we think it -- and this is perhaps one way to sort of move the issue along and to have a rule that has landing gear on it but also with some identified areas that we may need to work on this, basically to say that until we can work out and have the, you know, opportunity for the people interested in 76(a) to come talk about it on the appellate level that it might be appropriate just to limit these new documents and sealing disputes over those to a remand to the trial court, who really is set up to have those hearings and say that what we are going to reserve for later when we end up with all of this extra time on our hands after we finish this big task the question of a 76(a) rule to allow the appellate court itself to hold the hearing.

MR. HERRING: So in the interim all hearings would have to be at the trial court level. There could not be a hearing for 76(a) at the appellate court level?

HONORABLE ANN COCHRAN: I mean, it seems to me where we are going is that the real sticking point is the procedures for having the appellate courts do it, and the things that we think would be problems for the appellate courts are the ones that will make the 76(a) proponents go absolutely nuts if we mess with them, that maybe in the interest of having a deadline and trying to meet it and move things along that might -- I'm just laying it out as one thing that might work as a practical solution to the dilemma.

SHARON MCCAULLY: And then under those circumstances can't we eliminate all reference to any of the court documents and just rely on the first set of procedures and say any motion to seal can be referred to the trial court for handling in accordance with 76(a)?

MR. YELENOSKY: Or shall be.

SHARON MCCAULLY: Shall be. Uh-huh.

MR. LATTING: Well, does that mean that an appellate court does not have the inherent power to hold a hearing for itself if

somebody files a new motion in the appellate court, files a motion there to seal the documents, never having appeared in the trial court, and the court of appeals has to, has to, refer that back to a district court, cannot have a hearing.

MR. YELENOSKY: Well, Chuck is suggesting that they won't want to hold those hearings. They are not set up for them, and unless we are going to figure out the way to set them up for it then maybe we don't have any choice.

PROFESSOR DORSANEO: I think that's right. They are not going to want to have any of these.

MR. YELENOSKY: Right.

PROFESSOR DORSANEO: None of these hearings will ever occur in the appellate court, whatever this rule says, unless it says they have to.

MR. LATTING: Well, if we make it against the rules for them to occur there, they certainly won't, and that's the issue, is whether we ought to have them available.

PROFESSOR DORSANEO: Well, what

I am hearing people say, Chuck Herring wants to put something in there like (4) with or without all of the 76(a) hoopla, and Judge Cochran wants to leave (4) out and stick with her proposal, and that's both sides of the argument. I think we are ready to vote one way or the other. So I am going to ask Judge Cochran to restate her proposal.

HONORABLE ANN COCHRAN: That was my clarification.

MR. YELENOSKY: You can go ahead. That was your motion. She started it.

PROFESSOR DORSANEO: Which I understood to be (1), (2), and (3), leave out (4) and change (c) either by only leaving the first line or by leaving the first line together with instructions to hear evidence and grant relief in accordance with Civil Procedure Rule 76(a).

HONORABLE ANN COCHRAN: No. If I can restate what I think the proposal is for (c). "An appellate court shall refer any motion to seal court records to the trial court for proceedings in accordance with Rule 76(a)."

PROFESSOR DORSANEO: All right.

MR. HERRING: But you don't mean the substantive standard because you have deleted the provision in 76(a) which would allow you to seal court records.

HONORABLE ANN COCHRAN: I haven't deleted any provision in 76(a).

MR. HERRING: Yeah.

HONORABLE ANN COCHRAN: I am saying that the entire proceeding would be in accordance with 76(1), which includes the standard for whether to seal or not.

MR. HERRING: Well, then why do you have (b)(1), (2), and (3) because those are taken care of in 76(a)? All you are deleting is (4), which also is taken care of in 76(a).

HONORABLE ANN COCHRAN: No. Two are ones that -- (2) and (3) are ones that the trial court has already handled them in accordance with the Texas Rules of Civil Procedure. Okay. This is for any new document. You have already had motions to seal on (2) and (3). I mean, the trial court has already handled whether or not it's

appropriate for those to be sealed or in camera. You're not deleting any standards. You're saying that any motion -- any new motion to seal court records is going to go to the trial court.

MR. HERRING: No. 76(a) says that you may seal a court record if there is a specific, serious, and substantial interest that outweighs the countervailing openness rule.

MR. BABCOCK: Clearly outweighs actually.

MR. HERRING: Clearly outweighs. That's right.

MR. YELENOSKY: Let's get every word.

MR. HERRING: We aren't going to have that in this rule, or you're saying it will be in this rule because we are incorporating 76(a), and this does not purport to change at all the standards specified in paragraph (1)(a) of 76(a)?

HONORABLE ANN COCHRAN: Or any provisions in any part of 76(a).

PROFESSOR DORSANEO: Well, let

me see if I understand this. Are you saying now leave (4) in?

HONORABLE ANN COCHRAN: No. No.

PROFESSOR DORSANEO: All right. That's really --

HONORABLE ANN COCHRAN: No. I'm just saying that we are not deleting anything. We are incorporating 76(a) in its entirety.

PROFESSOR DORSANEO: If you want to do that, then you need to leave (4) in in some form.

MR. HERRING: No. They are saying the standards. You have written a different standard under --

HONORABLE ANN COCHRAN: You have written a different standard.

PROFESSOR DORSANEO: It's not different standards. It's verbatim. I copied it.

MR. HERRING: No. It's not verbatim.

MR. BABCOCK: No, it's not.

MR. HERRING: You have written

a slightly different standard in (4). They are saying the same identical -- the identical standards of 76(a) are going to apply to determination of the appellate.

PROFESSOR DORSANEO: How about this then? Instead of saying in (4), "provided that" (a) and (b), how about and saying something like "and should be sealed in accordance with Civil Procedure Rule 76(a)"? And then say this goes back to the trial court.

MR. BABCOCK: No.

PROFESSOR DORSANEO: Now, if that's not a reference to 76(a) twice -- because, Chuck, you're right. What you said is if it says that are open unless (1), (2), or (3), it means (1), (2), or (3). It doesn't mean (1), (2), or (3) and 76(a).

HONORABLE ANN COCHRAN: Hold on. Now, what would happen if you sent it back down to the trial court in (c), and the trial court said, "yes, they should be sealed," then you have got documents under (2), under (b)(2). I mean, that's what we are doing here.

MR. BABCOCK: Yeah.

HONORABLE SARAH DUNCAN: I think that's right.

MR. BABCOCK: If the intent of the rule, if the intent of (b)(1), (2), and (3) is to somehow set up a different standard than 76(a) I didn't read it that way, and if that was what the intent was, then that would be objectionable, but I don't see that. Because it looks to me like in (b)(1), (2), and (3) you are merely stating what is the obvious and that is that if the lower court has ordered the records sealed then they can come up to the appellate court under seal, and the clerk can have direction to not release those sealed documents until the appellate court might disturb that lower court ruling.

So that (1), (2), and (3) is fine, but where you get into a problem is on (4); and Ann's, Judge Cochran's, proposal it seems to me solves everybody's problem, and it solves Chuck's problem because it leaves (c) saying that in those circumstances where the trial court has not had an opportunity to rule on whether or not documents should be sealed or

not but for whatever reason the person coming to the appellate court needs a document sealed, then in that event an appellate court shall refer any motion to seal court records to the trial court in accordance with the rule and in accordance with Rule 76(a). So it solves everybody's problem, and it seems to me it doesn't create any problems.

MR. LATTING: I have a question about that. What if that motion on its face the appellate court believes not to be valid? Does this mean it shall refer it to the trial court for a hearing even though on its face the appellate court believes the motion is no good? Do we want to tell appellate courts they must refer any motion to seal documents to the trial court?

PROFESSOR DORSANEO: Okay. We are going to take one more minute and then what I am going to do is I am going to appoint Chuck and Chip and Ann Cochran to study both of these and to come back for this to be dealt with in some later year.

HONORABLE ANN COCHRAN: I sure would like to hear from Rusty because he sure

is --

PROFESSOR DORSANEO: But I tell you what you said is not right. Okay. If you don't leave (4) in there in some fashion it's going to be only (1), (2), and (3) and not as otherwise provided in 76(a), and this business about going round and round and ultimately getting back to 76(a) would at least be an unusual construction.

MR. MCMAINS: That -- yeah. That's my basic concern is that I don't agree and don't really see where the argument is that you can expand the things that can be sealed beyond what's in (1), (2), and (3) in order to get a hearing just by getting a hearing on what theoretically is on (1), (2), and (3) and somehow is all of the sudden expanded. The precise issue that Chuck was talking about, which is something that's filed in the appellate court for the first time, is not dealt with in (1), (2), or (3).

PROFESSOR DORSANEO: Correct.

MR. HERRING: Right. Right.

MR. MCMAINS: It ain't there.

MR. HERRING: Right.

MR. MCMAINS: And I don't think it gets there by saying that you can have a hearing on the (a) part when it ain't in (1), (2), or (3).

MR. BABCOCK: But, Rusty, procedurally if you have got a document that has not been dealt with in the trial court and you want to file a motion in the appellate court and attach something that you think ought to be sealed, don't you have to do something to cause that document to be sealed? And what you do is you file a motion to seal it.

MR. MCMAINS: I am not --

PROFESSOR DORSANEO: Where?

MR. BABCOCK: Well, in the appellate court under Chuck's scenario.

MR. MCMAINS: Well, but the point is that this says "all documents." I mean the rule, the general rule itself, (b) says "all documents including the transcript or the statement of facts and any other items or papers made a part of the record on appeal or otherwise filed or presented for filing are presumed to be open to the general public

unless," and those are the -- and then you have these three exceptions.

MR. YELENOSKY: Well, why don't we just add -- I mean, is all you're saying that we need a (4) that references the substantive portions of 76(a) and that --

PROFESSOR DORSANEO: That's what I said.

MR. YELENOSKY: Well, then let's just do that, and then (c) references essentially the procedural aspects of 76(a). So it's just a drafting problem. (4) needs to reference the substantive provisions in 76(a) and (c) can reference 76(a) again.

PROFESSOR DORSANEO: Well, I will repeat. We can put in there (4) and then instead of the (a) and (b) just say in accordance with 76 -- Civil Procedure Rule 76(a).

MR. YELENOSKY: Right.

MR. LATTING: I think that's a good idea.

MR. YELENOSKY: I think that's a friendly amendment to the whole concept.

PROFESSOR DORSANEO: But when

you say it's just simply a drafting problem, you go back and read 76(a), and you will see it is an enormous drafting problem. I would just cross-reference it and let you figure it out when you're practicing.

MR. HERRING: Bill, why don't we move on, and let Chip and I and the judge later this morning get together and tinker with this a little bit and bring it back up later today if we can come up with a way that does it rather than spending a lot more time talking about it.

MR. GOLD: Can I ask one thing? Because I don't think it's been addressed, is can you also add to the consideration just not letting anything be submitted to the appellate court without it first having been submitted to the trial court, and thereby, you wouldn't have to deal with this issue at the appellate level? The trial court would always be the first port of entry.

MR. MCMAINS: Yeah. But there are things that -- I mean, there are things that the appellate court can receive or have to receive.

MR. GOLD: Well, I'm just saying it would have to go through the trial court first.

PROFESSOR DORSANEO: Paul, that's like ordering rocks to fly. I mean, if somebody presents it, what's the court going to do? Say, "You can't present it." I mean, so maybe that would be a nice thing, but we are talking about what somebody presents, gives something to the appellate court clerk, and the clerk is supposed to say, "Has this been given down below? Because if it hasn't, I'm not taking it."

MR. GOLD: Well, there is going to be a lot of stuff in the air. We might as well add rocks to that.

PROFESSOR DORSANEO: I am amenable to moving on to the mandate rule although I think the issue is clear, and we will bring it back up after discovery tomorrow morning. Okay.

Judge Guittard, why don't you take the mandate rule? 23 is the next one on the list, on the same page.

HONORABLE C. A. GUITTARD: This

rule is a rule that applies to all three kinds of appellate courts and would replace Rule 86, which has to do with a mandate from the court of appeals, 156, Supreme Court; 231 and 232 in the Court of Criminal Appeals, and wherever you see the language here that's not underlined or stricken out or not underlined it's taken from one of the existing rules, and when it's stricken out it's stricken out of one of the existing rules. When it's underlined it's added, of course. There are no basic changes except in the court of appeals of subdivision (a)(1), the 45-day period is raised to 50, and the 20-day periods are raised to 20.

PROFESSOR DORSANEO: 15 to 20.

HONORABLE C. A. GUITTARD: From 15 to 20. Yes. Because of the concern that the court of appeals doesn't get -- doesn't have the -- in a case where a writ of error is refused the court of appeals takes little time to get that back; and so, therefore, they need 50 days instead of only 45. That's not true in every instance, but for the sake of uniformity we are changing all of the 45-day

periods to 50 and all of the 15-day periods to 20. Otherwise the only revisions are relatively minor and textual. If you want to go over the subdivisions one by one, we can; but I don't think it's necessary, and I move that the rule be adopted as drafted here.

MR. SUSMAN: Second.

PROFESSOR DORSANEO: All of those in favor? Opposed?

Okay. The next rule is plenary power and expiration of terms, Rule 24.

HONORABLE C. A. GUITTARD: The only provision in the appellate rules concerning plenary power is the rule concerning the court of -- concerning expiration of the term. There are no rules about plenary power. The only rule concerning expiration of the term is in Rule 234, I believe, with respect to the Court of Criminal Appeals. It's a general situation both with respect to plenary power and expiration of the term in all three courts. With respect to plenary power the conventional wisdom is that the plenary power extends only to the end of the term and then stops unless there is some

other provision.

Now, the appellate court terms are fixed by law on account of the basis. That doesn't make too much sense. The only case that I know about is one from the Dallas court in a bank decision, in which I participated but descented in some respects, where they said, "Oh, yes, the court has" -- the majority said, "Oh, yes, the court has plenary power up to the end of the year," but we can't foresee any good place that that could -- we can't really envision any occasion in which that might be appropriate.

So if there is no real effect of having a plenary power to the end of the year, let's just cut it off where the court said that you should cut it off, and that is 45 days after the judgment if no motion for rehearing is filed and then and so on. So the idea is to provide -- make a specific provision as to the extent of the plenary power where there was no plenary power before and to provide that the expiration of the term has no effect on the plenary power or on the court's authority to cite any matter pending before the court when

the term expires.

So if you want to go over the express provisions of it, well, I will be glad to set that out. I will call attention to subdivision (c) which has to do with what the court can and cannot do after the expiration of its plenary power. In the first place, it can't modify or set aside its judgment, but it can do certain things: (1), correct clerical errors; second, issue it's mandate as provided by the rules; (3), enforce its judgment if the case is not pending in the Supreme Court or the Court of Criminal Appeals; or, (4), order publication of an opinion previously designated not for publication if the opinion conforms to the standards of the Rule 90. Well, that's the substance of it, and I move its adoption be recommended by the committee.

PROFESSOR DORSANEO: Discussion? Pam.

MS. BARON: Does this rule apply to the Supreme Court?

PROFESSOR DORSANEO: Yes.

MS. BARON: Or just the court of appeals?

PROFESSOR DORSANEO: Yes. It's a general rule that applies to all appellate courts.

MS. BARON: And secondly, on the publication standards the court of appeals cannot order publication once a writ has been denied, and I am not certain that this has incorporated that same standard. 90(d) is just a substantive standard for what an opinion has to contain.

HONORABLE C. A. GUITTARD: Right.

MS. BARON: But it cannot do this after its plenary power expires if the Supreme Court has denied a writ; isn't that correct?

HONORABLE C. A. GUITTARD: I didn't so understand it. Is that correct?

HONORABLE SARAH DUNCAN: Yes. That's correct.

MS. BARON: Yes.

HONORABLE C. A. GUITTARD: Is that right?

HONORABLE SARAH DUNCAN: They amended the rule. I would rather not

incorporate it.

MS. BARON: So that you can't order an opinion not published, get the Supreme Court to say, "No." Say, "Okay. It's not published. We don't care," and then publish it once the Supreme Court doesn't have an opportunity to review it. That's the point of the rule.

HONORABLE C. A. GUITTARD: Oh. Well, perhaps we ought to insert that if that's a good law.

HONORABLE SARAH DUNCAN: I would rather repeal that portion of 90.

PROFESSOR DORSANEO: What's the specific recommendation, Ms. Baron?

MS. BARON: Well, I think we would have to conform to the standards of 90(d) and some other part of 90 which has that position in it. Let me look at it real quick.

PROFESSOR DORSANEO: How about say, "order publication of an opinion previously designated not for publication in accordance with Rule 90."

HONORABLE C. A. GUITTARD: Or except as provided in 90 or something.

MS. BARON: That will be fine, "as provided in Rule 90."

PROFESSOR DORSANEO: All right. We will do language that makes it clear that we are talking about all of Rule 90 and not just paragraph (d).

MS. BARON: Can I make another point?

PROFESSOR DORSANEO: You may.

MS. BARON: It's kind of a little known procedure, but the Supreme Court generally doesn't view 15 days as an absolute, drop dead date on motions for rehearing because it views that as not a jurisdictional deadline. This would change it into a jurisdictional deadline so that if you missed the 15 days on your motion for rehearing or you missed the 30 days on your motion for extension that you could not file a motion for rehearing. I am not sure I care about it one way or the other, but I just wanted you to know that it is a change.

PROFESSOR DORSANEO: It occurred to me the Supreme Court might not want to have limits on its plenary power.

MS. BARON: That's very possible.

PROFESSOR DORSANEO: But they can worry about that, and it also occurred to me after that occurred to me that they could probably figure out a way to deal with it.

MS. BARON: Well, I think they take the view that it's sort of the motion for a hearing of time is extended to this bizarre end of term period if it's not within the 15 days. So let's suppose if they issue an order on December 31st and the motion for rehearing would be due on January 15th, no motion is filed, the court would actually view that it had plenary power until the end of that year the following year. So it would have another eleven and a half months.

MR. MCMAINS: It doesn't have it in (d).

MS. BARON: No. It wouldn't have.

MR. MCMAINS: It doesn't now, not under this rule. (D) says the expiration of the term makes no difference.

MS. BARON: Right. So it would

continue forever, I suppose.

MR. MCMAINS: No.

PROFESSOR DORSANEO: No. It ends.

MS. BARON: Well, it would end after 45 days under (a), but if you only had (d), it would continue forever, but it's an archaic concept, and I don't know how the court is going to respond to it one way or the other. I'm not sure it's a bad change. I am just pointing out it is a change.

PROFESSOR DORSANEO: All of those in favor? Or Rusty, go ahead.

MR. MCMAINS: All I was going to ask is didn't we arrive at the notion that plenary power existed until the end of the term? Isn't that a statute somewhere, some archaic statute?

PROFESSOR DORSANEO: No.

MR. MCMAINS: All right. It was at one time.

PROFESSOR DORSANEO: It may have been a statute at one time. It's a common law concept. I don't know whether it was ever codified. What's codified is when

the term ends. Right, Judge?

HONORABLE C. A. GUITTARD: That's right.

MR. MCMAINS: I'm just wondering have we checked to make sure that we don't have to do something to a statute?

PROFESSOR DORSANEO: Well, we can check again.

MR. MCMAINS: In regards to term. That was my only concern.

PROFESSOR DORSANEO: We can check again. All of those -- subject to checking the statutes all of those in favor?

MR. MCMAINS: I don't mind changing the statutes. We just need to identify it.

PROFESSOR DORSANEO: All of those in favor? Opposed?

All right. The next one -- and we don't really have that many more, and I think none that we haven't given pretty substantial consideration that involve any complexity. It is Rule 52, which if you are looking on the short handout is on page 8, and it's on page 29 of the January 19th cumulative report.

Now, the paragraph (a) is what has not been voted on under this number in the form that it appears here completely. I think we actually at the last meeting voted on the language, but it wasn't assembled altogether in one package. This paragraph tries to accomplish at least four different things. The first, which actually is stated most clearly in the second sentence, is based on a recommendation by our chairman, Luke Soules, that there be a statement in here concerning nonwaiver, and he recommended at the last meeting that we use this language or a comparable language.

"No complaint shall be considered waived if the ground stated is sufficiently specific to make the judge aware of the complaint." The idea is that that is supposed to be the same standard as in the charge draft rules, and I believe that it is, if not verbatim, the same idea. And we have actually already voted on that, and it's incorporated into this. We can reconsider it if you want.

The second point is the Cecil Vs. Smith point that's really most embodied in the third

sentence. The judge's ruling on a request, objection, or motion must also appear of record, which is what 52(a) says now. Okay. The proviso that's in this sentence is meant to embrace Cecil Vs. Smith. "Provided that in civil cases the overruling by operation of law of a motion for new trial or a motion to modify the judgment is sufficient to preserve for appellate review the complaints properly made in the motion unless the taking of evidence is necessary for proper presentation of the complaint in the trial court."

The Supreme Court opinion in Cecil Vs. Smith says that you don't need to get a ruling if it is something that can be overruled by operation of law under 329(b), and this language, which isn't copied from Cecil Vs. Smith is my effort to codify the Supreme Court's opinion in Cecil Vs. Smith to the extent I understand it.

The third one was voted on as well as a recommendation, I believe. "An order may be recited in the judgment, entered as a separate signed order, shown in the statement of facts, or otherwise made to appear in the record."

This is designed to overrule cases that are subject themselves to criticism that would require a separate order for certain types of rulings such as a motions for judgment as a matter of law, motions for judgment NOV. Okay.

MR. ORSINGER: Or directed verdict.

PROFESSOR DORSANEO: Or directed verdict. And this would allow the matter to be shown however. Okay. In the judgment, in the statement of facts, where the -- you know, where the trial judge would say, you know, the motion is denied after an oral presentation of a motion for instructed verdict, and that would do as long as it's shown of record.

The fourth thing is in part to deal with default judgment concepts. "A party properly notified but absent from the trial court waives all objections and complaints that the party would be required to raise at trial unless the party's absence was wrongfully induced by another party." I think we have talked about that last time.

I am moving the adoption of all of these concepts into the general preservation rule to be included in Appellate Rule 52(a). I will state that we have a companion rule in the cumulative report for the trial court consistent with our discussion last time that these rules ought to be in both places, but it is our belief that what we should do with respect to our trial court proposals is to refer those matters to the appropriate trial court committee. There is absolutely no way we could complete consideration of the revisions of all of those rules here today.

HONORABLE SARAH DUNCAN: "Otherwise made to appear in the record," does that include a docket sheet entry? For instance, several courts have held that if you have got a written objection to summary judgment proof a docket sheet entry isn't sufficient to preserve that error. You have got to have a signed written order. Does this change that?

PROFESSOR DORSANEO: I'm not sure whether it changes it. I hope that it would. I think those cases are stupid.

HONORABLE C. A. GUITTARD: Should it, Sarah?

HONORABLE SARAH DUNCAN: I'm just -- I'm wondering what's "otherwise made to appear in the record" intended to reach.

PROFESSOR DORSANEO: What we intended for it to reach is everything, and we did not talk about a docket sheet entry, and I actually think there are some cases that treat docket sheet entries under certain circumstances in certain contexts, looks a certain way, as valid orders. You know, straining against the other authority.

HONORABLE C. A. GUITTARD: Of course, other orders in the record would take precedence over docket sheet, but if there is nothing else then the docket sheet entry perhaps ought to be recognized.

PROFESSOR DORSANEO: And I am particularly thinking of the case where the judge signed the docket sheet, and I think they counted that as an order, sensibly. Richard Orsinger.

MR. ORSINGER: This clearly would include formal bills of exception, and I

think it arguably would include docket sheet entries, and I think we ought to make it clear that it does include docket sheet entries. Many of the docket sheet cases have to do with motions for new trial that are granted by the court, noted in the docket sheet, but an order is not signed before the court loses plenary power and then the judgment goes final. If the judge writes in the docket sheet that he granted an order -- a motion for new trial, why isn't that good enough for the legal system? I think it's -- if there is a dispute about what the judge actually meant by the docket sheet you can just file a motion in front of the judge and have him clarify it. So I think that we should interpret this broad enough to include docket entries.

HONORABLE C. A. GUITTARD: The part out of the Rule 51 provides that among the instruments that are required to be put in the transcript is the court's docket sheet.

PROFESSOR DORSANEO: Now, the down side on this, you know, the other side would be if presumably we might be starting the clock earlier, you know, on taking a

remedial action.

MR. ORSINGER: We don't want to do that.

PROFESSOR DORSANEO: You know, if it counts, then it counts.

HONORABLE SARAH DUNCAN: I was going to say that's --

MR. ORSINGER: Well, the appellate timetable on an appeal should not start running any earlier than the signing of a written judgment.

PROFESSOR DORSANEO: Well, we don't have that rule now. We would have to make up a rule like the federal rule that says there has to be a judgment.

MR. ORSINGER: We don't?

PROFESSOR DORSANEO: No. We don't have a rule that says you have to write a judgment at the end of all of this that memorializes everything. It's just the last thing that's signed that disposes of the last matter that makes the judgment final.

HONORABLE SARAH DUNCAN: I guess I am not sure that I agree with you that a docket sheet entry should be sufficient. I

am not sure -- I'm not saying I disagree. I'm saying I'm not sure that I agree.

PROFESSOR DORSANEO: The issue is, I guess for everybody here -- I'm sure it's obvious to everybody, but I will state it anyway just to state the obvious, is whether we leave in "or otherwise made to appear in the record" or we take that out; and let's talk about it a little bit, but I guess the most likely thing is the docket sheet, unsigned docket sheet. Rusty McMains.

MR. MCMAINS: Bill, two observations. No. 1 is that I'm assuming that you mean in the trial court record. It doesn't -- in context one would assume that, but it doesn't say that, and you could make it appear in the record by simply saying in some hearing, "Now, you remember, Judge, back when I moved for this." Now, I don't think that should be a -- you shouldn't even have an argument if there isn't anything to substantiate that you did, in fact, move for that. You know, you would have to go through the bills of exception in practice in order to

get something in the statement of facts, and so to some extent I think that the "otherwise appear in the record" is a little bit loose.

MR. KELTNER: But, Rusty, doesn't that phrase modify the term order? It takes care of that. I mean, the concept seems to me to be relatively clear.

MR. MCMAINS: Well, except that it says "an order," and if you say, "Judge, you ordered such-and-such when the reporter was out." Okay.

MR. KELTNER: I see what you're saying.

MR. MCMAINS: Now, why can't -- or "I presented this, and you overruled it," and it doesn't matter whether it shows anywhere else. If that's part of the record, then that's a ruling and an order, and I don't -- that's my concern. If what you're trying to do is to capture the docket sheet, I don't have any objections to putting the docket sheet in here in terms of it being in there as a reflection of the order. But to just leave it loosely to say "otherwise appear in the record" bothers me a little bit as to

what might be made, in fact --

PROFESSOR DORSANEO: Judge Cochran.

HONORABLE ANN COCHRAN: And even if it's going to say the docket sheet I think you should consider whether or not you want any docket sheet. You know, because a lot of times it's what the clerk thinks the judge did, and at least have it limited. I mean, there are a lot of judges that make their own docket entries, but there are an awful lot who never touch a docket sheet, and I don't think you want the clerk's idea of what the judge might have done as being the record. I mean, at least have the judge's initials on that particular entry before you are going to start saying the docket sheet.

PROFESSOR DORSANEO: Well, "otherwise made to appear of record" is going to need construction. You know, maybe it would capture the docket sheet, maybe it wouldn't capture the docket sheet, maybe it would have to be initialed by the judge and maybe not; and people have expressed views up and down the line, but I'm beginning to think

we would advance progress here by just saying it can be, you know, in the judgment or in the statement of facts as well as in a signed separate order, and that will deal with the problem that we really thought we were meaning to deal with.

MR. ORSINGER: You need to include formal bills also because you can reflect an order after the fact in the formal bill of exception.

PROFESSOR DORSANEO: Well, but isn't that signed by the judge? Doesn't that amount to an order?

MR. ORSINGER: No. Well, maybe it does.

HONORABLE SAM HOUSTON CLINTON: They can let it go and never approve it. Just qualify it.

HONORABLE SARAH DUNCAN: I would like the focus to be, in terms of construction, what constitutes an order, not what otherwise appears in the record because I think Rusty's right. That does lead to a very loose construction of what's an order, but we have got a lot of law on what's an order, and

if a docket sheet entry with a signature of the judge from the hearing, if that constitutes an order, it constitutes an order.

HONORABLE C. A. GUITTARD: Perhaps we ought to have a provision that if there is a signed order embodying a docket entry then the signed order rather than the docket entry controls so that we won't -- so that a docket entry wouldn't start any timetables. It would have to be done from the signed judgment.

PROFESSOR DORSANEO: What's your pleasure, people?

David Keltner.

MR. KELTNER: I think you could cure Rusty's problem but not Sarah's problem. Now, I think what Judge Guittard was talking about accomplishes some of that. I think you can cure Rusty's problem by striking the term "recited" and say something like "reflected by the judge," by the trial judge. That cures two problems and then continue with the sentence. That would do two things.

Sarah, I think it cures most of your problem because if it is good enough under the

reported cases in the docket sheet to be an order, so be it. If it's not, as Ann was saying, it's just not. That way, I think -- and I think that law is fairly well settled at this point, and that takes care of that problem.

As to starting time periods, it does not address that, but I want us to think about is this a mountain or a mole hill really? Because if we only have -- I can only think of one, maybe two situations, in which a time period can be started by an order.

PROFESSOR DORSANEO: Right.

MR. KELTNER: And it just ain't going to happen that often.

PROFESSOR DORSANEO: Uh-huh.

MR. KELTNER: But that's just a recommendation that I think solves two of the problems, not the third.

PROFESSOR DORSANEO: Well, I didn't get your specific language.

MR. KELTNER: The sentence would read, "An order may be reflected by the trial judge if the judgment entered as a separate signed order, shown in the statement

of facts, or otherwise made to appear in the record," and you could use recited. You could say "recited by the trial judge," and I think that would probably be just as well. That way it can't be by mention of a party. Second, it's got to be done in the trial court. So it can't be done elsewhere, and then the question of where we start appellate time periods, you know, I'm not addressing because I don't think that's going to be a major problem.

PROFESSOR DORSANEO: Don Hunt.

MR. HUNT: Bill, I'm concerned that since we are attempting to state when error is preserved at every other point in (a) we have talked about ruling. Then when we get to this sentence we talk about order, and we repeat the word "order" in a little different way. Isn't what we are talking about is recording the ruling? We are not talking about a specific kind of an order. We are just saying that in order to preserve error the trial judge must make a ruling some way, and this sentence is to say how that ruling may be shown in the record. If we made it a ruling may be shown in a signed -- in the

judgment, in a signed order, in the statement of facts. If we use that language, it would add some clarity and perhaps avoid some of these other problems.

PROFESSOR DORSANEO: Well, I think if I'm hearing you correctly -- and, David Keltner, correct me if I am wrong, that is, in essence, your same point. If it says ruling, it's obvious that it's by the trial judge.

MR. KELTNER: That's right. And I think that Don's suggestion by calling it "ruling" is a lot cleaner.

PROFESSOR DORSANEO: Well, we are going to just go ahead and do that. Okay. So a ruling -- Don, you shortened it up a little bit more, too.

MR. HUNT: Yes. I don't know that we need some of these verbs. "A ruling may be shown in the judgment, in a signed separate order, in the statement of facts." Perhaps we ought to say "transcript," too.

HONORABLE C. A. GUITTARD: It would have to be an order if it's in the -- if it's an order it would be in the transcript.

MR. HUNT: Yeah. Signed order, that would be correct, but if we just limit it to those things we don't get into the quagmire of otherwise appear of record or the docket sheet business; but if it's a ruling and it otherwise is a good ruling because the cases on docket sheets make it a good ruling, it's recited somewhere.

PROFESSOR DORSANEO: Uh-huh.

MR. MCMAINS: Now, this -- how does this read?

PROFESSOR DORSANEO: Well, the proposal I think that improves it would read this way at this point: "A ruling may be shown in the judgment in a" --

MR. ORSINGER: Signed separate order.

PROFESSOR DORSANEO: -- "signed separate order" or "separate signed order," and then the question is still whether it says "or shown in the statement of facts," period, or whether it's "shown in the statement of facts or otherwise made to appear in the record," and this docket sheet problem may be a problem we want to avoid after the

discussion, and I think we are ready to vote on whether we want to just keep it statement of facts, period, or try to make it a little broader than that without making it too broad, and are we ready to vote on that as to whether we want to keep it to the statement of facts or continue to work on it? Would that be all right to vote on that now?

HONORABLE SAM HOUSTON CLINTON: Let me ask you a question before you do that. Don't judges in civil cases sometimes write letters to the party telling them how they are going to rule and how they are ruling on a certain thing? Which one is that in here?

PROFESSOR DORSANEO: That doesn't count.

HONORABLE SAM HOUSTON CLINTON: It doesn't count?

PROFESSOR DORSANEO: Right.

HONORABLE SAM HOUSTON CLINTON: That's usually put in a record of some kind.

PROFESSOR DORSANEO: Well, but actually, it doesn't count. I mean, we have a lot of cases that would say that that's just a letter.

MR. ORSINGER: But that's a final judgment letter.

PROFESSOR DORSANEO: Well, it could be a final judgment letter, but we actually interpret those letters mostly as just being proposals for --

MR. LATTING: Statement of the judge's intent.

PROFESSOR DORSANEO: Yeah, intent. Statements of helpers, somebody helped draft the order.

HONORABLE C. A. GUITTARD: But if the point --

HONORABLE SAM HOUSTON CLINTON: That's not the way we do it in criminal cases.

HONORABLE C. A. GUITTARD: But the point is that if the letter may be otherwise shown of record it might count where --

MR. MCMAINS: Right.

HONORABLE SAM HOUSTON CLINTON: That's what I'm trying to say.

HONORABLE C. A. GUITTARD: -- as we don't intend it to.

MR. ORSINGER: Well, let's --

Richard Orsinger.

PROFESSOR DORSANEO: Go ahead.

MR. ORSINGER: On the letter issue I think a letter can constitute a rendition of judgment, but it's clear that it doesn't constitute a written judgment from which the appellate timetables start to run.

HONORABLE C. A. GUITTARD: That's right. That's right.

MR. ORSINGER: I don't have an objection to an incidental ruling other than the final judgment being reflected in a judge's letter that's filed with the district clerk. I don't have a problem with that. I do have a problem if it's a judgment from which the timetables run, but I don't have a problem if it's overruling a motion or something of that nature.

HONORABLE SAM HOUSTON CLINTON: That's all I'm talking about. I'm not talking about a final judgment.

HONORABLE C. A. GUITTARD: But suppose the -- you say "otherwise shown in the statement of facts." Suppose the statement of facts shows at the end of the hearing a

judgment for the defendant. Now, of course, what does that count for? We don't intend for it to start anything running.

MR. ORSINGER: That's just a rendition.

HONORABLE C. A. GUITTARD: That's a rendition.

HONORABLE SAM HOUSTON CLINTON: No. What you're really doing here, I think, is just talking about preservation of error.

HONORABLE C. A. GUITTARD: Right.

HONORABLE SAM HOUSTON CLINTON: Not of anything that has a consequence of a judgment.

HONORABLE C. A. GUITTARD: That's right. And the question is whether or not this "otherwise shown of record" changes the law in some respect, and we don't really intend it to. Maybe we ought not to use that language.

PROFESSOR DORSANEO: By changing it to "ruling" I think we have improved it to the point where I wouldn't start thinking about judgments.

MR. ORSINGER: Right.

HONORABLE SAM HOUSTON CLINTON: That's right.

PROFESSOR DORSANEO: You know, I think we could stand "or otherwise" --

MR. ORSINGER: Well, it's clear we're not talking about judgments.

PROFESSOR DORSANEO: "Otherwise made to appear in the record."

MR. ORSINGER: We are talking about a ruling may be reflected in the judgments. So clearly a ruling must be something other than the judgment.

PROFESSOR DORSANEO: It could go -- it will be better than what we have now either way with Don Hunt's changes that we voted up, but let's decide to either cut it off at "statement of facts" or -- and there are equal burdens of persuasion here -- to cut it off -- who's in favor of cutting it off at "statement of facts," and the vote otherwise would be to have it continue "or otherwise made to appear of record." So a non-vote is a vote for the other proposal.

Okay? "Statements of facts," vote; and

if you don't vote, it's for the longer version. All of those in favor of the first option?

MR. MCMAINS: You mean stop at "statement of facts"?

PROFESSOR DORSANEO: Stop at "statement of facts."

All of those for the longer version? Okay. We are going to stop it.

HONORABLE SAM HOUSTON CLINTON: Well, let me just raise a question for you. We have had several criminal cases lately, and I assume this rule --

PROFESSOR DORSANEO: Is going to apply.

HONORABLE SAM HOUSTON CLINTON: -- also applies to criminal cases.

PROFESSOR DORSANEO: Uh-huh.

HONORABLE SAM HOUSTON CLINTON: Where judges in multi-districts write letters and communicate by letter, and there is no statement of facts, in which they just tell the parties, "This is the way I am going to rule." Not on the final thing, but on some preliminary thing, and now you are making

it -- you are making that without any effect at all, it seems to me, unless it somehow constitutes one of the other things there. We have had cases that the state deems very important because they got a letter, and they didn't know exactly what the effect of that was, and we had to dicker around with trying to construe that for --

PROFESSOR DORSANEO: Uh-huh. So what you're saying is that --

HONORABLE SAM HOUSTON CLINTON: So what I'm saying is in criminal cases there are some situations where communications like that are significant, but they are not now in -- will not now be included in what you have got here.

HONORABLE SARAH DUNCAN: And I think Judge Clinton's articulated my concern, is that docket sheet entries, letters, they can be very vague about their effect. I mean, is this a ruling, or is this what you say you're going to rule unless you decide not to rule that way? And I guess that's why I am uncomfortable with permitting those kinds of things, is that if that's an order of the

trial court then it needs to be in order form, and everybody knows that that's an order. There is not a question as to what that is and what effect it has.

PROFESSOR DORSANEO: Well, and the point is if it's not, if you don't treat it as an order, then it's waived. Then it is, in effect, a denial of relief. So maybe we better vote again so we get the exact vote on this, with Judge Clinton's comments that they don't like that in criminal cases because they want to look more to the substance than the form.

HONORABLE DAVID PEOPLES: Bill, what's unfair about making the person who loses the ruling and might want to appeal it be sure that it's reflected on the record, in the statement of facts, and in a written order? I mean, what's unfair about that?

HONORABLE SAM HOUSTON CLINTON: Well, the only thing I can tell you is about the statement of facts, and if he's already made that ruling, he's writing the parties elsewhere, and some of them in one county, some of them in another, and there is no

occasion to have a statement of facts.

HONORABLE DAVID PEOPLES: Well, at some point, the loser ought to get that in writing to conform to this rule if he wants to complain on appeal. No unfairness at all.

HONORABLE SAM HOUSTON CLINTON: Well, he thinks that letter is something in writing.

PROFESSOR DORSANEO: Well, let's just vote again to see and let the court decide. I mean, it's not -- all of those in favor of requiring it to be in the judgment, in a separate order, or in the statement of facts in order for the complaint to be preserved, which was the vote last time, please raise your right hand. Okay. That's -- all of those opposed to that? One, two, three, four.

Okay. So I think that's like nine to four.

MR. ORSINGER: Can I raise an issue?

PROFESSOR DORSANEO: Go ahead, Richard Orsinger.

MR. ORSINGER: I am concerned

that since we do not list formal bills that we might be excluding formal bills as a way to cause a ruling to be reflected in the record. Now, this very ruling contains procedures for formal bills, but we have not listed it as one of the exclusive ways that you can cause it to appear, and a formal bill that is granted will be signed by the court, although, I don't think that's an order; but a formal bill that's rejected and that you have a bystander's bill is nowhere signed by a judge so it couldn't arguably be an order, and I think that by having an exclusive listing that doesn't include formal bill we have just cut it out, and certainly we don't want to.

HONORABLE C. A. GUITTARD: Well, add that here then.

MR. ORSINGER: I would like to add "or by formal bill of exception." There is nothing in there that says you can reflect the ruling because this --

PROFESSOR DORSANEO: I am just going to add that in unless somebody has an objection. If we take out "or otherwise made to appear in the record," we have to put the

formal bill of exception in there. Okay.

Now, 52(b), a very small change, and the rest of it we have voted on already in this 52. "When evidence is excluded the offering party shall as soon as practicable before the court's charge is read to the jury" -- now, there is nothing in there about when you have to do this in nonjury cases. Okay. So the combined committee recommends that we add "or before the judgment is signed in a nonjury case." Okay. "Be allowed to make an offer of proof in the form of a concise statement."

So in nonjury cases you have to make your offer of proof, your bill of exception, if you want to call it that, before the judgment is signed. All of those in favor? Opposed?

All right. The rest of it we have voted on. Judge Guittard mentions that maybe since we have spent so much time discussing the third sentence that we failed to remember the fourth sentence we presented in the overall motion. Does anybody have any concern about the last sentence of 52(a)?

HONORABLE C. A. GUITTARD: That sentence does change the law, which says that

if a person doesn't at the trial -- is not at the trial he doesn't have an opportunity to object, and therefore, he doesn't have to preserve error by objection. Now, this provision would change that to the extent that if he's not there although he's notified, it doesn't make any difference whether he had an opportunity to object or not. He's waived it. He had an opportunity. In effect, it means that if he was notified of it and he's not there, he had an opportunity to come and object. So that's the philosophy behind this last sentence in subdivision (a).

PROFESSOR CARLSON: Bill?

PROFESSOR DORSANEO: Elaine Carlson.

PROFESSOR CARLSON: Would that extend to special exceptions?

PROFESSOR DORSANEO: You mean pleading defects?

PROFESSOR CARLSON: Right.

HONORABLE C. A. GUITTARD: Objections that the party would be required to raise at trial if present. So I guess it would, if he hadn't made some other sort

of -- made his exception in some other way.

PROFESSOR DORSANEO: Most of that law has pretty much gone away anyway.

PROFESSOR CARLSON: A lot of it has.

PROFESSOR DORSANEO: But I guess the more significant concern, and I should know this but I will ask for the record, is it meant to extend to the presence of a court reporter?

HONORABLE C. A. GUITTARD: Yeah.

PROFESSOR DORSANEO: That's the big one.

HONORABLE DAVID PEOPLES: Trial by consent if the judgment exceeds the pleadings? You would have made that objection if you had been there. Do you waive it here?

PROFESSOR DORSANEO: Yeah.

HONORABLE DAVID PEOPLES: In a default judgment?

HONORABLE SARAH DUNCAN: Yeah. That's what I keep thinking about.

HONORABLE C. A. GUITTARD: I don't know about that now.

PROFESSOR DORSANEO: That's not a pleading defect. That's a whole different claim. I wouldn't think you would be waiving anything there. I mean, that's like saying if you are not there, you can waive, but they can say, well, now, this case is about something else altogether different. That can't be right, under due process if nothing else.

MR. ORSINGER: Richard Orsinger. Could we improve it by saying "evidentiary objections"?

PROFESSOR DORSANEO: That's what I thought it meant.

MR. ORSINGER: Waive all evidentiary objections and then someone can't take a judgment for a cause of action that was unpled.

HONORABLE C. A. GUITTARD: Well, suppose it's a -- suppose it's a claim that the case should have been continued or something.

MR. ORSINGER: There wouldn't be a motion for continuance on file, so --

HONORABLE C. A. GUITTARD: Well, yeah.

MR. ORSINGER: -- could you raise that if you didn't file a motion for continuance?

HONORABLE C. A. GUITTARD: Well, maybe there has been a motion for continuance filed but he wasn't there to urge it. He's waived it then, right?

MR. ORSINGER: That's true. And that is the case, isn't it?

HONORABLE C. A. GUITTARD: Sure.

MR. ORSINGER: That would still be the case.

PROFESSOR DORSANEO: Well, I think it's too broad, the more we discuss it. I think it needs to be "objections to the admission or exclusion of evidence and request for affirmative relief," you know, at a maximum.

HONORABLE C. A. GUITTARD: Well, here's a big one, insufficiency of evidence to support the damage finding.

HONORABLE SARAH DUNCAN: We've got it right now.

PROFESSOR DORSANEO: Shouldn't

waive that.

HONORABLE C. A. GUITTARD: No. It shouldn't waive that.

MR. ORSINGER: Well, you would have to raise that by a motion for new trial unless it's a nonjury case. Then you can raise it in your brief.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: Uh-huh. Sarah Duncan.

HONORABLE SARAH DUNCAN: I guess I am confused. This bothers me a lot that it may reach a lot of things that we are not thinking about, intending that it reach. Why do we need the last sentence at all? What problem are we trying to fix?

HONORABLE C. A. GUITTARD: We are trying to fix the problems where an absent party has more rights than a party that's present. In other words, in certain cases it's been held that a party -- for instance, to objections to evidence, that if a party is absent he doesn't have an opportunity to object; therefore, he hasn't waived the

objection. This is to change that rule.

PROFESSOR DORSANEO: I don't think that's a rule, Judge. I think it's your case like Morgan Express Vs. Elizabeth Perkins where if somebody is not there then they don't have to request the presence of a court reporter, that that's just responsibility of the one who's proving it up to make sure it's proved up on the record, and I'm beginning to think we ought to just leave this sentence out.

HONORABLE C. A. GUITTARD: But Judge Hecht wrote an opinion which deals with the question and said -- what is it? I forget the --

PROFESSOR DORSANEO: Wilson Vs. Dunn.

HONORABLE C. A. GUITTARD: That's right. It's to deal with the Wilson Vs. Dunn problem.

PROFESSOR DORSANEO: Yeah. Which is a problem that Judge Hecht thinks is a problem. Without being Chair I think we ought to leave this out of here because I don't think we can deal with it, and it's a

bigger can of worms than we expected it to be at the committee level.

HONORABLE SARAH DUNCAN: And, for instance, motions for new trial and sufficiency of the evidence to support damages and petitions -- you know, what we are turning into a six-month writ of error that's not going to be called a six-month writ of error anymore. I mean, I just -- this is a broad area of preservation that I just don't think you can reduce to a sentence.

PROFESSOR DORSANEO: Well, we have uncovered new concerns here that we didn't talk about at the committee level. You want to continue to work on it here, or do you want to recommit it to the committee to work on it further? It's been a problem for a while. It's not going to hurt for it to continue to be a problem for a while longer.

HONORABLE C. A. GUITTARD: Let's recommit it.

HONORABLE DAVID PEOPLES: I move we drop that sentence and start with "party properly notified."

PROFESSOR DORSANEO: Okay. All

of those in favor of recommitting it to committee, in effect, please raise your right hand or whatever hand you like.

MR. ORSINGER: No. David was saying just kill it now and don't even leave it in there.

HONORABLE DAVID PEOPLES: Why don't we drop it and then the burden is on anybody that wants to come up with it later.

PROFESSOR DORSANEO: I know. I know what he said.

MR. ORSINGER: I see.

HONORABLE SARAH DUNCAN: I would like to second that motion because I would like the remainder of 52(a) to get in with this group of changes, and in order for me to vote yes on this 52(a) I need that last sentence not to be there.

PROFESSOR DORSANEO: All of those in favor of removing the last sentence from 52(a) please raise your right hand. All of those opposed? Okay. It's removed. Three descenting votes.

MR. ORSINGER: But only four affirmative votes.

PROFESSOR DORSANEO: The (d) change you can look at it, but it's just -- it's a Richard Orsinger suggested language cleanup only. I'm not even going to ask you to vote on it unless somebody has a complaint about it, but I would ask you to look at, especially appellate lawyers.

The change is to eliminate some of the excess verbage only. "A complaint regarding the legal or factual insufficiency of the evidence in a nonjury case including," and I added this, Richard, the reference to excessive or inadequate damages even though I recognize that's a factual insufficiency complaint. Okay. Because it's a distinct form of one. "May be made for the first time on appeal in the complaining party's brief." That's the law now. The language is simply more economical, and there is also a distinction drawn from a request to a trial judge to amend a fact finding or to make an additional finding consistent with those rules or findings.

Okay. Docketing statement, criminal cases. Judge Clinton, this is something that

was drafted. It's Rule 57. It's on page 11 of the little draft. It's something that was drafted by Justice Cornelius for criminal cases. I don't know if anybody here other than you would really be in -- and Judge Cornelius is not here. I don't know anybody else who does a lot of criminal work who would be in a position to evaluate the ins and outs of it. Do you want us to talk about it?

HONORABLE SAM HOUSTON CLINTON: I thought we went over that about three meetings ago, and I expressed the view of what I thought would be the view of the court that we don't really need that.

HONORABLE C. A. GUITTARD: This is just for the court of appeals.

HONORABLE SAM HOUSTON CLINTON: It's up to them. It's up to them if they want to go and put somebody to the time and trouble. We don't need it.

HONORABLE C. A. GUITTARD: The only suggestion I have is in subdivision (6), the date of the offense, I don't believe the proposal anywhere says that the defense should be specified, and I would suggest that in (6)

it say begin, "the offense charge, the date of the offense," and so forth.

PROFESSOR DORSANEO: Well, so the committee moves with that change, which we will accept, the committee moves the adoption of the docketing statement for criminal cases as indicated in the cumulative report as well as in this little short report on page 11. All of those in favor say "I." Opposed? Okay. Passed.

Rule 61, just for your information, Ken Law recommended after giving the matter substantial study, the repeal of Appellate Rule 61 because it is unnecessary given the fact the government code talks about this a lot, and unless somebody -- well, I will just move the adoption of its deletion.

MR. ORSINGER: Second.

PROFESSOR DORSANEO: All of those in favor? Opposed? Okay.

Judge Guittard, why don't you talk about these two judgment rules? Rule 80 and Rule 180, the rules that talk about the types of judgments to be made in the appellate courts. 80 is the court of appeals. 180 is the

Supreme Court.

HONORABLE C. A. GUITTARD: This rule does attempt to change the law but only to codify it. These rules purport to specify what kind of judgments are being rendered, and it's not quite comprehensive. So other types of judgments are included here such as No. 5, vacate the judgment of the trial court, dismiss the case, and that would occur if the case is removed, or (6), dismiss the appeal if the appeal is subject to dismissal.

The more interesting part is subdivision (c), and that has to do with remand in the interest of justice, and I think this codifies the current practice that if reversible error is found, that the court then has the discretion to remand the case to a trial court for another trial in the interest of justice instead of reversing. So that's the change here, and the same sorts of changes are made in Rule, what is it, 180?

PROFESSOR DORSANEO: Yes. In the draft of 180 there are a couple of clerical changes. In (5) we should take out "if the cause is mute," being a restriction

that's not necessary to articulate, and it should say in (6), "if the Supreme Court of the United States has announced a relevant new rule of law," et cetera, and I think at the combined committee level we voted that in that circumstance the case should be remanded to the court of appeals rather than directly to the trial court on the theory that that's different from what's talked about in paragraph (b) where there is a reversal of the judgment of the court of appeals, and in that circumstance it can remand it to the trial court for another trial.

HONORABLE C. A. GUITTARD: I'm not clear on the point that if the Supreme Court of Texas announces a new rule that that kind of a remand should be a problem. That's the way it's written.

MR. ORSINGER: Well, that was intended, too.

HONORABLE C. A. GUITTARD: Yeah. I thought so.

PROFESSOR DORSANEO: Oh, I made a mistake there. I am going to respeak my -- I thought (6) was restricted. So it should

say, "If the Supreme Court or..."

HONORABLE C. A. GUITTARD: It does. Or the United States Supreme Court.

PROFESSOR DORSANEO: It doesn't say "the." That's the thing.

HONORABLE C. A. GUITTARD: Or "the." That's right.

PROFESSOR DORSANEO: Okay. Richard Orsinger.

MR. ORSINGER: This is the current practice. The Supreme Court sometimes have cases that are similar, will hand one down and then send the other ones back without reference to the merits of the court of appeals to evaluate in light of the new announced change in law, and I think that's a perfectly acceptable practice, and this is not meant to eliminate that. It's meant to permit that. Also for the U.S. Supreme Court, if they change the applicable law.

PROFESSOR DORSANEO: But should it be -- as we voted in our committee, should it be sent to the court of appeals only or can the Supreme Court send it all the way back to the trial court?

MR. ORSINGER: We decided you couldn't send it to the trial court as a jurisdictional matter, in my view. I don't think that the Supreme Court can send a case from the court of appeals back down to the trial court without reversing the court of appeal's judgment.

PROFESSOR DORSANEO: All right. So the draft -- and pardon me for confusing matters. The draft on page 14 to the little paper and in the companion part of the cumulative report on 6 should say, "If the Supreme Court," meaning the Texas Supreme Court, "or the United States Supreme Court has announced a relevant new rule of law remand the cause to the court of appeals." In other words, strike "or the trial court." Sarah Duncan.

HONORABLE SARAH DUNCAN: It seems to me this would also apply, could apply, in the case where the court of appeals has rendered a judgment and while the application is pending the Supreme Court clarifies the law, writes new law, whatever, and they may want to -- you may want to put in

if the Supreme Court or the United States Supreme Court has announced a relevant new rule of law after the trial or appellate court rendered its judgment it may remand, and I was thinking about the constitutionality of the prenuptial agreement in that case out of the Waco Court of Appeals.

MR. ORSINGER: Fanning Vs. Fanning?

HONORABLE SARAH DUNCAN: Right.

HONORABLE C. A. GUITTARD: The trial court or court of appeals?

PROFESSOR DORSANEO: We can accept that. Don't you think?

HONORABLE C. A. GUITTARD: Yeah.

MS. BARON: Richard, I'm confused by something you said. I don't understand how you can remand without doing something to the judgment. Aren't you going to reverse?

MR. ORSINGER: Well, it's my conception, and correct me because you worked at the court and I didn't, but when the Supreme Court announces a change in Texas law

and then sends a cluster of cases back down to the courts of appeals to be reconsidered I have usually seen a tag-in on there "without ruling on the merits or without regard to the merits," letting me think that that wasn't a bona fide reversal, but if you think that that is a bona fide reversal then this is really no different from ordinary appeal and reversal. In which event why are we even writing it?

PROFESSOR DORSANEO: Well, the question is whether the word "remand" should be used. "Remand" is usually like horse and wagon reversal and remand, but "remand" could be thought of as a more generic term. We could say "recommit" or use some other word that isn't connected up with reversal. This is not meant to mean reverse and remand. It's just meant to mean send back.

MS. BARON: I understand that, and that's very confusing. I mean, to me you have to do -- assume that they operate on the judgment before you can send the case back.

PROFESSOR DORSANEO: Well --

HONORABLE SARAH DUNCAN: In all the TransAmerica remands did they actually

reverse the judgment of the court of appeals before they remanded for reconsideration?

MS. BARON: We would have to go look at the judgments. Do you know?

JUSTICE HECHT: It seems like they were all mandamuses, but maybe there were some.

HONORABLE C. A. GUITTARD: Now, this is in the Supreme Court. It doesn't deal with the Court of Criminal Appeals, which presumably has its own rule in that respect. We haven't purported to deal with the rules concerning remand or judgments by the Court of Criminal Appeals, and perhaps Judge Clinton would want to comment on that problem.

HONORABLE SAM HOUSTON CLINTON: We are happy the way it is. We do what we understand the Supreme Court of the United States does in those situations. It's just remanded to the court of appeals for further consideration in light of whatever that case is. It's just that simple.

HONORABLE SARAH DUNCAN: Because if you do reverse the judgment at least in simple cases you're going to affect

sureties and supersedeas and post-judgment interest and lots of things.

PROFESSOR DORSANEO: This does not say "reverse," and the remand idea is comprehensive enough not to be an accompanying concept that only it can work when there is a reversal, and we could change the word "remand," but Judge Clinton just used the word "remand" when he didn't mean reverse and remand.

HONORABLE SAM HOUSTON CLINTON: I didn't say "reverse." I said vacate the judgment, vacate the judgment, not reverse it. Vacate the judgment and remand it for further consideration.

HONORABLE C. A. GUITTARD: That's another question.

HONORABLE SAM HOUSTON CLINTON: That's what the Supreme Court does, as I recall, not your Supreme Court, the Supreme Court of the United States. They simply vacate the -- they grant the writ, vacate the judgment, remand it to the court for further consideration. They don't reverse them. No.

HONORABLE C. A. GUITTARD:

Well, perhaps we ought to put in that "vacate the judgment" then.

HONORABLE SAM HOUSTON CLINTON: That's what we do. You asked me.

HONORABLE C. A. GUITTARD: If we have to do something about the judgment.

MS. BARON: I think you do.

MR. ORSINGER: Well, Richard Orsinger. If this is a reversal, we don't even need this subdivision (6) because it's covered by the subdivision that permits the reversal. It was our conception that the Supreme Court has yet another alternative besides reversal, and that's what we were trying to describe here, and perhaps "vacature" is what it is.

HONORABLE C. A. GUITTARD: That's right. In other words, a reversal means that the judgment of the court of appeals has been determined to be wrong, and that's not what we mean. We mean simply that the court of appeals needs to consider it further. So "vacate" would be a more appropriate word.

HONORABLE SARAH DUNCAN: And

then the trial court's judgment would be the judgment in place.

PROFESSOR DORSANEO: The court reporter needs a break. Let's stop and think about this for a minute and come back and be ready to vote on something. We only have a few things to do. Let's do those, and get it over with.

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

PROFESSOR DORSANEO: All right. Why don't we get started? I know everybody wants to get through with this. Back to Rule 180.

MR. ORSINGER: Why don't I just make a motion? If you will recognize me, I will make the motion.

PROFESSOR DORSANEO: Richard Orsinger.

MR. ORSINGER: Bill, I would make a motion that we --

PROFESSOR DORSANEO: Speak loud.

MR. ORSINGER: I would make a

motion that we amend Rule 180, the last subdivision (6), after a consultation with the clerk of the Supreme Court and with the justices of the Supreme Court will arrive at the proper term whether the term is reversal, whether it's remand without reversal, or whether it's vacate and remand, we will put in language that's consistent with the Court's past and intended future procedure, but the concept will be that this is something other than a bona fide evaluation of the court of appeals on the merits in the full sense.

PROFESSOR DORSANEO: So we will say something like "vacate," or some other word, "the judgment of the court of appeals and remand the cost."

MR. ORSINGER: It would say something like that, whatever the Supreme Court thinks the proper procedure is that we are actually doing.

PROFESSOR DORSANEO: But we wouldn't be vacating the judgment of the trial court?

MR. ORSINGER: Not the trial court.

HONORABLE C. A. GUITTARD: Well, I think the Supreme Court may want us to make our recommendation as to what the words should be. I think "vacate" is the proper word, isn't it? I mean, there is no problem with it. That's frequently used, particularly by the Court of Criminal Appeals.

MR. ORSINGER: I will be happy to move "vacate" subject to if that creates some problem administratively by the Supreme Court let's substitute a word that the Supreme Court is comfortable with, but I would move "vacate" subject to that qualification.

PROFESSOR DORSANEO: All right. All of those in favor? All of those opposed? Passes.

All right. The next subject is electronic recording. We met for almost three-quarters of a day dealing with electronic recording on December 29th trying to incorporate all of the suggestions and to deal with all the comments made at the last meeting of the advisory committee in November. The proposals are with respect to the Rules of Civil Procedure in 264(a) and 264(b),

appearing in the little supplementary report on pages 16 through 20. There is a clerical mistake on page 19. If you will cross out the second electronic recording discussion, which is actually our prior draft on page 19, beginning at about the top third of the page including all of the rest up to the notes and comments, you will get the complete draft.

HONORABLE SARAH DUNCAN: Say that again.

PROFESSOR DORSANEO: 264(b), it begins electronic recording and then goes (1), (2), (3), (4). It should stop there. Cross out the rest of it. Electronic recording on page 18, (1), (2), (3), (4), what we decided to do subject to final approval of this committee at our last meeting preliminarily was to take out the paragraphs concerning responsibility of the judge and certificate of the judge and to simply have it be a Rule 264(b) that talks about the equipment, the recorder, the party may have a court reporter, and the effect of the rule.

Judge Brister came up to Dallas and visited with us to try to reconcile our

differences, and I am going to ask him to comment as to whether this draft is satisfactory from his perspective in terms of what this committee decided to do last time.

HONORABLE SCOTT BRISTER: Yeah. I'm satisfied with the amendments in 264(b). As indicated at our previous meeting I think some of it's unnecessary, but other people think it is necessary, and I don't see anything in it that's -- from a judge that does use electronic recording, anything in it that is inconsistent with the current Supreme Court rule. This in effect is codifying it or the actual practice of using it.

PROFESSOR DORSANEO: Just for the record I move the adoption of 264(a) and 264(b) in the draft and in the cumulative report subject to removing the part that I mentioned needed to be excised, although I think we have already actually voted on all of these individual changes.

JUSTICE CORNELIUS: Is that everything past (4) is --

PROFESSOR DORSANEO: Is out. On 264(b). All of those in favor please

signify by raising your hand. All of those opposed?

Okay. David Jackson is opposed to the entire concept.

Now, we need to back up and look at on page 15 Appellate Rule 74. At our last meeting we spent a lot of time talking about the appendix in electronic recording appeals, and there were concerns about copying service, et cetera. After a lot of discussion the committee, and the combined committees, recommend the draft that's on page 15. "Each party shall file separately in the court of appeals at or before the time the party's brief is due one copy of an appendix." Now, so it's one copy of an appendix, which is what we had before.

"Containing a typewritten or printed transcription of all portions of the recorded statement of facts that the party considers relevant to the issues raised on appeal." That's Judge Cornelius' suggestion, and I don't recall whether we exactly voted on that last time, but this committee previously approved the concept in terms of the

discussion we had that what's to be included is what the party preparing the thing considers relevant to the issue raised on appeal, and it may include exhibits. Okay. But need not.

New here in this draft are the last two sentences, particularly, "Written notice of the filing of an appendix must be given to all parties to the trial court's final judgment at the time it is filed." So a notice idea and the notice must do this. "Together with a specification of the parts of the recorded statement of facts," the tapes, "included by reference to the counter numbers in the court recorder's logs."

Now, the log part of the discussion with respect to the recorded statement of facts indicates that the recorder must have logs, and the logs must have counter numbers at at least the beginning and ending of the various examinations, direct and cross-examinations of the witnesses and at other pertinent places. The reason why the combined committee wanted to have this in here is to avoid a situation where somebody might prepare a tactical

appendix that leaves out parts of the recorded statement of facts without giving a clue to the other parties that this had been -- this had been done.

We are not completely happy with this type of specification, but after giving it considerable thought this is the best that we could do, and I hope that doesn't encourage too much discussion.

Service of a copy of the appendix is not required, and we move that the appendix part of 74(i). Your Honor.

HONORABLE SARAH DUNCAN: Quit. I just don't think it's right that you can file something in writing with the appellate court and not serve it on opposing counsel.

HONORABLE SAM HOUSTON CLINTON: And not what?

HONORABLE SARAH DUNCAN: And not serve it on opposing counsel.

MS. BARON: Well, you don't right now, the statement of facts and the transcript. That's what this is replacing, the statement of facts, and my point is that you shouldn't have to go out and make 20

copies for everybody in the trial court's judgment of the statement of facts.

PROFESSOR DORSANEO: I thought you two were both on the same side at the last meeting.

MS. BARON: I thought we were, too.

HONORABLE SARAH DUNCAN: Maybe I have switched.

HONORABLE C. A. GUITTARD: Different perspective.

PROFESSOR DORSANEO: Well, that is the issue. Anybody else want to join the fray?

HONORABLE SCOTT BRISTER: The proposal does make it consistent with the statement of facts where you don't have to make copies of the entire everything that happened at trial for everybody. They can check it out and make their own copy.

MS. BARON: Right.

MR. SUSMAN: So moved.

PROFESSOR DORSANEO: Any further discussion? Okay. I move the proposal. All of those in favor? Opposed?

Okay. That takes care of it.

Let me see. I don't think -- is there anything, Judge, in 53 that is not just simply mechanical?

HONORABLE SCOTT BRISTER: The only other thing we might discuss would be this part of 74(4), inability to pay.

PROFESSOR DORSANEO: Oh, yes. Judge Brister, why don't you talk about that since you drafted it?

HONORABLE SCOTT BRISTER: The idea was to figure out some way where, for the main concern, the professional litigant, the tax protester that has 200 cases on file but is an indigent and therefore is able to file 50-page motions but is unable to do the transcript of anything, or the inmate who's able to do the same things; the idea being that the prison system or in some cases the court would be able to provide the equipment, and say, "Look, you have got a lot of time and obviously great typing skills. Why don't you type up the trial," rather than the county who currently has to bear the cost of it.

This proposes to do that by adding a

section to the affidavit. If you have recording -- if it's done by recording system where the court or the prison system could provide the equipment the person has obvious skills where they could prepare the -- this is the statement. This is the equivalent of the statement of facts, the appendix. We will make them do it by themselves.

HONORABLE SARAH DUNCAN: I would just add the words "shall file in the trial court."

HONORABLE PAUL HEATH TILL: Say that again.

HONORABLE SARAH DUNCAN: "Shall file in the trial court."

HONORABLE SCOTT BRISTER: On the second line?

HONORABLE SARAH DUNCAN: Uh-huh. First line.

HONORABLE SCOTT BRISTER: One other thing Steve just pointed out to me on the fourth line it should probably say at the end of the fourth line, "if all contests are overruled" rather than "if any contest is overruled." The problem being you might

overrule a contest as to -- you overrule a contest as to the person's ability to type it for themselves. So you make them type it for themselves, but you don't overrule the contest as to the fact that they don't have enough money to do it themselves. So there are those different kinds of contests that would be raised. So it should be "if all contests to the affidavit are overruled" then it shifts the duty to the court recorder.

PROFESSOR DORSANEO: Steve.

MR. YELENOSKY: Yeah. I just want to comment on that. That part that Judge Brister has just identified is, I think, just necessary to be accurate here because you do have a different decision between whether the person is indigent and whether they are able to type up the appendix. So you do have to have the possibility of different -- or contests to different portions of the affidavit.

The thing I want to raise and I raised for the subcommittee, and apparently they didn't agree, was whether the burden stated in Rule 45, to which this refers, the burden

there, I think it's under (c), is upon the affiant to establish indigence, and my suggestion was that if they have met that burden because you would never get to the question of typing the appendix unless they have met that burden then they should not also have the burden of showing that they don't have the skill and don't have the access to the equipment in order to type it. But at that point if we are talking about a litigious prisoner or whatever, the burden ought to be on the party contesting the affidavit to establish that they do have the skill and ability to prepare the appendix, and if we are talking about prison litigation or if they can demonstrate it by their prior pleadings or whatever, that they shouldn't have the burden twice.

PROFESSOR DORSANEO: So your proposal is that the burden should be on the affiant to set under Rule 45, put the burden on opposite party to show that they have a typewriter.

MR. YELENOSKY: That they have a -- yeah. The skill as well as the

equipment, the two parts that it --

PROFESSOR DORSANEO: Well, let's vote on that first. All of those in favor of having the burdens be different, have the burden on the indigent person to prove indigency but then the burden on the other party to prove ability, if I am getting this right.

HONORABLE DAVID PEOPLES: Bill, all the facts that are pertinent to this are in possession of the indigent, ability to type, presence of a typewriter. How is the contestant going to get evidence about what's available in Huntsville?

MR. YELENOSKY: Well, I mean, what they're -- well, first they have the burden of going forward because they have to state in their affidavit that they don't have the skill. From there then the burden -- if they also have the burden of proof they would have to have the burden of proving that they don't have the skill; whereas, for instance, one evidence would be prior pleadings that they have prepared on their own. In a prison case it would be the state saying they have

got typewriters, and he's typed stuff before. Otherwise, I guess, the affiant is in the position of proving that they don't have skill and don't have a typewriter, and they have stated that in the affidavit. What more can they do?

HONORABLE SCOTT BRISTER: And I would take the position that their statement in the affidavit ought to be enough that -- it's not a big deal to me one way or the other because I think the opposite proof is going to be that the judge and county or prison system is very well aware of and knows all the facts. It's not a big way one way or the other, but I don't think it's that big a deal that it's on the indigent because they would say what they say in the affidavit, "I can't do it."

PROFESSOR DORSANEO: Everybody understand what the issue is? To state it in general terms, who wants to have the burden stay on all issues on the same side as opposed to having it depend upon the issue as to who has the burden of persuasion as to who prepares this thing? All of those in favor of having it be on the same side please raise

your hand. All of those in favor of shifting burdens or different burdens raise your hand.

Okay. Same side. So it will be entirely proposed to be changed in this way only. "Any party unable to pay the cost of an appendix shall file in the trial court," the balance of that sentence staying the same, and then "if all contests to the affidavit are overruled the recorder shall transcribe." Do I have that right?

HONORABLE SCOTT BRISTER: Yes.

PROFESSOR DORSANEO: All of those in favor please raise your right hand. Opposed? Okay. One opposed.

On to 296. We have two things to go. 296 spent -- took up a lot of discussion last time, took a lot of discussion at our advisory committee. It's on page 21 of the little report, and I didn't turn to the big report.

HONORABLE DAVID PEOPLES: 73.

PROFESSOR DORSANEO: 73. Now, to refresh your recollection in brief there were a lot of concerns with this rule. One concern was -- and a concern that's addressed here was that in some cases that are partially

bench tried some courts -- or that are only partially bench tried, that are partially tried to a jury, some courts have concluded there is no entitlement to findings of fact on issues tried to the court. This draft tries to say, and I think says in clear terms, that if it's bench tried in part, the judge has the responsibility of making findings of fact on the issues tried to the court.

This draft does not attempt to change the definition of the word "tried," which in the case law does not encompass nonevidentiary hearings or the cases that are not tried on the merits but are handled at a preliminary level. Okay. That was discussed. The committee recommends that we don't buy on that at this time, if ever, to try to expand findings of fact requirements to all hearings or all evidentiary hearings.

The last sentence was in here in a slightly different form before. It encompassed a concept of plenary trial, and now it simply states, "A request for findings is not proper and has no effect with respect to an appeal of the summary judgment." The

idea being that if you have a summary judgment there are no facts to be found. Any requests for fact findings would not be proper, and the request for a finding of fact would not authorize an expanded timetable for giving notice of appeal because the request is senseless, and that's the proposal as redrafted. I will tell you at our committee level we didn't really finish this. This is my effort to finish it, which may or may not be a successful effort.

Rusty McMains, you're shaking your head back there.

MR. MCMAINS: Well, Richard was going to draft something. Did he not get --

PROFESSOR DORSANEO: This is it.

MR. MCMAINS: Oh, is this what Richard drafted?

PROFESSOR DORSANEO: Well, he made -- this is the draft that we have to vote on.

MR. MCMAINS: The problem that I had -- and I realize suggesting that the case law takes care of this notion of what's

tried to a judge but the problem is that any time you have an evidentiary hearing there are issues of fact tried to the judge, and I am concerned that the question as to whether or not that means you are entitled to findings of fact on any kind of an evidentiary hearing the truth of the matter is the courts frequently say that the judge makes a preliminary determination even during trial on admissibility, for instance, or the -- you know, some respects to determine admissibility of evidence.

Well, I don't think that anybody was expecting that the judge just because he determines a preliminary question of fact that you're entitled to a finding on that issue. I mean, it's basically you object to the evidence, and it's just a legal point. What we talked about at the subcommittee that I was concerned about -- and I recognized Richard's problem was the use of the term "ultimate issues" because of the problem peculiar to the family law that he really wants an ability to make an argument for subsidiary issues, and I'm not sure the committee is fully aware of

that controversy, and if this is an effort to basically change from ultimate issues to that and not confine it to those matters where the trial judge has to try the issue, as in the division of property issue, that bothers me.

PROFESSOR DORSANEO: No. We talked about a lot of things. All right. And this is only meaning to change what it says here. It doesn't mean to change anything other than the idea that if the case is tried to a jury some and bench tried some the judge can't say, "This was not a case tried to the court; therefore, I don't need to make findings." To the extent it was a case tried to the court, whatever "tried" means, the judge has to make findings of fact, whatever that means. Okay. Whether it's ultimate or evidentiary or some other degree of difficulty on a continuum. It also says and only is meant to say that if you request findings of fact in a summary judgment case you have been wasting your time because it is not proper; you are not entitled to them; and it doesn't give you more time to appeal; and that's all that this addresses, and it's all that the

committee is proposing.

MR. MCMAINS: Well, but the interpretation of your entitlement to findings of fact under the old rule as to what "tried" means is because of the first part of it we have deleted, which is "in a case tried in the district or county."

PROFESSOR DORSANEO: But it says tried to the court in the language that replaces it. Now, we took out "district or county court" because these rules are for district and county courts.

MR. MCMAINS: Yes. But it doesn't say with respect to a case tried to the court. It says with respect to issues of fact tried to the courts or to the court, and what I'm telling you is that there is a difference between trying issues of fact which happens in a lot of different proceedings and trying a case that is set for trial on the merits, and the omission of the word "case" in my judgment is likely to make a difference in the appellate court's interpretations of when you are entitled to findings of fact and inclusions of law.

PROFESSOR DORSANEO: All right. We will accept with respect to issues of fact "in a case tried to the court."

HONORABLE SARAH DUNCAN: It seems to me then you are re-injecting the problem that was initially addressed of a case tried to the court, but maybe your new sentence --

PROFESSOR DORSANEO: Another sentence takes care of it, Sarah, I think. Now, I agree. Rusty, that's a good point. It may be that some of these cases focus on the word "case" as well as the word "tried."

MR. MCMAINS: They do. That's how they get to the notion that a case is either nonjury or if it's at all jury then it's jury.

Now, my only other point in that conjunction is that the effect, of course, of the deemed findings rule is that if you do not submit all but only some of the elements of a claim or defense currently we have a deemed findings rule, and in my judgment one of the problems you have is when you say "trial of some issues of fact to a jury in the same case

does not exclude the trial judge from making findings of fact on issues tried to the court," the effect of not submitting those elements at the present time is they are deemed found in support of the judgment. You can ask for findings under the deemed findings rule if you do so prior to the judgment, but you're not entitled to. The judge doesn't have to do it, and they are just deemed found.

PROFESSOR DORSANEO: Well, you say you're not entitled to them, but yet the rule says the judge is supposed to do them. What you're saying is if he doesn't do them, it has the effect of a deemed finding.

MR. MCMAINS: No. The rule says -- it doesn't say that he has to do anything with them. It just says he can find them.

PROFESSOR DORSANEO: All right.

MR. MCMAINS: He can make a finding. He doesn't have to make a finding. The case law is very clear that he doesn't have to make a finding. The effect of the deemed findings rule is there.

Now, the other comment that I made in the

subcommittee, which is one of the things that I was concerned about trying to be included in the rule, I don't have any objection, and I agree whole-heartedly that if the parties are trying a case in part to the court on some issues, like frequently attorneys' fees, and part to the jury that they ought to be entitled to findings of fact on the issues that are tried that everybody knows is being tried, but I do not think that we should interfere with the deemed findings rule the way it has operated and all of the jurisprudence that we have under it, and I am concerned that this does that as well.

Because two things: No. 1, it may be if we don't intend to change the deemed findings rule, we leave it as it is, some people may think that we have changed the deemed findings rule because you don't have deemed findings. You have a right to request. If you don't request, you don't get a deemed finding. So you are simply missing an element that was tried to the court that nobody requested a finding on.

MR. LATTING: What do you think

we should do?

MR. MCMAINS: And the question is, what do you do about that? And this doesn't solve that. You know, it doesn't address that problem, and I don't think it was intended to, and we are not trying to address that problem, is my understanding of the deemed findings rule, but the question is how do you say in this in a case tried to the judge that it wasn't done so unknowingly.

PROFESSOR DORSANEO: I, you know, personally think you are just stressing us with imaginings, but -- Judge Peoples.

HONORABLE DAVID PEOPLES: Rusty, would it solve your problem on deemed findings if we added some language of "upon request"? In other words, there would be deemed findings if there was no request for written findings?

HONORABLE C. A. GUITTARD: It says "on request."

HONORABLE DAVID PEOPLES: That's the way it happens now if there is no request for expressed findings.

MR. MCMAINS: Except that the

deemed findings rule operates automatically. The judge enters automatically the deemed findings.

HONORABLE DAVID PEOPLES: Automatically but if there is a request that takes it out, doesn't it?

MR. MCMAINS: No.

PROFESSOR DORSANEO: It should.

MR. MCMAINS: No. Under the rule, under the deemed findings rule, right now you can request a finding. He doesn't have to deal with it.

HONORABLE DAVID PEOPLES: Okay.

MR. MCMAINS: You aren't entitled to it under Rule 296, 297. It is deemed found in support of the judgment. He merely makes a decision, and there are circumstances in which you can make such a request, in which, you know, you are entitled to make that request and circumstances in which you are not, and obviously we have well established jurisprudence as to when deemed findings occur.

PROFESSOR DORSANEO: So what's your proposal?

MR. MCMAINS: Well, all I am concerned about is the language when we say "trial of some issues of fact to a jury in the same case does not exclude the trial judge from making findings of fact on issues tried to the court."

PROFESSOR DORSANEO: But what's your proposal?

MR. MCMAINS: The next sentence undoes the deemed findings rule.

PROFESSOR DORSANEO: So do you propose to take it out?

MR. MCMAINS: No. I wasn't proposing anything. I was telling you -- identifying a problem which I identified before which nobody has addressed in this revision.

MR. LATTING: Well, could we say that in a footnote, that nothing herein shall be taken to mean that you are changing the deemed findings rule? And I suggest that that would be helpful.

MR. ORSINGER: Richard Orsinger. Rusty, why don't we just append a comment that we did not intend to change the

procedure relating to deemed findings under Rule 279, and that ought to squelch any effort to interpret this sentence to do that.

HONORABLE SARAH DUNCAN: I move the adoption of Richard's suggestion.

MR. MCMAINS: I mean, I -- you know, it may be that you can draft, you know, a thing which says that this does not modify, that regardless of this sentence it doesn't change the operation of the deemed findings rule under rule whatever.

PROFESSOR DORSANEO: Well, why don't we put that in a comment?

MR. LATTING: Yeah. Let's do that. Let's put it in a comment.

MR. MCMAINS: Are the comments part of the rules?

MR. LATTING: They are kind of part of the rules.

MR. HERRING: Sort of.

PROFESSOR DORSANEO: Sometimes the rules aren't part of the rules.

MR. HUNT: Not exactly.

PROFESSOR DORSANEO: Let's vote on this. All of those in favor.

MR. LATTING: With the comment?

PROFESSOR DORSANEO: With the comment. Opposed? Plus with the additional change, "issues of fact in any case tried to the court," that we talked about before that Rusty brought up. Okay. Pass to the comment.

Last one, execution. At the last meeting there was a lot of discussion about this, and I tried to draft it after reading the discussion, which was was not enjoyable, reading it. Okay. The idea here is a simple one, the filing and approval of a bond. It's 634, which is on page 22 of the little draft. If you're working from the bigger draft, you will have to catch up with me on your own.

HONORABLE SARAH DUNCAN: 22.

PROFESSOR DORSANEO: "The filing and approval of a supersedeas bond immediately suspends commencement or continuation of any proceedings or official actions to enforce the judgment," and this is meant to be comprehensive, "by execution, garnishment, under Civil Practice and Remedies Code, Section 31.002," which is referred to as a turnover order but which never itself uses

that term, "or otherwise." Okay.

And this deals with the problem we talked about last time, is do I need to get a writ? And the answer is "no." Okay. The clerk or justice shall immediately issue a writ if you want one. Okay. Assuming the bond has been filed and approved. So the two things that I gleaned from the approximately 50 pages of discussion are incorporated here, that the bond stops everything and that you can get a writ if you want one.

HONORABLE SARAH DUNCAN: And you just did a beautiful job.

PROFESSOR DORSANEO: I don't know if I did or not. I frequently find that I did a very poor job.

HONORABLE C. A. GUITTARD: This time you did fine.

MR. ORSINGER: This is better than the Gettysburg Address.

PROFESSOR DORSANEO: Great. Any discussion? Rusty.

MR. MCMAINS: I just want to ask one thing. What do you mean by "suspend the commencement"?

PROFESSOR DORSANEO: Well, it doesn't begin.

MR. MCMAINS: I mean, do I understand that to --

PROFESSOR DORSANEO: I have to use English. I don't have any other language to use. I don't know what else to say.

MR. MCMAINS: If you're saying suspending the continuation I can understand it, but I mean, you say commencement, and I just don't understand what a suspension of a commencement is.

MR. LATTING: Why don't we just say "suspends the proceedings"?

MR. MARKS: It stopped in the beginning.

PROFESSOR DORSANEO: Prevents the commencement or -- and suspends the continuation.

HONORABLE C. A. GUITTARD: "Suspends the commencement" is clear enough.

MR. LATTING: Bill, why not just say it suspends any proceedings? That would cover everything.

PROFESSOR DORSANEO: No, it

doesn't. That won't cover it.

MR. MCMAINS: That's what I'm getting at, is I don't know what the "commencement or" was designed to accomplish.

PROFESSOR DORSANEO: I got the language "commencement or continuation" from the bankruptcy rules which I just also happened to be working on and, granted, the word "suspend" is a little bit awkward because technically something has to begin before it's suspended.

MR. LATTING: Oh, who cares? Let's just put it in.

PROFESSOR DORSANEO: I agree. Who cares?

Now, the last one, 657.

HONORABLE C. A. GUITTARD: Well, have we voted?

PROFESSOR DORSANEO: Yeah. We voted. We approved it. Now, the last one, 657.

HONORABLE SARAH DUNCAN: Wait. Did we vote on it?

PROFESSOR DORSANEO: I thought we did.

JUSTICE CORNELIUS: No. We haven't voted on that.

PROFESSOR DORSANEO: All right.

HONORABLE SARAH DUNCAN: I really want to vote on this rule.

PROFESSOR DORSANEO: Please, Sarah Duncan.

HONORABLE SARAH DUNCAN: For years.

PROFESSOR DORSANEO: I'm sorry.

HONORABLE SARAH DUNCAN: I move the adoption of Rule 634, Rules of Civil Procedure.

PROFESSOR DORSANEO: Judge Cornelius.

JUSTICE CORNELIUS: Second.

MR. LATTING: What's it going to say?

HONORABLE C. A. GUITTARD: What it says here.

MR. ORSINGER: No change.

MR. LATTING: Okay.

PROFESSOR DORSANEO: All of those in favor of leaving it just as it appears on this page raise your right hand.

Opposed?

Now, the last one is just as is, 657, except I took the last sentence of Sarah's draft off, given the flip-flop in the position that she did the last meeting. Right? Now, we have you can get the writ of garnishment but the bond's approval suspends enforcement.

Okay. The draft in the prior cumulative report said you couldn't get a writ of garnishment before the 30 days, and the way I read the minutes at the last meeting after lunch Luke said, "Would it be all right if we have the writ of garnishment but it stopped if there is a supersedeas," and I thought we agreed at that meeting based on the minutes, correct me if I am wrong, but that's how it turned out.

HONORABLE C. A. GUITTARD: But don't we give the unsuccessful party some time to get it "supersedeased"?

PROFESSOR DORSANEO: No.

HONORABLE C. A. GUITTARD: You just go right down the next day after the judgment or the afternoon of the judgment, and they get a garnishment before anybody can get

a supersedeas.

PROFESSOR DORSANEO: Well, presumably the garnishment is going to take a little time but not much.

HONORABLE SARAH DUNCAN: Huh-uh. It doesn't take any time. Did I really flip that completely on this?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Well, that ties up all their money so they can't do anything.

PROFESSOR DORSANEO: You just changed your mind completely.

HONORABLE C. A. GUITTARD: And they might not be able to get a writ of -- a supersedeas bond if --

MR. ORSINGER: They don't have extra money.

HONORABLE C. A. GUITTARD: They don't have any money.

HONORABLE SARAH DUNCAN: I think I changed my mind subject to once the supersedeas bond is posted the garnishment ceases to be effective and the funds are released.

HONORABLE C. A. GUITTARD:

Well, you can release the funds by a supersedeas.

HONORABLE SARAH DUNCAN: Well, that was the condition that I changed my mind on, I think, if I am remembering two and a half months ago correctly at a weak moment in my life.

MR. ORSINGER: No time. This doesn't permit any time.

MR. LATTING: Oh, boo.

HONORABLE C. A. GUITTARD: We just suspend it.

PROFESSOR CARLSON: That's the way it is now.

PROFESSOR DORSANEO: That's what was voted on on the record at the last meeting. If we want to change it back to the other one, let's just do that, and the issue is do you want to give -- do you want to have garnishments start at the same time, okay, as execution and not earlier or can garnishment start right away?

MR. LATTING: No. No.

PROFESSOR DORSANEO: Which no?

MR. LATTING: It ought to be

commensurate and consistent with the execution rules.

PROFESSOR DORSANEO: All right. We had the language drafted the other way in the prior cumulative report.

MR. LATTING: Was there some -- I was not at the last meeting because I was prevented from being here, but is there some outcry in the public or the Bar that we need to change that? Is that something that doesn't work in our society? I mean, we are talking about giving people 30 days after a judgment is entered against them in order to get a supersedeas in place.

PROFESSOR DORSANEO: Your client does not have any time at all if it's garnishment.

MR. LATTING: That seems wholly unreasonable to me.

HONORABLE SARAH DUNCAN: That's the way it is now.

PROFESSOR DORSANEO: That's the way it is now.

MR. LATTING: Oh, in order to prevent a garnishment?

PROFESSOR DORSANEO: Yes.

MR. LATTING: Oh, I don't think so. I don't think so.

MR. MCMAINS: Yes. That is the law.

HONORABLE SARAH DUNCAN: That's the way it is now.

MR. MCMAINS: Post-judgment garnishment.

MR. LATTING: It's not that way in the Western District of Texas in Judge Sparks' court. And under Texas procedures, Texas state procedures, in fact, it's really not that way in Sparks' court.

MR. SUSMAN: There is no reason to -- why change the law?

MR. MCMAINS: The basic problem is that you can have a judgment.

MR. LATTING: Immediately?

PROFESSOR DORSANEO: Rusty McMains.

MR. MCMAINS: The basic problem is you have a judgment, and the entire notion of getting a garnishment in part is that the person is going to start moving their assets,

but when you say 30 days -- I mean, execution is slightly different than -- particularly if we are talking about real property because it ain't going nowhere, but as opposed to if they have funds they will immediately transfer them, which can be done within 24 hours or less, and certainly if there are physical goods of some kind or whatever, and of course, that's probably a different issue.

PROFESSOR DORSANEO: Right.

MR. MCMAINS: And they could transport them. Even security value I guess can garnish in that fashion. They can physically take the title.

PROFESSOR DORSANEO: I don't want to chill any debate, but does everybody remember talking about this for about two hours last time?

MR. YELENOSKY: Well, I object to even discussing it without a vote. I mean, the very last meeting we did this, and if it's going to be re-opened I think we need a vote. Otherwise, why come to the meetings? I mean, you just come to the last meeting and say let's talk about it again.

PROFESSOR DORSANEO: Well, let's take this vote. The way we had it at the cumulative report that is dated November 16 which provides that you don't have a writ of garnishment -- do you have that report?

HONORABLE SARAH DUNCAN: I have November 2nd.

PROFESSOR DORSANEO: Lee?

MR. PARSLEY: No.

HONORABLE SARAH DUNCAN: It's the same.

PROFESSOR DORSANEO: Which provides a writ of garnishment, and we voted to say, "a post-judgment writ of garnishment may issue upon application and order no earlier than the date upon which a writ of execution may issue under Rule 627 and 628."

That during one point in our discussion was voted up, and after lunch we voted the exact opposite. Now, I want this group to vote now. Do you want that sentence, or do you not want it? All of those in favor of not having the sentence, which is my appreciation of what the record provides now, please raise your right hand. If there is going to be a

discussion, I don't want to chill that for a little bit.

MR. SUSMAN: Is this not to revote -- are we being asked not to revote? Is that the first issue?

PROFESSOR DORSANEO: Yes.

MR. SUSMAN: I move that we don't revote things.

MR. YELENOSKY: Well, that's what I was saying, but I don't think that's what he just said.

PROFESSOR DORSANEO: No.

MR. YELENOSKY: You are. Okay.

MR. SUSMAN: I move we not revote things that have already been voted.

PROFESSOR DORSANEO: Okay. All of those in favor of not reconsidering that, please raise your hand.

Okay. The sentence is out. That concludes our report.

HONORABLE SARAH DUNCAN: Can I just make one point about the final statement that was made? When I brought this to the appellate rules committee I believe I made the statement I don't much care personally whether

writs of garnishment issue conceivably immediately when the judgment is signed or if they have to wait until a writ of execution could issue.

My problem is that I don't think most people know that they are subject to a writ of garnishment as soon as the judgment is signed, and if that's the committee's feeling because we are not going to reconsider it or because it really is the committee's feeling I would ask that a sentence be put in the post-judgment garnishment rule that alerts people that they are subject to a writ of garnishment as soon as the judgment is signed and not just leave it silent because then we are in the same situation we have been in, which is that people don't know. Only a few people know.

HONORABLE F. SCOTT MCCOWN: Mr. Chairman? Mr. Chairman? This is not a real world problem. I have never seen a case or heard of a case where somebody got garnished wrongly before they had an opportunity to be heard. By the time you can move -- by the time you find out where to

serve the garnishment, by the time you get it served, get an order and get it served, by the time you get the clerk to do the paperwork, this is just not a real world problem, and I ask anybody here have they ever experienced this problem?

MR. LATTING: Yes, I have. I have.

HONORABLE SARAH DUNCAN: Yes.

HONORABLE F. SCOTT MCCOWN: Once?

MR. LATTING: Well, vividly recently. Yeah. One that's most on my mind if I look back over the years.

HONORABLE SARAH DUNCAN: It may not be a real world problem in Austin because it's so laid back, but it is a real world problem in other districts throughout the state.

PROFESSOR DORSANEO: Well, let me say this to close it up. This is a rule that's in the Rules of Civil Procedure in the 600's that is primarily committed to a different subcommittee of this advisory committee. We were asked to complete our work

on it. As far as the appellate subcommittee is concerned we are through with it.

HONORABLE SARAH DUNCAN: That's fine.

PROFESSOR DORSANEO: And I am going to pass the Chair to Steve Susman.

Oh, we have one more. I'm sorry. I'm sorry. One more. Look at -- where is it, Judge?

HONORABLE C. A. GUITTARD: Page 6 of the --

PROFESSOR DORSANEO: Page 6. This won't take but two minutes.

HONORABLE C. A. GUITTARD: Of the cumulative report. This is really mostly drafted by our staff. It provides for substitution of parties when there -- when a party -- particularly when there is a public officer or something. It was originally -- did we vote on this? Originally the rule provided that if there is a -- an injunction against the public party.

PROFESSOR DORSANEO: Right. We have a rule for a substituting successor that applies in mandamus, prohibition, or

injunction proceedings. No rule for substituting a successor of a public officer and proceeding in generally. Judge Guittard drafted a rule that would apply not just to original proceedings but to all proceedings in terms of substitution of parties, and we move the adoption of that change. The same rule for substitution of parties be applicable in cases generally, not just limited to original proceedings. All of those in favor please raise your right hand. Opposed?

Thank you.

MR. MCMAINS: Bill, may I ask one question, please? On the provision on cost is our rule the same in the original proceedings on costs? My concern, it says, "The successor shall not be liable for any costs that were approved before he or she was made a party," and if, in fact, the successor is a representative of the entity that has been there all along such as an executor, et cetera, then what does that do with regards to the liability for costs that have occurred for the proceedings on behalf of the entity that it is legitimately representing?

HONORABLE F. SCOTT MCCOWN: Say that again.

MR. MCMAINS: Well, it says, this rule, the one you that everybody just hurriedly passed says these successors shall not be liable for any costs that have accrued before he or she was made a party, and all I'm saying is that you are talking about, for instance, most frequently would be executor or trustee in bankruptcy or whoever. To say that they are not liable for the costs that have accrued prior essentially gives everybody the incentive, for one thing, to delay getting in all the costs.

PROFESSOR DORSANEO: Why don't you move the deletion of that, Rusty?

MR. MCMAINS: Well, I mean, I can see where it's not unfair in some circumstances but I --

PROFESSOR DORSANEO: I move the deletion of that and let the cost rules take care of themselves.

MR. MCMAINS: I think it could be adjusted in the appropriate circumstances.

MR. LATTING: You can't do

that. You're the chairman.

PROFESSOR DORSANEO: Yes, I can. I just stepped out of the Chair. I move the deletion of the part we just approved of the part about costs, leaving the costs rules to take care of costs.

HONORABLE F. SCOTT MCCOWN: Second.

HONORABLE C. A. GUITTARD: Bearing in mind this is a provision of existing rules where that is a change in existing law, or at least an existing rule.

PROFESSOR DORSANEO: Well, it may be only -- all of those in favor please raise your right hand. Opposed? Okay.

MR. SADBERRY: Bill, before you step down while Steve's getting in place. Your last comment about these rules that we just talked about in the 600's being really under the purview of another subcommittee, that was brought up at the last full committee, as I recall, and I believe we decided to go ahead and finish that work under your committee. I just want it clear that it is finished, and our subcommittee is not now

expected to do something with that.

PROFESSOR DORSANEO: Well, I just was saying that, Tony, in case somebody wanted to go back and make another proposal that they not bring it to me.

MR. SADBERRY: But as it stands now there is nothing like that on the table or given to us as an assignment at least?

MR. SUSMAN: All right. We now turn to the work of the report of the discovery subcommittee which will hopefully occupy -- hopefully we will finish in the next eight hours that we have to meet. You have before you or should have before you received in the mail from us what I believe will be the final report of our subcommittee, dated January 16th, 1995. Let me give you a little background of how we got to where we got with these 19 rules that you have before you.

As you know, the work of the discovery committee which began meeting this spring was discussed by this full committee at our May, July, and September meetings. The votes were taken at those meetings on a number of subjects. The votes are recorded in the

transcripts. I do not propose that we go back and revote matters today because I think if we go back and revote matters we will never get anywhere.

The subcommittee finished our work. We did not discuss the work of the discovery subcommittee at the last meeting of the advisory committee in November. At the meeting in September we ended up discussing Rules 1 through 10 and did not discuss Rules 11 to the end. Therefore, we don't, except from the May and July meetings, have your sense on Rules 10 through the end, and that's where I propose to begin going back, with 10 through the end, and then we will begin at the beginning again so you get the full picture. The subcommittee had its last meeting on Saturday and Sunday last weekend. All members except John Marks were present, including Justice Hecht.

MR. MARKS: I apologize.

MR. SUSMAN: And the meeting began by considering a memo from Justice Hecht in which he stated, and I quote, that he "has generally described the subcommittee's work to

the majority of the Court, and they appear to not only to favorably be disposed to most of the proposals but anxious to see a final product." He does go on in his memo to suggest a three-tier system for discovery where very simple cases would fall in one tier with extremely limited discovery vehicles available. The normal case would fall in a second tier and then very complicated cases could fall in a third tier by order of the court or agreement of the parties. He concludes by saying, "Several members of the court seem to think that this strikes the right balance among the various competing concerns."

In reaching our report we considered the work of the discovery task force which have been working since 1991 and produced its report this summer, headed by David Keltner. We also considered the work of the discovery rules subcommittee with the State Bar rules committee headed by Mr. Marks which concluded its work, I think, in December. We have their report. They also had been working for three years.

There was a feeling at our last meeting that we needed to get these rules to the court and let the court look at these rules, promulgated and on the street promptly and in advance of other rules; and therefore, I urge that we march through this today. It seems to me we are fiddling while Rome is burning. It is time that the lawyers in this state restrict the cost of litigation and expedite trials. The Legislature may make this all moot for us in the next few weeks or months, either here or in Washington, but maybe this is the last chance for us to show that we are capable of policing ourselves severely and curtailing discovery expense.

As we go through the rules in particular, please focus on the concepts, not the language. If there are language changes, we can give them to Alex who has been our able draftsman on most of this, and she will fix the language up for us. Call it to our attention but let's not debate language. It's mainly the concepts we want to vote on.

Rules 1 through 9, which have been discussed, the major change there -- and

again, I am going to just tell you about it, but I don't want to discuss it now because we will find ourselves spending most of our time discussing that, and I would rather discuss that at the end.

It is the concept of Rule 1 the cases will be handled in one of three tears. Tier 1 is cases where neither the plaintiff nor defendant seek more than $50,000 excluding interest, costs, in prejudgment, and attorneys' fees. In those cases which are clearly simple cases, and we think there are a lot of them in the system, each side will be limited -- each party will be limited to six hours of depositions, and there will be no more than 15 interrogatories, and we decided in that case not to create an official discovery period that cuts off after 90 days, although, that was the suggestion before the house at our last meeting. The reason we did that is we felt that we have so limited the discovery vehicles to a number of hours, six per party and 15 interrogatories, that we shouldn't particularly care when the litigants choose to fire the limited ammunition that we

are giving them for those cases of 50,000 and under.

The second tier cases which we created are cases where either party seeks more than $50,000, and these are the cases where neither the parties can agree nor the trial court is energetic enough to on its own motion or at the request of parties actively supervise discovery and enter a discovery control plan. In these cases we have created the Tier 2 cases. You will see the limitations which you are all familiar with.

Nine months, which was a vote taken last time. The only change we made is when it runs from. We have changed the nine months of the discovery window. It runs instead of from the commencement of the action, which was our vote at the meeting in September, we have gone back, for reasons I will explain to you tomorrow, to this discovery window, the nine month window, opens from the date of the first response to a written discovery request other than a request for standard disclosure is due or the date the first deposition is taken and closes nine months thereafter or 30 days

before trial, whichever is earlier. That's the one where you have the 50 hours of deposition limits per side and 30 interrogatories.

And then there is a third category, Tier 3 cases, and those are the cases where the parties by agreement or by motion and court order actually get a discovery control plan. Now, that is the major change, I think, from -- in the first nine rules, and so at this time I suggest we skip over and look at Rule 11, which is the rule for request for production and inspection of documents, which you have not seen before. I mean, you have seen but we just haven't discussed that in a full committee before.

We need to -- because we have done some -- again there is some word craftsman problem here. No. 1, instead of saying, "during the discovery period" we would propose changing that "at any time prior to 30 days before the end of the discovery period," meaning that the request for production of documents can be served with the petition, which was everyone's sense at our prior

meetings, and can be served up to 30 days prior to the end of the discovery period.

We have not done much to change the request rule. We have gone back to a single written response which is due 30 days after service. We struggled as much here with the electronic or magnetic data provision, which is subdivision (5) on page 24 as we did with anything in this rule. That's the new part of the rule, I would say. The big change from -- the kind of change from existing law, and our thought there was to make everything subject to discovery, but if you want someone to go play around in the bowels of their computer and hire some expert to figure out what they can retrieve from the hard disk, you have got to make clear to the other side the extent to which you want them to go to such effort in piecing together what is available, and you may have to pay them the price of doing it.

I don't think there are any other big changes to Rule 11. I assume you have all read Rule 11, and I would propose -- and the way I propose to handle this is each of these rules will be -- we will begin with Rule 11(1)

and without saying it there will be deemed to be a motion and a second. The motion is made and seconded by members of our subcommittee. So you have a motion on the floor, Rule 11(1). Any discussion? Again, we have eight hours to cover 14 substantive rules so I am going to move it along. Yes, sir.

MR. YELENOSKY: I just wanted to understand or clarify what we are voting on. Earlier on I had mentioned to Alex a concern that I had, and she said that your subcommittee has not necessarily gone through each of the letters that you got concerning discovery. There was an issue in there concerning discovery of mental health records, for instance. Are we to just ignore those kind of things in these votes and deal with just the concepts here, or did I misunderstand what we are going to be doing?

PROFESSOR ALBRIGHT: As I told Steven, what -- I don't think we have gone through all these rules because I think the way the committee has been operating is we need to figure out the basic structure of how we are going to conduct discovery. Then we

can address specific issues that are brought up in these letters, such as the mental health records. I think there are important issues in all of these letters raising important issues, some of which will be taken care of once we have figured out the structure, but we can't deal with anything else --

MR. YELENOSKY: That's fine. I just wanted to know that when we vote on something that it's with that --

MR. SUSMAN: It will be. I mean, we will go back. I mean, I assume we will have some work to do. It's just not going to be major. Concept, Rule 11(1), any further discussion of it? Remember your request for production can be served with citation. It can be served 30 days 'til the close of the discovery window. All in favor of Rule 11(1) raise your right hand. All opposed? That passes.

Rule 11(2), contents of a request for production of documents. Any discussion of this? I don't think, Alex, there has been much change from existing law at all, has there?

PROFESSOR ALBRIGHT: Not that I remember.

HONORABLE SCOTT BRISTER: Steve, does the -- is this the appropriate place to discuss the objections to the task force proposal about any requests for discovery shall be presumed not to cover attorney-client, work product, et cetera?

HONORABLE F. SCOTT MCCOWN: We have got a whole specific rule on that.

MR. SUSMAN: We have got a whole section on that.

HONORABLE F. SCOTT MCCOWN: We will get to that. We have solved that problem.

MR. SUSMAN: This is not the place. We are coming back to it.

HONORABLE SCOTT BRISTER: Okay.

MR. SUSMAN: All in favor of subdivision (2) of Rule 11 raise your right hand. That passes.

Subdivision (3), take a look at it. Again, I don't think there is any change on this one from existing law or intended to be. Any discussion, subdivision (3)? All in favor

of subdivision (3) raise your right hand. All opposed? That passes.

Subdivision (4), production. Alex, you help me here. Is there much change from existing law on this one or not? It was never controversial in our subcommittee.

PROFESSOR ALBRIGHT: It's more clarification about -- is this where we put in -- I think we clarified it that you either produce it at the place requested or at the place in the response because there will be a lot of times that you say I am not going to produce it on this day at your office. I am going to produce it on this day at my client's office where the documents are, and if there is no objection to that, then you just produce it there. So I think this -- I don't think this changes the current law. I think it just makes it more clear the way people operate in the real world.

MR. SUSMAN: Any further discussion about subdivision (4), production? All in favor of subdivision (4) raise your right hand. All opposed to subdivision (4)?

Subdivision (5), electronic or

magnetic --

HONORABLE F. SCOTT MCCOWN: You need to say on the record there that we passed that.

MR. SUSMAN: I'm sorry. That was passed.

HONORABLE F. SCOTT MCCOWN: You're not used to making that record.

MR. SUSMAN: Excuse me. And I will put on the record that unless I say it fails, it passes. So we will have a running pass.

MR. YELENOSKY: Let's vote on that.

MR. SUSMAN: Electronic or magnetic data, we have struggled with this mightily, and it was substantially redrafted at our meeting in Galveston. It's not really controversial. We just kind of have a difficult time putting it in words, but I think we have captured it now. "To obtain electronic or magnetic data the requesting party shall specifically request it. The responding party shall produce all electronic or magnetic data responsive to the request

that is reasonably available to the responding party in the ordinary course of business." If you have got to take extraordinary efforts, the requesting party shall pay the expenses. Any problem with that?

MS. MCNAMARA: Can I ask one question?

MR. SUSMAN: Judge.

HONORABLE C. A. GUITTARD: I have a problem with this footnote down here which says, "Requesting party must specifically request data in the form in which it wants the data produced, specify any extraordinary steps for retrieval and translation." I suggest since that's a mandatory provision -- I'm not suggesting any change in the committee's approach to it, but simply that it be put in the first sentence of section (5) rather than simply relegate it to a footnote since it is a mandatory requirement, and so I would suggest that to obtain electronic or magnetic data the requesting party shall describe specifically the data requested, the form, and so forth as in the footnote.

MR. SUSMAN: Scott? Comment?

HONORABLE F. SCOTT MCCOWN: Yeah. Judge, we originally had that concept in the rule itself, and the reason that we moved it to the comment -- and perhaps we ought not put it in that mandatory language. We may need to redo the comment a little, but we didn't want a requesting party, who after all doesn't know what the other side has, not to be able to retrieve it because of the form of his request, and we didn't want people to get in fights with this everchanging technology about whether the request is in the proper form to trigger my duty to respond, and so we went with more generic language that simply says if you're asking for this high tech stuff that's not traditional documents or tangible things, you have got to specifically say that's what you're asking for.

Then the responding party has to disgorge what is reasonably available to them in the ordinary course of their own business. So whatever they do in their own business in terms of putting this data together and pulling it out, they have got to do for you;

but if you want them to do something extraordinary, something they don't do regularly in their own work, then you have got to pay the reasonable expenses for that, and we thought that that kind of generic approach would be the best way to handle this highly technical and highly changing area.

MR. SUSMAN: Ann.

HONORABLE ANN COCHRAN: If a guiding principle here is to reduce costs, it seems to me that it might make sense to say that if the request is going to require extraordinary steps, and I would take extraordinarily to normally mean expensive, that the requesting party should first notify -- or, I mean, that the responding party should first tell the requester, you know, what you have asked for is going to cost $100,000. Normally the requester will say, "Well, I didn't want it that about bad. Is there some other way I could get what I need?" Right now it's just automatically you will get it with a big bill.

MR. SUSMAN: I think you're right. Well, my comment to both of you is, A,

Scott I think is absolutely right, and the sense last week was probably the comment has not caught up, Alex, with the revision of the text.

PROFESSOR ALBRIGHT: Right. We have not redrafted the comment.

MR. SUSMAN: We didn't change the comment. The sense was to make it the first sentence of the text, not the comment. The comment needs to be -- that part needs to be struck. Insofar as your comment, Ann, I think our feeling was we envision exactly that kind of dialogue going on. We don't know -- I mean, you know, we envision that you will request electronic data. The other side will call up and say, "Well, I only have it in this form and if you want it in some other form, it's going to cost you X," or "I can only get it if" -- now, maybe we have not captured how that goes on, but I think we envision that kind of dialogue going on between counsel.

HONORABLE ANN COCHRAN: I think you are envisioning a little more friendliness than I remember.

MR. LATTING: I am concerned

about something that Ann raises. The plaintiff asks the defendant for certain electronic data, 25 days later gets the electronic data with a bill for $6,000. The defendant later says it required extraordinary steps. They asked for it; they got it.

MR. SUSMAN: We don't want to do that.

HONORABLE F. SCOTT MCCOWN: No. Wait. That couldn't happen under the rule. All the responding party is supposed to do is produce what's reasonably available in the ordinary course of business. If it's extraordinary, it's not ordinary. We use those words to contrast.

MR. LATTING: Okay.

HONORABLE F. SCOTT MCCOWN: If you send a bill -- in other words, if you unilaterally sent a bill you would have unilaterally taken extraordinary steps. There would be no -- you couldn't do that. The only way you take -- the only way you get extraordinary is if they ask you for it.

HONORABLE ANN COCHRAN: I don't think it's clear enough. It seems to me that

it's purely the requester -- I mean, the responder's analysis, and yes, there is, but it also says that if it requires extraordinary they shall pay.

MR. SUSMAN: I think the point is well-taken. I mean, I think the entire subcommittee would agree that we don't want just weird data sent with a big bill.

PROFESSOR ALBRIGHT: But we can redraft.

MR. SUSMAN: We will cure it. Okay. As cured do you-all have any problems? We will cure this.

MR. MEADOWS: I think, Steve, on this language in the second sentence it says, "reasonably available to the respondent party in the ordinary course of the business." I believe we intended that to say "in the ordinary course of its business."

MR. SUSMAN: Right.

MR. MEADOWS: We just need to include that.

MR. SUSMAN: We are putting "its" there.

HONORABLE F. SCOTT MCCOWN:

Steve, I have got the solution already.

MR. SUSMAN: Good.

HONORABLE F. SCOTT MCCOWN: All right. In the second sentence say, "The responding party must produce" instead of "shall produce," just change that to "must produce," and then add a third sentence. This won't be the wording, but it will be the concept that before production in its response the responding party must identify the estimated cost and must state whether it thinks that that cost is an ordinary cost that it will bear or whether it thinks that cost is an extraordinary cost that the requesting party must bear, and if there is disagreement, they can go to the courthouse.

MR. KELTNER: I think there is an easier cure, Scott.

PROFESSOR ALBRIGHT: Why don't we talk about it in our committee?

MR. KELTNER: Yeah. I think if that's agreeable with the group, I think that's something we can do. I think we can change the third sentence to put a burden on the responding party before answer date to

notify the requesting party. Let's do it. We can play with this.

MR. SUSMAN: Listen, I do not want us to spend our time drafting over the next few hours. We all agree with the concept. This was an oversight of the subcommittee, I assure you. We don't expect information to be forthcoming with a huge bill. So let's move on. As we cure that is there any problem with the concept? You are going to get another set of these to see if we have honestly cured the problem. All in favor of subdivision --

MR. MARKS: Wait a minute. I have a question. I have a question.

MR. SUSMAN: Oh, excuse me.

MR. MARKS: The next sentence, "If the request requires extraordinary steps," does that mean requires extraordinary steps to produce documents in the usual course of business, or you know, there are other provisions here that say that you can produce documents as they are kept in the ordinary course of business, and that's okay. Now, does this change that?

PROFESSOR ALBRIGHT: This is not documents.

MR. MARKS: Well, it is documents in a sense. I mean --

PROFESSOR ALBRIGHT: No. This is only electronic data.

MR. SUSMAN: Well, our intention here was to make this comparable to producing documents. In producing documents, as I understand it, there is no objection that I have got to look through 150 files to find the relevant document to the other side. That may be an extraordinary -- I can't charge you for the cost of having a lawyer look through 150 files to find the documents that you specifically asked for simply because it's extraordinary. I can find them. We don't mean to put that expense on the other side, but if I ask you on documents to go to your document shredder and take the shredded documents and go hire a scientist to put them back together, which would be possible, that would be extraordinary. I mean, in the sense that you almost have to hire someone outside to come in and do something and manipulate the

data that is there, and that's I thought what we wanted to accomplish in a comment saying something like that, and maybe we need to.

PROFESSOR ALBRIGHT: Well, and I think also what we are intending is -- okay. You want my prior drafts that are on my network and so you ask for -- that is electronic data. It is not on a piece of paper. It only exists in electronic data. So you say, "I want all those prior drafts that are on your network drive." So I say, "Okay. I can produce those in the ordinary course of business because I can access my network drive in the ordinary course of business."

We may have a discussion. I may give you a disk with that stuff on it, or I may print it all out and give it to you in pieces of paper, but I as this -- as this rule envisions I, as the producing party, have the ability to decide what is the ordinary course of business, my ordinary course of business for how I want -- how far I have to go back and get it and the way I have produced it to you.

I think it makes sense then to have a step in the middle where we say, "This is what

I am going to do in the ordinary course of business, and this is how I am going to produce it," and if I think it takes extraordinary steps I am going to tell you I am not going to do this or you have to pay for it, but what we are trying to do is figure out where the fight is. We are trying to get the parties to identify the fight without people requesting too much or producing too much and then sending a bill for it.

HONORABLE ANN COCHRAN: Okay. Let me try to put it in a -- because whether you produce something that's already in your computer on disk or hard copy I don't see as part of the problem, if I could get a copy. To make sure I understand what this rule would do, any large data base you can, if you program the request appropriately, get essentially a printout that gives you everything that matches whatever your parameters are. If you wanted to see, you know, everybody in your data base who, you know, lives at such-and-such zip code and whose first name starts with an "s" and owns a dog, I mean, if those fields are in your data

base, in the ordinary course of business the data is all there.

You have those fields, and it is computerly possible to retrieve it, but the computer program that sets up what reports you get doesn't include the dog part in it, and if you had to -- so you would have -- it's not in your ordinary course of business to be able to get a report like that, and you have the data and could if you hired somebody to -- I mean, you have got the right report writing software, and you could spend two hours programming it, you can do it. I am saying that would be an extraordinary step that's not in your ordinary course of business to do it, but you have the data.

HONORABLE F. SCOTT MCCOWN: Right. Right.

MR. SUSMAN: Well, I think it would be an extraordinary step. I have always viewed it as when you request the manipulation of data. I mean, I would prefer to say the party who's asked has to turn over the data to the other side and let them manipulate the data, let them figure -- as long as they can

read it, as long as they can put it on their computer, then let them manipulate the data. I do not have to go through complaints from customers and categorize which complaints came from Texas complaining about --

HONORABLE ANN COCHRAN: Okay. But let me ask you this, though. What if you're the person with that data base. I want your data. Your computer is already set up to automatically spit out whenever you want them a report that does manipulate the data in a certain way. Can't I get the manipulations that in your ordinary course of business every Friday morning is on your desk?

HONORABLE F. SCOTT MCCOWN: Yes.

HONORABLE ANN COCHRAN: Can't I get that?

HONORABLE F. SCOTT MCCOWN: Yes.

MR. SUSMAN: Yeah. Yeah.

HONORABLE ANN COCHRAN: Okay. That's fine. So whatever manipulation you already do I can make you manipulate it for me. Okay. That's what I wanted to make

clear.

MR. SUSMAN: Richard.

MR. ORSINGER: If the information is stored on backup tapes like old E-mail of previous drafts, would going back to the backup tapes and recovering it, that would be ordinary course of business, or would that be extraordinary?

MR. SUSMAN: I think that would be ordinary. I think that would be ordinary, going to the backup tapes.

MR. ORSINGER: Okay.

MR. SUSMAN: Extraordinary we envision is going to your hard disk. I mean, you can write programs to go back and get stuff off of your hard disk.

MR. LATTING: Steve, is all of this covered within the trial court's ability to prevent undue harassment and unjust actions? Does the trial court have that power over all of this discovery?

MR. SUSMAN: Sure.

MR. LATTING: In these rules.

MR. SUSMAN: Yes.

MR. LATTING: Well, then no

problem.

MR. SUSMAN: Steve.

MR. YELENOSKY: I just -- I don't know how far we should go with the hypotheticals because they are all going to be outdated as technology improves, and I mean, within a year what we think right now may be extraordinary might be quite ordinary. So I don't know that you can go beyond using the language that you have already chosen.

MR. SUSMAN: Yeah. Okay.

MR. MARKS: I guess, and this has partly been answered, but shouldn't it say if the request requires extraordinary steps to obtain the information available in the ordinary course of business? I mean, if you can produce the information in the ordinary course of your business then you can give it to them that way and let them sort it out, and that's what you have in mind, but I'm not sure that it's real clear here that you have that option.

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: I think this is the same concept, but we have

developed phrases and words over a period of time that have case law meaning like "ordinary course of business," and the word "extraordinary" has no meaning at all other than what meaning we would add into it. Your examples are -- the one was like Herculean efforts.

MR. SUSMAN: It's a bitch.

PROFESSOR DORSANEO: And I don't know whether it's a good idea to completely depart from the terms that have some meanings. It might be "extraordinary" is a fine word. It means more than ordinary efforts is all it means.

HONORABLE ANN COCHRAN: I think I agree that we don't need to do drafting at this level, but I do think that -- and I just mentioned to Scott -- that some of it is just that if we would just try to be a little more clear in the language. Not, again, not wanting to get into specifics but that extraordinary steps is essentially referring to if we have the data but it's not ordinary in your business to produce it that way. Then I think it's extraordinary in that its not in

your ordinary course of business, and that's really the only thing, but that's purely a language thing, and I think the sense is clear from this discussion.

MR. SUSMAN: My motion is that we -- here is the motion that I would like to put before you. We approve subdivision (5) subject to anyone who thinks they can do a better job or clearer job drafting as it's already done send in their --

HONORABLE F. SCOTT MCCOWN: No, no, no.

HONORABLE ANN COCHRAN: Let's just agree to try to redraft it.

HONORABLE F. SCOTT MCCOWN: We can fix this, and we don't need a vote on it.

MR. SUSMAN: No, no. I'm just saying if there is a problem, you-all give your specific problems to Scott within a week.

HONORABLE ANN COCHRAN: But we don't have to reiterate our specific comments that you have already agreed the committee agrees with.

MR. SUSMAN: Sure. Right.

HONORABLE ANN COCHRAN: Okay.

HONORABLE F. SCOTT MCCOWN: We can fix it. We don't need to vote on this because we are not going to really get a vote without specific language. We can fix this.

MR. SUSMAN: Okay. We will move on. We won't vote on (5).

(6), nothing new. Any discussion of (6)? All in favor of subdivision (6) raise your right hand. All opposed?

No. 7, "Unless otherwise ordered by the court the expense of producing documents," et cetera, et cetera, "will be born by the producing party. The expense of inpecting, sampling, testing, and copying is born by the requesting party." I don't think that's a new concept. Any discussion of that?

PROFESSOR ALBRIGHT: This is not in the current rule.

MR. SUSMAN: Not in the current rules but a pretty common concept. Any discussion of subdivision (7)? All in favor of subdivision (7) raise your right hand. All opposed? Thank you.

What I would like to suggest we do now, I think is lunch served over there? What I

would suggest, if we can, I would like to ask you to do this. Let's break for about 20 minutes, and everyone get lunch, and can we have a working lunch? Is that okay? Will you-all come back here and sit around with your sandwiches and let's continue working so we can get through this?

Thanks lots. We will adjourn for about 15 minutes for everyone to load up.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter in and for the State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 20, 1995, and the same was therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,058.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 7th day of February, 1995.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas
Highway, Suite 110
Austin, Texas 78749
(512)306-1003

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/96

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