506

11/30/89 2

APPEARANCES

Supreme Court of Texas:

Chief Justice Thomas R. Phillips
Justice Franklin S. Spears
Justice C.L. Ray
Justice Raul A. Gonzalez
Justice Oscar H. Mauzy
Justice Eugene A. Cook
Justice Jack Hightower (Not Present)
Justice Nathan L. Hecht
Justice Lloyd Doggett

Speakers: Page

P R O C E E D I N G S

CHIEF JUSTICE PHILLIPS: Good morning, and welcome to the Supreme Court's public hearing on the adoption -- proposed adoption of new rules of civil and appellate procedure. We very much appreciate your interest in the rules of procedural law of the State of Texas and your taking time to be here to help give us the benefit of your thoughts on what rules we should adopt and -- and how they should read.

This is, frankly, a bigger crowd than we had anticipated. It's going to necessitate our proceeding, I think -- rather than just letting everybody get up and give their whole say, we will proceed by blocks of rule numbers, and if you want to speak in that area, then we will speak to it.

Also, we are recording -- we are having these sessions reported. That is not something new. We have 40 or 50 years of reports on the Supreme Court Rules Advisory Committees, and those are very helpful sometimes in interpreting the rules, and so we are

also reporting for posterity these proceedings today.

Since the court reporter does not know all of you by name, please state your name before you proceed to make any remarks so that she will be able to have an accurate statement. Why don't you state your name and home town so that she will have an accurate statement of who has said what in these proceedings.

Justice Nathan Hecht is the head of -- he is the liaison with the Supreme Court to the various rule-making advisory bodies that help the Supreme Court promulgate its rules, so Justice Hecht will preside over these proceedings today, and I will turn it over to him at this time.

JUSTICE HECHT: Thank you, Mr. Chief Justice.

We want to begin by thanking our Rules Advisory Committee for its hard work and the proposals that they have laid upon the table. Some of the members are here including the chairman, Luke Soules, this morning, and many of these -- this committee has in the past served at its own expense and gives a lot of

time and energy to the multitude of proposals that the Court gets each year on changes in the rules, and we thank them.

This is the first session that I recall, at least in recent memory, in which the Supreme Court has entertained direct comment on proposed changes in the rules, so if we were a little unsure as to how many would want to make comments, we have received over 50 letters in response to the invitation in the Bar Journal, and, of course, we have a good number of you here this morning.

The -- as the Chief Justice said, a record is being made of these proceedings, as of all committee proceedings, to help show some of the discussion that goes into the changes that are made.

Besides the proposed changes that were printed in the State Bar Journal, a number of other projects are pending which some of you wish to comment on today, too, by your forms that -- on which you signed up.

One of those is the local rules project: an effort to make some sense out of the local rules and to consolidate them.

Sealing of court records: that subcommittee of the Rules Advisory Committee is proceeding in its work and has a tentative proposal, I believe, and is continuing to discuss it.

There is a long-term, ongoing project to try to recodify the rules and renumber them for simplicity's sake.

And then, of course, our ultimate concern, which is to simplify the rules and reduce the delay and expense in civil litigation.

So the rules changes are proceeding along different tracks, some fairly technical and some fairly general; and you are welcome to address any of those this morning.

I believe the best way to proceed is to go through the proposed changes that were printed in the State Bar Journal, and we will take them by blocks of rules. If you wish to comment on a specific rule when that block comes up, we'll ask you to come to the end of the table here and, as the Chief Justice said, state your name and anybody that you are representing, the city in which you reside, and then you are welcome to make whatever comments you wish. And

the Court may have some questions for you along the way, as well.

I think the first block that it makes sense to discuss are Texas Rules of Civil Procedure 1 through 21b, those rules. If -- whoever wishes to speak to rules -- Texas Rules of Civil Procedure 1 through 21b, please come to the witness chair. Who will be first?

MR. NIEMANN: May I approach the bench, Your Honor?

JUSTICE HECHT: Yes, such as it is.

LARRY NIEMANN,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. NIEMANN: May it please the Court, my name is Larry Niemann. I represent the Texas Apartment Association, some 7,000 members in Texas, and the Texas Building Owners & Managers Association.

I wish to compliment the committee

for their hard work, but I also wish to register a -- an objection and state my reasons to the Court why we think that Texas Rule of Civil Procedure No. 4 has gone a bit too far. That is the rule in which the proposed change is for time periods under five days to have weekends and holidays not counted in the calculation of that time period. I have written a rather comprehensive letter to the Court regarding that, but let me try to summarize it.

The reason we are concerned is that these -- Rule 4 has a very serious effect on -- an adverse effect on the eviction process, forcible entries and detainers.

Just how important is this rule to our industry and to the people of Texas is exemplified by the fact that there are 900,000 civil cases filed in original jurisdiction courts in Texas every year. Very surprisingly, 12 percent of that total, or 106,000 cases, are forcible entry and detainer cases. So we're talking about a very serious effect on a lot of people in a lot of cases.

Now, how does the proposed change -- what is the basic reason, as I understand it,

for the proposed change in Rule 4? And that is to conform the calculation method to that of the federal rules where weekends are not counted in these short five-day time periods, and to prevent lawyers from playing games where they will deliver a five-day time period type notice or pleading on a Friday afternoon, and the opposing lawyer simply does not have time to properly prepare and react.

My comments there are that this game-playing problem does not exist in evictions. Now, where does the five-day rule come into evictions? Following the eviction judgment, the rules require that there be a mandatory five-day wait before the landlord can get a writ of possession to execute on the judgment he has just won. So after the landlord wins, the tenant still gets to stay there five more days before the landlord can get a writ of possession to implement the judgment.

The other way it comes into effect is that there can be no -- there is a five-day time period for appeal by the tenant -- or by the landlord, for that matter -- to the county court following an eviction.

Now, if this new rule is adopted -- if, for example, a judgment was granted on a Friday, the Saturday and Sunday wouldn't be counted. The next five days would count, but the landlord couldn't get his writ of possession until the Monday following, so that is expanding a five-day rule into a nine-day rule. And the same applies for the eviction: the five days to nine days under those circumstances. And, of course, it cuts back to seven days if the judgment is rendered on a Thursday.

Now, unfortunately, in nearly all evictions there are non-payment -- well, I would say at least 90 or 95 percent of all evictions are non-payment of rent evictions, and the substantive effect of the proposed rule is to give the tenants, as a practical matter, two to four days more free rent. Theoretically, it is not free rent, because the tenant is liable for it, but as a practical matter in a non-payment of rent eviction, it is -- it is very seldom a recovery of unpaid rent under those -- under those circumstances. So you're affecting the substantive pocketbook, so to speak, of the landlord, and we think it is an unfair

substantive effect to elongate the time for getting the writ of possession and the time for getting -- for appealing the case.

JUSTICE HECHT: Mr. Niemann, you have also commented on 749c --

MR. NIEMANN: Yes, Your Honor, I have.

JUSTICE HECHT: -- the requirement of a deposit of one month's rent to perfect an appeal even if the appellant is in forma pauperis.

MR. NIEMANN: That's right, Your Honor.

JUSTICE HECHT: And you say in your letter that when this rule was promulgated, the Supreme Court and the Texas Tenants Association were both of the opinion that these rules were unconstitutional.

MR. NIEMANN: Did I say "unconstitutional"?

JUSTICE HECHT: It seems a little strange that -- I assume you meant that you thought that they were both constitutional.

MR. NIEMANN: That was a very serious typographical error, Your Honor, and I

MR. [illegible]: [illegible]

[illegible] -- [illegible]

MR. [illegible]: [illegible]

[illegible]

MR. [illegible]: [illegible]

[illegible]

MR. [illegible]: [illegible]

[illegible]

JUDGE [illegible]: [illegible]

"[illegible]"?

MR. [illegible]: [illegible]

[illegible]

[illegible] Court and the Texas Supreme [illegible]

[illegible]

JUDGE [illegible]: [illegible]

[illegible]

MR. [illegible]: [illegible]

[illegible]

JUDGE [illegible]: [illegible]

[illegible]

MR. [illegible]: [illegible]

[illegible]

can't blame that --

JUSTICE HECHT: And then you add: "No one has ever challenged the constitutionality of these rules." Actually, 749c has been challenged, although the point was not reached in our decision of Walker versus Blue Water Garden Apartments.

But why, if a month's deposit is required for supersedeas, doesn't that protect you against the problem that you are concerned about, which is the elongated holding-over period?

MR. NIEMANN: No, Your Honor, I don't think that a supersedeas bond is applicable in an eviction appeal. The special rules that apply to eviction appeals, I don't think, apply -- don't bring in the supersedeas bond. I -- I --

JUSTICE HECHT: 749b does require a month's deposit to supercede the FE and D judgment and to hold over during the appeal. As long as you have that protection, why do you need also the deposit of a month's rent in order to perfect the appeal when the appellant is in forma pauperis and says he can't make the

deposit?

MR. NIEMANN: I understand. The 749b says that during the appeal rent shall continue to be paid. It doesn't say that any monies must be tendered in to the court as a condition of appeal. And I think what we will find is that if -- if we simply have a rule that during appeal rents must continue to be paid, then that is not self-enforcing; the tenant doesn't pay the rent and what the landlord has to do is to go to court, get a hearing, set it, get a -- get a judgment to say "This tenant has not continued to pay the rent, Your Honor; therefore, we" -- "we want him out."

And we think that as a practical matter what is going to happen is that following an eviction, a very astute tenant is going to say, "I'm a pauper. Even though I have lost my case on non-payment of rent, I'll sign a pauper's affidavit; and the judge certainly can't disprove that I'm a pauper, and the landlord can't disprove that I'm a pauper." And we think as a practical matter there are going to be frivolous appeals to the county courts based on pauper.

Now, I would say, Your Honor, that several years ago when these rules regarding pauper appeals and conditions for pauper appeals were presented to the committee, they were, in fact, initially drafted by the attorney for the tenants -- I think it was Mr. Jim Piper (phonetic) at the time -- and myself, and thoroughly considered by the -- the Supreme Court Advisory Committee.

And briefs were written at that time and submitted to the committee, and I think both the tenant lawyer and myself were of the conclusion that requiring the payment of the one rental period's rent in non-payment of rent cases was a constitutional protection of the landlord.

JUSTICE HECHT: Any other questions of Mr. Niemann?

CHIEF JUSTICE PHILLIPS: What's your solution to Rule 4? To just not make the change at all, or make --

MR. NIEMANN: No, no.

CHIEF JUSTICE PHILLIPS: -- the five days four days?

MR. NIEMANN: No. As I -- as I

requested in my letter, Your Honor, we think that the appropriate solution would simply be to carve out from Rule 4 the five-day time periods contained in Rules 748 on a writ of possession, and Rule 749, I think, a, b, c, and d, regarding appeals of eviction cases. You have similarly done that already in the proposed Rule 4 in that you have carved out an exception for three days when service is made by registered certified mail.

JUSTICE HECHT: Thank you, Mr. Niemann.

MR. NIEMANN: Thank you, Your Honor.

JUSTICE HECHT: Other comments to Rules 1 through 21b?

Yes, sir.

JUDGE GUY JONES,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

JUDGE JONES: Mr. Chief Justice,

gentlemen, my name is Guy Jones. I'm judge of the 202nd District Court, Texarkana, Texas. I'm here representing myself. The record will reflect that it's at my own nickel and -- if it please the Court.

I appear before the Court today seeking a change in Rule 13. This Court adopted Rule 13, and as all of you know and are very familiar with the rule, there is an escape mechanism in the rule by what is known as the 90-day rule.

I wrote a letter to Justice Hecht and then didn't mail it. I decided to appear personally before the Court, because I have very strong feelings about the ineffectiveness of Rule 13.

To start with, I'll read just a portion of the letter that I had originally intended to mail to Justice Hecht. And I'm going to give it to him. In fact, I have copies for the Court, if you would like to have it. But I'll read a portion of it, and it says that "the rule gives to the trial courts a very valuable weapon with which to correct an age-old problem of frivolous suits, irresponsible

pleadings, falsified documents, and general" -- and this is important -- "general slipshod practice of law. But the addition of the sentence" -- the 90-day escape clause sentence -- "renders this almost totally ineffective. In addition to this sentence" -- that is, the 90-day escape clause -- "it simply tells the trial judge that an attorney or party can offend the very heart of what Rule 13 tries to do and then says that you can escape by the simple expediency of just saying, 'Whoops, I'm sorry, Your Honor, I withdraw the offending pleading. The damage has been done, but I'm sorry, I withdraw the offending pleading,' and the case is over. There's no sanctions that can be applied under Rule 13."

I submit to you, gentlemen, that once the heart of Rule 13 has been offended, the damage is immediate. The offended party or parties -- and which could be the Court, the taxpayers -- once they are offended, that damage is immediate. And if someone has, in fact -- has, in fact, offended the very heart of Rule 13 and what it strives to do, they should be allowed no escape mechanism.

I'll give you an example of something that just happened to show you -- to show you why that this rule needs to be amended.

Incidentally, I have a proposed substitution to Rule 13. I'm not going to even suggest that I think that you gentlemen may adopt my rule in toto, but I'm hoping that by my presence here today and my presentation, and by giving you the proposed substitution to Rule 13 and my reasons therefor, that perhaps we can get some more teeth into Rule 13.

I had a lawsuit where a -- this is just one example. Now, I can sit here -- I can't take this much time; obviously, you have a lot of other people that want to appear. I will give you one prime example.

A car dealer sold an automobile to a lady. It was a used car, had 26,000 miles on it. The lady ultimately, some two years later -- a little less than two years later -- called the bank which was the lending institution, without recourse, and she said, "You can come get this car. I don't want it. It don't run. Come get it."

The bank comes and gets it, has the

motor repaired, and sold it, sued the lady for the deficiency.

The lady went to a lawyer. Now, it was a very small deficiency, but it was district court case. She went to a lawyer; he immediately files a third-party action against the automobile dealer saying, "If you hadn't sold her a lemon" -- or -- "Judge, if that car dealer hadn't sold her a lemon, we wouldn't be here suffering this deficiency, so any deficiency judgment you render against her, we would ask you to carry that over to the defendant," a third-party defendant car dealer.

Now, there are some lawyers, gentlemen, and I'm sure you are all aware of this, that if you have got a person that comes into your office with a warm body and 50 bucks, they will file a lawsuit.

Now -- so this dealer has to go get him a lawyer and defend his third-party action. Comes proof time. The lady gets on the stand. The lawyer who filed the third-party action wasn't there. He sent some young boy that was just a young, wet-behind-the-ears lawyer over to try the case.

the jurisdiction."

The jury went to a lawyer. "Jury is
a very well-qualified jury, but it was divisive
court case. The went to a lawyer; we
'm sorry to see a third-party design regional
ic authority to say, "I don't
not in a hurry" -- or -- "Judge, if at
doctor hasn't made a ruling we don't go
here differing this deficiency, on any
duplicating ink cut you condemn rights be we
result of you as new step over to the
defendant," a third-party defendant car dealer.

Now, there are more lawyers,
practically, and I'm sure you are all aware of
this, that if you have got a motion that on
the your office with a very busy and so busy,
they will file a lawsuit.

"We -- no other lawyer has to get
a lawyer [illegible] section.
Close proof it is. The jury retires on the at no.
The juror who is for the civil-rights action
won't sleep. "I seem more young per shift not

Here's the evidence: She bought the car when it had 26,000 miles on it. When the bank repossessed it on a voluntary repossession, it had 96,000 miles on it. This is not all. The plot thickens.

The lady, during that interim time in putting on that 70-something thousand miles on that car, never once, not one time, went back to that car dealer and carried that car back and made a complaint. The plot gets even thicker.

The engine that blew up in the car that -- when they returned it to the bank was not even the engine that was in the car at the time the car dealer sold it to the lady. It had burned up at some 78,000 miles and she had a shade-tree mechanic over at New Boston put her another one in it, and it blew up, so she just told the bank, "Come get this piece of junk."

Well, at the conclusion of her testimony, I looked at her and I said, "Ma'am, whose idea was it to sue this Mr. Mankins?" (phonetic). The guy's name is Pete Mankins. I said, "Whose idea was it to sue this car dealer, yours or your lawyer's?"

She said, "I guess it was my

lawyer's. I don't have anything against Mr. Mankins."

Well, at that moment the young lawyer, being smarter than his old partner, jumped up and says, "Your Honor, we move to dismiss the case against Mr. Mankins."

I guess he had -- he had read the escape clause in Rule 13. But anyway, he dismissed his lawsuit.

This is just one example of slipshod law practice, filing pleadings where there is no reasonable inquiry into -- as to whether there is any legitimate basis for them or not. And that happens in the trial courts of this state much more than anyone might imagine, and it needs to be stopped.

I said to Justice Hecht in my letter, we have to remember that the impact of Rule 13, if it is offended and truly offended, that impact is immediate. The damage that's done is right then. The taxpayers' expense is taken when you have to go into that clerk's office and take up that clerk's time filing a piece of meaningless pleadings or a motion. The Court's time is immediately taken, and not only

is the court time immediately taken on hearing such frivolous matters as this, the person who is involved outside of the court is damaged by having to hire attorneys, incur expenses.

And it's my opinion that if somebody is going to willfully violate the heart of Rule 13, he should not have an escape mechanism. And if we are to stop, in my opinion, the wholesale filing of false pleadings and meaningless and groundless lawsuits and frivolous claims that clutter the dockets of this state -- and we all know it happens -- then I strongly urge that you gentlemen adopt a rule, some rule, that gives more power to the trial courts to issue sanctions for people that violate the rule.

And I certainly am not going to be one that says that this should be done without notice and hearing. It should be done after notice and hearing; it should be done after the accused, offended party has a full right to defend himself as to the accusations that he has filed something frivolously or for harassment, yes, and it should be fully subject to appellate review.

But the trial courts have got to

have -- if we are going to stop this type of thing that keeps cluttering our dockets -- and we started with Rule 13; we tried. But we put the escape clause in. I mean, it's a full escape vehicle for them, and this needs to be amended.

I suggest that we take the escape -- the escape language totally out -- oh, incidentally, while I was looking back in -- I went back and got a paper, and I'll bet you-all have seen this. There was a paper that was delivered to the judicial section by Judge Joe Morris back in '88, and Judge Morris -- and I note with interest that he says in his conclusion on this paper -- he said, "There are several shortcomings to the rule, most notably the 90-day escape clause." And he says, "If attorneys' only fear under Rule 13 is that they may be required to withdraw or amend their pleadings in order to avoid sanctions, there would be little to deter attorneys from filing frivolous claims."

He goes further and says, "Nor would they be strongly motivated to reasonably inquire into the allegations contained within a paper

next -- if we [illegible] under this type of thing that we [illegible] -- in to start [illegible] the one [illegible] today, it's a full [illegible] to [illegible] on.

I suggest that we take the escape -- the case language totally out -- oh, incidentally, while I was [illegible] -- I went back and got a paper, and I'll bet you- I have seen this. There was a memo that was delivered to the [illegible] section by Judge [illegible] back in '68, and Judge [illegible] -- and I note with interest that he says in his conclusion on this paper -- he said, "There are very few [illegible] things to the [illegible], most notably the [illegible] a place." And he says, "The attorneys' only fear under Rule 13 is that they may be required to withdraw or amend their pleadings [illegible] avoid sanctions, there would be little [illegible] attorney from [illegible] frivolous claims."

[illegible] and [illegible], "We want [illegible] into the [illegible] within [illegible]

filed with the Court." And, gentlemen, that has been the case since the adoption of Rule 13.

He goes on further and he says, "As pointed out earlier, the rule's teeth are not very sharp. It seems clear that one may avoid sanctions altogether by simply withdrawing his pleading, motion, or other document filed with the Court prior to the expiration of the cure period." That's true. That's happened.

Gentlemen, I don't want to take any more of your time; there's too many other people here that want to testify before the Court. But if you have any questions, I will be glad to ask (sic) them. I do have copies made that I will give to your clerk of the proposed change.

Oh, and may I add this? In Rule 13, we used too many "ands" and not "ors." For an example, what I would like to see the Court additionally do is take out all of these "ands." In other words, it's not -- if it's groundless, quote, "and" brought for the purpose of delay, if it's groundless, that's offensive to the rule. If it's brought for the purpose of delay, that's offensive to the rule. And so it shouldn't be groundless "and for"; it just

should be groundless "or for" harassment.

You know, you gentlemen, I'm sure some of you have been on the trial benches. You see these lawyers get at each other's throats all the time, and they just -- they go berserk, bonkers. You know, they just fight each other and they end up and the Court gets in the middle. And certified questions: "Don't answer that question." And it's a good -- a real good question. They certify it, taking up my time. If -- if -- you know, what a first-grade law student -- a first-year law student would know better.

And the trial courts need some help in order to cure these things and to stop the clutter of these -- of our dockets and to go on with meaningful lawsuits and not frivolous motions and lawsuits made for the purpose of harassment.

JUSTICE DOGGETT: You are going to leave us a copy of your --

JUDGE JONES: Yes, sir. Anybody have any questions?

JUSTICE GONZALEZ: Judge Jones, perhaps an observation: I agree wholeheartedly

with you that we need to arm the trial court with rules that have teeth in them, but I don't think you want to leave the impression here today that most lawsuits that are filed in your court are of this nature.

JUDGE JONES: Oh, heavens, no, Judge --

JUSTICE GONZALEZ: This is an aberration --

JUDGE JONES: -- and I hope to know whether you gathered that impression.

JUSTICE GONZALEZ: Well, we've got the press here, and I don't want them to think --

JUDGE JONES: Oh, well, ladies and gentlemen of the press, don't get that notion.

JUSTICE GONZALEZ: This is an aberration.

JUDGE JONES: Please don't get that impression. Most of them are not that way. It's this handful or so that clutters up the dockets of the court that we're trying to be able to cure.

JUSTICE GONZALEZ: Yeah.

JUDGE JONES: We're looking for a

with you [illegible] and to [illegible] the trial court with [illegible] shots have teeth in them, but I don't think you want to leave the [illegible] impression here both that and [illegible] remarks that are filed in your court as [illegible] that nature.

MR. [illegible]: Oh, heavens, no, [illegible] --

THE [illegible]: With all aberration --

MR. [illegible]: -- and I hope to know about you [illegible] that [illegible].

MR. [illegible]: Well, we've got a [illegible] here, and I don't want them to think --

MR. [illegible]: Oh, well, I [illegible] any mention [illegible] the room, let's get that noted.

MR. [illegible]: [illegible] is aberration.

MR. [illegible]: If we can't get that impression. Part of the [illegible] that way. Take this handful or so that shuttles up the [illegible] of the court that we're trying to be able to cure.

THE COURT: Yes.

MR. [illegible]: We're [illegible] for

cure mechanism to frivolous lawsuits and claims.

CHIEF JUSTICE PHILLIPS: Judge Jones, in -- in two sentences or less, how does your proposal differ from Federal Rule 11?

JUDGE JONES: Not a whole lot; not a whole lot. It's just a little bit tougher. It doesn't -- Judge, listen, I'll admit that -- I'm -- I'm going to circulate my proposed substitution to you, and I think it's a good one.

And I think that -- why should a party offending Rule 13 have any greater right than a person adjudged of any contemptuous action? I mean, if the damage is done, it's immediately done. And if the trial court finds, subject to appellate review, that -- that -- that -- that damage was done, that the heart of the rule had been violated after hearing, why should that person be allowed to escape because of some 90-day rule we've got in Rule 13 -- or some escape clause in Rule 13? If he's done damage and he's violated the rule in the process of doing it, then he should be sanctioned.

JUSTICE COOK: How much of your time is taken up each week by lawyers on frivolous

motions and matters of the kind you've outlined?

JUDGE JONES: Your Honor, I couldn't answer that question. That's -- I mean, I wouldn't -- it happens, you know, but I wouldn't want to speculate on -- there is a certain amount of time. I mean, we spend a lot of time on frivolity.

JUSTICE COOK: I know.

JUDGE JONES: We spend lots of time on frivolity.

JUSTICE RAY: Some weeks more than others.

JUDGE JONES: Huh?

JUSTICE RAY: Some weeks more than others.

JUDGE JONES: Oh, yeah, yeah, yeah. Good morning, Justice Ray. You're a little -- you weren't here the whole time to hear my pitch.

JUSTICE RAY: I heard it on the telephone before you got down here.

JUDGE JONES: Oh, did you? That's right, I -- I gave it to him before I got here.

JUSTICE RAY: I can't figure out why it is you are getting so gray-headed.

BEFORE THE

SUPREME COURT OF TEXAS

IN ADMINISTRATIVE SESSION TO CONSIDER
CHANGES PROPOSED IN TEXAS RULES OF COURT

--*-*-*-*-*-*-*-*

BE IT REMEMBERED that the above entitled matter came on for hearing on the 30th day of November, 1989, beginning at 9:00 o'clock a.m. in the courtroom of the Supreme Court of Texas, Supreme Court Building, Austin, Texas, before the Justices of the Supreme Court of Texas, and the following proceedings were reported by JUDITH CAROLYN COX, Certified Shorthand Reporter in and for the State of Texas.

ORIGINAL

ORIGINAL

JUDGE JONES: Well, Ava is out -- over here. Look at her. She's -- she's -- she's been -- she's been -- she's causing me to get this way.

Justice Hecht, here are the proposed copies of the rule that I think -- and it's got -- and those have teeth in it. They just don't give you an escape clause. It just says -- and I take out the "ands," put the "ors." If you file a case for the purpose of harassing somebody else, you are subject to sanctions.

If -- you know, gentlemen, if -- if you-all have any further questions, I know this -- I don't want to take up --

JUSTICE SPEARS: I have one question.

JUDGE JONES: -- an inordinate amount of time.

JUSTICE SPEARS: I have a question.

JUDGE JONES: You have a question?

JUSTICE SPEARS: Has it been interpreted under the federal rule, or is it anywhere in your proposal, as to what you do with the lawsuits that are filed in an effort to

change the common law or to change an interpretation of a statutory provision --

JUDGE JONES: Yes --

JUSTICE SPEARS: -- or is that considered -- that's considered by some judges as frivolous and by other judges as legitimate effort.

JUDGE JONES: Well, in my opinion, that's legitimate effort. If -- you know, if it is filed for the sincere purpose of change because -- the law is -- is a -- is a -- always a never-ending change, as we all --

JUSTICE SPEARS: Well, I can foresee some district judge saying, "Well, this is the settled law, and you just filed a frivolous lawsuit and I'm going to hit you."

JUDGE JONES: Well, I can understand that, and -- and --

JUSTICE SPEARS: How do you protect against that?

JUDGE JONES: By the language in the same rule, that a -- that a -- that a legitimate lawsuit filed to change an existing law is not violative of the rule. In fact, that's in there now, and, in fact, in my proposal also I -- not

only do I safeguard the parties who may be accused of offending the rule by appellate review, you know, the amount of damages claimed cannot be -- cannot offend the rule; a general denial cannot offend the rule. But --

JUSTICE SPEARS: Well, I -- I was specifically referring to your suggestion that we replace the "ands" in the rule with "ors."

JUDGE JONES: Well, here's --

JUSTICE SPEARS: That would make it a little stickier, wouldn't it?

JUDGE JONES: No. In fact, it gives it -- it gives it some teeth. If you say "groundless and for the purpose of delay," that means that if you want to file it for the purpose of delay, if it has some merit, even though it is for delay purposes only, you don't offend the rule.

My -- my thinking is this: If you file a lawsuit or a motion or any other paper before a court that you know to be groundless, you know it's done for harassment purposes, you know, you know it to be frivolous or you have filed it without making any kind of reasonable or diligent inquiry as to the validity of what

you are doing, that's slipshod law practice. And it's -- also, it's taking up time of the courts and cluttering the dockets, just the one I just -- the example I gave: filing that third-party action.

I looked at the car dealer and said, "I'm sorry, sir, that you had to be brought before the Court. We hope that justice is better than this, but I can't do anything for you."

Now, under my proposal on a tougher, more teeth than Rule 13, I could have said, "I can do something for you. I'm going to have that lawyer that filed that third-party action before the Court on contemptuous action and see if I'd gain them both sanctions."

And the people of this state, Justice Spears, need to be made whole when they're damaged by people that do things like that. You see?

JUSTICE HECHT: Any others --

JUDGE JONES: So I say harassment means harassment; delay means delay.

JUSTICE HECHT: Any other questions of Judge Jones?

Judge, we thank you for coming.

JUDGE JONES: Thank you, sir. I appreciate the attention of the Court and --

JUSTICE HECHT: Thank you so much.

JUDGE JONES: -- and appreciate it very much.

JUSTICE HECHT: You bet.

JUDGE JONES: I thank you.

JUSTICE HECHT: Thank you.

Any other comments on Rules 1 through 21b?

JUSTICE DOGGETT: Rule 13 that we just heard testimony on was not in the committee recommendation --

JUSTICE HECHT: Yeah.

JUSTICE DOGGETT: -- so if anyone has a suggestion on a rule covered by this cluster of numbers as we go along, they can offer it, even if it's not --

JUSTICE HECHT: Yes.

JUSTICE DOGGETT: -- anything the committee is considering.

JUSTICE HECHT: Right. If you -- if you didn't hear that, if you have any comment on any of these rules, whether a change is proposed

or not, why, feel free to make it.

DAVID DAVIS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. DAVIS: Justice Hecht, my name is David Davis. I'm from Austin. I'm here in two capacities: one as a -- as a trial lawyer with primarily a defense practice, and also as a representative of the Texas Association of Defense Counsel.

I have just a number of comments on the rules, and I have provided to the clerk a copy of our -- of our comments, and there are several of us that will speak at different times in writing that summarizes it.

As to Rule 10, the proposed rules eliminate the provision that simply allows the filing of a notice to substitute an attorney when there's an -- in particular, where the client consents to the change and a new attorney

is substituted in.

And we -- it is our feeling that by doing this, by requiring a motion showing good cause of situations where there is an agreement, it is unnecessary involvement by the Court and eliminates a process that is used fairly frequently and can be done without any purpose of hurting anybody in the actual lawsuit.

Now, what I'm talking about is simply the case where the client decides to change attorneys and the attorneys make the decision to comply with that. If there is problems, there's other provisions within the rule that can make certain that such a substitution does not occasion any delay in the case. Say if an attorney is willing to take it upon himself to substitute in and his client is agreeable to that, and a reasonable notice is given to all parties and the Court of that substitution, we feel that -- that provision should be allowed left in the rules.

CHIEF JUSTICE PHILLIPS: Do you have language -- if I heard you, what you are saying is if there is an express written consent of the client and a statement that it would occasion no

delay, then you see no need to have to have a written motion for good cause.

MR. DAVIS: Right. Essentially, what --

CHIEF JUSTICE PHILLIPS: But that's stronger than the current rule is now, isn't it?

MR. DAVIS: Well, basically, under Rule 10, the current item to be --

CHIEF JUSTICE PHILLIPS: The problem we have now is -- is sometimes the client has no idea these things are going. I mean, there's no -- there's no protection in the rule to keep -- for a client to demonstrate to the Court that they are aware of what's happening, particularly the withdrawals.

We have a lot of -- the attorney loses his client and doesn't make a very diligent effort to find the client --

MR. DAVIS: Right.

CHIEF JUSTICE PHILLIPS: -- and the case just disappears in smoke and there's nobody accountable for it.

MR. DAVIS: Chief Justice Phillips, what we are asking is under the current Rule 10 provision, sub-item (b) in the rules following

the "or": "upon presentation by such attorney of a notice of substitution designating the name, address, telephone number, and State Bar ... number of the substitute attorney, with the signature of the attorney to be substituted,and an averment that such substitution has the approval of the client and that the withdrawal is not sought for delay only."

It would appear to be that there is protection of all of the Court and the parties through that. If it's abused by an attorney, then, you know, perhaps that could be -- if -- if there would be a requirement, not only an averment that the client has agreed to it, but a provision that the -- the notice also include the signed consent of the client, that would satisfy the requirement of assuring that the client did consent to this. When--

CHIEF JUSTICE PHILLIPS: Your problem is having to bring a motion before the Court which would --

MR. DAVIS: Right.

CHIEF JUSTICE PHILLIPS: -- lead to some delay --

MR. DAVIS: You just have to do it,

MR. DALE: You just have to do it,
some day.

CLERK MACKAY: -- Load to
MR. DALE: Right.
Court Action would --
problem is having to bring a motion before the
COURT REPORTER SMITH: Now
client did consent to this. Once--
matter, the requirement of ensuring that the
the signed consent of the client, that you
provision in this -- the notice and inquire
ascertain that the client be agreed to, but
it there would be a requirement, not only in
a law, you know, perhaps that could be -- it --
reference of it at the end that with re
to not comply for any of
... number of the future briefs, with the
reference of the attorney to be maintained,
on. You see that such publication by the
have the client and if the attorney
it not comply for any of
It would please to do that there
reference of it at the end that with re
a law, you know, perhaps that could be -- it --
it there would be a requirement, not only in
ascertain that the client be agreed to, but
provision in this -- the notice and inquire
the signed consent of the client, that you
matter, the requirement of ensuring that the
client did consent to this. Once--
problem is having to bring a motion before the
COURT REPORTER SMITH: Now
Court Action would --
MR. DALE: Right.
CLERK MACKAY: -- Load to
home early --
MR. DALE: You just have to do it,

and it auto -- automatically has a delay with that.

As to Rule 13, I won't repeat Judge Jones' comments except to indicate that at the time we speak also about Rule 87, that I believe that -- that a stronger Rule 11 -- I mean a stronger Rule 13, perhaps based upon some provision similar to Federal Rule 11, would provide some mechanism whereby a party in a venue hearing where a cause of action is taken as true without any requirement of a prima facie showing, but should it be later determined that the cause of action was frivolous, then under a strengthened Rule 13, there would be some remedy other than simply by an appeal. But I won't make any more comments on Rule 13 except to the extent of indicating we do believe it should be stronger.

Under Rule 21a, I do want to comment about the telephonic document transfer that we typically refer to as "fax."

The problems that we perceive are two: One is that fax provides no inherent verification of receipt, which makes it more analogous to a first-class letter. It's not, I

don't believe, technically analogous to certified, registered mail delivered by an attorney or his agent, or use of a courier. In each one of those situations, there is a provision whereby we see as verified.

This could be corrected simply by requiring that if faxes are used to provide, that the party faxing the document has some obligation to provide a mechanism for obtaining receipt of that document, even if it includes -- simply includes a separate sheet that needs to be acknowledged and then faxed back to the faxing party to show some indication that the document was received by the party to whom it is directed. Without that, then the Court will be involved again in disputes as to whether documents that were allegedly faxed were actually received by the party to whom the document was faxed.

The second problem that we perceive is that there still is no reasonably accepted period of delivery for faxes, unlike every other method of delivery of any of these notices, which are all generally limited to some type of normal business hour. Fax machines, unless a

firm sets its own on and off times for the fax machine, can receive documents 24 hours a day.

I know the rules have been changed to allow inclusion -- or the exclusion of Saturdays, Sundays, and holidays from notice provisions, but still that doesn't address the problem, for example, with depositions where it is reasonable notice, or in some of the other provisions for so-called reasonable notice, when the document is faxed to the recipient party after normal business hours on a Friday or before a holiday, and then shows up when the attorney returns to his office on the normal business hour, finds the fax that came in two to three days before, and has very short notice within which to respond.

There is a remedy by going to Court, of course, and asking for some kind of relief through a motion to protect, or for something of that nature, but I think that unnecessarily involves the Court.

I think, again, if you simply provide that where a fax is used, that it is to be -- any delivery by fax can only be accomplished to the extent that it is initiated

I
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

within a period of time, say, 8:00 a.m. to 6:00 p.m. of customary business hours, of customary business days, or something of that nature. But there is no limit at this time as to that. And perhaps, if a party chooses not to do that, to deliver it during these customary business hours, then it should be presumed to be untimely if an issue arises as to whether the fax was sent. That is all I have as to that particular rule.

JUSTICE HECHT: Any questions of Mr. Davis on these rules?

Thank you.

MR. DAVIS: Thank you, Judge.

JUSTICE HECHT: Any other comments on Texas Rules of Civil Procedure 1 through 21b? All right. We'll move to the next block of rules --

MR. STORIE: Excuse me, Your Honor; I just -- very briefly, if I may.

JUSTICE HECHT: Yes.

GENE STORIE,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. STORIE: I'm Gene Storie. I'm here on my own. I'm an assistant attorney general, and I have a very brief comment about Rule 21a. It seems rather minor in view of some of the others we've heard, but I wonder why we don't include the courier delivery in the three-day rule. That is, if we are going to make allowance to give the three extra days for mail, it seems to me we ought to do the same with a courier. Because as I read the rule now, you could send it off, say, by Federal Express, if your due date is a Thursday, and you would be late if it arrived on Friday, whereas you could mail it on Thursday and be timely if the materials were received on a Monday.

JUSTICE HECHT: Some proposal in the correspondence that we received is to not extend the three-day rule to either that sort of

Civil Violence, Inter Se Doctrine

Whether a civil disturbance, and hence the
applicability of the Inter Se Doctrine, exists
depends to large part on the degree of force
employed by the participants in the disturbance.
Thus, the Inter Se Doctrine would not apply to
a riot in which no force was employed by the
participants. Nor would it apply to a riot in
which only minor force was employed by the
participants. Even a riot in which substantial
force was employed by the participants would not
be governed by the Inter Se Doctrine unless the
force was employed by the participants against
each other. Thus, if the participants in a riot
employed substantial force against persons not
participating in the riot, the Inter Se Doctrine
would not apply.

delivery or fax delivery. But you think it ought to be the other way?

MR. STORIE: I just -- I guess I don't understand why it should be treated differently, because it seems to me a lot of people do business that way, and if the objective is to set a deadline so the materials are received timely, then it seems to me that something that's going to come to a person on Friday should be timely, as timely as something that's going to typically come to them on Monday. That's all I have.

JUSTICE HECHT: Any questions of Mr. Storie?

Did you fill out one of these slips, Mr. Storie?

MR. STORIE: No, I haven't.

JUSTICE HECHT: Would you do that before you leave, sir, please?

MR. STORIE: I will, sir. Thank you.

JUSTICE HECHT: Thank you.

All right. We'll move to the next block of rules, if there are no other comments on that block.

[illegible]

ought to be the other way?

MR. [illegible]: [illegible] -- [illegible]

don't understand [illegible] for

[illegible], because [illegible] a lot of

[illegible] and I thi[illegible]

[illegible]

are read [illegible] timely, then it seems to me that

something that's going to [illegible] person on

Friday should be timely, as timely as something

that's going to typically come to them on

Monday. That's all I have.

JUSTICE HECHT: Any questions of Mr. Storie?

Did you fill out one of these things, Mr. Storie?

MR. STORIE: No, I haven't.

JUSTICE HECHT: Would you do that before you leave, sir, please?

MR. STORIE: I will, sir. Thank you.

JUSTICE HECHT: Thank you.

All right. We'll move to the next block of rules, if there are no other comments on that block.

Rules 22 through 100 -- 22 through 100, but omitting -- we'll save the court sealing proposed rule, which I think is proposed Rule 76a, till we finish these other rules, so we will pass on that one for now. But any other -- other Rules of Civil Procedure 22 through 100?

Yes, sir, Professor.

PROFESSOR PATRICK HAZEL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

PROFESSOR HAZEL: Members of the Court, I'm Patrick Hazel from Austin, Texas, and I'm here, I suppose, only representing myself, or nobody, if that would turn out to be.

I would like to speak -- I sent a letter, and the one that -- to Justice Hecht. The one I would speak to at this moment is 87 (5), the venue provision that, I think, has been misinterpreted by a couple of Courts of

Yes, sir, Professor.

Tuesday 1023

Other -- other Rules of Civil Procedure 22

(c) (1), the second location item, I think, is

the one I mean, which is an item relating to

letter, as the one item -- to duplicate copy.

I would like to speak -- I beg o

or nobody, it does not. Then one to be.

I'm here, I endorse, only reluctantly. Again,

item, I'm puzzled [illegible] Rules, even

SECRETARY WHITE: Number 22 pro-

A, "Action," period or 23 rules:

Unless it specifically requires, any Order [illegible]

a hearing, notice to parties [illegible]

[illegible] to mean [illegible] of Civil Procedure, terms

a reasonable period to permit [illegible]

[illegible] of Rule 23 [illegible]

THE CHAIR: [illegible]

Appeals. And I think that it was not the intention of this Court -- or if it was, I think it should be changed -- that once a trial on the merits has been heard or is in process, that the trial court can no longer reconsider what was done during a venue hearing. At the venue hearing, the trial court can only rule on affidavits and pleadings that are before the trial court.

The appellate court is mandated by statute to consider the entire record including the trial on the merits. Now, because of Rule 87 (5) -- and, also, the latest case used that statute as well -- at least two courts have said the trial court has no power. Even if the trial on the merits shows conclusively that what was decided during the venue hearing on affidavits now is shown to be wrong, the trial court must proceed with the entire trial, let it go up on appeal, and then the appellate court says there's no -- no such thing as harmless error, so we have to reverse it. There are some other problems in that area that don't really pertain here, but....

I simply would ask the Court for two

intention of this Court -- or if it can, I do
not object to that as well -- I would like on the
motion to have been heard at the previous, that is
this motion for reconsideration, that the
court will be vacating [illegible] the
[illegible] trial.

Mr. [illegible] the court to reconsider its
action in the circumstance the entire [illegible]
the trial on the merits. "Or," because of this
(?) -- and, also, the latest case used that
structure is well -- at least two courts have held
the trial court has no power. "Yes if the trial
on the merits shows conclusively that we [illegible]
[illegible] vacating an affidavit
[illegible] shown to [illegible], the trial court
proceed with the entire trial, let it go up on
appeal, and then the appellate court says
there's no -- no such thing as harmless error,
we have to reverse it. There are some other
problems in this area that don't really [illegible]
here, but....

[illegible]

things that I mentioned in the letter. First, to retitle number 5. It's called now, "No Rehearing." I don't think the body of Rule 87 (5) talks about that. It really talks about no new motions to be heard. But by calling it "No Rehearing," it sounds like you are saying we can't -- the trial court has no power, no jurisdiction to reconsider. I would simply call it "Hearing New Motions," and then the body of the thing talks about you can't hear new motions. And then I would add the -- the additional phrase: "The trial court shall reconsider, in light of the trial on the merits, motions already ruled on when brought to its attention."

I think this does two things. It, first of all, lets us -- the trial court know you have the authority to reconsider in light of the trial on the merits, and you shall do that if it's brought to your attention. And I think that will also add another factor; and that is, if a party wants to complain about this on appeal and has not brought it to the trial court's attention so we could have saved all that appeal time, and everything, then they have

waived it.

JUSTICE HECHT: Any questions of Professor Hazel?

Thank you, professor.

Any other comments to Rules 22 through 100?

BILL WADE,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. WADE: Justice Hecht, my name is Bill Wade, and I'm from Lubbock, Texas, and I do trial work and I'm here as a representative of the Texas Association of Defense Counsel.

And I would like to join in some of the comments that Professor Hazel has made. I think that is certainly some valid observations. I am concerned, and we are concerned, about the proposed change to Rule 87 requiring -- or not allowing any issue to be made of a cause of action.

..

[illegible]

[illegible] questions of

[illegible]?

[illegible] you, Professor.

Any other comments to Judge?

[illegible]

[illegible]

[illegible]

[illegible] petition [illegible] writ of [illegible]
administrative cessation to counsel [illegible] notice
[illegible] to take [illegible] Civil Procedure, [illegible]
Plan of Appellate Procedure, and Texas Rules [illegible]
Civil Procedure, stated [illegible] as follows:

[illegible]. "ADR": Justice "cobb" by mine [illegible]
[illegible] "ADR" does [illegible] "mean" [illegible]
[illegible] mark and I'm [illegible] negotiations [illegible]
the Texas Association of Defense Counsel.

I'm [illegible] like to join in some of
the comments that Professor [illegible] have made. I
think that is certainly some valid observations.
I'm concerned [illegible] we are [illegible], about the
[illegible] need changes to Rule 11 regarding -- or not
[illegible] may issue [illegible] of [illegible]
action.

Our concern about this is a situation where you could have forum shopping, and you could have multiple defendants, and several of these defendants are held by the allegations against the resident defendant, but they cannot raise the issue of proper joinder unless they are able to raise the issue of the -- of the validity of the cause of action that the plaintiff has against the resident defendant. And without being able to do that, of course, then, they are -- they are hung in that situation and -- and their venue is -- their venue challege is really of no merit.

And we feel that this would certainly not be fair to those defendants, and I think that is probably the situation that I think of that's most glaring, is there would be no way to raise the issue of proper joinder.

CHIEF JUSTICE PHILLIPS: Are you for no change in --

MR. WADE: Well, apparently, there's some --

CHIEF JUSTICE PHILLIPS: -- 87 (2), or --

MR. WADE: Excuse me, Judge. I'm

sorry to interrupt.

Apparently, there is some question about whether or not what the law is in that area, whether or not you can challenge the existence of a valid cause of action against the resident defendant, but I don't think this is the way to solve that -- that issue. This certainly would put that issue to bed, but it would also -- when it does that, there would be some victims along the way, and that is our objection to the proposed change.

JUSTICE HECHT: Mr. Wade, you have not written us on this change, I don't believe.

MR. WADE: I have joined with Mr. Davis in -- in the written presentation to the Court --

JUSTICE HECHT: All right.

MR. WADE: -- which has been filed with the clerk.

JUSTICE HECHT: Any other questions of Mr. Wade on this subject?

MR. WADE: Thank you, Your Honor.

JUSTICE HECHT: Other comments to Rules 22 through 100?

MR. DAVIS: Justice Hecht, under Rule 63 --

UNIDENTIFIED VOICE: Name?

MR. DAVIS: I'm sorry. David Davis.

DAVID DAVIS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. DAVIS: Under Rule 63, the -- the rule has been amended to include responses as being required to be filed no later than within -- or outside of the seven days of trial.

The problem that -- I understand that one of the reasons perhaps this has been done is to avoid an apparent loophole in the rules involving filing supplemental pleadings that don't appear to be covered by the current Rule 63.

But with the change that's imposed by the proposed rule, a respondent, whether it be a plaintiff in some circumstances responding

to an affirmative defense, or perhaps the defendant in responding to an affirmative -- a pleading by the plaintiff, if the pleading is filed at the last possible moment, then the respondent has no way to file a response to that -- to any specific changes, but through going before the Court.

Currently, you can respond to a new allegation, whether it be an affirmative defense, perhaps, by a plaintiff where the plaintiff responds, or a new cause of action or a change in the cause of action by the defendant.

And I would simply request that some mechanism be provided that doesn't require the party to go before the Court to file a response to a new pleading. Perhaps a period of three days from -- at that stage to respond, or something of that nature.

I may be not making myself clear. Currently, if somebody files an amended petition or amended answer that raises something new --

JUSTICE HECHT: Eight days before trial --

MR. DAVIS: -- eight days before

trial --

JUSTICE HECHT: -- then you are concerned that they can't get a response in on time?

MR. DAVIS: Right. And when you are simply responding, not raising any other new issues.

JUSTICE HECHT: All right. Any other questions of Mr. Davis on this subject?

MR. DAVIS: Thank you, Justice.

JUSTICE HECHT: Other comments to 22 through 100? All right. We will move, then, to Rules 103 through 165a. Any comments on Rules 103 to 165a?

JUSTICE GONZALEZ: Mr. Hecht, aren't you going to take the sealing of the court records next?

JUSTICE HECHT: No, we're going to save it for the last.

JUSTICE GONZALEZ: Oh.

MR. BAILEY: How are you?

JUSTICE HECHT: Fine.

BILL BAILEY,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. BAILEY: My name is Bill Bailey. I'm from Harris County, Pasadena. I'm here representing the Justices of the Peace and Constables Association of Texas.

On Rule 103, we would propose returning to language similar to the original Rule 103 prior to its being changed. "Who May Serve" the citation, leaving it to officers of the Court, the sheriffs and the constables, or other person authorized by law, changing that section to "upon a written motion to the Court showing good cause as to why." We will be addressing other changes a little later on in the proposed changes that would go hand in hand, but while we had Rule 103, we wanted to make our position known on that, as well.

JUSTICE GONZALEZ: Mr. Bailey, there is a growing industry of private process

servers --

MR. BAILEY: Yes, sir.

JUSTICE GONZALEZ: -- that are competing with the constables, obviously, for this business. Are there some problems with that other than competition?

MR. BAILEY: Well, that's a many-faceted question, Your Honor. Obviously and clearly, it is. We don't think that -- we -- we're -- we're for privatization whenever privatization serves the public good.

A peace officer and an officer of the Court serves process and has as his goal good service and not a profit. The counties receive the money, and goes to pay salaries and the cost of doing county government. It is not a profit center. We don't think it should be a profit center.

We have seen cases where a $35 citation, because someone's -- and when we serve a citation it's 35 if we go by and catch him on the first attempt or it's the twentieth attempt. We have seen cases in private process where the cost has gone much higher. Who -- who bears that cost? Obviously, it's the defendant,

which -- we don't think it's a good rule.

JUSTICE GONZALEZ: The complaint was that many attorneys have difficulty in getting their civil process served by the constable. Very little effort is made, and they had to resort to private process servers because the private process servers guarantee that it will be served.

MR. BAILEY: I have no problem with that, sir. And under -- and under written motion, that -- that was certainly available to where -- the cases where they couldn't get service from the officers of the court, yes, sir. I have no problem with that.

But wholesale, it is not the case that you can't get good service. My office served 91 percent of the process through October of this year. There is a profit motive there, and profits -- I'm not -- I'm -- I'm for the American way. I'm for profits, but not in government, and not with -- not with papers of the court.

Now, let's be honest. There's money in them there papers, and -- and a paper that's a $35 paper -- you men are all lawyers, and I'm

just a little old country constable from the east end of Harris County in the poverty pocket over there. I'm not telling you anything you don't know. It's -- it's a matter of fairness and who do you trust.

JUSTICE DOGGETT: You said you had, I gather, comments on some other rules, but do they all center on this problem of private process servers?

MR. BAILEY: Well, it's not -- I don't want to just say it's private process servers. That is a big part of it, yes, sir, but we -- first of all, Justice Doggett, in practice, how many people that are getting this private process -- or let's just say -- and we're going to speak to 536, in the justice courts where the rules will be relaxed where anybody can serve without motion. How many of those are actually going to be unbiased and not -- not have some interest in it? That's open to speculation.

We know that an officer of the Court, a sworn officer of the law, is -- is going to be trustworthy. His sworn oath -- he has got a constitutional oath he's taken, and we

feel that the public is certainly better served by having these kind of people handle their papers. It's worked in the past.

And, Justice Gonzalez, I'll admit there's been problems, and we're addressing those problems now. Through this Court we have received -- through the Justice of the Peace and Constables Association, the Justice Court Training Center, we're -- we're -- we're training great numbers of constables and deputies all across Texas for the first time. And, you know, we've been to the moon and back and we've never had a school for newly elected constables until this year, under a grant from the Governor's office. We had a -- a 40-hour school for newly elected constables.

We're making great strides, and it's being done through education, but it's being done through officers of the Court, and it's not being done with a profit motive in mind. Certainly, Texas has seen enough profit motives in the dispensing of justice, and I'll just stop my comments there.

JUSTICE HECHT: Any other questions?

MR. BAILEY: Thank you very much,

[illegible]

[illegible] I'll do it
[illegible]
[illegible]
[illegible] through the [illegible] -- [illegible]
[illegible] Public Corporation, the Justice Court
[illegible] Crime Center, we're -- we're -- we've
[illegible] great numbers of [illegible]
[illegible] -- [illegible] -- [illegible]
[illegible], you know, we've been to [illegible]
and we've now [illegible] for nearly closed
completed until this year, under a grant fr[illegible]
the Governor's office. We had a -- a 40-[illegible]
school for newly elected constables.

[illegible]'re talking great numbers, and it's
being done through election, but it's being
done through officers of the Court, and it's
being done with a profit motive in mind.
Certainly, Texas has seen enough profit motives
in the [illegible]ening of justice, and I'm just stun[illegible]
by comments like--

THE COURT: Any other questions?

MR. [illegible]: Thank you very much,

sir.

JUSTICE HECHT: Thank you, sir.

Other comments to Rules 103 through 165a?

Yes, sir.

GASTON BROYLES,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. BROYLES: My name is Gaston Broyles from Corpus Christi, and I am here representing myself; and I am also a member of Mr. Davis's ad hoc committee from the Texas Association of Defense Counsel, and consequently my comments are contained in the letter that Mr. Davis delivered to the clerk this morning.

We are concerned with that provision of Rule 120a contained in paragraph two of part three wherein it appears that the opposing party to a 120a motion is going to be allowed a second opportunity, if he did not make it the first

Yes, sir.

CLERK MCKEON:

civil evidence, stated as follows:

MR. DOYLE: My name is Gaston
Boylen from Clinton Christi, and I am here
representing myself; and I also have a matter of
it. Having no one with me from the Texas
Association of Defense Counsel, and consequently
my comments are contained in the letter sir.
Civil Motion 4 to the Clerk this morning.
We are concerned with that rule,
of Rule 1304 contained in paragraph two of said
Rule. 1304 motion is going to be signed a second
time wherein it appears that the opposing party,
by certainty, if he did not move it the first

time, whereas the moving party is not. This is an opportunity to go back and try again, in addition to the current rules that allow for discretion on the part of the trial court to grant continuances prior to a hearing.

The way the proposed rule currently reads, it appears that if an opposing party is not able to adequately oppose the motion through the affidavits the first go-round, or during the hearing, that the Court may order a continuance to allow him to try again. And such an opportunity is not afforded to the movant, and we did not think that was particularly appropriate.

JUSTICE HECHT: Specifically, what language are you referring to, Mr. Broyles?

MR. BROYLES: The language which reads as follows in Rule 120a, part three, paragraph two: "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make

such other order as is just."

CHIEF JUSTICE PHILLIPS: Mr. Broyles, that language tracts Rule 166a (f) almost to a tee. Have you had any problems on summary judgments with a movant -- I mean, any time a movant decides they are not ready on a summary judgment, you can file a second motion for summary judgment. Is there anything in the rule that prevents a second attempt of a special appearance?

MR. BROYLES: Not a second attempt, necessarily --

CHIEF JUSTICE PHILLIPS: I mean, the movant controls when they are ready to -- to go forward --

MR. BROYLES: Correct.

CHIEF JUSTICE PHILLIPS: -- with a special appearance or a summary judgment, and --

MR. BROYLES: The movant gets to set the hearing, yes.

CHIEF JUSTICE PHILLIPS: And the respondent is on a short -- has to respond to that on a shorter time frame. And secondly, is there anything that prohibits the movant, if

materially different evidence appears, from making a second motion, just as there are second motions for summary judgment if a movant fails the first time but -- but acquires new information?

MR. BROYLES: On juris --

CHIEF JUSTICE PHILLIPS: Yes.

MR. BROYES: No, Your Honor.

JUSTICE HECHT: Your problem is that the hearing might get underway and look bad for a party and then they want to regroup midhearing?

MR. BROYLES: Precisely. That -- that's --

JUSTICE HECHT: You see the -- one of the other concerns of the change is that a hearing would be set on affidavit, and another responding party would say, "Wait a minute. These affidavits aren't going to do it. We've got to take this fellow's deposition and show that he's not telling the truth in these affidavits." You don't have any problem with that?

MR. BROYLES: No, Your Honor. And that -- in fact, a continuance before a hearing

could be granted. And I think that this addresses Justice Phillips' problem, too.

Or my problem there is that I don't necessarily want the opposing party to be able to go to a hearing, all -- get all the way up there without having moved for a continuance. If they are not ready, they can move to continue the hearing, either move to continue the hearing on a summary judgment or move to continue a hearing on the 120a motion. But my problem is getting there, seeing what the truth is, deciding at that point that they are not ready, and then going out and trying again.

CHIEF JUSTICE PHILLIPS: Well, I don't see anything in 120a that limits it to the time of the hearing; nor is there anything that obliges the trial judge to grant such a request.

12

MR. BROYLES: He is not obliged to grant such a request; that's correct. It just allows for the continuance at the time.

JUSTICE HECHT: Other questions of Mr. Broyles?

Thank you very much.

MR. BROYLES: Thank you.

[illegible] to continue. Mrs. [illegible] that the

[illegible] sentence that is [illegible] objection, two.

[illegible] Do my previous [illegible] don't

[illegible] unanimously want the [illegible] entity to be able

to do [illegible], all -- [illegible] the way I

[illegible] their right having moved for [illegible].

[illegible] Any further [illegible] entity can have to consider

[illegible] the matter, please move to continue the [illegible]

[illegible] [illegible] and [illegible] to continue

[illegible] voting on the IDDA petition. Do my [illegible] to

getting there, seeing that the trust [illegible]

[illegible] then going out and trying again.

CHIEF JUSTICE PHILLIPS: Well,

don't see anything in IDDA that limits it to

the time of the hearing; nor is there anything

[illegible] the trial [illegible] graph and

request.

MR. BOOKER: We is not objecting to

[illegible] request; that's correct. I just

ag ree for the continuing it [illegible].

[illegible]: Other questions of

MR. BOOKER: Thank you.

Thank you very much.

JUSTICE HECHT: Other comments on 103 through 165a? All right. We will take up, next, Rules 166 through 166a, those two rules; 166 and 166a.

BILL WADE,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. WADE: May it please the Court, I'm Bill Wade, again, who earlier talked about the venue. I am here representing the Texas Association of Defense Counsel, and also myself as a trial practitioner.

It -- it would appear to us, and to me personally, that if the Court is working and laboring to reduce the cost of litigation and to streamline litigation, that to put on the trial bench and the trial bar the requirement of a free trial order, much like we have in federal court, seems to be counterproductive.

I think the trial judges now have

MR. [illegible]: Other comments on

103 through 1502? [illegible]

[illegible]

[illegible]

[illegible]

[illegible] before the [illegible] Court [illegible]

[illegible] tive session to consider proposed

changes to Texas Rules of Civil Procedure, Texas

Rules of Appellate Procedure, and Texas Rules of

Civil Evidence, stated as follows:

MR. [illegible]: May it please the Court,

[illegible], again, we earlier talked about

the venue. I am here representing the [illegible]

Association of Defense Counsel, and also [illegible]

as a trial practitioner.

It -- it [illegible] appear [illegible] me, and to

me personally, that if the Court is working

[illegible] to reduce the cost of litigation and

the [illegible] litigation, [illegible] on the

[illegible] hand [illegible] the requirement of

a free trial order, much like we have in federal

court, [illegible] to be counter productive.

I think the trial judge now has

the ample authority that they need to, in appropriate cases, request and get a pre-trial order put together which would take care and encompass most of the things mentioned here in the proposed rule without the necessity of it being codified as it is here.

If I -- and I may -- there are certainly other people here better qualified to speak on this, and -- but if I read the language in the first sentence, it says, "In any action, the Court may in its discretion, or on request of any party."

It would appear to me that by including that, then a party can force a pre-trial order in a case which the case may not merit it, and I think this cuts on both sides of the docket, that the cost of litigation would increase terrifically in the state court if we were required to have pre-trial orders and go through the pre-trial procedure that's set out here.

CHIEF JUSTICE PHILLIPS: You -- you don't have any problem with -- right now our rule indicates some things that can be done in a pre-trial order, and it's obviously incomplete;

that is, stipulations. So your problem isn't really fleshing out more what a pre-trial order could contain. It's ambi -- it doesn't even appear to be ambiguous, does it? It's the language in the first sentence that --

MR. WADE: That -- that really bothers me, and that could be, I think, abused by either side of the docket.

And we obviously know that there's some cases in the district court -- and I handle quite a few of them -- that can't bear the expense of this sort of time and effort spent on both sides of -- of the case.

JUSTICE HECHT: You do not want one party to be able to force another party to prepare a pre-trial order --

MR. WADE: That's correct, Your Honor. I would prefer to leave that to the discretion of the Court in an appropriate case where that can aid in the disposition of the -- of the matter.

JUSTICE HECHT: All right. Thank you.

MR. WADE: Thank you.

UNIDENTIFIED VOICE: Thank you.

JUSTICE HECHT: Other comments on 166 and 166a? All right. Then we'll move to the discovery rules, 166b through 215; 166b through 215.

DIANE SHAW,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MS. SHAW: My name is Diane Shaw. I'm from Dallas, Texas. I'm here as a trial attorney and a representative of the Texas Association of Defense Counsel.

We had two comments on 166b, and the initial one, starting with Section 4, "Presentation of Objections," only one statement with regard to the seven-day requirement of the affidavits.

We believe this may work as a situation representing some traps for the parties, because many times, as you know, it's difficult enough to get everything in order --

your evidence, affidavits, and so forth -- prior to the hearing. But more importantly, the attorneys, as a practical matter, are working out negotiations during this seven-day period to see what they can come to an agreement on: "Do we really need this hearing?" "Well, perhaps if I can get you this, then we don't need to proceed on the hearing," or, "I'll give you two of these, so we only need to go on one matter toward the hearing." There's --

CHIEF JUSTICE PHILLIPS: What specific part of the rule are you referring to?

MS. SHAW: 166b (4), "Presentation of Objections" --

CHIEF JUSTICE PHILLIPS: Okay. Thank you.

MS. SHAW: -- where it has a seven-day requirement for the affidavits. Many times the attorneys are working on the negotiations during this seven-day period, and if they are working on the negotiations during this period, they are not considering the affidavit, hoping that we may not even need the hearing. Then two days before the hearing, things may fall through; you don't have your

affidavit. And it seems to work as somewhat of a trap.

Alternatively, it may well chill the effect of the negotiations prior to the hearing because of the need for the affidavit or the evidence to be submitted in that seven-day period prior to the hearing. And that's all I have to say about that particular rule.

JUSTICE HECHT: And then you have a comment on 7, Section 7?

MS. SHAW: That's right, 166b, Section 7. We would propose that the certificate of conference, instead of it being worded "all discovery motions," if we could interject "all requests for hearings on discovery motions." It seems that the effect of having the certificate of conference on all discovery motions when it pertains to protective orders actually minimizes the 30 days that one has to respond to interrogatories, requests for production, and the like.

Many times, as a practical matter, you're -- you're getting your objections and answers in on the thirtieth day for the interrogatories, and you file the motion for

protective order along with the objections, as is now required. Therefore, if you have to have a certificate of conference, conferring prior to that time, it does minimize what has always been the 30-day requirement.

And, really, the purpose of this is to make sure that the attorneys have tried to work things out before they waste the Court's time at a hearing, or the attorneys' time.

So if that language could be interjected that the certificate of conference only be necessitated in the instance where a hearing is requested, that would solve that problem.

JUSTICE HECHT: Questions of Ms. Shaw?

JUSTICE RAY: Have you submitted the proposed language that you would like for us to use?

MS. SHAW: Yes. Yes, we have. Thank you.

JUSTICE HECHT: Other comments on the discovery rules, 166b to 215?

GASTON BROYLES,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. BROYLES: Gaston Broyles again, from Corpus Christi. I'm a trial attorney and I'm a representative of the Texas Association of Defense Counsel.

We have a problem with the proposed changes to Rule 169, "Request for Admission," specifically that portion of the change that allows for the service of a request for admissions on a defendant before that defendant has had an opportunity to hire an attorney.

It appears that this change may very well result in a trap for an unwary, unsophisticated defendant who does not understand the importance of a request for admissions if those requests accompany the petition and citation.

It appears that it would be possible for a plaintiff's attorney to include requests for admissions that essentially prove up damages

enough that in the event of a default he would be able to prove up liability and damages without anything further than admissions that went unresponded to when they arrived along with the petition. The same opportunity is not afforded the defendant, as plaintiff necessarily goes first.

I do not see that there are any benefits to this change. We would much prefer to have requests for admissions sent to a party after that party has had an opportunity to employ the services of an attorney who understands the significance of requests for admissions and what may occur if those admissions are not responded to adequately or in a timely fashion.

JUSTICE GONZALEZ: What specific language are you referring to?

MR. BROYLES: The language at the very beginning that states: "At any time after commencement of the action, a party may serve upon any other party a written request for the admission," as opposed to the language that states that they may be sent after a defendant has made an appearance in the cause or the time

upon [illegible] that [illegible] cause [illegible]

[illegible] able [illegible] and [illegible]

[illegible] original [illegible] rather than relations that

were unrecorded [illegible] arrived along with

the petition. The same opportunity is not

afforded the defendants, or plaintiffs' necessarily

does it.

I do not see that there is any

benefit to this type. It would much prefer

to have the motion for [illegible] to [illegible]

allow that party [illegible] had an opportunity to

retain the services of an attorney who

understands the significance of requests for

admissions and what may occur if those

are not [illegible] responded to adequately or in

a timely fashion.

[illegible]: What specific

language are you referring to?

[illegible]: The language at the

very beginning that states: "At any time after

commencement of the action, a party may serve

upon any other party a written request for the

admission," as opposed to the language that

states that they may be sent after [illegible]

has been [illegible] in the [illegible]

thereafter has elapsed.

So I am simply opposed to sending out requests for admissions along with the petition and citation, as is currently possible with interrogatories and requests for production.

CHIEF JUSTICE PHILLIPS: You see admissions as really being in a different category because of their binding --

MR. BROYLES: I absolutely see admissions being in a different category because of the binding effect, yes, sir.

JUSTICE HECHT: Other questions?

Thank you.

JUSTICE RAY: You recommend it be done after answer date?

THE WITNESS: Yes, sir.

JUSTICE HECHT: Thank you, Mr. Broyles.

Other comments? Professor? All right.

MR. DAVIS: Justice Hecht?

JUSTICE HECHT: You have to be quicker on the draw.

proceedings to a close.

I'm not in a position to comment
with knowledge on the questions that
petition of Intervenor, in the quasi-judicial
proceeding.

Does counsel for Intervenor wish to
argue briefly why the petition should be
granted in a different category because --

MR. POLLARD: I understand the
petitioner is not in a different
position than the other Intervenors.

MR. MARK: Counsel?

Other comments, Mr. Zahnleuter?

Mr. Zahnleuter: Yes, sir.

Does either counsel have a
question?

Mr. MARK: Mr. Zahnleuter, I
believe you stated that you were
a resident of the area.

Mr. ZAHNLEUTER: Yes, sir.

MR. MARK: How close do you live
to the plant, approximately?

MR. ZAHNLEUTER: I live in the
Bethany area.

MR. MARK: Other questions?

MR. POLLARD: I understand the
petitioner is not in a different
position than the other Intervenors
with respect to the quasi-judicial
proceeding.

DAVID DAVIS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. DAVIS: David Davis.

JUSTICE HECHT: Yes, sir.

MR. DAVIS: And I believe this is probably my last comment.

We do, by our presence, want to indicate also that we -- we really wholeheartedly endorse the bulk of everything that's being done here, and we feel it's -- it's -- it's a very good way of correcting a lot of problems we're all having to deal with.

As to Rule 167, it's more of an inquiry than a -- and a comment as to why the need for Texas licensure for psychologists. The proposed rule by an addition at the very end of the rule sets out: "For the purpose of this rule, a psychologist is a psychologist licensed by the State of Texas."

No similar requirement is for physicians, and I can't for the life of me

[illegible]

[illegible] Rule 17 of the Rules of Procedure in
a limited action be considered proper
[illegible] Rules of Civil Procedure, Texas
Rules of Judicial Procedure, and Texas Rules of
Civil Evidence, to-wit as follows:

MR. DAVIS: Paul Davis.

JUSTICE [illegible]: Yes, sir.

MR. DAVIS: Sir, I believe this
probably my last comment.

I do, by our presence, want to
indicate also that we -- we really
wholeheartedly endorse the work of everything
that's being done here, and we feel it's --
it's -- it's a very good way of correcting a lot
of problems we're all having to deal with.

As to Rule 17, it's use of an
inquiry then a -- and a comment on to why the
need for "good diligence for [illegible]". The
[illegible] by an addition of [illegible] be very [illegible]
the rule says cut: "For the purpose of trial
only, a continuance is a [illegible] diligence
by the Rules of Texas."

[illegible] material requirement is for
[illegible], and I can't do this life of a

decide why there is a distinction being made for psychologists, as opposed to physicians, in this -- in this situation.

JUSTICE HECHT: The reason is that "physician" carries the connotation of licensure, whereas "psychologist" does not have -- does not carry that distinction by itself. You wouldn't think this would happen. But it might just add, "Anybody's Name, Psychologist," and how would that qualify them to conduct a compulsory mental examination?

MR. DAVIS: One -- we -- we discussed that possibility, and we felt like that perhaps if the rule provided a psychologist as a psychologist licensed by the State of Texas, or otherwise eligible for reciprocity, licensure by reciprocity by Texas, some mechanism whereby a truly licensed psychologist from another state who would otherwise satisfy the requirements in Texas, that that same individual could be used in a -- for independent --

JUSTICE SPEARS: How would we be able to determine that? We've had similar questions in other fields about when someone is

licensed in another state. Does that automatically give them comity in Texas to practice their trade, or testify, or something?

MR. DAVIS: Your Honor --

JUSTICE SPEARS: We don't -- have no idea what the other states' standards are.

MR. DAVIS: There -- there --

JUSTICE SPEARS: I'm thinking of the bar exam, for example.

MR. DAVIS: Yes, Your Honor. There are mechanisms in place in each of the licensing boards, to my knowledge, that set out the requirements very specifically under the rules for reciprosity, and perhaps there should be some need -- or the party proposing an individual who is not licensed in Texas would have to have the burden of establishing it if such, you know, situation were questioned. It seems like there is a mechanism in place by those agencies to determine.

In fact, you know, licensed psychologists from outside of Texas routinely come into the state to provide continuing education to Texas psychologists, and it seems like some of those individuals ought to be able

like some of those individuals would to be able
examination to take anyplace, and it seems
more into the state to provide continuing
psychological tests outside of "open public by
those individuals to determine.

In fact, you know, licensed
there is there is a medical -- in psychology
sure. We know, although more questions. It
have to have the burden -- establishing it
individual who is not licensed in Texas would
role model -- or the party responding as
for certainly, and perhaps there should be
be returned very specifically under the rules
bonded, to by know cops, that let out the
the modification in place of the "license."

MR. MAY: Yes, Your Honor. There
is exam. for one year.

QUESTION BY MR. : I'm thinking of a's
a. JUDGE: There -- there --
Does that the plea bargain' mean that etc.

MR. QUAID: It's -- law no
-- JUDGE: Yes, Your Honor --

[illegible] c. test to, or [illegible]
appropriately give Boo [illegible] Texas to

[illegible] in the [illegible] test

to, through some mechanism, be utilized in these situations.

JUSTICE HECHT: All right. Are you in favor of the addition of psychologists to the rule?

MR. DAVIS: Yes. Favor the addition, but with some broadening of it.

JUSTICE HECHT: All right. Thank you.

Does the Court want to take a recess, or --

CHIEF JUSTICE PHILLIPS: The Court's trying to find out if there's coffee available.

JUSTICE HECHT: Oh.

JUSTICE GONZALEZ: Well, in the meantime we can proceed till we find out.

JUSTICE HECHT: All right.

JUSTICE GONZALEZ: Hazel has --

JUSTICE HECHT: Professor Hazel?

PROFESSOR HAZEL: I'll be very brief.

JUSTICE HECHT: We'll keep going.

UNIDENTIFIED VOICE: We ordinarily don't break till 10:30.

PROFESSOR PATRICK HAZEL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

PROFESSOR HAZEL: I'm the same Patrick Hazel that was here before, representing the same people.

Rule 168, I believe, still has a slight glitch in it. You have made very specific, with respect to Rule 167, that requests for production and responses to requests for production are not to be filed and the recipient is to keep -- keep the original. I simply think that ought to be made clear with respect to interrogatories in Rule 168, as well.

All you did with 168 in the '88 amendments was drop the language that said a copy was to be filed with the clerk, so that's just not there. But it doesn't say what is to happen with them. I don't think there is any real question among lawyers now that they are not to be filed, and that sort of thing. I simply say: Why not take almost the same

PROCEEDINGS IN CHAMBERS,

meeting prior to the [illegible] of [illegible]

interrogative session to mandate [illegible] are that

changes to Rules [illegible] of Civil Procedure, hence

Rules of Appellate Procedure, and [illegible] Rules of

Civil Evidence, stated as follows:

PROFESSOR VARAT: I'm the same

perfect [illegible] that was here before, repeating

the same copy.

Rule 158, I believe, still has a

slight glitch in it. You have made very

specific, with respect to Rule 157, that

requests for production and responses to

requests for production are not to be filed in

the registry is to keep -- keep the original.

I [illegible] think that ought to be made clear with

respect to interrogatories in Rule 158, as well.

All you did with 156 in the '80

amendments was drop the language that said a

copy was to be filed with the clerk, so that's

just not there. But it doesn't say what is to

be done with them. I don't think there is any

real question among lawyers that they are

not to be filed, and that's out of [illegible].

[illegible] says, "Why not [illegible] almost the same

language from 167 and add it to 168 so that it's also clear, and that the Court may order them to be filed for good cause shown so that the Court has the same power with respect to 168 as 167. I have supplied that language for the Court in a letter to Justice Hecht.

The only other thing that is even more minor than that: With respect to 166b you have rewritten the "Presentation" -- Section 4 -- "Presentation of Objections," and you have added something there that says: "Either an objection or a motion for protective order made by a party to discovery ...." You just added the "protective order" in there, and that makes good sense.

You also brought over from 168 into 166b the provision about late filing of objections, that they are waived. And it states that "After the date on which answers are to be served, objections are waived unless an extension of time has been obtained ...." Well, as I say, this may be very, very minor, but somebody is going to pick it up and say, "Well, they didn't say the motions for protective order are waived, though," and they have included

objections, that they are weird. As it stands
that "After the date on which anyone may [illegible]
we vest objectionable practices in [illegible]
[illegible] objection of this kind obviously ...." [illegible]
as I have, that may be very, very useful, but
[illegible] can't come to [illegible] it my own way, "I'm
[illegible] didn't pay the [illegible] for protective action
... to work," that [illegible] [illegible]

motions for protective order.

All I'm saying is probably all that would need to be done is enforce -- say, "Either an objection or a motion for protective order timely made shall preserve the objection," and that may save you ever having to have to decide that on appeal.

Thank you.

JUSTICE HECHT: Thank you, Professor.

Other comments to 166b through 215?

CHIEF JUSTICE PHILLIPS: Let's proceed until --

JUSTICE HECHT: All right.

CHIEF JUSTICE PHILLIPS: -- we see that we're estopped.

JUSTICE HECHT: All right. The next area of rules that we'll take up, then, is Rules 216 through 295; 216 through 295.

Yes, sir.

Xes, sir.

Did Rhonda Doe, 914 Maywood Ave.

Case of Miss Jane Doe, 90-11 Echo Dr., Queens, for Junior

Counsel will state.

Miss Jane Doe, 914 Maywood Ave., Queens, is a senior

at Forest Hills Academy, and is also a member of the Girls'

Basketball Team. She is a very good student, and has

been on the Honor Roll every term. She has never been

in trouble before.

Counsel will proceed.

Mr. Jones, you may call your first witness.

Mr. Jones: Rhonda Doe.

RHONDA DOE, 914 Maywood Ave., Queens, N.Y., 11375,

having been duly sworn by the Clerk of the Court, testified

as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q Miss Doe, would you please tell us your

address?

A 914 Maywood Ave., Queens, N.Y., 11375.

Q Miss Doe, are you a member of the Girls'

Basketball Team at Forest Hills Academy?

A Yes, I am.

Q How long have you been a member of the team?

A Since the beginning of the season, which was

November 1st.

Q Have you been practicing regularly with the team

since November 1st?

A Yes, I have.

Q Have you been absent from practice at any time?

A No, I have not.

Q Have you been absent from school at any time?

A No, I have not.

GASTON BROYLES,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. BROYLES: My name is Gaston Broyles from Corpus Christi, again representing myself as a trial attorney and the Texas Association of Defense Counsel, and this will be my last -- my last appearance.

I really had more of a question about the change in Rule 216, and the inquiry is basically whether this change in the rule will allow for actually less uniformity rather than greater uniformity in terms of jury fees.

By -- by the addition of the language "Unless otherwise provided by law," is it now going to be incumbent upon trial attorneys who practice in more than one county to find out in -- in the future what that particular county's jury fee is going to be?

JUSTICE HECHT: Unfortunately, the answer to that question is yes. The Legislature

trial "evidence," stated as follows:

"Rules of Appellate Procedure, and Texas rules of

evidence for Corpus Christi, Nueces Co[illegible]

[illegible] of a trial attorney and the Court

[illegible]ion of Defense Counsel, can then with no

[illegible] -- my best appearance.

I really had more of a question

about the change in Rule 613, and the inquiry is

basically [illegible] this change in the rule [illegible]

after for certainly some uniformity with or [illegible]

practice uniformity in terms of just form.

My -- My the addition of the

language "Unless otherwise provided by law," it

is not going to [illegible] in some [illegible] upon trial

[illegible] in some [illegible] one course

to find out in -- in the future what that

[illegible] is [illegible] to do?

[illegible] Theoretically, the

has answered that by changing the jury fee in Texas Government Code, Section 51.604.

MR. BROYLES: All right. We'll look that up.

JUSTICE HECHT: In a certain area -- I've forgotten what -- where that was, Luke.

UNIDENTIFIED VOICE: Oh, it's Harris County.

MR. BROYLES: Harris County. It's -- the population is over -- over two million.

MR. SOULES: To support their ADR.

MR. BROYLES: Pardon me?

MR. SOULES: It would support their ADR.

MR. BROYLES: Okay. It's for populations over -- over two million, I believe, is how it is. Is this going to -- so this was just in there to make that consistent so the people would look for -- Harris County?

JUSTICE HECHT: So that they wouldn't look at Rule 216 and say, "Well, thank goodness, that's all we have to pay is $10," and then send the money in to Harris County and find out that they have not properly demanded a jury

because they have not paid the proper fees.

MR. BROYLES: Is it anticipated that other counties will have similar changes so that counties between 399,000 and 420,000 will have their own jury fee set?

JUSTICE HECHT: I doubt it. I -- I certainly hope not, but --

JUSTICE MAUZY: If we can get 76 votes in the House and 16 in the Senate, you bet.

MR. BROYLES: Thank you.

JUSTICE HECHT: Other comments on 216 to 2 -- whatever I said -- 95?

Yes, sir.

LOUIS MULDROW,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

PROFESSOR MULDROW: My name is Muldrow. I teach at Baylor Law School, advanced procedure and the practice before the courts.

"Can, sir.

MR. LEWIS: Thank you.

DIRECTION REQUESTED: Other comments on
MR. to 2 -- whatever I said -- Sir?

vote in the House and it is the Senate, You
bet.

DEFENDANT "AL": If we can get it
at this time, not, but --

DEFENDANT "AL": I doubt it. -- I
think we can duly vote next

Number three 317,022 one 432,000 will have
obtain another eligible applicant for that
". Clerk: If it exists, then
I. Then the [illegible]

My comments relate to the proposed changes in Rules 217 through 279, and my comments relate only to the charge, and specifically to permitting preservation of error based solely on objections, dispensing with the necessity of requests.

I -- I think that dispensing with requests and allowing preservation of error on the basis of objections alone simplifies the task of the lawyer, particularly the defense lawyer. My former colleagues at the defense bar would probably be surprised and distressed at my saying this, and the plaintiffs' lawyers who are here are going to be surprised, as well, but I think that this is a very significant advantage to the defense lawyer. It is a disadvantage, in my opinion, to the trial judge, and, I think as well, probably a disadvantage to the plaintiff's lawyer.

This Court has observed in a number of opinions that there is a considerable difference between sitting back and objecting orally. The objections go by rapidly, we all know. They are frequently mumbled just so that the court reporter can get them down. They go

by rapidly at a tense and tough time in the lawsuit, anyway, and this Court has previously observed that the trial court is helped greatly by having tendered to the Court written requests for issues, definitions, or instructions, and they are there and the judge can look at them and study them and understand them much more readily than a rapidly expressed oral objection.

It's -- it's remarkable to me that we are going back to a practice that existed apparently prior to the adoption of the rules in 1941. I can't claim to have been here in the '20s and '30s, but the commentaries following the adoption of Rule 279 in 1941 indicate very clearly that dispensing with objections alone as a sufficient basis for preserving errors, irrespective of what kind they are, was initiated in large part to help the trial judge by assuring full and complete cooperation from the lawyers with respect to the precise wording that ought to be used in the questions, definitions, and instructions. I think it's a lot easier to object than it is to draft, in substantially correct wording, the question, the definition, or instruction that ought to be

used.

JUSTICE HECHT: Why isn't that tool still available to the trial judge in Rule 271 (1)?

PROFESSOR MULDROW: A good question. And there does not appear to me to be in this cluster of rules an apparent, clear consequence of the trial lawyer not complying.

273 (5), I think, says that "Compliance or noncompliance with 271 (1) shall never constitute waiver of any objection to the court's charge made in compliance with Rules 272 and 273." So the lawyer has got to object. If the judge says, "I want you to tender to me in writing the proposed charge," what is the consequence if the lawyers fail to do so? What is the consequence if what they tender is not exactly right? What if they tender something and then turn around and object to it?

I think, arguably, Subsection 5 of 273, when it says "Compliance or noncompliance" with the judge's request or order to tender "shall never constitute a waiver of any objection," could be said to dispense with invited error or estoppel. Now, I don't know.

The -- the -- the law, as I understand it now, is that if I, as the lawyer, request or tender something to the judge and the judge submits it, my lips are sealed thereafter to complain about that. I've invited it, and I'm estopped to say that what I led the Court into now was error, if this means that compliance or noncompliance shall never constitute waiver of any objection. It doesn't say "doesn't constitute waiver of the obligation to object." It says "constitute waiver of any objection."

Then, arguably, a lawyer who -- might under some circumstances be satisfied with a reversible error. I think most of time, frankly, that's going to be the defense lawyer. "If I can win before the jury, that's great, but if I don't win before the jury, I'm sometimes just as satisfied to have a reversible error in there, and if all I have to do is object..." then I think the trial judge has an immeasurably more difficult task -- the trial judge and the plaintiff's lawyer have, in my opinion, an immeasurably more difficult task; I think more difficult from the plaintiff's viewpoint now,

object on."

Then, arguably, a lawyer who --
might under some circumstances be ineffective with
a reasonable error. I think out of time,
Frankly, that's going to be the defense in your.
"I can win before the jury. That's exactly what
if I don't win before the jury, I'm committed
work as not asked to have a reasonable error in
there, and it will have to do about..."
then I think the trial judge has an immeasurably
more difficult task -- the trial judge and the
an skilled lawyer have, in my opinion, an
immeasurably more difficult task. What your
difficult for the skilled practitioner may

because there doesn't seem to be any limitation under 271 (1) as to whether the judge may order one or both to tender or request just their own questions, definitions, or instructions, or whether or not that does not, as it seems to me, extend to the charge as a whole.

JUSTICE HECHT: But if there was an objection: "Your Honor, this charge does not contain satisfactory instruction, a definition of negligence," and the trial judge says, "Well, would you submit that in writing? In fact, I direct you to submit what you consider to be satisfactory in writing and for my consideration."

So -- and he goes off and writes it up and brings it back in, hands it to the judge and says, "All right, this is what I request."

And the trial judge says, "If I give this instruction now, will that eliminate your objection?"

And he says, "No, that won't eliminate it."

He says, "Well, what will?"

"Well, you need to change it up some more."

"Well, I told you to give me what you wanted."

All right. So he goes off again. And isn't the trial judge able, in essence, through the process, to be sure that the objection is either covered or is not going to be covered?

PROFESSOR MULDROW: If -- if we retain, I think, invited error for estoppel -- and that's a question that I have about Subsection 5 -- if -- if the lawyer requests it, the lawyer is not going to be heard then to level objections at it. I think that clarifies a lot of it.

I -- I don't understand exactly why we're dispensing with the obligations to request, sort of in advance, other than to try to come into some sort of compliance with what the federal rule has. It seems to me that the process of objecting, considering the objections, and then directing the lawyer to draft a request, is going to be a more time consuming process, perhaps, than we have now.

JUSTICE HECHT: I think the concern -- some of the concerns expressed at the

"[illegible] give [illegible] it

[illegible]."

All right. [illegible] goes off again.

And I think [illegible] in essence,

the [illegible] the

objection is either covered or not going to

be covered?

[illegible]: [illegible] -- [illegible] --

refusing, I think, "invited error" [illegible] --

and that's [illegible] I have doubt

connection 5 -- 11 -- as the lawyer [illegible]

the [illegible] it not [illegible] they

have objections to it. I think that [illegible]

a lot of it.

[illegible] -- I don't understand exactly why

[illegible] with the obligation to

request, not of in advance, other than to try

to [illegible] some sort of [illegible]ance with what

the federal rule [illegible]. It seems to me that the

process of objecting, [illegible] the

objections, and then directing the lawyer to

[illegible] requests, is going to be [illegible] than

[illegible], [illegible], than we have now.

[illegible]: I think the

concern -- [illegible] the concern [illegible]

committee hearing were that the -- what is required to preserve error in the charge under our current rules is a complex body of law and very difficult for even skilled and frequent practitioners at the courthouse.

PROFESSOR MULDROW: Primarily, because I think errors of commission and omission blur into one another, and we don't really -- it's not absolutely clear when there is an omission and when there's a commission, and that's the main problem, I think, in that respect.

CHIEF JUSTICE PHILLIPS: It's past our break time, and I know we're going to have more questions of you, but I'd like to request the Court to take a 15-minute break. And I think we will -- I have some questions of you.

PROFESSOR MULDROW: All right, sir.

CHIEF JUSTICE PHILLIPS: We're -- the blurring of -- as we go to a more general charge, whose burden it is to carry an issue is getting more and more blurred, and we would like to keep this body of law manageable but at the same time give protections to the trial court and the attorneys. So maybe -- maybe out of

co[illegible] that the -- that
keyed to records [illegible] on the shape of the
[illegible] in a [illegible] on body of law are
very difficult [illegible] even [illegible] and frequent
[illegible] the [illegible].

PROFESSOR HUNTER: Exactly,
[illegible] I think [illegible] of [illegible]
[illegible] one [illegible] and we don't
[illegible] -- it's not [illegible] when there
[illegible] and when there's a contradiction,
and there's the main problem, I think, in that
respect.

CHAIRMAN [illegible]: It's past
our break time, and I know we're going to have
more questions of you, but I'd like to request
the Court to take a 15-minute recess. And I
think we will -- I have some questions of you.

PROFESSOR HUNTER: All right, sir.

CHAIRMAN [illegible]: It's --
the [illegible] -- as [illegible] more [illegible]
clear, there burden [illegible] to carry an issue is
getting more and more blurred, and we would like
to keep this body of law [illegible] but at the
same time give [illegible] the trial court
and the attorneys [illegible] -- say [illegible] I

this process we can think of a way to achieve all those goals.

We'll take a 15-minute recess.

(At this time there was a brief recess.)

CHIEF JUSTICE PHILLIPS: Okay. We've got a quorum.

PROFESSOR MULDROW: Shall we go, Your Honor?

CHIEF JUSTICE PHILLIPS: Yes, if you don't mind proceeding.

PROFESSOR MULDROW: Back -- back to the -- back to that first sentence in 271 (1). What if -- what if the trial judge says, "Well, you've objected; just draft," or the trial judge, without having gotten to the objecting stage, directs the lawyers to tender what they think the charge ought to be, and the lawyer says, "Judge, I'm sorry to admit it, but I will be frank with you: I don't know; I can't figure out what the law is, and I don't know how that thing ought to be worded, and I can't."

But they get down to the objections and he says, "But I don't think what you have got here is right, and so I'm objecting to it

for these reasons, but what all it ought to be, I'm not sure." And it doesn't seem to me that there is a clear consequence to the lawyer's failure or refusal to tender.

If, in response to the judge's question, it gave me an idea, perhaps, that one of the reasons the thing may be proposed the way it is, is that when the trial judge starts hearing the objections, the lawyer says, "We object to this issue," or "this instruction," or "this omission for the following reasons," object, object, object.

The judge says, "Well, if you find what is there objectionable, I order you to draft what you think it ought to be."

I think there will probably be trial judges who, out of an excess of precaution, perhaps, direct the lawyer with respect to every objection that is made: We'll just draft what you say it ought to be, and it will take three days to prepare the charge instead of two or three hours, maybe, if that is the practice that's adopted. At any rate --

CHIEF JUSTICE PHILLIPS: Well, is it your sentiment that the current system is

working all right?

PROFESSOR MULDROW: Well, it's a very -- it's a very difficult area. It's -- we all know that there is no -- in my opinion, no single part of a trial that it is -- that is as technical and hazardous as the charge, and I just don't see how changing the rule is going to simplify what, by its nature, is an inherently difficult and technical area.

I think there is something to say for the fact that since the Pepper (phonetic) case and since the adoption of the rules in 1941, at least we have got about 50 years of precedent that gives us specific directions, not always answering all the questions, because it continues to cloud. I don't know that scrapping it and starting over from scratch is necessarily going to accomplish what is desired.

I don't -- I don't know that I can say that I think it works fine. We see a lot of cases where lawyers have done their very best to draft definitions and instructions, only to be told on appeal that that's not in substantially correct wording.

JUSTICE HECHT: Or that they have

requested matters be included in the charge without objecting, only to be told on appeal that by requesting, rather than specifically objecting, they waive any error in the charge.

PROFESSOR MULDROW: That's right; that's right. But if we say to the lawyer, "All you have got to do is object," we've got to say to somebody somehow, however you interpret it, "Somebody has got to draft it." And if I were the trial judges, I think I would be down here complaining, because I think if the lawyer says, "I'm sorry, Judge, I don't know how to draft that thing" --

JUSTICE HECHT: A good many have written, so -- and their voices are being heard.

PROFESSOR MULDROW: -- and when the rule says compliance or noncompliance doesn't affect a waiver of the objections that the guy then makes, I think you can hook the judge with the dilemma. That's all I have.

JUSTICE HECHT: Thank you, Professor.

PROFESSOR MULDROW: Thank you.

JUSTICE HECHT: Other comments on these rules up through 295?

Thursday, 2023

THE COURT: Okay. Counsel on

[redacted]: Thank you.

THE COURT: Thank you.

Procedure.

JUSTICE [redacted]: Thank you,

the dice roll. That's all I have.

[redacted] when [redacted], I think you can look the judge in the

eye and say confidence or nonconfidence doesn't

affect a waiver of the objection at the day

[redacted]. -- and when the

[redacted] -- and their voices are losing [redacted].

[redacted]: A good many have

left [redacted]" --

"[redacted], Your [redacted]. I don't [redacted] for [redacted]

[redacted], I think I would be even less

[redacted] if the lawyer said,

"Somebody has got to [redacted] it." In fact, the

[redacted] somehow, however you interpret the

[redacted] you have got to do it [redacted]," you're not to

[redacted]. But if we are to the [redacted],

[redacted]: [redacted] right:

[redacted] there have been error in the [redacted].

[redacted] by [redacted], [redacted] [redacted] specifically

[redacted] objecting, only to [redacted] a [redacted]

[redacted] -- it is [redacted], [redacted]

CLINARD HANBY,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

17

MR. HANBY: I'm Clinard Hanby from Houston, and I came to watch and wasn't planning on saying anything, but after the last gentleman raised the issue, I decided to come and say something.

It's really between a rock and a hard place. The current system under these rules is intolerable. I -- I consider myself an extremely technical lawyer, and I frequently can't figure out when a party is required to object and when a party is required to submit a -- an instruction or a definition or an issue in substantially correct form in order to preserve error. But I'm not sure whether going to just "all you have got to do is object" is the right solution to the problem. It is a major problem.

There are a lot of legitimate errors

that occur that are waived on some kind of a technicality, and we're supposed to be trying to promote substance over form sometimes. But if I were doing recommendations, my recommendation would be to treat these rules the way you treated many of the other rules, which is: When you change the rule -- for example, Rule 166b in the case law -- you have always rewritten the rule to conform with what the case law is. The major problem here is that when a party needs to object and when a party needs to submit, you can't tell by reading the rule.

And my recommendation to the Court would be to rewrite the rule and spell out that if it's part of your case, or an instruction that you are relying on, you have to submit it in substantially correct form. If it's the other guy's case, there is something he is relying on, an objection suffices, and spell that out one, two, three in the rule.

Now, I haven't written a proposed rule for the Court, but --

JUSTICE HECHT: With a general charge, however, that becomes increasingly difficult, for some language in the charge is

almost in the middle. Both sides --

MR. HANBY: That's true. Things like if you are objecting to the definition of "proximate cause," for example, and saying it should be producing cause in this case, then there may be issues that relate to both, which the solution may be to -- to say that any time it's an instruction, and it's one that you conceivably could be relying on, you have to -- to give the judge a -- a copy of it.

But my -- my point is that the rule ought to be -- ought to specify when you have to object and when you have to request, rather than having to go to a lot of case law that is very confusing and very contradictory to try and figure that out.

And I think that whatever solution you come to on "when" is going to be better than the present system, and that I'm -- I'm kind of disinclined if you just go to everything as an objection, because that does -- that does have, as the last gentleman was saying, a lot of potential for sandbagging the judge, although you have eliminated some of that by putting in the rule about hiding your objection amongst --

figure that out.

And I think that whatever motion

counsel is going to be better than

coming up to a lot of case law that is very

objection and when you have to respond, rather than

right to do -- maybe to specify when you have to --

But my -- my point is that has the

to give the judge a -- a to y on it.

somebody might possibly be saying one year to --

is to instruction and also one that you

of instruction may be to -- to say that this

like I have to read a flat rule to this, which

I might be precluding entire lines

" recharge clause," to create, and saying it

like if you are objecting to the definition of

. "Yeah. That's true. Think

amongst a bunch of frivolous objections.

CHIEF JUSTICE PHILLIPS: As I recall, the committee tried to write a rule such as you mentioned, and it was after trying to write that, that they came up with this side to --

MR. HANBY: They gave up.

JUSTICE HECHT: We couldn't agree about what the law was.

Any other questions for Mr. Hanby?

Mr. Hanby, would you fill this out, please, and hand it to the lady in the back before you leave?

MR. HANBY: Thank you, Your Honor.

JUSTICE HECHT: Who else on this group of rules?

MR. McMAINS: Your Honor, it --

JUSTICE HECHT: Yes.

RUSSELL McMAINS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. McMAINS: May it please the Court, I'm Russell McMains from Corpus Christi; and apparently I'm appearing in defense of the Supreme Court Advisory Committee under assault by the academic community, which, actually, we have our share of academics on the committee, and they couldn't come up with a better rule, either.

The fact of the matter is -- and I think I really wanted an opportunity to talk with the rest of the members of the Court, because I am assuming that there is much pressure from the trial bench, privately in the halls and judicial conferences, and whatever, with regards to, you know, massive alterations of the rules.

And, of course, as Justice Hecht recalls, there was some fairly vocal opposition when we passed the rule in the Supreme Court Advisory Committee, anyway, by some members of the judiciary that were there: Justice Peoples, for instance, and yourself, for that matter; you expressed some reservations. And so I knew that it was going to be hotly debated.

And for us who do appear in the back

rooms and chambers to -- and called in frequently at the last moment for objecting purposes, preservation purposes, and to attempt to wrestle with and get the case submitted at least the best way you can, the one area that is unclear in our rules by virtue of the injection of the movement to the general charge is the principle question of -- under our current rules -- when do you have to object, when do you have to request.

And now the Corpus court, two months ago, in the Valero (phonetic) versus National Union case, has held for the second time that you have to do both or suffer waiver. Now, frankly, with all due respect to our Court, I do not believe that anybody interprets the rule, nor can it be legitimately read, to require you to do both at the same time. It may not be clear which one you do have to do, but it doesn't require that you do both of them.

On the other hand, every academic and every person in this room that has spoken at seminars, of which there are probably 30 or 40, on the charge always say to the practitioner: "When in doubt, do both." So now the Courts of

Appeals have picked up on it and require that you do both, which is the worst of all possible worlds, if there is some divergence.

Now, I disagree respectfully with Professor Muldrow with regard to his contention that you have the ability as a lawyer to sandbag the judge in terms of, say, "I'm not going to do something that I actually want in the charge; I'm just going to sit back and object to it, and I don't have to tell you how to do it, because I just don't know."

We have included in the definition of "objection" what the court has -- what the courts are already saying and have said is the standard for an objection. It must be clear as to what your legal grounds of complaint are, and how to fix it.

Now, if the objection that you make is not good enough to identify to the judge or the party litigant's attorney, the other parties, as to how to fix it, you can't figure it out, there is not going to be any reversible error. That objection is not good enough, and it is not going to be preserved.

We did take out, and we intended to

take out, the principles of invited error that had been applied in circumstances where as two lawyers are tussling, trying to find out some middle ground to submit cases that we may not have pattern jury charges on -- and -- and the way things are going, may never have on some of them -- when you are tussling on that issue, then the question that comes to mind is: Why shouldn't you have a right to try and do the best you can with the issues going to be submitted against you without having to worry about somebody coming back later on and saying, "Well, you invited the submission of that issue, you requested it, it's right there in the charge conference, your name is on it, and you said do it this way," when, in truth, what you are saying is, "If you're going to do it to me, do it this way"?

And the opportunity to wrestle with the charge first is a recognition of the pragmatic operation of the charge practice, which is that one side or the other, or both, do, in fact -- will give requests to the judges.

Most of the time the plaintiff and defendant will both come with a complete charge.

The idea expressed by the trial judges that you are going to show up with no charge is really fairly preposterous to those of us who show up in the trial court and have to look a judge square in the eye and tell him that we don't have our questions ready, despite the fact that we are required to do so.

CHIEF JUSTICE PHILLIPS: In fairness, as a former trial judge, I will say there's a surprising number of cases that lawyers do not present you with any charge --

MR. McMAINS: I understand that.

CHIEF JUSTICE PHILLIPS: -- and point to the rule that it's the trial judges, and I have stayed up late at night --

MR. McMAINS: I understand that, Your Honor.

CHIEF JUSTICE PHILLIPS: -- doing the best I can, and, of course, the penalty is, under our current rules, that their appeal is going to be pretty....

MR. McMAINS: And the odds are their charge isn't going to be too good, either.

CHIEF JUSTICE PHILLIPS: Well, we have a little more --

MR. McMAINS: Because if the other side -- I mean --

CHIEF JUSTICE PHILLIPS: I resent that.

MR. McMAINS: I'm talking about attorneys with the other side jumps in and helps you. It is a problem when neither side is prepared.

CHIEF JUSTICE PHILLIPS: Yeah. Well, that happens --

MR. McMAINS: And I understand that.

CHIEF JUSTICE PHILLIPS: -- on more than you would suspect.

MR. McMAINS: But I think that -- I think -- you know, and obviously the real problem -- if we want to get down to that problematic, is that the trial courts don't have independent legal assistants in terms of staff attorneys or clerks running around by which they can sort any of this out anyway, which is what -- the benefit the federal courts have.

But frankly, I think, pragmatically -- and this was the consensus of the committee, as Your Honor will remember, as he was there, is that there really is ample

power -- if nothing else, by moral persuasion of the trial judge -- to get the assistance of the lawyers with regards to putting together the best you can do. But you still need to be in a position for the protection of your client's interest to object to it. The fact that you agree that to the extent it's going to get done to you, this is what it is, you still need a vehicle to object to it.

The second problem of trying to incorporate or complete requests in terms of requiring those on a regular basis is it's altogether unclear, as Your Honor has pointed out, as to whose burden it is under the current rule, because basically your request obligation is in all cases of definitions instructions, and then the question of a question is as to whose burden it is. Well, the problem is that many, many defenses, as well as claims, are being presented in the course of the instructions now. And if you literally apply our -- our principles where that, in fact, a general charge is given to where basically all of the theories of grounds of recovery and defense are presented in, more or less, one or two questions with all

of the involved legal principles involved in the instructions, both parties have the obligation to fix those instructions right and to sub -- and to correct -- tender in substantially correct form.

And the problem is that it doesn't save any time to require a request, because if you are going to tender it before trial, the odds are some of it's going to be in there anyway, in which case you have duplicative material in there and you've got to go back and recraft the request or else you have encumbered it with material that's already going to be in the charge. So you wind up in technical violation of the rule, as the Court is well aware, in the Posencio (phonetic) case which I had presented to the Court, that if there is a basis by which the trial court has a reason to say, "I'm not going to submit that," whether it's duplicative, whether it's already in there, or whether it is technically wrong, arguably in some respect, even if nobody pointed it out, then the definition of "substantially correct" has extended to mean, well, there is no error, and not give it; whereas in reality the

[illegible]

[illegible] review [illegible]

instructions. Both parties have had [illegible]

to [illegible] there is [illegible] in it and to [illegible] --

and is correct -- [illegible] in substantially

a [illegible] way.

The [illegible] reason is that it can't

[illegible] any time to [illegible], because

you are [illegible] matter [illegible], the

[illegible] are some [illegible] going to [illegible] there

anyway, in which case you [illegible]

material in there and you've got to go back and

recall the [illegible] you [illegible].

[illegible] with material that's already going to be in

the charge. [illegible] you wind up in technical

violation of the rule, on the [illegible] as well

[illegible] the Pescasio [illegible] case which

had reference to the [illegible], that it [illegible]

[illegible] by [illegible] the trial court and [illegible] record to

new, "I'm not going to [illegible] that," [illegible]

[illegible] it's [illegible]

or whether it is technically wrong, as [illegible] in

some respect, even if nobody noticed it [illegible],

that the [illegible] "constitutionally correct"

[illegible]

[illegible] in reality, the

objection process should be where we think -- I think the consensus of the committee was we needed to do one or the other and that the objection process, I agreed, was easier. And that was really one of the theories: that it ought to be a little easier to know what you have to do to protect your client's rights.

JUSTICE HECHT: Do you think the proposed change favors one side of the case?

MR. McMAINS: I really do not; I really do not. I do not believe that -- that either side has an advantage under the current rules. I think there is an equal degree. And I represent both sides periodically, whoever might be in trouble on any given case, and there are disadvantages to plaintiffs and defendants under the current practice. There are disadvantages to plaintiffs and defendants under the new rule with regards to what might happen to you.

But I really think that the new rules that we have proposed by -- are just primarily more notice of what is actually required of the lawyer in order to preserve his appellate complaint, and less concern about the fact that he is running around with these dual

functions of trying to get the charge the best way he can without somehow being claimed to have invited an area.

And I don't think it encourages sandbagging if the objection has to be specific enough to specifically object and to explain how to fix it, because if there is a technical defect, or just a wording defect, or something that can be added, that's going to be necessary to make the objection clear in order for it to be preserved.

On the other hand, if -- if what it is, is that you don't think the concept should be submitted, as I'm sure the Court is inundated with cases on good faith and fair dealing as -- as a theory of recovery -- now, as a defendant, if you are faced with an issue on good faith and fair dealing, and your position is in a particular context arising out of a loan transaction, or whatever, that that is not a legitimate theory of recovery.

Any system that requires you to start defining good faith and fair dealing as a prerequisite to making a complaint on appeal is a system that is unfair to that party, just like

in terms of trying to characterize a defense that someone is wishing to urge is some kind of new defense.

To impose upon the plaintiff the burden to define a term that is used in a question is just unfair, and that is what the status of our current rules are, is that the definitions and instructions all have to be substantially requested, or else it's -- it's waived. And that doesn't make any sense. There should be an ability to object to it: "That's not a defense; that's not a ground of recovery, or legitimate theory of recovery," so that you can identify what it is that your complaint is without having to do the other side's work on those theories that you are resisting.

JUSTICE HECHT: Any other questions of Mr. McMains?

Thank you, Mr. McMains.

MR. McMAINS: Thank you, Your Honor.

JUSTICE HECHT: Other comments on this block of rules?

We -- with the Court's leave, we have a couple -- a couple of people to testify about the use of cameras in the courtroom which

have scheduling problems -- who have scheduling problems, and I know everybody has scheduling concerns --

CHIEF JUSTICE PHILLIPS: Let's save at least one of those witnesses so that the press will grace us with their presence.

JUSTICE HECHT: We will go ahead and hear these, unless -- unless there's objection.

Mr. George?

JIM GEORGE,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. GEORGE: I'm Jim George from Austin. I represent KTBC-TV and other television and broadcast companies on a regular basis, and I'm here to support the proposal that this court have the authority to allow truly open proceedings to occur in this court in hope that some day all of the courts in the state of Texas will be authorized to have truly open

last case [illegible] -- [illegible]

[illegible]

concerns --

[illegible]:

[illegible]

[illegible] with their reasons.

[illegible]:

[illegible] -- unless there's objection.

Mr. [illegible]?

[illegible],

appearing before the Supreme Court of Texas in its advisory capacity to consider proposed changes to the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. [illegible]: [illegible]

truth. [illegible] other

selection and then cast [illegible]

[illegible]

[illegible] have the authority [illegible]

[illegible] court [illegible]

that come [illegible] courts in the state [illegible]

[illegible]

proceedings.

As the court is aware, most states in this country, and I believe over 40, allow electronic communications to broadcast or telecast, in some manner, their proceedings. They -- if you go to Florida or California or New York or Illinois, or most every place else in the country, the current technology allows nonobtrusive, nonobstructive communications by broadcast medium of what goes on in the courts.

And in Texas we have failed to keep pace with this trend, and it's truly a tragedy in a state which has a unique -- unique commitment to both freedom of the press, through its constitutional provisions, which are at least as extensive as the United States Constitution -- under this Court's rulings probably more so -- and a unique provision or provisions that do not appear in the Constitution of the United States guaranteeing open courts.

We, the founders -- the people who wrote the Constitution of Texas -- made a commitment in that era that we would truly have an aggressive press and open courts. And today

the medium of television is truly the way that people of this state can have access to their courts to see what happens.

And I believe -- speaking as a lawyer who tries cases day in, day out, of all sorts, as well as representing the communications industry -- that the public confidence in the judiciary in the process of deciding disputes, both criminal and civil -- civil in this particular case -- would be drastically increased if the public, by and large, could see how well those obligations are carried on by the lawyers and the judges. And this Court, the proposal that's currently before you, to allow it to be the first to allow public access, true public access, would enhance its stature.

And in -- in my judgment, in this era when so many of our public issues are going to be decided by this Court and other state courts, it is imperative that we look closely to our traditions of openness and free press in this state, unique traditions, and allow -- begin to put our toe in this water that so many people are freely -- freely swimming in, in the

other parts of this country, and see that truly it is a method allowing the people of the state of Texas to see how well the judges of this state perform, to see how well the juries and lawyers by and large perform, and improve both the access to the courts and the public's informational base through a fully-informed, free press.

CHIEF JUSTICE PHILLIPS: You're not saying that 40 states allow cameras in the trial --

MR. GEORGE: I believe -- and I have not checked that -- but I believe that there are approximately 44 states that allow some sort of broadcast medium in some of their judicial proceedings, and I had --

CHIEF JUSTICE PHILLIPS: Would that include just the states' appellate courts?

MR. GEORGE: In various forms of things. Now, many -- as the Court knows, many jurisdictions -- many jurisdictions -- most of the larger states like Texas; Florida; California; New York; and Illinois, in some current cases -- the big states -- most every one of them allow full access to the trial court

proceedings through electronic media. If you go to Florida or California or New York, or some place, and turn on the local television, you will see a trial judge hearing a case broadcast on television, not unlike C-Span. I mean, they have -- we have, you know, the -- I believe last week the British House of Commons allowed television in for the first time, and the Senate of the United States. And if the British House of Commons and the Senate of the United States can allow television in, it certainly -- the courts of the state of Texas, particularly this Court, ought to be able to allow the same medium to coverage. We see it as -- it is the norm in most parts of the world, particularly in other jurisdictions of the United States, and there is no reason not to do it here.

CHIEF JUSTICE PHILLIPS: As you probably know, twice in this decade this Court has requested a referendum of the trial judges -- of all the judges of this state at the judicial section meeting. In 1981 it was a four to one margin against cameras. Progress being made for your position, it was only slightly more than two to one against it in the most

recent --

MR. GEORGE: Well, one of the advantages --

CHIEF JUSTICE PHILLIPS: What -- what do you suggest we do to -- if there are those of us who believe that there is no reason why the courts should not be open to cameras, what do we do to convince the -- the trial bench that this is not something that will impede the administration of justice in their own courtrooms?

MR. GEORGE: The first -- I think the solution to that is what is proposed: to begin with, this Court standing up and allowing its proceedings to be open to the electronic media. It has the facilities, it has the capacity, and it can show the leadership.

It is a part of this Court's responsibility -- not only in revising these rules, the rules of procedure that we are here today talking about -- to provide leadership to both the appellate -- all the appellate courts and the trial courts, and to provide leadership in other areas. And this is an area of leadership by letting it in -- let my clients

and others in -- to telecast the proceedings in this court, and will go a long way.

I mean, I doubt that the court will fault, and I doubt that the administration of justice will be greatly impeded in this court, and at least those trial judges will have some comfort that it -- it can be, and it is not the end of the world, to allow television in the courtrooms.

JUSTICE DOGGETT: The proposal that you refer to that I have made is aimed just at giving discretion to this court.

MR. GEORGE: Yes.

JUSTICE DOGGETT: We had a videotaping done during the Edgewood case, which was then embargoed under the code of conduct, and this will take the change in the code of conduct, as well as the -- the rules. But is there a way in this court that you can have video for various television stations and not interrupt and -- the strife from the -- from the arguments?

MR. GEORGE: We're doing it today, and --

JUSTICE DOGGETT: Well, we've got

more light in here today than we have had in recent years.

MR. GEORGE: The technology, I'm sure, can be handled. The providing of additional lighting to the courtroom shouldn't be a tremendous problem, but even with the lower lights, there is technology available. If you have ever seen the Friday night football game highlight films, they do manage to videotape the Bastrop Bears playing the Lockhart Lions, and the lighting in those stadiums is not great; and your technology is available to do that. I think that the quality of the medium would be improved with a little -- little more light in the courtroom, but that's not a --

JUSTICE RAY: Some think we need more light, anyway.

MR. GEORGE: Both -- both real and substantive and figuratively.

JUSTICE SPEARS: I have another question which is not new, but I've never heard a good answer for it. We have had requests of this same nature for the 11 years I have been on the Court, and with the two exceptions, we have declined to authorize them.

One of the problems that's been cited is that the coverage of the television media necessarily must be very brief because they are in short segments, and it is interesting to note in that line that there have been two television cameras in the courtroom today, and not until you testified did they jump up and start filming. I'm sure there will be excerpts of your testimony that will appear on news programs, and so forth.

The problem that we perceive is that it's impossible -- and I think that's a fair word -- to accurately portray to television viewers the sense of a trial that maybe lasts over weeks, or even days, in a one-minute segment, and that it necessarily requires an editor to selectively choose certain elements of the testimony or of the evidence that could, in effect, not give a true picture of what the trial is all about. And that -- that can be done by the print media, but it cannot be done in a one-minute segment for the evening news.

JUSTICE GONZALEZ: Thirty-second bite.

MR. GEORGE: There is a -- there's

two responses to that. And the nature of the media is that the electronic medium on commercial television stations, by and large, is local news segments in which they try to cover the events of the world in 30 minutes. By the nature of that medium, it cannot include a two- or three-hour proceeding in this court to determine how the Rules of Civil Procedure are modified, because you just simply don't have the methodology to do so.

We have, however, experienced today -- if you will -- if you have cable on your television, Justice Spears, you will see that the full proceedings of the Senate of the United States debating the entire proceeding are on C-Span. The full proceedings of the House Committee on the impeachment of a federal judge -- the Senate trial of the impeachment of a federal judge was on C-Span, the entire thing. You get up in the morning, you turn it on.

Now, their -- the cable networks provide outlets for extended coverage. That is a reality that exists in all sorts of public forums today. And if you go to other jurisdictions, you will see the cable systems

carry extended coverages. The local news, like the local paper, contain snippets, because that's the only way you can, because it's not the only event happening, to do so. And with all due respect, the nature -- the nature of the press is to edit the world for the rest of us, because we all can't be there, and we all can't see everything.

JUSTICE SPEARS: Some of us find that, in some senses and in some instances, a rather arrogant approach.

MR. GEORGE: Well, you can't all be in Czechoslovakia this morning, and we can't all see what happens there entirely. We have to depend upon some medium to select for the rest of us what part of the events happening in eastern Europe we can see. There's no -- it's simply the physical limits of the world.

The press has always, whether it's electronic, or print, or otherwise, had to play editor, because you can't simply recreate the entire world through a newspaper or a television or a radio broadcast. It has to be selected. And our commitment in this state to the freedom of that selection through our constitutional

provisions is dramatic.

CHIEF JUSTICE PHILLIPS: Well, just as an aside, 44 states have a freedom of speech clause that has some press responsibility language in it, and 39 states have a substantially similar open courts provision to Texas, so --

MR. GEORGE: Most of --

CHIEF JUSTICE PHILLIPS: It's not -- I mean, we are following the majority of other states in being different than the federal constitution on those --

MR. GEORGE: That's true. There is no question about that. But 40 of those states also allowed broadcast medium in their courts. Now that suggests that, you know, maybe those other fellows are reading their constitutions more openly than we have, and I would suggest that -- the federal constitution not particularly a good guide -- the federal courts have never done it, but they have -- there is no open court provision in the federal constitution. There is no -- the free press provisions of the federal constitution is not -- are not as protective as the state constitutions

are.

JUSTICE GONZALEZ: Can you summarize briefly your proposal?

MR. GEORGE: My proposal is essentially the one -- today?

JUSTICE GONZALEZ: Yes.

MR. GEORGE: Today this Court should have the discretion to authorize the telecasting and broadcasting of proceedings it selects. I think we -- if I was to write on the perfect world, I would recreate the systems that are in Florida or California or New York or Rhode Island, or many of the other jurisdictions. I don't think the state trial bench is ready for that.

JUSTICE GONZALEZ: But eventually you would move in the direction that you want the trial proceedings. You will want to have access -- you will want the ability to have TV in your -- you want any -- any barriers that would prohibit you from being in the trial courts where the action is -- a majority of the action -- I mean live action that is sensational in the nature of a -- that can be seen or shown, you know, in a 30-minute -- a 30-second sound

bite.

MR. GEORGE: You would have to couple it with the technology provisions that allow -- if you watch television, or your cable systems have these trials on them here in Austin, you can watch them. They have technology requirements that the court has to be equipped with one camera. There can't be news people standing around the courtroom, for example, in these other jurisdictions. Those kinds of provisions would be included, but the cameras could be turned on in the preceding telecast.

JUSTICE GONZALEZ: There's some concern about invasions of privacy, for example, of showing the jury -- the camera spanning the jury and the trial bench, and there's some legitimate concerns about that. Or a sensational sex trial or rape witness, for example, invasions of privacy.

MR. GEORGE: What is it --

JUSTICE DOGGETT: I think those are the kind of concerns that the Chief mentioned of the poll we took -- a couple of them that have been taken -- that there seemed to be strong

right.

"JUDGE: You really have to
[illegible] it with it. I think any [illegible] that
[illegible]tion -- if you really to [illegible] on your copy
[illegible] exactly have those facts on them there if
[illegible] "well, I can work that." They have
[illegible]y relied on that fact to work [illegible]
[illegible]ed with one answer. Since every [illegible]
[illegible] starting around the country, for
[illegible] in there other jurisdictions. There
[illegible] of revelation would be important, but the
[illegible] would be burned on in the meeting
to occur.

"MATTON COUNTER: There's no
[illegible] about transfers of privacy, for example,
[illegible]owing the jury -- the jurors examining the
[illegible] the jury box, and there's more
[illegible]ate cause as about that. Or a
[illegible]ssistance for trial or else without, for
[illegible] invasion of privacy.

"MR. [illegible]: Just in it --

"[illegible]: I think there
[illegible] of concerns that the first question --
[illegible] -- I would of the right [illegible]
[illegible] -- that this would [illegible]

sentiment of trial judges against doing this thing, and why this proposal really is narrow and just simply gives this court and the Court of Criminal Appeals, if it wants to join in, the discretion to do this.

JUSTICE GONZALEZ: The concern of my fellow judges is that, you know, as we go, they will go, you know. And in a --

JUSTICE DOGGETT: Well, I guess that depends on what our experience is. If that experience is not a favorable one, they are not likely to do so.

JUSTICE HECHT: The U.S. Supreme Court has considered this. What is the status of their consideration?

MR. GEORGE: As I understand it, they have considered it. They have never allowed the live broadcast of their proceedings. They have had some videotapes made of some of the oral arguments. The current Chief Justice has suggested that they consider changing that rule. I don't know that there is any great movement afoot in that court to -- to make any change, although I believe that it is something that they are actively considering.

that they are actively considering.

although I believe that it is unwilling
more, to take out
several cases in that court to -- to take out
rule. I wouldn't say that it is any reason
has specified that they consider about the
the rest rightly. The lawyers didn't do
They have just come within an inch of doing it
affirmed the invalidity of their proposed acts.
they have considered it. They never
of their constitutions

MARTIN FRANZ: The U.S. Supreme
Court has considered this. That is the status
in an action is not a reasonable one, they are not
like to do so.

JUSTICE BOGGS: Well, I guess it
depends on what one's experience is. If that
is, you know. I -- I --

MARTIN FRANZ: The concern of my
colleague Judge is that, as to con-
tinue to sit.

JUSTICE BOGGS: If it wants to join in,
of course, I'm sure that the Court
would welcome their participation in that event to -- to take out
rule. I wouldn't say that it is any reason
has specified that they consider about the
the rest rightly. The lawyers didn't do
They have just come within an inch of doing it
affirmed the invalidity of their proposed acts.
they have considered it. They never
of their constitutions

MARTIN FRANZ: The U.S. Supreme
Court has considered this. That is the status
in an action is not a reasonable one, they are not
like to do so.

JUSTICE BOGGS: Well, I guess it
depends on what one's experience is. If that
is, you know. I -- I --

MARTIN FRANZ: The concern of my
colleague Judge is that, as to con-
tinue to sit.

JUSTICE BOGGS: If it wants to join in,

It is again, as we got -- you know, we got the Senate to open up to television last -- two years ago, and the British House of Commons this week. It seems to me that we're making small steps.

And the Supreme Court of the United States hopefully will understand the medium as a -- as a method by the way the people can really see its court. It is, after all, their court, as this court is the court of the people of the state of Texas, and the only true way that they can ever see it. The only way that those folks in Houston can ever see what happens in here is if there is some electronic medium that allows them to participate via television.

JUSTICE RAY: Jim, let me suggest that, as one who had a pretty high profile a couple of years ago, that the hate mail and the kooks all come out of the woodwork when -- when your picture gets shown on TV, even from people that you don't know or never had any contact with.

The folks in the penitentiary start writing and say, "Uh-huh, that's that judge that

must have put me in this institution, or had something to do with putting me in the institution," and the letters started coming saying, "Boy, when I get out of the penitentiary, I'm going to kill you." And they didn't write just one letter; they wrote a lot of letters. And there were a lot of people writing the letters.

And you put judges at risk from the kooks of the world as they get more of a high profile, particularly on television.

MR. GEORGE: Well, I suppose that the problem with that argument just raised is that fundamentally those of you who offer yourself up for service on these courts have chosen to respond to, and appear, and deal with the people of Texas in their entirety, including those kooks. They're your constituents, too.

And it seems to me unfortunate to suggest that lack of information for the people to not know who you are is somehow in the interest of good government and good justice. I think that while that may be that the more well-known people -- Robert Bass was recently --

[illegible] in the [illegible]

connecting to [illegible] in the

[illegible]," and the lower [illegible]

saying, "Hey, when I get out of

[illegible]," "I going to his [illegible]." In the

didn't matter just one [illegible]; they [illegible]

of [illegible]. And there were a lot of [illegible]

writing the letters.

[illegible] of [illegible] to talk from the

books of the work as they did so it

[illegible], particularly on [illegible].

MR. GOOGE: Now, I am sure that

the people with that argument just refined to

that fundamentally those of you who offer

service up for service on those courts may

object to [illegible], and anyway, and [illegible]

with the people or [illegible] in their [illegible]

[illegible] there room. "Hey's you"

[illegible], too.

I'm it seems to [illegible] unfortunate to

me [illegible] risk of [illegible] the [illegible]

to not [illegible] who [illegible] to [illegible] in the

[illegible] [illegible] [illegible]. [illegible]

[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]

they arrested somebody trying to kidnap him because he is a well-known person -- maybe a rich person, as well -- but a well-known person. And well-known people are subject to more attention and unusual mail than not well-known people.

But after all, you are elected by all the people of this state of Texas, and you have to choose in some way, by seeking this office, to risk that notariety, because, in fact, it is important -- I think it's important that people do know what Justice Gonzalez looks like and who he is.

JUSTICE RAY: The drug dealers would delight in that. Drug dealers now, you know, are after judges, particularly who are tough on drugs.

MR. GEORGE: There's no question, and --

JUSTICE DOGGETT: Most of those folks know the people who sentence them, though.

MR. GEORGE: Well, I don't know that there is -- those folks probably know who you are already. I mean, it's the rest of the people that don't.

JUSTICE HECHT: Any other questions of Mr. George? Thank you --

MR. GEORGE: Thank you.

JUSTICE HECHT: -- Mr. George.

And Ms. Kneeland is here also to share her views.

CAROLE KNEELAND,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MS. KNEELAND: I brought my remarks written, and I'll read them and try to go through them relatively quickly. We -- we double up a little bit on what we say, but -- and then I -- I would like specifically to address your question, Justice Spears.

My name is Carole Kneeland. I'm the news director at KVUE television station, Channel 24, here in Austin, which is the ABC affiliate here.

I'm here to speak in support of a

THE CHAIRMAN: Any other questions of Dr. Gee? Thank you --

DR. GEE: Thank you.

THE CHAIRMAN: -- Dr. George.

And Ms. Kneeland, you were also to share her views.

CAROLE KNEELAND,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MS. KNEELAND: I brought my remarks written, and I'll read them and try to go through them relatively quickly. I'd -- we -- we doubled up a little bit on what we say, but -- and then I -- I would like to specifically address your questions, Justice [illegible].

My name is Carole Kneeland. I'm the news director at KVUE television station, Channel 24, here in Austin, which is the ABC affiliate here.

I'm here to speak in support of --

resolution to allow television cameras inside this courtroom to record the legal proceedings of the Texas Supreme Court, proceedings normally open to the public and covered regularly now by news reporters without cameras. We feel opening up the Texas Supreme Court would be a tremendous first step toward television coverage of courtroom proceedings at all levels in Texas.

There are several reasons we think that's important. First, we feel the public's right to a public trial is abridged if cameras are excluded.

When that right was protected originally by our forefathers, television cameras hadn't been invented. But today more citizens say they receive their news through television than any other medium.

For most people, unless they are directly involved in a trial as an attorney, a juror, or a witness, there's no opportunity to watch the courts in action. We could provide that if we could televise the proceedings. We feel if we are to comply with the spirit of that right to a public trial in this day and age, television coverage is important.

Further, we believe if we could televise court proceedings, it would lead to a more -- much more informed public, giving people more confidence in the judicial process. By providing more accurate and complete court coverage, we could contribute to wider public acceptance and understanding of court decisions.

Under our form of government, there must be a constant concern for educating and informing people about all three branches of government. There may be no field of governmental activity where people are as poorly informed as the courts. Many of us complain about the apathy of voters in judicial elections, but we feel that by banning cameras from the courtrooms, we are closing the windows of information from which they might see and learn.

Beyond what we feel our coverage could do to promote understanding and respect for what's happening in our courtrooms, we feel it would eliminate some of the chaos that sometimes occurs outside the courtroom now, as we must chase people down in the hallways to get the television pictures we need to illustrate

our stories. We wouldn't have to do that if we could get our pictures quietly in the courtroom.

And this is where, in addressing your -- your concern, I think what -- one of the -- one of the problems that happens with trial judges now is that their only experience is seeing us crashing around in hallways and seeing on the air, you know, defendants kicking at us, or -- or whatever.

And if you think that our editing of what happened in a courtroom would perhaps be mistaken, you know, and misunderstood, I think -- I would argue that right now it's much more misunderstood because of the pictures that you are seeing over what we are saying. They are the only pictures we can get, and they frequently are very distracting from what really happened in the courtroom. We didn't really see a defendant in the courtroom, you know, walking down the hallway with a -- with a book in front of his face kicking at people; that's not what happened there. But that, right now, is the only thing we can show, because that's all we can get, outside of -- unless we have courtroom artists, which also don't depict the actual

thing that happened in the courtroom.

Once Texas was one of only two states that permitted television cameras in the courtroom. As I'm sure you know, it was the notorious 1965 Texas case of Billy Sol Estes that led to a ban of cameras in the courts. But in 1981, the U.S. Supreme Court ruled that the presence of television cameras is not inherently unconstitutional, throwing the issue back into the state courts. Since then, 44 other states have allowed cameras access to the courts, and not just the appellate courts, but in many cases the lower civil and criminal courts, as well.

Florida was the state that brought the issue to the U.S. Supreme Court in 1981. And I brought you a copy of the 1979 Florida guidelines which ensure that television cameras are as unobtrusive as possible so as not to prejudice court proceedings in any way. I will leave that with you.

You will see that the Florida experience has shown that the presence of the cameras in the courtroom has little negative effect on trial participants' perception of the judiciary or the dignity of the proceedings.

They found the cameras disrupt the trial either not at all or just slightly. The ability for jurors and judges to decide the truthfulness of witnesses or concentrate on testimony is unaffected, and no one seems to feel self-conscious. In fact, the Florida experience showed the presence of the cameras makes the jurors and witnesses feel slightly more responsible for their actions.

Technical advances have reduced the size, noise, and light levels of the electronic equipment so cameras can be used unobtrusively. And while you may find these lights distracting today, if we were -- if we were shooting in here on a regular basis, we could work out a better lighting arrangement that would more -- more fill in the room without having these spotlights like we have now. It's just that -- and I don't mean this in any -- in any more powerful way than I say it, but it's kind of dark in this room. It only --

JUSTICE HECHT: Literally.

MS. KNEELAND: Yeah, I mean it literally. No offense, please.

It only requires one camera

stationed in one place throughout the proceeding with video fed out of the courtroom through one cable for pool coverage by several television stations at once. Existing sound systems used by court reporters can be modified to provide sound for the television cameras.

WFAA, the ABC affiliate in Dallas, has done a tape of television coverage of some mock trials, both appellate and criminal, and I'm getting that sent down to you as soon as possible for you to see for yourselves what it involved. They actually -- they shot video of the -- the camera involved.

Beyond the technical advantages of the latest equipment, the authority given judges in Florida and other states to control their own courtrooms has proven to be very effective. Judges can, themselves, prevent videotaping of juries, children, victims of sex crimes, some informants, and particularly timid witnesses who might be unduly affected by the -- by the camera. I think in most cases, television stations will be more than happy to comply with those kinds of limitations, understanding that we do not want to change the outcome of a trial

by our presence.

I only heard about this resolution you're considering very recently, so my testimony was prepared rather hurriedly. I know there are other news directors around the state who would welcome the opportunity to discuss this with you further, and I'd be happy to answer any questions or try gather other materials for you that would help you make the decision on this. In fact, I brought a documentary that we did at KVUE a couple of years ago for you to look at, if you would like to, about the issue.

We feel this is one of the most significant actions you can take to enhance the public's understanding of the important job that you have.

JUSTICE HECHT: Have you left us a copy of your --

MS. KNEELAND: Yeah. Here's my remarks, and here is the copy of the Florida -- the 1979 opinion that the Florida court rendered, with their guidelines, which was upheld by the U.S. Supreme Court in 1981.

CHIEF JUSTICE PHILLIPS: Ms.

Kneeland, are you aware of the Arizona experiment with their Supreme Court --

MS. KNEELAND: No, I'm not.

CHIEF JUSTICE PHILLIPS: -- on public television?

MS. KNEELAND: I'm not.

CHIEF JUSTICE PHILLIPS: They selected a few cases to broadcast their proceedings, and -- and the public television station in Arizona provided background on the case, went to the scene of where the --

MS. KNEELAND: Oh, uh-huh.

CHIEF JUSTICE PHILLIPS: -- the facts -- where the occurrence in question occurred and interviewed the attorneys and made a broadcast out of it.

Do you think that there would be enough interest in some of our proceedings for your station, or perhaps a public station or a cable station, to provide the background information --

MS. KNEELAND: Certainly.

CHIEF JUSTICE PHILLIPS: -- that would make our proceedings understandable? You -- you have sat here this morning through a

lot of discussions of our rules, and I must admit they are fairly arcane, even to lawyers.

MS. KNEELAND: I'm not sure that's the one we will want to cover, but....

CHIEF JUSTICE PHILLIPS: But most of our cases that come to us do not come on a -- on a judgment of the entire facts. We have no basis to review those facts. We are looking at one or two narrow points of law that we are reviewing, and would be unintelligible, perhaps -- many of our cases -- to viewers as a whole without background explanation.

MS. KNEELAND: Sure. And it might be that there would only be a few cases a year, even, that we actually were very interested in.

We would have been thrilled to have been able to use the video from the Edgewood case. It certainly would have made it very much more understandable, and that's probably one of the most important cases you -- you have dealt with this year, certainly, and we already had plenty of video to illustrate that story. We had video of the school -- the school -- the very school districts that you talked about your -- in the -- in the case, and -- and had

that kind of thing that would have provided background.

One thing I wanted to say, and this kind of relates to that in terms of what you asked about, although, you know, you mentioned a minute. We actually get a minute and thirty. I'm sure that really soothes your mind, doesn't it, and makes you feel a lot better? We get between a minute thirty and two minutes to present it.

And I would argue that, you know, almost anything you go to could use some editing. You may have felt that way about what you heard this morning. I don't -- I mean, I -- I -- I didn't -- I don't know what you -- you know, I'm no lawyer, so I didn't understand part of what you're talking about, but I would think you wouldn't have minded to have heard the -- a summary, and --

JUSTICE SPEARS: No argument there.

MS. KNEELAND: Okay. And that's essentially what we do. And maybe sometimes we don't do it as well as you would like, or even we would like, but we try very hard to -- our philosophy is that we're trying to take the

viewer to the scene of whatever we witnessed, whether it's a trial, or the Legislature in action, or an accident, or a fire; whatever it is. But you are trying to go and get the essence of what happened there, the most important thing that happened, and present it. And in the case of trials, you are trying to present both sides, because there's usually at least two.

And maybe we don't succeed all the time, but that certainly is our -- our effort, and we could succeed at it a whole lot -- we would be a whole lot more likely to succeed at it if we could actually show what's said in here by intelligent people presenting the argument, and witnesses, than this business that we do now, which is, you know, people running -- chasing people down stairways and through hallways trying to get them to repeat what they said in the courtroom. I think that does the whole judicial system a real disservice.

JUSTICE SPEARS: I hope you understand the spirit in which I said it.

MS. KNEELAND: Sure.

JUSTICE SPEARS: Often what is news

[illegible] to the court or to the jury,

[illegible] that's a trial, or the jog [illegible] to

[illegible] in the incident, or [illegible]; whatever it

[illegible]. The jury are trying to [illegible] the

case, so if [illegible] happens then, the most

[illegible] that can [illegible] more serious [illegible].

[illegible] it's one of trials, you are trying to

[illegible] tell.

[illegible] that's a trial, because [illegible] the most

[illegible] that [illegible] -- that [illegible],

[illegible] that [illegible], is one -- one [illegible],

[illegible] we can [illegible] that is a [illegible] -- to

[illegible] be a whole lot more likely to succeed at

[illegible] it is no sound scientific [illegible] to [illegible].

[illegible] interchangeable [illegible] [illegible] a [illegible].

[illegible] [illegible]. When this [illegible] that we [illegible]

more [illegible], you know, people [illegible] --

[illegible] people [illegible] [illegible] through

[illegible] in the courtroom. I think [illegible] this

[illegible] to [illegible] [illegible] [illegible] [illegible]

[illegible] to the judicial system [illegible].

[illegible]: I hope for

[illegible]. Thank you.

[illegible]: If we might [illegible]

is what's bizarre, or strange, or unexpected, or dramatic. And sometimes that doesn't -- very often doesn't portray what is really at issue and the issue that the court, whether trial court or appellate court, is trying to focus upon.

MS. KNEELAND: Yeah. I would agree with you that sometimes that's --

JUSTICE SPEARS: The distractions is not a problem with me.

MS. KNEELAND: Uh-huh.

JUSTICE SPEARS: The technology today is -- is good enough that you can have a television camera, and you can have sound, and not disturb any of the proceedings. And I have been in one of those as a trial judge, and after about an hour, the jury forgets all about it, so I don't think it's a problem there.

My concern is its coverage in the way that it is edited and presented to the people, that it be an accurate portrayal of what the trial is really about, rather than some dramatic side issue or side event. Do you see?

MS. KNEELAND: Yeah, and I -- I absolutely agree with you and appreciate it and

realize that -- that, you know, in the short period of time, it's true that sometimes it is always, of course, the most dramatic and it's going to be reported.

But if you cover a trial over a week's time, you know, that may be one thing that happens one day, but there will be -- you know, I -- I would hope that in the course of that time, you would cover the essence of the -- of the whole issue. I certainly don't --

JUSTICE SPEARS: Those are usually criminal. Those are usually criminal trials in which --

MS. KNEELAND: Yeah. I'm not sure how much you had that was bizarre and dramatic in the school finance case. I -- I -- you know, if there were, we missed that completely.

JUSTICE SPEARS: It was absorbing.

MS. KNEELAND: I'm sure it was.

We would -- you know, and that's why, I think, starting here would be a good place to start. And, you know, you would -- you wouldn't be giving up control of your courtroom. You would -- you would have the authority to decide which cases we would get to do,

essentially. But we sure would like the opportunity, because we feel it would be -- it would be more accurate.

JUSTICE HECHT: Any other questions of Ms. Kneeland?

Thank you very much for coming.

And there's no other witnesses signed up on this subject -- Professor?

PROFESSOR PATRICK HAZEL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

PROFESSOR HAZEL: I would -- if you don't mind, I'm going to say something very briefly again -- Patrick Hazel -- for another audience that would be most interested, at least in the videotapes of the proceedings before this Court, and those are the law schools. I think it would be of a tremendous asset for us to be able to have those arguments, and how the Court questioned the lawyers, and all of the

[illegible] The [illegible] will [illegible]

[illegible] -ttcctly, [illegible] we look [illegible] -- it

wou[illegible] accurate.

PRESIDING [illegible]: Any other quest[illegible]

[illegible]?

Thank you very much for coming.

The [illegible] no other [illegible]

[illegible] on this subject -- Professor?

PROFESSOR [illegible].

[illegible] before the Rules Committee [illegible] in

[illegible]distinctly [illegible]

[illegible] to Rules of Civil Procedure, the

[illegible] Appellate Procedure and [illegible] Rules of

Civil Evidence, stated as follows:

PRESIDING [illegible]: [illegible] you -- [illegible]

don't mind, I'm going to [illegible] concerning ver[illegible]

briefly [illegible] -- [illegible] -- for another

[illegible]ence that would be most interesting, [illegible]

in the vicinities of the proceedings before the

court and there are the [illegible] schools. I think

[illegible] a tremendous [illegible] us to be

[illegible]

[illegible]

proceedings, for all the law schools.

Now, our students in Austin can come down here, but I'm sure you know with class schedules, parking, and all the other, they don't do it very often unless they are in a class that's related to the topic, or something.

But in Houston and in Waco and in -- out in Lubbock, those don't have that much availability. So if videotapes were available, you might even benefit. We might be able to provide you with people who could argue a little better before the Court after seeing the others, so I speak in behalf of that.

JUSTICE HECHT: Any others on that subject? All right. Then returning to the Texas Rules of Civil Procedure, we had gotten through Rule 295. Any comments on Rules 296 through 330?

HARRY TINDALL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. TINDALL: I'm Harry Tindall from Houston, Texas.

And somehow in the drafting of the proposed Rule 308a, I think it fell through the cracks and didn't get quite drafted correctly. One clause was left out.

JUSTICE SPEARS: Excuse me just a minute.

Is -- is it just coincidental that you have stopped the television coverage of this area, or is the one issue that you are here for already been done?

MR. TINDALL: Judge, I had hoped that 308a would be newsworthy, but I'm....

JUSTICE SPEARS: I think we agree.

MR. TINDALL: It's not very sexy.

Anyway, it's just a -- a correction here, and I wanted to get on the record that I think this does correctly reflect what the Advisory Committee figured out.

JUSTICE HECHT: All right. Technical change --

MR. TINDALL: Right.

JUSTICE HECHT: -- 308a.

MR. TINDALL: That's it.

JUSTICE HECHT: All right. Any other comments on 296 through 330? Any comments on the rest of the Rules of Civil Procedure?

JOHN WILLIAMS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. WILLIAMS: I'm John Williams from Nueces County, Robstown, Texas. I represent the Justice of the Peace & Constables Association.

I would like to comment on Rules 534 and 536. We oppose the change in these rules. Let me start off with 534 where it says that you have to give the -- oh, the person who files the claim or the citation, that you shall give him back the papers if he wants to serve them.

As it stands now, usually it's the constables that serve all of our papers. We're happy with this setup. We don't have any gripes

about it, and we don't seem to have problems getting them served. My worst doubt, I guess, would be in default judgments where if somebody served the papers that you didn't know or wasn't sure if they really got served. If -- I feel like that if your constable or one of his deputies served it, then you are more apt to believe that the papers were served.

As you go on down, they have marked out: "The citation shall further direct that if it is not served in 90 days..." it would be returned. Well, how are they going to return the citation to the court? Are they going to keep it from now on? They have no way to getting it back to the court. So I think this -- this change is bad, too.

And under "Form," b, where it says that the -- should be signed by the clerk and under the seal of the court, the justice court has no seal. We -- we have never had a seal.

So there's a bunch of changes here that we can't conform to. I don't -- and I'm not against changes at all, but there's a bunch of things that we can't conform to. So in 534 we're asking that it go back to its original

state and stay that way.

JUSTICE HECHT: All right. Any questions?

Thank you very much.

MR. WILLIAMS: Thank you.

BILL BAILEY,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. BAILEY: Bill Bailey from Pasadena. If it please the Court, the same song, second verse. I'm sorry that Justice Gonzalez is not here. He opened up another avenue that -- that we weren't really going to broach in our opposition to the change in -- in 534, 536.

534 we share the concern over the removal of the 90-day. Even if we were to go to a hundred and twenty days, we would like to see some end date on those papers, obviously, and we would like to see some tracking of those papers.

MR. BERNARD: Thank you.

Questions?

Yes, Mr. Gray.

MR. GRAY: I'm sorry.

[illegible]

MR. BERNARD: Thank you.

Questions?

Yes, Mr. Gray.

MR. GRAY: I'm sorry.

[illegible]

MR. BERNARD: Thank you.

Questions?

Yes, Mr. Gray.

MR. GRAY: I'm sorry.

536, let me speak to the removal of the emergency language. It's a case where we believe that we want to invoke the doctrine: If it's not broke, it doesn't need fixing. It's worked. And there have been concerns by lawyers across the state, and rightly so, that they have been unable to get good service. Who here doesn't know the name Tracy Maxim (phonetic) in Harris County? That's plagued us for years, and we're still trying to live that down. We're working diligently, with your help, across the state of Texas to educate and get better service, get a better class of officer on the street. Now, with the TCLEOSE rules, I would like to point out to the Court that an officer has to keep going back for his in-service training. If he doesn't, he's going to be out. That's going --

CHIEF JUSTICE PHILLIPS: Could you tell us what those --

MR. BAILEY: Sir?

CHIEF JUSTICE PHILLIPS: You used an abbrev -- abbreviation.

MR. BAILEY: Texas Commission on Law Enforcement Standards and Education -- pardon

me, Your Honor. That -- all sworn officers in the state of Texas now must have 40 hours in-service every two years in order just to maintain his license. We think that's important.

JUSTICE COOK: How -- how many hours does he have to have to get his license?

MR. BAILEY: Four hundred and twenty -- four twenty -- 420, yes, sir. And that's -- that, here again, is also governed by the Texas Commission on Law Enforcement Standards and Education.

One of the things that -- may I use TCLEOSE? -- hasn't addressed that we think, that through your help, and our justice court training center is doing, is on civil process. I think they require eight hours of civil process to get your basic certification. We're offering 20-hour schools, plus, this year, under an extended grant from you folks, we have come up with three classes, three schools of advanced 40 hours, advanced civil process. We have made tremendous strides.

Isn't it odd that the people that want to serve the papers want to serve the easy

citations? We have not seen a hue and cry from across the state of Texas asking to serve the attorney general's papers where they're -- they're exempt from any kind of a fee, and we think that's patently unfair. We -- we serve the free papers, and we serve the hard papers, and it's all one price. And we think that everybody ought to sing on the same sheet of music. Reliability, credibility; a peace officer proven by his license that he is an officer of the court; liability. The constable -- as an elected official, I am liable from now on.

And let me say another thing: Those of you -- and I'm sure there are some bad constables, and we're working -- we're working harder than anybody to clean up our own act. We want them out of office. We want them out of office and out of town.

But where are these attorneys that are having this great problem? First of all, there is remedy under current law by going in and filing motions, and the judge has the leeway to grant all who serve it. Why don't these lawyers file a writ of mandamus, or some other

charge, to force that officeholder to do his job? If you-all don't perform your duties, you are going to be removed from office. Same thing with -- we -- we say remove the scoundrels; kick them out. If they're not doing what they're -- they're civilly and criminally liable in many instances for what they do. They should be removed, and they should be filed on. We haven't seen any great deal of that.

Accountability in tracking: In Harris County we are on a JIM, the Justice Information Management system, tracking at any time. All of the papers go, save and except the justice courts -- and we get them right from our JPs -- but they go to the constable of Precinct 1 downtown. They are put on a computer; then they are sent to the constables out in the precincts. Then they assign them to an officer. All that's done on the computer, and it's tracking. A lawyer, anybody that's interested in that case, can find out where that case is at any time. That would not be the case if it was given up to a private or individual -- a person outside of the court.

Also, let me point out to you the

cost of government that this would entail. This would cost county government. We would lose that $35 service fee. Now, in addition to serving the easy papers, we have the hard papers we have to serve. We also work in the court's behalf on extremely difficult -- writs of attachment where held in tremendous danger sometimes, mental health warrants that we serve.

The point of it is this: that the justices of the peace of the state of Texas and the constables serve. Now, you folks are the highest judges in the land in the state of Texas, and we're talking about the lowest court in the land. But they're going to see more on their docket in a week than you're going to see in a term, in many instances. It's an important court, but it can't be transformed into the Supreme Court under rules.

You see, we -- the written word and the practical application of the written word is many times very different, gentlemen, and I ask you to remember that in your deliberations. We ask that the -- the rules be -- remain unchanged.

And let me say this: that we have

addressed, also, poor service problems, because our association and our group passed legislation recently that a constable could serve in contiguous counties. So if you've got a problem in one county, there is relief available, at least in a surrounding county; and that gives you a wider forum. And we appreciate this forum.

I will address only one other thing, and that is in the future. This is a tremendous step, it's a breath of fresh air, and I appreciate the opportunity of just coming to make our views known.

We would also beg the Court to consider that in the future under rule making that's going to impact the justice courts, that they at least have some impact on the deliberations.

Thank you very much.

JUSTICE SPEARS: Just one question. We have had requests for the ability to -- for private service for years now. And my question to you is: Why do you think we have had all these requests, if everything is working so well?

MR. BAILEY: Sir, I -- first of all, I don't make the premise to come here and insult your intelligence by telling you that things are well all over the state of Texas; it's just not true. Secondly --

JUSTICE SPEARS: What can be done about it?

MR. BAILEY: Well, we're -- we're education, and that's what we're in the process of doing right now. We have thrown -- we have worked diligently to get upgrade in the -- let me tell you something: Peer pressure within our own -- own community is working to the benefit of the state of Texas, to the citizens of the state.

When you have got one constable in the -- in the -- in a county that's come to one of our schools -- schools that you-all have funded -- and he's doing a good job -- he's going to make John Doe get off of it over here; otherwise, he's only got two years before he's got that license that's going to come due, and if he doesn't go to some kind of school, he's going to be gone. Do you see what I'm saying? The process is working.

Now, also I want to point out to you, Justice Spears, a moment ago I said you -- I know that they've come to you. I think the motive is two-fold: number one motive, money; number two, it's the easy way to do it. If they have got a problem with a man that's not the sheriff or a constable, okay? either one -- and let's just put the sheriffs in on this, because in a lot of counties the sheriff -- this is not just a constable's dilemma. Why haven't they filed a writ against him to force him to do his job? Well, they don't want to do that for political considerations. Well, now wait a minute. Now, let's be fair to everybody, okay?

I'm not saying that it's -- it's -- I'm saying it's a far better way to leave it in the hands of professional officers of the court and peace officers.

Let me mention one other thing. We're not welcome guests at a banquet many times when we serve a paper, even though it's a civil citation. They don't invite us in whenever that hated woman that they loved not six months ago is suing them for divorce and trying to get their pension fund, and they take out that

frustration on the officer sometimes.

May I call your attention that they -- that we are still peace keepers also, and I think you're leaving it open to some other worms if you just let anybody go serve that citation. You're going to get somebody's head whipped.

Thank you very much. We appreciate it.

JUSTICE HECHT: Any other comments on the Texas Rules of Civil Procedure?

Yes.

HARRY TINDALL,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. TINDALL: Judge, I'm Harry Tindall, and I'm here to -- I was a chief draftsman on the Advisory Committee on these rules regarding service, and I feel like something must be said for the lawyers of this

state who have dealt in the past with problems on the service of citation.

That rule was considered over about a two-year period, and the consensus of the committee at that time and, I believe, of the court clerk, was that we would entrust to the trial judge the control of the process in their court and how they wanted it to be served. And I think that unanimously, if you poll the lawyers, that that has been a great step for improvement in this state. If the trial judge doesn't want it served by anyone but a sheriff or constable, so be it, but he controls the process in his court.

I don't hear lawyers coming down here saying they want to go back to the old restrictive system of allowing only sheriffs or constables to serve papers, and the only voices I hear down here is to go back to the old way of doing business, or those with a self interest in preserving that system.

The truth is, the sheriffs and constables get the easy papers. The private process servers are the ones that you have to hire for the difficult case, or the parties

moving from county to county, or they are going to be arriving at D-FW, and you have to stake out in two or three terminals because you don't know which flight and which airlines. Those are the ones that you have to hire the private process servers on. And I urge this Court not to go back on that. There has been no outcry that I'm aware of that the judges or the attorneys of this state are upset about opening up the system ever so slightly in the discretion of the judge about service of papers in his or her individual court.

Service has improved on the public level, but I think, in part, it's due to the competitive pressure that private process servers have provided in the service of papers.

A mandamus is an outrage to consider as a remedy for someone who can't get papers served. I mean, litigants should be able to get papers served on the other party and get to the courthouse, rather than having to go to extraordinary remedies for the mandamus.

Efforts have been made to regulate private process servers through the Legislature so that we know who they are and who they are

bonded by, but those who want to restrict it to the old ways are the ones that lobby in the Legislature to kill those efforts. And if they would join in the regulation of those people, it would be the better approach, rather than trying to always stifle that legislation so that they remain unregulated and strictly controlled by the trial court.

JUSTICE HECHT: Thank you, Mr. Tindall.

Any other comments on the Texas Rules of Civil Procedure?

Yes, sir.

CHIEF JUSTICE PHILLIPS: Let me take a poll. How many other people are going to testify on the Texas Rules of Civil Procedure?

JUSTICE DOGGETT: Well, you're including within that the rule on sealed records? We're saving that till the end.

CHIEF JUSTICE PHILLIPS: Well, except for sealed records. All right. I guess you're the last one. And then how many -- how many people are going to testify on something else that's on our docket the remainder of the day?

JUSTICE HECHT: Besides sealed records.

CHIEF JUSTICE PHILLIPS: Well, no. Sealed -- that would be sealed records or the local rules or the TRAP rules. All right. Then I think -- it's my sense -- and let me get a sense of the Court -- we'll finish with your testimony and then take a lunch break. So go ahead.

MR. SUITS: Thank you, Justice.

STACY SUITS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. SUITS: Stacy Suits, Constable, Precinct 5, Travis County. I was just going to observe today till I heard the last speaker, and I'd like to address a couple of his comments and be very brief so everyone can get to lunch.

In Travis County, I -- just speaking for Travis County, for what I know and my

knowledge, I'm the courthouse constable. We do an extremely high workload in child abuse cases. Our district attorney is pushing that caseload very -- very heavy; noncompensated for county attorney's office.

For battered women we're pushing protective orders. There is a high caseload on that.

Child support, the attorney general. And in Travis County we have one of the eight counties statewide who has a domestic relations. That's noncompensated, too.

Where I've been losing business has not been on family law or from this intergovernmental stuff. It's been primarily debt collection attorneys trying to save a little bit on service fees on the front end of a lawsuit that they don't know that they are going to collect.

So I would contest the fact that -- that the private process servers are getting the easy service. Prior to the change in Rule 103, I was -- just for my own policy, I was -- if it was -- if it involved a stakeout for two or three days -- this person is a truck driver and

he's going to be at the Texaco Truck Stop on St. Johns. I would -- rather than have the attorney issue the paper and we say we can't do it and it have to be reissued and charge a service fee, I would just immediately sign an affidavit and give it to the attorney's office to present to the judge. We can't do it. I don't have the overtime and staff available to stake out for that amount of time.

But that was very rare that we ever got into that situation, and I would like to end that this is the first year that my office has not been user fee supported, and it's due to primarily seven or eight debt collection attorneys using private process servers that are underbidding me $10 a citation on service.

And I appreciate you-all's time.

JUSTICE HECHT: Constable, would you please fill that out and give it to the lady in the back before you leave?

MR. SUITS: Yes, sir.

JUSTICE HECHT: Just to help with the scheduling this afternoon, there are no persons signed up to speak on changes in the Texas Rules of Civil Evidence. Does anybody

here wish to speak on those rules? And there is only one signed up to speak on the Texas Rules of Appellate Procedure. Anybody else want to speak on those rules?

So it looks like, Chief Justice, that we're probably ready to take up, after lunch, the sealing of court records pretty much first thing.

CHIEF JUSTICE PHILLIPS: All right. We'll take a lunch recess, then, until two o'clock. We appreciate this procedure this morning. It's been very helpful to us, and I hope you feel it's been helpful to you, and we'll see those of you who still want to testify at two o'clock.

(At this time a luncheon recess was taken.)

CHIEF JUSTICE PHILLIPS: Having a quorum as we do, we'll get started, barely. Justice Hecht?

JUSTICE HECHT: I believe Mr. Keith was here earlier to speak to the Texas Rule of Appellate Procedure 90, and he has had to leave. Is there anyone else who wants to speak to the Texas Rules of Appellate Procedure? Is there

anyone who wants to speak to the -- those changes in the Texas Rules of Civil Evidence? Anybody who wants to speak on the Local Rules Reorganization project?

Mr. Sampson was here earlier. I take it he has had to leave. Mr. Smith -- Mr. Tom Smith was here earlier. Which -- what subject do you want to address?

UNIDENTIFIED VOICE: On the rules of -- on closing the court records.

JUSTICE HECHT: All right. We'll come to that in just a minute.

And Mr. Groff of the Texas Association of Counties was here earlier, and I think he probably got covered with the constables and justices of the peace.

All right, then, if it please the Court, I believe that brings us to the last subject, which is the project ongoing to consider rules regarding the sealing of court records.

And just by way of reminder to you, the Legislature in the last regular session passed a statute requiring this court to consider rules regarding sealing of court

records. And so the Rules Advisory Committee appointed a subcommittee to consider such proposal, and they are in midstream of their work, but have a good bit of it done and are anticipating finishing it in the next couple of weeks and reporting back to the committee; but because we're meeting at this point, thought it good for them to report in. So I believe Mr. Babcock is going to go first.

MR. BABCOCK: Thank you, Your Honor.

JUSTICE DOGGETT: Let me say, as Chip begins, I think all of you got circulated yesterday a copy of this proposal. I've got a few extra copies if anybody doesn't have one. And also, Representative Garcia, who sponsored this legislation, just sent a note that he had an emergency and was called back to San Antonio, but I think he is going to forward some written comment to us about his intention on the statute.

CHARLES BABCOCK,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. BABCOCK: May it please the Court, I'm Charles Babcock. I'm from Dallas, Texas. I guess by way of further introduction, I'm a -- I'm a trial lawyer, and in my trial practice I represent a number of media companies and organizations, but I also regularly represent insurance companies and large and small corporations and short and tall individuals. And I'm a member of the Texas Association of Defense Counsel. I'm not here today representing anyone other than myself. I put on my sheet that I'm appearing pro se, so if you will, allow me to make my comments in that -- in that representative capacity.

As Justice Hecht has indicated, the Court has been directed by the Legislature to promulgate a rule regarding sealed records, and I don't propose to talk about whether we have to

do it or what exactly the committee, which I'm a member of, is doing.

John McElhaney and Tom Leatherbury have been working on the details and are very familiar with the various proposals that are working in the committee, and I think they are going to talk in a minute.

What I'd like to address is the urgency of promulgating such a rule. I think it is imperative that the Court act expeditiously for a number of reasons. First, the problem of sealing court records is widespread in the state of Texas, and the practice is growing. Second, in my judgment, the indiscriminate and wholesale sealing of court records is unconstitutional, and there is no easy way for the public in the state of Texas to challenge the sealing of orders under the current state of the law.

I think the practice is bad for business in this state. I think that there are some cases that are being sealed which have overriding interest to the public which are being -- the public's interest is being threatened by these sealings.

And finally, and perhaps most

importantly, I think that wholesale sealing, which is going on in this state, is a threat to our democratic form of government.

I want to talk about each of those five areas briefly and give you, if I can, my perspective or my overview of the urgency of the problem.

By way of reference, I have handled six litigated cases involving sealed records, including the only case that this court has considered, Times Herald versus Tuttle and Jones (phonetic), which was decided not on the merits but on a procedural ground.

The Washington Post did a study of the clerk's office in the District of Columbia and found, and reported with some shock, that there were 20 sealed cases in that courthouse. The Dallas Morning News, by contrast, did a study several years ago -- and that's going to be discussed in more detail here today -- but found that over 200 cases in the Dallas County courthouse alone had been sealed recently. In my personal experience --

CHIEF JUSTICE PHILLIPS: Over how long a time period was that?

MR. BABCOCK: I'm not sure of the specifics of that. I think David Donaldson is -- has their -- their study, and we talked about it. It is also, I believe, in the materials that -- that has been given to you. But as I recall, Justice Phillips, the study found that the -- the process of sealing records had accelerated greatly over the last five -- the five years prior to the article, which was a couple of years ago.

JUSTICE RAY: Was that a result of automobile litigation?

MR. BABCOCK: No, Justice Ray, I think that the study discovered that many of the records that were being sealed were in the -- were being done by a certain group of law firms and by certain classes of defendants, mostly; on the motion of defendants, mostly.

JUSTICE GONZALEZ: Are these records sealed in conjunction with protection of any trade secrets or secret processes?

MR. BABCOCK: Very few; very few, although there is trade secret problems, and that -- that's an issue that we all have to be sensitive to. The cases that I have dealt

with -- and in the last -- in the last 18 months I have personally been involved in six litigated cases, none of which involved trade secrets, and where entire files from the original petition through the judgment were being sealed.

JUSTICE GONZALES: Can you tell me what was the nature of those cases, what area of law or issues? Products liability cases, negligence cases, or slander, libel? What was it?

MR. BABCOCK: The ones that I was personally involved in, Justice Gonzalez, was: One was a lender liability case in San Antonio.

There was another case in San Antonio that dealt with allegations against a priest of child molestation, which you may have heard about -- something about.

There was a medical malpractice case where a psychiatrist was said to have been involved sexually with his -- one of his patients.

There was another case that dealt with insurance, whether or not an insurance company had sufficient coverage to cover a law firm.

There was another case involving the dissolution of a law firm in Dallas County where the whole records -- so they -- none of the cases that I have dealt with have had trade secrets or products liability aspects to them, although I'm sure there are some.

JUSTICE COOK: Have you ever been a lawyer representing a party where the records were sealed?

MR. BABCOCK: No, sir. I have handled trade secret litigation, and I have been able to get around those problems.

And when I say -- when I -- when I talk about records, what I am talking about are the records that are filed with the clerk and are used to influence the judge in resolution of the matter before the court. I'm not talking about discovery type information. For example -- in a trade secrets case, for example, where you might exchange, pursuant to a protective order, documents among counsel, I have been involved in that type of litigation, but I have never been involved in a case where there's been a wholesale sealing of the file, as a lawyer.

JUSTICE COOK: Where there has been selective sealing, you have been involved?

MR. BABCOCK: Yes, sir, I have, of discovery material only. I have never been involved in a case where -- where I represented a party where pleadings or orders or opinions of the Court have been sealed.

JUSTICE COOK: Do you see anything wrong with selective sealing?

MR. BABCOCK: I think that if -- if a very high standard is met -- and you can imagine different circumstances where it might be -- certainly there are certain circumstances where records should and could be sealed.

I think there are also, however, a species of records that can never be sealed. For example, the Legislature in Article 6252-17a, which is the Open Records Act, says that opinions and orders in the adjudication cases is public information. I think that is a statute that's on the books that is -- that -- that we're all obliged to follow. And, frankly, even if it wasn't on the books, I think the Constitution would compel that the opinions and orders of our courts are public and must be

public.

JUSTICE COOK: What about discovery depositions, say, in family law cases?

MR. BABCOCK: I think -- I think there is room for selective protective orders in those -- in those kinds of cases in the appropriate circumstances, yes, sir.

The -- the fact that the practice is, I guess, widespread, and, in my judgment, growing, I also -- in addition to the cases that I have actually been involved in, I am a member of the board of directors of the Freedom of Information Foundation of Texas, and as such, I man a hotline, which members of the public call in if they have problems with open government in this state. I'm not the only person that does it. There are other lawyers.

But we are getting a number of calls about courts, district judges, sealing court records. And this is not just immediate issue; we're getting calls from citizens for a variety of reasons that want to know: "Can they do that? What can we do to undo that?" -- various circumstances.

JUSTICE GONZALEZ: I was talking

about the premise that anything that happens in court is public business --

MR. BABCOCK: Yes, sir.

JUSTICE GONZALEZ: -- and should be open to the public.

MR. BABCOCK: Yes, sir.

JUSTICE GONZALEZ: Other than the -- perhaps a limited area in family law -- perhaps we could consider sealing some records in that -- in that area. Do you see any other areas where you can even consider sealing a court record that should be, by definition, open to the public?

JUSTICE COOK: Adoption.

MR. BABCOCK: Yeah, I think that there are certain things that the Legislature has said, adoption being one, that can be -- that are by statute made confidential. And there may be some limited discovery type things that -- that can be made confidential if an appropriate showing is made. But frankly, I see very few circumstances, if any, where the opinions of the Court, the orders of the Court, and the documents that are presented to the Court in an effort to influence those

decisions --

JUSTICE GONZALEZ: Settlement of the parties.

MR. BABCOCK: If the court is being asked to enforce a settlement agreement, if the settlement agreement is approved by the court, as sometimes happens, if the settlement agreement is filed with the court, then I think it should be a public document. If there is a settlement that does not require any sort of approval or enforcement by the court, and the parties choose not to file it with the court records, then I think that -- that the rule that is being contemplated would not -- would not cover that. But the minute that the parties ask -- seek judicial intervention either to approve or to enforce their settlement, then I think it must be public, unless there is a very compelling need and a showing along the lines of the rule that's being contemplated.

I don't want to burden the Court with a lengthy dissertation on -- on the constitution -- constitutional right of access or the common law right of access, or which -- which applies. There's a number of -- a lot of

briefing that's been done, and I think you have been provided with that information.

I do want to say, however, that procedurally in this state, as a result of some of the procedural decisions in this area, it is very difficult to challenge a sealing order, particularly if one finds out about it after the court has lost plenary power over the underlying case.

In the Times Herald versus Tuttle Jones case, the reporters for the Dallas Times Herald discovered the fact that an entire court file which had been open from the time the case was filed until the time the judgment was entered -- it had been open all that time and then was sealed in conjunction with the disposition of the case, but they found out about it five months after that occurred. This court held that the court had lost plenary power over the records in that case and that the Times Herald was unable to, in the context of the proceeding that they brought, get access to those documents and that the lower courts were without jurisdiction to consider that.

There has been a recent San Antonio

[illegible]

[illegible]

[illegible]

[illegible] in this [illegible] there [illegible] no [illegible] of the records [illegible] in this [illegible], it [illegible] very difficult to [illegible] a sealing order. [illegible] pardon [illegible] one [illegible] but about [illegible] court [illegible] have over the [illegible] case.

In the Times Herald versus [illegible] Tiger case, the reporters [illegible] the Daily [illegible] Herald considered the fact [illegible] file which [illegible] been open from the [illegible] the case [illegible] the judgment was entered -- it had been [illegible] files [illegible] then was sealed in conjunction with the disposition of the case, and they [illegible] about it five [illegible] occurred. [illegible] court held that the [illegible] over the records in this [illegible] Times Herald was [illegible], in [illegible] that [illegible] records and that the lower courts [illegible] jurisdiction [illegible].

[illegible]

case, the Spears -- Express News versus Spears, where, in conjunction with the disposition of a case, an entire file was sealed, and the newspaper intervened, which had been suggested in the Times Herald litigation as the -- as the proper method to proceed -- intervened after judgment, and the Court of Appeals held that the intervention after judgment was impermissible, even though the order that was being challenged was -- was the judgment itself which had sealed the records, and dismissed the case on the merits. There was a dissent, but -- but that case, with my understanding, is final now.

So -- so right now a citizen in this state who wants to challenge a sealing order procedurally has a number of barriers which they face and which I believe the rule that is being contemplated seeks to -- seeks to ameliorate.

The third factor: bad for business. The secret files, I think, breed suspicion and distrust because we don't know what's there. I can tell you that the journalists are, by nature, a cynical and suspicious group, and when they see a sealed file, it may, in fact, turn out to be very innocent, but their antenna goes

up.

And I can give you an example which I think is important to keep in mind for just -- just how this type of thing can happen and how an enormous amount of time, money, and judicial resources are devoted to something which is, in the bottom line, is totally meaningless.

There is a case in Bexar County by the name of Jaffe (phonetic) versus Sun Belt Savings. The Jaffe family became involved as witnesses in the House ethics investigation of Speaker Jim Wright in Washington. A group of investigators from the House came down to San Antonio to interview the Jaffes and take their testimony, followed by a horde of media. Some of those journalists from ABC News went to the courthouse to check up and see if there was any cases involving the Jaffes, and they found that there was a file styled Jaffe versus Sun Belt Savings that had been totally sealed.

The journalists remembered that Congressman Wright had been implicated or that there had been some questions about his involvement with the savings and loan industry. They said, "Hmm, Jaffes, Congressman Wright,

savings and loan, Sun Belt Savings. There must be some preferential treatment going on here between the judiciary in San Antonio trying to protect one of its prominent citizens and Sun Belt Savings and the congressman," and I can tell you they were very excited about getting into this file.

Well, we got the records unsealed, and I can tell you, as I suspected, this was nothing more than a lender liability suit that went on for about 18 months and then was resolved.

There was an enormous amount of publicity about the case, but the only publicity was about the fact that it was sealed and the fact that it got unsealed. The records were totally innocuous. There was never, to my knowledge, any further comment by any of the journalists, including the ones that had moved to unseal it, about the file.

It was a typical -- what you would expect -- a petition that alleged a bunch of things about a lender that had not fulfilled commitments, and some interrogatories and some deposition notices, and a number of other things

that -- but the fact that this record had been sealed bred distrust and suspicion, and, frankly, for a period of time for those people watching ABC World News Tonight, harmed, I think, the image and integrity of our -- of our court system because this -- this file was sealed and the journalists were unsure of what the motive was for sealing it.

The fact of the matter was, although no one ever told me this, I suspect that it was just -- it was just an embarrassment that the plaintiffs didn't want anybody to know that they filed this suit or were involved in this kind of a litigation.

I think any court records that are sealed, that the Constitution -- both our Texas Constitution and the Federal Constitution -- has something to say about that. But there are certain cases where there is an additional factor where there is an overriding public interest in not having these records sealed, and some of those files, in my judgment, are getting sealed.

For example, there was a savings and loan institution that as a standard operating

procedure, any time they were either sealed -- they were either sued or they brought a suit, they sealed the file on the theory that the public and the investors would lose confidence in the savings and loan institution if the public was aware that they were involved in litigation.

There is another case which -- which I'm familiar with. And -- and I've told Justice Hecht that anything I say about this case is derived from the Austin American Statesman. But a psychiatrist was accused of having sexual relations with one of his patients after getting her hooked on dangerous drugs. I wonder if my daughter or wife were planning on attending -- or being treated by that physician whether I might not want to be able to go down to the courthouse and see if there were any cases filed against that physician and, if so, what the allegations were and what the -- what the plaintiff had to say about it and what the -- what the court records had to say about it.

I -- I raise all this only by way of saying that -- that some of these cases that are being sealed are not just the run-of-the-mill

[illegible] --

they were either [illegible] dumb,

[illegible] the [illegible]

[illegible] conditions

in [illegible] and [illegible] patients [illegible] the

cases [illegible] that [illegible] were involved in

[illegible] them.

There is another [illegible] -- [illegible]

[illegible]

[illegible] that anything [illegible] this case [illegible]

[illegible]

[illegible]

[illegible] patients after getting

[illegible] hooked on drugs. [illegible]

[illegible] wife were planning on attending --

[illegible] by that physician [illegible]

[illegible] not want to be able to [illegible]

[illegible] any cases [illegible]

[illegible] that physician [illegible]

allegations [illegible] the

[illegible] and what the --

with the [illegible] records [illegible]

[illegible]

[illegible]

[illegible] not [illegible]

piece of litigation, but have an overriding public interest which make it even more important that this Court move quickly to try and -- try and ameliorate the situation that exists in Texas.

Finally -- and I don't want to waive the flag too much, but -- but I do believe that our democracy is premised upon the concept of self-government, and I think it's further premised upon the ability of the people to make intelligent decisions about the direction of their government.

We also have the old bromide that ignorance of the law is no excuse. How can people be informed about the law and the people who administrate that law if the administration of the law is being carried out in secret?

I think in closing I would just cite something that was said by our founding fathers in this state when they declared their independence from Mexico. It's an axiom in political science that unless the people are educated and enlightened, it is idle to expect the continuance of civil liberty or the capacity for self-government. That, to me, sums up one

of our abiding principles of government.

I think what is happening in this state in terms of sealing of court records now threatens that basic premise of our government, and I would urge you to expeditiously resolve the question.

JUSTICE HECHT: When you say "court records," do you mean the records that are actually filed with the court --

MR. BABCOCK: Yes, sir.

JUSTICE HECHT: -- as opposed to discovery which, for whatever reason, is not filed?

MR. BABCOCK: Yes, sir.

JUSTICE HECHT: Do you see a concern that one party may use a threat to file discovery in order to extort a more favorable settlement or advantage in the case?

MR. BABCOCK: Well, I mean, if that happens -- I mean, it's not just the filing of the discovery material; there are a lot of times people will call you up and say, "Hey, I'm going to sue your client, and if you don't settle with me," you know, "we're going to drag this all through the court system." That is -- that's

certainly a possibility. I hope -- I hope it's a rare one, but I have heard it in my practice and I suspect all the lawyers in the room have -- have, as well.

And there are -- I'm not saying that there are not costs to open government; there are. But if someone has material that is relevant to a matter pending before the court and thus can properly file that material in an effort to influence the court's decision, those records should be open, unless there is a very compelling reason why they shouldn't.

If there is material dumped into the -- into the court record that is not relevant to any issue and is -- is subject to being stricken or removed in some fashion, I think the rule that's been contemplated takes care of that. But I don't think we -- we should try to make rules based upon the misconduct of lawyers in this -- in our jurisdiction, and I think a threat like that might not be the appropriate way to pursue litigation.

JUSTICE HECHT: If -- well, just as a concrete example, if, in a family case, one party elicited from another party in a

deposition some embarrassing or salacious material, and previously there had been an agreement not to file these depositions for perhaps those concerns and others, and following the deposition a party who would be favored by that disclosure of information says, "If you don't agree to a better division of the property, we're going to file these depositions with the court and thereby render them public," what's to -- what do you see to prevent that sort of thing from happening? Or should it be prevented?

MR. BABCOCK: Well, there -- there are two things: Should we prevent parties from threatening each other with that type of thing? And that, I don't think, is going to be addressed by this rule, nor could it be addressed by this rule.

The second question is whether the material that is going to be filed with the court should be open or should be sealed. If -- if material is going to be filed or is filed that the other side believes should be sealed, there is a procedure in the rule that we are proposing that would allow a judge to determine

that, and if the material satisfies the standard which the court adopts in terms of sealing information, then the information would -- would be sealed. And if it doesn't meet that standard, then it wouldn't be sealed. And the improper motives of the person attempting to file the material may or may not be considered by the trial judge. I'm not sure that that is something that -- that would be relevant. I'm not sure if it would or not. But either they are going to meet the standard, or they are not.

JUSTICE HECHT: If counsel agreed that certain discovery would not be filed with the court except under certain conditions and those conditions did not occur, would that agreement be enforcible against a challenge by members of the media, members of the public, or someone else?

MR. BABCOCK: If the -- if the documents are not filed with the court or not presented to the Court so that -- so that the judge is not being called upon to pass on those documents in any way, shape, or form, then I think that then that would be a private agreement between the two -- two lawyers or the

two parties, and only in the event that the Court was called upon to -- to resolve that agreement would that information become public.

If there are no further questions, I'll -- I'll pass this to others.

JUSTICE SPEARS: Early in -- early in your testimony you seemed to either concede or to suggest -- I'm not sure which -- that certain documents or certain cases would be appropriate to be sealed, and one you mentioned was adoption records. And I think you mentioned another and I didn't write it down. Do you remember what it was?

MR. BABCOCK: Your Honor, I -- I -- I think I said that there is a -- I believe there is a statute that covers adoption --

JUSTICE SPEARS: Right.

MR. BABCOCK: -- proceedings and makes them confidential. There may -- there may be others. In fact, although it's not within the jurisdiction of this court, I think certain juvenile criminal records may be, by statute, made confidential.

JUSTICE SPEARS: Any others?

MR. BABCOCK: Not that I'm aware of,

Judge, which is not to say that there aren't some more, but -- and I don't believe I said -- and if I did, I didn't mean to -- that I think there are any situations where an entire case can be -- can be sealed. And I think that's what's happened, and that's a problem.

JUSTICE SPEARS: An abstract of that case, in other words, should be available --

MR. BABCOCK: Well, that's certainly true --

JUSTICE SPEARS: -- even though details may not be?

MR. BABCOCK: Yes, that's certainly true; but what we are saying is innocuous pleadings like a notice of deposition.

JUSTICE SPEARS: Right.

MR. BABCOCK: I mean, there's no reason for that to be sealed.

JUSTICE SPEARS: Thank you.

JUSTICE HECHT: It sounds like maybe the sort of underlying premise is that it ought not to be sealed unless there is more than a private interest or a personal interest or individual interest; must be some question of public policy in order to seal it, such as

protection of all juveniles, protection of all adoption circumstances. Is that sort of the premise, or is it different from that?

MR. BABCOCK: Well, I think -- no, really, the way -- I think I'm coming at it from kind of the -- the other end of the tunnel. If -- if individuals in our society are calling upon the government to resolve their disputes, then presumptively all the information that they bring to the court to resolve that dispute is -- is open. They can seal certain things if they meet a standard, which is a very high standard, but which would -- which would take into account certain intrasocietal interests. Trade secrets might be something. Something in the discovery area might be -- might be appropriate.

But the rule is for openness, and not the other way; not the other way around. Even if the Legislature were to pass a statute, as Massachusetts did, which said that the public may not attend a rape trial during the testimony of a juvenile victim of that rape, the United States Supreme Court said that kind of a per se rule is unconstitutional.

So even were the Legislature to

carve out a certain interest that in its view outweighed the interest of the public to have access to judicial proceedings or judicial records, that would still have to pass the scrutiny of the courts in the constitutional sense.

Thank you very much for listening to me.

JUSTICE HECHT: Thank you.

Next I have -- we have John McElhaney and Tom Leatherbury.

JOHN McELHANEY and TOM LEATHERBURY, appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. McELHANEY: I'm John McElhaney from Dallas, and my partner Tom Leatherbury from Dallas, and we represent the Dallas Morning News and Bevo (phonetic) Corporation and its various broadcasting properties, as well as some other media clients.

Tom and I have written a first draft of a proposed rule, and I believe that that has been distributed to you, and we're here to talk about it and answer any questions about it.

Before doing -- and Tom and I will both participate in that exercise. Before doing that, I wanted to make some general remarks following up a little bit on what Mr. Babcock mentioned.

It's apparent, of course, that we will have a rule about sealing, because the legislator has -- Legislature has directed the court to do that.

So the question really is writing a rule which, number one, passes constitutional muster from the standpoint that the Constitution does apply, and then, secondly, is a proper exercise of the leadership and authority and moral suasion of this court. And our experience in Dallas, I think, is instructive on this issue.

The statistics that were mentioned in Mr. Babcock's presentation go from 1980 in Dallas to the present time -- the time that the article was written about a year and a half ago,

and about 200 civil cases had been sealed during that period of time. At least that was how many the Dallas Morning News, by going to the district clerk, was able to ferret out as having been sealed.

JUSTICE COOK: How many cases were filed during that period of time?

MR. McELHANEY: Your Honor, I can't give you a number on that. I would -- the -- the way the statistic has some comparative meaning with other things is that the number of cases filed -- sealed during this period of time was so much more than had ever been filed -- or sealed, rather, in the history of Dallas up till that time. Obviously, of course, we have had litigation exposure and many more filings. But the experience was that this seemed like an awful lot of cases having been sealed.

JUSTICE COOK: Does it -- does it approach one thousandth of 1 percent of the cases that were filed during that period?

MR. McELHANEY: I -- I really wish I could discuss that with you, and I think that's a good point, maybe, that ought to be looked at. But I really feel that it is -- has been an

abuse.

We feel that the problem manifests itself from the standpoint of -- of very lax standards, lawyers merely -- on the agreement of the lawyers, or requests of one of the lawyers that's just not opposed by the other one; oftentimes get a case sealed for no real articulated reason. And this is, in fact, a -- a problem, because it's a frustration.

I think Mr. Babcock did a good job of presenting the press's view on that as a frustration and a great deal of suspicion any time a file is sealed. And one of the problems is if you have a rule that says, "We authorize sealing under some circumstances," that sort of invites use of the process. I think that really may account for some of the Dallas experience, because we had a set of local rules that got passed just about 1980, and then we have all of a sudden all this sealing going on. And it's -- it's sort of like -- like, "Since it's there, we ought to do it."

And I think it's important, since we are going to have a sealing rule as the Legislature has mandated, that we need to have

appropriate standards. And that's really what Mr. Leatherbury and I are about in our presentation here.

I -- I really feel that the abuses -- and maybe this is a conclusion that's subject to challenge as to whether there have been abuses, but we feel that there has; at least there's been too much sealing -- takes several forms.

Number one, the typical practice is it's just administratively easier, if there is going to be some part of the case sealed, to seal the whole case. The judge says, "We'll just seal that case and just send it downstairs and put it in a special section." And that's the easiest way to do it, and that's the way it has been handled in Dallas, and, I suspect, all over the state.

The problem is that that's overkill and overbreadth, because the entire case file is sealed and nobody knows what it's about. And the example about the savings and loan that Mr. Babcock gave is a good example of it. If merely some particularized part of that file was put under seal but the rest of the controversy was

there to examine, the tension and pressure really wouldn't -- wouldn't be there. So that's one problem, is just the overbreadth of the sealing.

JUSTICE RAY: Wouldn't the press, though, want to know what it was that was sealed, even if it was just one small part?

MR. McELHANEY: Your Honor, I'm sure that's right, but I -- I do think that public confidence is -- is better if at least most of it is there and the sealing is kept down to a minimum. Those parts of it in many of the cases that we have cited in this booklet that we have -- have submitted indicate that, that that ought to be the rule, that whenever you are invading public rights -- constitutionally protected rights, in particular -- the invasion needs to be as little as possible, and the least restrictive method of curing the problem -- least restrictive of the public's right to know ought to be there.

So, Your Honor, yes, we may not completely solve that problem, but I think we have some constitutional reasons for doing it as well as just prudential reasons for -- for doing

that.

JUSTICE COOK: Have you ever been a party to sealing of any --

MR. McELHANEY: Your Honor, it depends on your definition of "sealing." I would say most of the big commercial litigation that I get into involves at least protective orders. And, sure, that's common. That's just almost routine these days, and frankly, protective orders have, I think, a helpful effect from the standpoint of lessening of the trial court's burden on ruling on discovery. This is easier to get along with the opponents if there is an agreed protective order about some of the discovery, because it hopefully means less disputes that have to be ruled on by the judge as to specific items.

But we're distinguishing in this rule file documents from discovery that's exchanged outside of the filing system.

JUSTICE COOK: Okay.

MR. McELHANEY: And to answer your question: Have I been a party to a generally sealed case? I don't believe so, although I certainly would tell you that our firm has and

that it's -- it's been a common experience for Dallas lawyers to be involved in some aspect of some sealing and -- and suppression.

JUSTICE COOK: It's quite common that certain parts of the file, like you mentioned protective orders, that's very common.

MR. McELHANEY: Yes, of course. Now, we're not in any way trying to eliminate protective orders; we're not trying to tread on the toes of legitimate trade secret litigants, or anything of that sort. Our -- our problem, really, is with sealing of filed documents and taking those out of the public domain when they really are in the public domain was the thrust of our rule here.

One justification that's been advanced by opponents of sealing is -- or proponents of sealing -- is that, oh, gosh, it's -- a lot of times it's a condition to a settlement, and the defendant wants to have an agreement as part of the integral part of the settlement that the court would seal the record.

So the parties go to the judge and both sides say, "Well, that's all right with us, Judge, please do that," and the defendant says,

"Yes, it's just" -- "we aren't going to settle without that."

Well, that's, in effect, bargaining with the Court, and at that point it's very easy and likely that the judge will want to go along with it because he wants to move the docket, and there's a public policy in favor of settlement, and so forth. We think that it's important, really, to actually analyze those arguments and lay them to rest, because we don't believe those are really substantial enough arguments to overcome the thrust of what we are proposing, that is, much more limited sealing.

First of all, if you really analyze it, from the standpoint of the defendant that doesn't want all this information to be on public record, if you call his bluff and say, "Well, fine, we'll try the case," it's going to come out, and so it's not -- it's not really a legitimate thing for him to be telling the Court that "We're not going to settle it unless you seal this, Judge." It's kind of a bluff, to me, in my judgment.

Secondly, there could be all kinds of private agreements. There can be private

disputes and private dispute resolution, even, but once the parties have invoked the governmental authority and the jurisdiction of our public courts, the matter is no longer a private matter. It is part of the administration of justice, and these are the public records, not the court's records, not the judge's records, and it is a question of who is going to represent the public in this, in effect, bargaining with the judge over his ruling that the matters will be sealed if it is settled.

The judge is the only one who represents the interests of the public and is the only one who has this -- this duty to resist that, because the lawyers are loyal to their clients and represent only their clients, not the public. And, in effect, it really almost puts the court in an unfair position: bargaining, if you will, over whether there's going to be a sealing. It's almost a contractive adhesion kind of a situation because the judge is vulnerable. He wants to get the docket moving and the cases settled.

We think that having a definite rule

for the court to rely on in at least setting some standards, if not strictures, on the authority to seal, is a very important part of the concept, because the law of settlement is required -- these sealing orders are required for settlements, really, we don't think, is a -- something that holds up under close scrutiny or close analysis.

Next, we wanted to -- to talk about just the problems of the administration of the sealing of -- the rule that we have proposed. It sets as a standard a compelling need for sealing, and the problem there is that -- our Dallas County experience again -- is that if you don't have a high enough standard or pass constitutional muster, there is a tendency just for everybody to agree and have no real standards at all on -- on sealing. And that's been the experience we have had in Dallas that -- without articulating any reasons, or no reasons at all, other than just the agreement of the party these sealing agreements have been entered into.

The Constitution and the common law have required a much higher threshold, and we

have articulated that in our proposed rule. And it's variously formulated as compelling need, or most compelling reasons, or overriding public interest, or overriding reasons. These are all essentially synonymous articulations of formulations that the various Fifth Circuit -- excuse me, not Fifth Circuit -- various U.S. Circuit Courts of Appeals around the country have had, and in some cases some articulation by the Supreme Court.

I'm going to ask Mr. Leatherbury, if you will, just to start through the various specific provisions that we have, because essentially we think these are noncontroversial, but obviously any attempt to reduce this to a specific set of rules is subject to some discussion and debate at the very least.

JUSTICE DOGGETT: Those are on pages 25 and 26, I think, of your booklet, if you have got it handy.

MR. LEATHERBURY: Right. And the diversion of the rule on pages 25 and 26 has been annotated with citations to the federal and other state court cases that we believe support this type of a rule limiting sealing.

I think it's important to emphasize at the outset that this was a first draft, and it is a work in progress. We have had one excellent meeting with the Supreme Court -- or the subcommittee of the Supreme Court Rules Advisory Committee, and the rule has already been redrafted from what is in your booklet for further discussion at the -- at the committee level, and we have gotten a lot of -- a lot of good comments on it.

I think the first thing about the rule is the procedural protections against the sealing of records -- or sealing of records that -- on this overbroad basis. The rule provides for notice and hearing which are, of course, the cornerstones of due process. The notice would -- requirement would provide that the party seeking sealing would file a written motion. In support of the sealing request, the motion would be open for public inspection.

There would be a notice period. There is some discussion about what the notice period would be, how long the motion should be on file before the hearing is held, and we're continuing to work on that, although most people

seem to indicate three days, or 72 hours, or some period that's compatible with -- with some of the notice provisions already in the -- in the Texas Rules of -- of Civil Procedure.

The notice provision goes further and requires the party seeking sealing to post a public notice at the place where county governmental body notices are posted under the Open Meetings Act, and that is just a convenient place in the courthouse. The proposal on 25 and 26 of your booklet had the notice posted at -- where the foreclosure notices are posted, until our Harris County district clerk pointed out that that could be five to six thousand notices in Harris County, and you really -- that wouldn't provide effective notice. So we took that advice and in a redraft have moved that to a different -- different location.

The notice would specify the hearing, the style of the case, the names of the parties, the case number. And moving party would be required to provide the clerk of the court a copy of the notice and verify that the notice had been posted under the -- under the statute.

Ken Fuller, one of the members of the Advisory Subcommittee, has come up with a proposal for a limited ex parte order, sealing order, where the court would not have to comply with the full notice and hearing provisions provided for in the rule, but then would follow up promptly with posted notice and a hearing. And Ken, in his practice, foresaw the necessity of having some sort of limited ex parte sealing relief available if an emergency situation were to come up, but --

JUSTICE GONZALEZ: Can you give me an example of what type of emergencies you are contemplating?

MR. LEATHERBURY: Well, the -- and -- and, really, I'm speaking for Ken, so I perhaps don't understand fully what was in his -- his proposed redraft addressing this notice provision, but he came up with, you know, a situation of an abused child, or -- or something that would require immediate action and would require filing pleadings laying out in sufficient detail information that might invade another person's privacy or a minor's privacy, or something along those lines. That, again, is

part of the rule that is a work in process. It's not in the draft in here, but we are having some -- some pretty fruitful discussions about some sort of limited ex parte relief.

MR. McELHANEY: Your Honor, I can think of one other hypothetical along those lines. That's to assume that an irresponsible opponent decided he would plead many trade secrets that he had gotten hold of and just make them public records. I think there might be a reason for an emergency hearing, then, to quickly suppress that and then deal with that later.

But we recognize that we're not taking an absolute position that nothing can ever been sealed. We're just trying to work out a reasonable procedure for all of the things we can think of, and I think, most importantly and fundamentally -- then I'll turn it back to Tom -- is setting the standard at an appropriately high threshold so that the practice of just sealing indiscriminately is stopped.

MR. LEATHERBURY: The hearing provision in the draft rule is very

straightforward. It allows any person, whether or not a party to the lawsuit, to appear and oppose the closing of the court records, and Luke Soules has -- has proposed some -- some language tinkering with that a little bit to dovetail with the rules on intervention, and that's -- that's probably a good change that we'll -- we'll talk about at the -- at the subcommittee. The hearing must be held in open court and would -- would follow the notice provision that I have talked about.

The substantive standard that John has been talking about -- Chip has been talking about is the compelling need standard, and that's set forth in our proposal on 25 and 26 and has been taken forward into the redrafts that I have seen. The one phrase in the -- in the compelling need standard that seems to have drawn any opposition at all is the -- the phrase: "A serious and imminent threat to the administration of justice must be shown before you can seal any court records." And while that is one articulation of the test, particularly one adopted by the Florida state courts, which seem to have a lot of experience in interpreting

Florida common law and -- and constitutional provisions along these lines, I'm not sure that it's all that necessary, and so that may be eliminated in future drafts just to -- because there's -- there's been more -- more heat than light over those few phrases in -- or few words in the compelling need standard, and I'm not sure it's really necessary. The result would probably be the same.

The compelling need standard requires a showing that a specific interest of a person or entity will suffer immediate and irreparable harm or serious injury, words to those -- to that effect. It incorporates the less restrictive or least restrictive alternative test, and it requires that sealing will effectively protect the specific interest that is sought to be protected by sealing. And those are pretty well accepted as the three prongs of the compelling need standard that must be shown before you can seal any portion of a file.

The -- I -- I do want to say that as -- as you all have -- have asked questions along these lines, this rule does not deal with

effect -- to find effect. It incorporates the
[illegible] injury, words to
[illegible] objective to e, and it requires that each
[illegible] I offer [illegible] these [illegible]
[illegible] the [illegible]. A
[illegible] [illegible] [illegible] [illegible]
[illegible] the complaint must [illegible]
[illegible] claim [illegible] can [illegible] [illegible]
[illegible].

[illegible] -- [illegible] -- [illegible]
[illegible] -- [illegible] -- [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

discovery at all, and it specifically defines court records to include documents that have been filed in connection with any matter before the court, and it excludes discovery materials simply exchanged between the parties and not filed with the Court, and it also excludes documents filed with the Court in camera solely for the purpose of obtaining a determination of discoverability. And we thought those were important definitional exclusions so that we could come to some agreement on this rule. It's not to say that discovery and the good cause standard might not be subject of future rule makings, but we just didn't see it as necessarily going in this rule.

The -- while the proposal in 25 and 26 does not recognize the statutes such as the juvenile delinquency statute, the adoption statute, the -- mental health is another area where records are specifically made confidential by law -- some of the redrafts do incorporate that, and that's a good -- a good change to make, because we certainly don't intend to overrule any statutes by this rule and don't intend to affect those specific legislative

determinations that those records, for public policy reasons, should be sealed.

At the hearing, the draft rule calls for the court to -- to enter a sealing order. It requires the Court to make specific on the record findings in the order that the prong -- the three prongs of the compelling need test have been met, and to state the reasons for such findings.

There is, again, some debate about how can you have a specific sealing order and not give away the ball game, not make public what you intend to keep secret, but I -- I think that -- that the language in the rule leaves that to the lawyers to -- to work out, and I certainly think it's possible to draft an appropriate sealing order if you make the showing without revealing what you are trying to keep secret.

MR. McELHANEY: Let me interrupt there and say we think it's an important part of the concept to have articulated reasons and findings stated for the sealing order for several reasons: Number one, many of the federal cases applying the First Amendment have

recognized that that is a matter of constitutional dimension and there must be articulated reasoning.

Secondly, I think it's a matter of internal discipline for the lawyers presenting these motions, as well as the Court ruling on it, to be required to focus on the specific element; will help reach better informed, sounder decisions in this area.

Third, this is an analogy to the practice that we already have in the requirements under the Rules of Procedure for temporary injunctions and temporary restraining orders. It requires the reasons to be set forth.

So this is not an unfamiliar concept, as far as Texas practice is concerned, and I think the reasons for doing it there, as far as the forced discipline of addressing the right standards and articulating them in an order, is essentially the same policy.

MR. LEATHERBURY: The sealing order would provide that the Court would divide the files -- the court file into an open file and a closed filed; the closed file certainly

containing only those limited portions for which a need for sealing exists. The sealing order would always be open and -- and subject to -- to public inspection. I think that, again, is very important because of our experience in Dallas and what the Dallas Morning News's research showed about sealing orders being inside the sealed files.

The -- the last two sections -- or last two points in the proposal attempt to remedy some of the -- the rulings or the procedural problems that the press and other interested parties have had in challenging sealing orders. It provides for continuing jurisdiction, the court to maintain continuing exclusive jurisdiction to enforce, alter, vacate, or reinstate, or modify the sealing order, and provides for appeals of decisions relating to sealing orders by persons not parties to the lawsuit in the same manner as appeals from -- from temporary injunctions are provided.

It -- it further -- the appeals section also states that a court's failure to make the findings, the articulated findings

required by the rule, shall never be harmless error and shall always be reversible error, in another attempt to enforce the discipline on the lower courts to properly articulate the standards.

And a suggestion that was made this morning on the plane down from Dallas, which I think is a good one, is the failure to adhere to the posting requirements -- the notice and posting requirements -- would render any sealing order void and should also be -- be reversible. So that's a -- that's a quick synopsis of the point.

JUSTICE SPEARS: Forgive me for not having in front of me the booklet that you talked about. Who would decide and what would the criteria be for whether or not -- for dividing these -- these court records up into different categories, those that are discoverable, those that are not?

MR. LEATHERBURY: The Court would make that decision. I mean, the Court would be --

JUSTICE SPEARS: On an abuse of discretion standard?

MR. LEATHERBURY: Well, that's --

JUSTICE SPEARS: Or are there more definite standards than that?

MR. LEATHERBURY: It's -- it's a mixed question of fact and law that I would think the appellate court would not review on simply an abuse of discretion standard. It would -- it would --

MR. McELHANEY: Your Honor, yes, we would hope -- and we have not addressed appellate standards in this rule; maybe that is something that should be addressed.

JUSTICE SPEARS: I'm sure concerned.

MR. McELHANEY: We would hope there would not be that -- that -- that deferential a standard of review. When we're dealing with constitutional questions, normally that degree of deference at the appellate level is -- is not appropriate, and it -- it ought to be a review under whatever standards would apply on constitutional review of other important public rights. And I think that it's important at two levels, and it's at the initial threshold for the trial court to apply high enough and then for there not to be just deferential review that

says whatever -- "He must have had discretion to do that, so we're not going to second-guess the trial judge."

So I -- but I think the most important one -- because hopefully not very many appeals are going to be forthcoming; we're not looking for a new kind of industry -- a new area of litigation to create here. I think, really, if we will have some definite guidelines that they ought to be able to -- the trial courts will be able to deal with them.

I think setting it high enough and certainly well above a standard of just good cause -- that is in the local Dallas rule that's led to all the problems we've got. Good cause is just an invitation to do whatever you want. And we think that the constitution mandates a much higher threshold, and that's why we have attempted to be what appears to be maybe overly detailed by trying to articulate the tests that the certain courts have --

JUSTICE SPEARS: Another category of cases that we have gotten in this court in recent years has had to do with the sealing of discovery in products liability cases, and that

sort of thing. What does your rule do in that area?

MR. McELHANEY: Your Honor, if it does not become part of the public record, it's not dealt with by our rule, and so with the current practice of depositions not routinely being filed, with interrogatory answers not being filed --

JUSTICE SPEARS: Suppose they are filed.

MR. McELHANEY: If they are filed, the way our rule addresses it is that they are then part of the public record. So once they are filed, if there is something that one party wants to protect, then he would need to invoke sealing order procedures.

JUSTICE HECHT: "The serious and imminent threat to the administration of justice." Is that systematic or just in the individual case?

MR. LEATHERBURY: It's really systematic. We had a discussion about that at the subcommittee and David Donaldson articulated -- took on that question and articulated a pretty good answer to it.

It has to -- there are certain private interests that -- that the courts have to protect. And, in other words, if you are going to invade someone's privacy such that they would be chilled in bringing a legitimate claim to the -- to the courts, that would qualify as a serious and imminent threat to the administration of justice. It's -- it's -- it's -- it's a combination, really, I guess, of systemic and -- and individual -- facts of an individual case that could undermine -- that could lead to undermine the system.

It doesn't -- you know, I think there was a humorous comment at some point, you know, that meant that all the judges would resign or that they would all quit, or -- you know, and -- gosh, nobody had ever -- was ever going to be able to prove that. That's -- you know, that's clearly not what it means. It just -- it looks to the system and how it treats individual cases.

JUSTICE HECHT: What application, if any, would rules of collateral estoppel have in the challenging of the sealing orders or appeal challenges? For example, one party comes in and

challenges the order and they have a hearing and they lose, and then another party comes in and wants to challenge the some order. Where do we draw the line there?

MR. LEATHERBURY: That's -- that's a good question. I -- and -- and one that's really not -- not specifically addressed in these rules. You could envision with the passage of time that facts and circumstances would change, and something that was legitimately sealed under the compelling need standard at one point with the passage of time or with the development of some additional facts would not meet the compelling need standard for sealing anymore. So I -- I view it as sort of a -- a fluid field.

I think that -- you know, we thought about and we have been asked questions about "Do you really see this as multiplying litigation unnecessarily? Why is the rule so detailed?" and so forth.

And, really, my thought is that the procedural requirements that are in the rule are almost as important as the substantive requirements. And with the procedural

requirements where the notice is posted, where there is an opportunity to appear and be heard at the very outset, then ultimately you will have a lot less litigation if you do it right the first time.

JUSTICE HECHT: Is there any intention that the rule be retroactive?

MR. McELHANEY: Yes.

JUSTICE HECHT: So that after -- if the rule were passed, you could go back and move to unseal --

MR. McELHANEY: I -- I say that, Your Honor, in this vein. We haven't put in any language that makes it prospective only, and it does provide for the concept of intervention for the purpose of filing a motion to unseal records. Therefore, it could be applied as the way it's written in that -- in that way.

We recognize, however, that there are arguments that countervail such a ruling on the merits. Procedurally, we are there in court asking for these records to be unsealed, but we would expect that those opposing the unsealing -- in other words, keeping the status quo -- to argue that the rules were different

when it was sealed; the parties may have entered into a settlement in reliance on that, and time has -- is on their side. And so that -- this rule is a procedural rule, rather than governing the actual decision on the merits there, but, yes, it -- it could result in some motions being presented and filed on -- on old records.

JUSTICE GONZALEZ: That kind of rule we can't rule unconstitutional.

MR. McELHANEY: Hope not.

JUSTICE SPEARS: I would say we would be the only ones that could.

JUSTICE HECHT: A difference between power and desire there.

Any other questions of Mr. McElhaney and Mr. Leatherbury?

JUSTICE DOGGETT: You are going to look also, though it's not in this draft, at a draft rule for the Rules of Appellate Procedure --

MR. LEATHERBURY: Right.

JUSTICE DOGGETT: -- since this only addresses the district courts to cover things like attempts to seal briefs, that kind of thing?

MR. LEATHERBURY: Yes, yes. We'll look at that and also the jurisdictional point.

JUSTICE DOGGETT: Okay.

MR. McELHANEY: We -- we do have some copies of this -- of a redrafted rule, but since it's still evolving, we don't want to burden you with too much interim. We'll be glad to pass this out or wait and get you something more definitive. And, of course, it's in the hands of all of the subcommittee anyway. Thank you-all.

JUSTICE HECHT: Mr. Donaldson is next in line.

DAVID DONALDSON,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. DONALDSON: Members of the Court, I am David Donaldson, and I'm from Austin, Texas.

I'm appearing today on behalf of

Texas Media. Texas Media is a not-for-profit coalition of professional journalism groups that's dedicated to the First Amendment and freedom of information issues.

Texas Media includes the Freedom of Information Foundation of Texas, the Society of Professional Journalists, the Texas Association of Broadcasters, the Texas Associated Press Managing Editors Association, the Texas Daily Newspaper Association, the Texas Press Association, and the Texas Press Women. As you can tell, it has a lot to do with the press.

In addition to representing Texas Media, I also represent reporters, editors, and broadcasters on a day-to-day basis advising them about how to obtain information and open government issues, and I'm here today to represent Texas Media.

We had another witness whose name is Howard Swindle. You heard references already to the Dallas Morning News study. Mr. Swindle is an assistant managing editor from the Dallas Morning News.

We submitted to the Court some written testimony from Mr. Swindle, and I have

also submitted some written testimony. I don't want to burden the Court with presenting all of my written testimony, necessarily, but I do think Mr. Swindle's statements are particularly appropriate and present information that I think you have been asking for as we go through: How extensive is the problem? How serious is it?

With the Court's permission, I would like to go ahead and read Mr. Swindle's -- at least a portion of his -- his written testimony so that you will have the benefit of that.

JUSTICE GONZALEZ: We've got -- we've got the copy here, and I, for one, am not interested in your reading the material. You know, we're going to read it. I'm more interested in having your comments about proposed 76a. Do you see any problems with proposed Rule 76a?

MR. DONALDSON: Well, in that -- in that context I have an easy answer, Your Honor. I do commend the Court and ask the Court to take a look at it, because it does answer some of the questions about the number of cases that have been sealed, the nature of the cases that have been sealed, and raises, frankly, an issue that

hasn't been raised so far: the -- the public perception that sealing is available to those with corporate clout, with influence, with some "in" with the Court that assists them in obtaining the sealing of records.

JUSTICE GONZALEZ: That is not my question. My question was: Do have any comments about the proposed rule that -- that the last two speakers spoke about that are asking us to enact?

MR. DONALDSON: Yes, Your Honor, I do. And that -- my response to that is that we have been working -- I'm one of the members of the committee, and I've been working closely with Mr. McElhaney and Mr. Leatherbury and the other members of the committee in discussing that, and, yes, we are very -- in favor of the rules that are being proposed by the committee, the rules that are being discussed.

There have been -- as Mr. McElhaney mentioned, there are a number of changes in the rules that -- the proposed rules that you have even seen. We have gone through several iterations even today. We're hoping to meet again in early December. Hopefully, we will

come out and have a set of rules for you to review and with the hope that this, in fact, will be decided.

JUSTICE GONZALEZ: I'm only one of -- you know -- one of my ideas. The judges may want to hear you read the testimony. I don't --

JUSTICE COOK: I read it this morning. I've underlined it.

MR. DONALDSON: So you're ready on that. All right. Well, let me make a couple of other comments: One, just to try to bring into focus the role that this information plays in how we -- how we run our government.

The way that we operate in our system is that the citizens use the information that they receive, and they make decisions, including the decision to elect our public officials, based on the information that they receive. Now, all -- all of us would like, I suppose at some point, to have the opportunity to actually be there to get information we consider important to do our job as citizens, but we can't be there, and the people that we rely upon to do that job is the media: the

reporters and publishers, the eyes and ears of the public who are there in the courtrooms and who are there in the district clerks' offices who are observing the cases that are being filed and the activities that are taking place with regard to those cases.

Consititutional access to public trials is -- is become -- has become clearly established. It's a matter of constitutional law. What is it -- there is a trend toward recognition of that access, and several lower courts below the Supreme Court have recognized the right to such access to public records, also. And the idea is that we have to have the ability to see those records in order to be able to do our job as citizens. Because as you realize in civil cases, of all the cases that are filed, not many of them are actually tried. Most of them are resolved short of trial. And unless we have the right to have access to that information, we will not have enough information to determine whether our judges are doing the right thing, what kind of cases are being filed, what sort of claims are being made. That sort of information is something that the public

needs the right to obtain.

JUSTICE HECHT: Well, in all fairness, how does it help a member of the public to discharge his civic responsibility to know that a party in a divorce case had been involved or had dealings from time to time with somebody else? What public good does that serve? Isn't this just about selling newspapers?

MR. DONALDSON: No, Your Honor, it's not. And I think every time I have had to deal with that issue, that's one of the questions that comes up, and it really is not. You heard Ms. Kneeland this morning describe their efforts to present to the public what's going on. That's not really the effort.

But think for a moment. Of all of the types of cases that our citizens are likely to become involved in, the most likely type of case that they will be involved in is a divorce proceeding, unfortunately. And although the specific and intimate details of those events may not necessarily be something that -- that should be a matter of public knowledge --

JUSTICE GONZALEZ: But some of them

make very good copy, and that's what you're interested in, are you not?

MR. DONALDSON: No, Your Honor, that is -- that is not the case. What we're interested in is being able to have access to information that is useful for the public to determine how its courts are operating. It's important, for example, in a divorce case.

JUSTICE GONZALES: Well, what --

MR. DONALDSON: It's important to know whether or not -- whether or not an indiscretion will result in differing --

JUSTICE HECHT: We're operating by suffering cases in which this kind of discovery is being taken. What -- how does it help the public to know that?

MR. DONALDSON: Well, Your Honor, that is the --

JUSTICE HECHT: Mr. Babcock presents the case of a -- of a physician -- a psychiatrist or psychologist; I have forgotten which, although I certainly should know -- in which I read in the Austin paper he was alleged to have been involved with his patient, but -- so an argument is made: "Well, the public

should know that a man in his position is alleged to be involved in that kind of conduct."

But just from a person who is trying to get through the unfortunate circumstance of a divorce, how does it help the public to know that in addition to all of that, he has -- he or she has done these things in the last five years or 10 years, whatever, which were extracted in the course of discovery in order to, of course, perfect a more favorable outcome of the property settlement?

MR. DONALDSON: Well, Your Honor, that -- let me respond to that in a couple of ways. The first question: What about the psychiatrist? How do we know about that?

JUSTICE HECHT: Well, that's an easier --

MR. DONALDSON: That's an easier case.

JUSTICE HECHT: -- that's an easier case.

MR. DONALDSON: I grant that; I grant that. It is an easier case.

In the instance where you have the situation that you have described, that's one

that can be presented to the district court, and the district court can determine. If it is even becoming an issue at all, the district court can then determine whether or not the circumstances are such that a compelling need has been met.

JUSTICE HECHT: Well, except in this proposed rule, a person's sensitivity, embarrassment, or desire to conceal the details of litigation is not the greater interest which overcomes the presumption of openness. So how could a party ever resist the concealing of that -- that discovery?

MR. DONALDSON: Well, Your Honor, you are putting me in a position of trying to defend and provide arguments for those who might want to -- to restrict access to information, and that's an unfortunate position for me to be in.

I guess one's response might be, though, that in order for us to -- well, I mean, one response may be, "Well, that may be the result; that may be the result," and it may be that it is important to know, not just in a specific case. But suppose that you want to do a study to see what effect indiscretions have

upon property settlements. Unless we have the ability to find out that information, such studies can never be done.

And -- and again, as I point out, one of the most critical areas -- one of the areas that most people, if they ever have any contact with the court at all other than as a juror, will be in a situation where they are involved in a divorce. It may be that they don't want their particular case to be spread out in front of the newspapers; and as a practical matter, they aren't on a day-to-day basis. But it is -- it would be interesting, and it would be important for their lawyers to know what can happen in cases involving particular types of conduct.

JUSTICE HECHT: Sort of the cost of an affair.

MR. DONALDSON: That may be. That may very well be.

JUSTICE HECHT: Other questions of Mr. Davidson?

MR. DONALDSON: Donaldson.

JUSTICE HECHT: I'm sorry; Donaldson.

JUSTICE GONZALEZ: Is that Sam Donaldson?

MR. DONALDSON: You said Donaldson.

JUSTICE COOK: The only problem that I had is -- you know, I like numbers, okay? And you get the impression by listening that -- I think one of the phrases used was "sealing indiscriminately," like this is going on, on a mass, wholesale basis. And -- and I -- I had someone call up, and in county cases during an eight-year period, in Dallas you had 133,656. They didn't have a chance to add up all the district court cases, but I'm sure they would probably equal that number. And if you use the total number that you gave us in the media report, which was, I think, either 202 or 220 --

MR. DONALDSON: 202.

JUSTICE COOK: -- 202, even the federal government would say that's really a diminishing number. Now, using the -- you know, it only took me a few minutes to call up there to Dallas and get the correct information.

Now, I'm not saying there is sealing done where it should not be done, and I don't think sealing should be done indiscriminately,

but I don't see the crisis of the dam breaking to the extent that I hear. When you have got several hundred thousand cases in an eight-year period, and you've only got 202 cases that have been sealed, it doesn't really appear that the judges have rushed forward to say, "I'm going to seal everything that enters my courtroom."

MR. DONALDSON: It's not the judges that are going to be doing that, either, Your Honor. What I'm concerned about is that now that this practice has been recognized and now that it is occurring, that it is going to spread. More and more you are going to see this sort of request for sealing, and there are no -- there are no provisions in the rules at this point that -- that control the Court's discretion on that.

And, frankly, if the judge is given a case in which the parties come in and say, "Well, Judge, if you will agree to seal this, we'll settle it and it'll be another case off of your docket," there is nothing that -- there is no real incentive for the Court to keep it on there.

JUSTICE COOK: Well, I was just

concerned because you gave the impression that this was something that was going on on a wholesale basis, when statistically, you have got less than one in a thousand cases being sealed.

MR. DONALDSON: I understand your concern, Your Honor. Let me -- let me put it this way: If this issue -- if the possibility of obtaining sealing is as -- in particular cases -- is as easy as it appears to have been in the 202 cases that were outlined -- and it appeared -- the impression that I got from reading the Dallas Morning News information is that the process has accelerated.

As a defense counsel -- and I have been a defense counsel on many -- in many different cases -- I have to wonder whether it's malpractice not to seek a sealing order admitting cases, and if that's the case, we're going to see more and more of these cases, and it's helpful now for the Court, instead of having to deal with it on a case-by-case basis as they might come up to this Court, it's more -- it's more reasonable for the Court to deal with it now by rule and set everything out

and make sure it doesn't become an epidemic problem.

JUSTICE COOK: Well, one of the earlier speakers mentioned specific examples. It was clear in some of those cases there were reasons why these files probably should not have been sealed, but I don't see the epidemic proportions you're talking about. And the statistics you have given us do not show year-by-year increases. Moreover, like I say, you've got an eight-year average of one per thousand. You know, that's -- that's not really a very large percentage.

MR. DONALDSON: Well, all I can tell, Your Honor, is that that's the results, and we're looking at one county in one location over a fairly lengthy period of time.

JUSTICE COOK: It's -- it's a representative sample, I think.

MR. DONALDSON: And I don't know -- I don't know exactly the number of cases per year, but the impression that I have received is that it is an accelerated process, and --

JUSTICE SPEARS: It would be better for us to go ahead and establish some standards

now than to wait until it does, perhaps, reach epidemic --

MR. DONALDSON: Frankly, Your Honor, I would -- I would like to have ignored this problem and not have to deal with it, but I don't think I can do it anymore.

JUSTICE COOK: I don't mind --

MR. DONALDSON: I think it's going to -- I think it's going to affect us once again.

JUSTICE COOK: I don't want to igore it. I have no problem dealing with it. It's just that the data that was presented, I felt, was inadequate and insufficient, because at the same time it was represented that, you know, the sky is falling.

MR. DONALDSON: Well, I apologize to the extent that Mr. Swindle's approach doesn't give the Court as much information as it would like, and unfortunately there hasn't been a study on the number of -- of cases that have been sealed over the entire state during the last few years, but I could -- just anecdotically I could say that --

JUSTICE COOK: 1981 through 1988:

district court, 480,397 cases. So my percentage was incorrect. I was assuming there would be at least as many district court cases as there are county court cases. There are a lot more district court cases, and so the number of one in a thousand is way out of proportion. It's probably one out of every 4,000.

MR. DONALDSON: That may be true, Your Honor, but even in that situation, the type of -- the number of -- the type of cases being sealed may have different merit.

There are some cases that are of extreme importance. The Edgewood -- the Kirby case, the school finance case, for this court to consider, that's a case of extreme importance, statewide importance. How many of those 202 cases may involve defective products? How many may involve professionals who have committed malpractice over and over and over again? How many of those involve matters that affect public health and safety? We don't know.

JUSTICE DOGGETT: Because they're sealed.

MR. DONALDSON: Because they're sealed. And it may be -- it may only take two

or three of those cases to affect thousands of people, and so --

JUSTICE COOK: You're generalizing again.

MR. DONALDSON: Yes, Your Honor, I am, but that's because I don't know.

CHIEF JUSTICE PHILLIPS: Mr. Donaldson, do you see any constitutional considerations on the other side? This Court, two years ago, recognized a constitutional right to privacy. And in a case we had last year -- maybe this year -- regarding psychological testing under Rule 167a, an argument was made -- it was not in our opinion, but it was made by the attorneys -- that the constitutional privacy right was invaded when a court ordered psychological testing that would then be disseminated on the record.

Do you see that an individual who has private information that is not subject to sealing under this standard would have any constitutional argument that the State has, through the court process, invaded any constitutional rights?

MR. DONALDSON: Your Honor, I don't

believe so. I believe that in those --

JUSTICE HECHT: No right -- no right at all, or just not an overcoming right?

MR. DONALDSON: Not an overcoming right. There may be instances where particular situations may authorize a finding of compelling need, and the basis for that might be a privacy claim. But, I think, stating as a general basis, does a constitutional right of privacy exist that would stop any effort to produce court records? No, I don't think so. There may be a balancing that would have to be done.

JUSTICE HECHT: We have about five other speakers signed up. Any other questions of Mr. Donaldson?

CHIEF JUSTICE PHILLIPS: This is normally our time for a break. Does the Court desire a break?

JUSTICE GONZALEZ: I would rather, you know, move on and get through with it.

JUSTICE HECHT: We're getting down to the end, I think.

CHIEF JUSTICE PHILLIPS: Well, go ahead, then.

JUSTICE HECHT: Thank you, Mr.

Donaldson.

JUSTICE COOK: Thank you. I agree with you that we need to set standards. That does not bother me at all. It's just that I like full and accurate disclosure of information, as do the journalists.

MR. DONALDSON: Absolutely. Thank you.

JUSTICE HECHT: Tommy Jacks is next. Mr. Jacks?

TOMMY JACKS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. JACKS: Members of the Court, I'm Tommy Jacks from Austin. I am here this afternoon on behalf of the Texas Trial Lawyers Association.

I -- you have heard mainly from my friends today who are members of the Texas Association of Defense Counsel. I think that

this demonstrates to me that the issue we're here about is not an issue of plaintiffs' lawyers or defendants' lawyers. All of the lawyers who are coming here before you this afternoon are asking for your help because we are being put in a very difficult position, and it's becoming increasingly common for us.

As many of you know, I mainly represent plaintiffs in injury cases. My practice includes a heavy dose of product liability cases and medical malpractice cases, and these are two categories of cases in which information is increasingly becoming inaccessible to the public and the press, and it is a -- it is from that background that I speak.

There are other areas that some of you have raised in your questions that I don't have any experience or expertise in: adoption, family law, and so forth. And I'll be on very thin ice if I try to venture into those areas, but I would like to speak about the area I do know about.

I -- I come here sharing many of the ideals that have been expressed by those who represent the media, but I think it is not only

the media that have an interest. And in my background and experience, my first job as a practicing lawyer was with an organization called Public Citizen, in their Washington office. Tom Smith of that organization will speak to you later today.

But one of the first cases I worked on was a case that involved the right of consumers -- it happened to be in the state of Virginia -- to be able to get information at the drugstore about the price of drugs. They were challenging a statute that prohibited the posting of prescription drug prices, and it was a case that eventually went to the United States Supreme Court, and addressed their -- the other edge of the two-edged sword of the First Amendment, that it is not only a right that protects the right of citizens to speak and the press to publish, but also the right of the public to know.

Now, I'm not here to suggest that this court should attempt to codify in rule form the bounds of -- of the constitutional right to know; I'm not here to suggest that you should codify in rule form the bounds of the common law

right of access to court records, although there is law there which is of interest.

I am here to say that I think at some times those of us who are most involved in this system forget that we are here as -- as the servants of -- of the people. These are -- the courts are the people's courts. The documents that are filed with the courts are the people's records, I believe. And it is the interest of the people in the administration of justice that is, I think, objective.

Justice Cook has asked some very probing questions about the extent of the problem. I don't have a survey that I can bring to you today, but I can tell you anecdotally, based on my experience, that in the past seven or eight years, I have noted increasingly the use of court orders to prevent the disclosure of information in which the public has a real interest.

In product liability cases, it is now the rule -- and I think Mr. Donaldson was correct in which he says -- when he says that defense lawyers worry about whether it would be malpractice not to -- to follow this rule -- but

it is the rule that important records about dangerous products are routinely sealed.

Now, it arises in two settings, in my experience. The first, and the one with which I have far more familiarity, is the very common practice that's been noted of protective orders. Now, I want to talk about that for a moment, because protective orders, I believe, are being abused in our system nowadays.

It is -- and when I say we lawyers are here appealing for your help, we're there in an individual case representing an individual, and all we're looking out for is that individual. So if I'm approached by a defense lawyer proposing an agreed protective order, as long as it permits me the access to the information I need to handle my lawsuit, that's fine. I'm representing my client; that's all I'm there about, and I'm not going to look out for the public interest, quite frankly. I have got a lawsuit to handle, and I have got other lawsuits to handle, and I don't have time to fight about the intricacies of what should or shouldn't be sealed in any individual case.

Trade secrets have been mentioned

here, and I will tell you that if there is anything that's abused in the protective order system that we have today, it is the abuse of what are called trade secrets.

I handled a case a couple of years ago that involved a medical device, a medical device that is used in every operating room in this state every day. In that case, there was a protective order entered into, and thereafter -- and this is an example; it's not the only one I could give you -- every piece of paper that came in response to discovery was stamped "Confidential." Now, that included things such as sales brochures that were handed out to doctors in doctors' offices around the country. It included literature that was sent to their sales forces in the field. It -- it -- it included things that, in other words, clearly were not properly confidential. Now, if I had wanted to, I could have gone to the Court and said, "Now, Judge, they're abusing this. These things aren't confidential." I'm not going to do that. I have got a lawsuit to handle. I'm a busy man. I don't have time to protect the public's interest. I don't have time to see

that everything is scrutinized as it should be.

These orders, generally, are entered into by agreement. Sometimes they are contested, as you know, but more commonly by agreement. And the result is that those records, in which I submit the public has an important interest, never see the light of day. The vast majority of those cases end up being settled, and that's the second setting in which the sealing of court records becomes a problem.

The -- it is increasingly commonplace that defendants insist as a condition of settlement that either the entire file, or all the discovery records on file, or all the exhibits on file, be sealed, and that the attorneys return their copies of all those records to the manufacturer from whence they came, and the whole case is -- I mean, it's "poof"; it disappears. It's like it never happened.

And, again, we're talking about products, be it cigarette lighters or heart valves or restraint systems in automobiles, that affect the lives and health and safety of thousands of people.

I will concede, Justice Cook, that I think the number of cases, if you look at it system-wide, in which sealing orders are entered or in which even protective orders, although more commonly employed, are entered, is an infinitesimally small fraction of the total caseload. But I will also submit to you that if you were to develop a scale between the importance of the issue to the public and more -- and the likelihood that the information will be concealed from the public, that the problem takes on greater proportions.

If you look at 133,000 cases filed in county court, or a like number filed in district court in Dallas County, that's going to include divorce cases, automobile wreck cases, worker's comp cases, and a vast array of other cases, in which, frankly, the public doesn't have any burning interest.

JUSTICE COOK: My point was --

MR. JACKS: Yeah.

JUSTICE COOK: -- it was --

MR. JACKS: Yes.

JUSTICE COOK: The impression was given the number was somewhat larger.

MR. JACKS: And -- and -- and I don't think it's a problem of numbers. I don't think it's a problem of numbers if you are looking at it system-wide. I do think it is a problem of numbers if you look at a particular category of cases: product liability cases. I have not handled a product liability case in the past three or four, five years, in which there has not been a protective order entered that has resulted in the sealing of documents filed with the court. Now, I'm not saying in every one of those cases that the entire court file has been sealed. I am saying that in every one of those cases, there has been a protective order entered, and it is in those cases, I believe, a very serious problem.

JUSTICE COOK: Well, will this correct that problem?

MR. JACKS: Well, it won't. And that's -- you've asked and Justice Gonzalez asked about particular comments about the rule, and I would like to turn to one portion of the rule and talk about concerns I have with it. I'm talking now about the John McElhaney draft that is before you.

JUSTICE COOK: Other than the document which I read this morning, which was going to be read to us, it doesn't mention products liability. It refers to drug abuse, for instance; malpractice, divorce, dissolution of professional partnerships --

MR. JACKS: Well, I would suggest that it may be, because no plaintiff's lawyer in his right mind will file a products case in Dallas if he can avoid it, and so I'm not sure -- I'm not sure how good the example is.

But I would invite the Court -- would invite the members of the Court over the coming weeks to talk to the lawyers you know who do this kind of work and see if what I'm telling you my experience is comports with theirs, and I think you will find it does.

And the part of the rule that I would like to comment on in particular is the definition of "court records and its exclusion of discovery documents" from the definition of "court records," because in the product liability cases that I'm talking about, that's where all the gold nuggets are that are to be mined that would be of use to the public.

Now, you know the distinction is made in this rule about whether discovery documents are filed with the court or are not filed with the court. Well, now, you all know that till some recent rules changes you've made in the past few years, they were all filed with the court, and it was not because this court suddenly decided that those records had any -- were of any less importance to the judicial process that they weren't filed with the courts, because the clerks didn't have room to put them anywhere.

The cost and the expense of storing documents necessitated changes in -- in Rules of Civil Procedure so that depositions were no longer filed at the time they were -- the transcripts were typed up. Instead, they went to the lawyer who asked the first question, and that lawyer was charged as being the custodian of those depositions until the time for the case to come to trial.

When -- until only a few years ago, interrogatory answers were filed with the court, responses to requests for production of documents were filed with the court, and a

policy decision has been made -- and it's one with which I do not quarrel -- that the -- the expense and trouble of keeping up with those records should fall to the officers of the court, the lawyers, rather than to the clerks, who have limited budgets and limited space.

But there is no question at the same time that we hold those documents in our custody as officers of the court. And certainly I think any court would take a dim view, for example, if -- if lawyers who were the custodians of -- of these records tampered with them, did devious things with the records. They are the court's records, still. We're simply the ones who have custody of them until the day when they are needed.

It is in these documents in the depositions that are taken, in the documents that are produced by manufacturers, that the information that the public should have a right of access to are concealed.

JUSTICE COOK: So you are saying the bill really hasn't addressed the main problem?

MR. JACKS: I am saying it has not addressed the main problem, and I am saying that

the first thing I would ask this Court to do in any proposed rule is to see that discovery documents are included. Now, that's going to raise some practical problems. Two, in particular, I'll comment about.

There is another way in which information is concealed from the public besides the sealing of court records, and that is at the time of settlement there simply is an agreement entered into that all that information will be withdrawn from the court -- be it trial exhibits -- if it's a case that is settled during or after trial -- discovery documents, depositions -- so that they disappear from the public view, but not because the court puts them under wraps, but because the court enters an order saying that they can be withdrawn. And the agreement is they all go back to the manufacturer so that they never see the light of day.

The second is that even in those cases where the -- there is no -- the records never have gotten filed in the first place, I submit that they still are public records, the people's records, the people's documents, and

they are records to which the public should have access.

JUSTICE GONZALEZ: Mr. Jacks, if we do that, what effect do you think that's going to have on the settlement of cases?

MR. JACKS: I think that -- when I say that lawyers from both sides of the docket are here asking for your help, it is because I think cases will continue to settle. I really do. Cases really settle because, in my experience in these cases, not because of the fear that information will be divulged, but because of the fear of what will happen when the jury returns its verdict. The -- I think cases will continue to settle, but there is no one who is representing the public interest in this process at present. I'm representing my client, David Donaldson is representing his client, and neither of us is overly concerned about what information the public is going to have access to when we're up there on Monday morning ready to pick a jury and we're talking about settling our lawsuit.

CHIEF JUSTICE PHILLIPS: Excuse me. How is the court reporter doing? Do you need a

break?

THE COURT REPORTER: I will shortly, to change paper.

CHIEF JUSTICE PHILLIPS: But I meant your hands and --

THE COURT REPORTER: I'm getting a little tired.

CHIEF JUSTICE PHILLIPS: Well, when you change paper, we'll take about a 10-minute break.

THE COURT REPORTER: Okay. Give me about five to 10 more minutes.

CHIEF JUSTICE PHILLIPS: All right, sure.

MR. JACKS: The --

JUSTICE GONZALEZ: I'm talking about, you know, the --

MR. JACKS: Yeah, yeah. I --

JUSTICE GONZALEZ: -- the Pinto cases, the Jeep cases, or the -- you know, the -- that type of a case where -- where if the industry knew --

MR. JACKS: Yeah.

JUSTICE GONZALEZ: -- that these documents were going to be given in every case

and there was going to be sharing of information --

MR. JACKS: Well, you see --

JUSTICE GONZALEZ: -- what they do with the testimony --

MR. JACKS: They have already got that problem because of Garcia against Peeples; they've already got that problem. And -- and Garcia against Peeples was -- was very useful in solving one problem with the concealing of information, and that is that other victims who have a case against the same manufacturer were being deprived of information and therefore were having to go through the expense -- and it's expense for the administration of justice, too -- to re-invent the wheel every time. So that problem was taken care of by Garcia.

And -- and manufacturers, when they settle cases, are mainly worried about that, that it's going to go to other plaintiffs' lawyers in other suits. But they've already got that problem.

So I don't think that anything this Court does in seeing that information that I can give, when I settle a case to another

plaintiffs' lawyer, might also be accessible by a newspaper or public interest group or consumer association. I -- I don't think the incremental disclosure, in short, will dissuade people from settling cases.

JUSTICE GONZALEZ: What about the size of settlement? In other words, sometimes their fear is that -- if the paper publishes --

MR. JACKS: Yeah.

JUSTICE GONZALEZ: -- we gave a zillion dollars, you know, is it going to have an effect on other cases.

MR. JACKS: In some cases, it may. I really think that part of what goes on when -- when sealing orders are entered into, or protective orders are entered into, though, is out of inertia. I don't care enough to make that big a fight of it.

But I can't think of a single case where I really believe I got more money because I entered into an agreement about what should be done with the court records.

I will say -- and Justice Hecht asked the question earlier: "Well, aren't you worried about this being used as a threat, that

records might be filed with the court to threaten the other litigant?" I would be equally worried if I really thought that bribery was going on where litigants were being paid to keep information from the public, but I don't -- I don't think it's that sinister.

I think it simply is that none of us is in the business of representing the public when the time comes to agree to that order. We are each in the business of representing our clients. But all of us, plaintiffs lawyers and defendants lawyers, think it stinks because we know what's in there and we know that it's information that the public has an interest in knowing.

And we believe, because we do take seriously our obligations to the system at large, that our courts are jeopardized when the public perception becomes that valuable public information is being concealed because high-dollar lawyers are entering into agreements and judges don't care enough to look behind them, because judges are busy, too, and they have got dockets that they have got to move and they sign agreed orders. It's that simple. And

that's why a rule from this Court, I think, is needed, and I think it must include discovery.

There are a few other aspects of the rule I would like to address, but if the -- it would be a transition to a new subject, and if this is a convenient time for the court reporter --

UNIDENTIFIED VOICE: Yeah.

UNIDENTIFIED VOICE: Go on break.

CHIEF JUSTICE PHILLIPS: A good time? Okay. We'll take a break till four o'clock.

(At this time there was a brief recess.)

CHIEF JUSTICE PHILLIPS: Okay. You're back. Is this a problem in other states? Is it -- are we talking about a nationwide problem?

MR. JACKS: Yes.

CHIEF JUSTICE PHILLIPS: Have other states addressed this problem with any type of rules or case law?

MR. JACKS: I don't know. I have not --

JUSTICE DOGGETT: Virginia has

passed a statute this year dealing with some of this, but it's -- and I could circulate copies to you --

CHIEF JUSTICE PHILLIPS: I wish you would, because I heard at a speech that we all were at, I believe --

JUSTICE DOGGETT: And Georgia has passed a rule, but it's a much more narrow one than the one that John McElhaney is describing.

CHIEF JUSTICE PHILLIPS: Mr. Nader's speech at the bar convention --

MR. JACKS: Yes.

CHIEF JUSTICE PHILLIPS: This summer he said that no state had yet responded to this problem.

MR. JACKS: Well, I think that --

CHIEF JUSTICE PHILLIPS: And I just wondered if there had been some change, so that we would have some --

MR. JACKS: If that's an over-statement, I suspect it's only a very slight one. It is -- but I have not done research to be able to document that for you. I -- I, frankly, intended to do more background research on this issue before coming here today, but I

have been a little occupied with one of the other branches of government in the last few weeks, and -- and I didn't get that done. But I -- I gather that research is being done.

I -- Justice Cook and I were chatting about some of the things I've been talking about during the break, and one question he raised was a very good one that I think is worthy of some comment. And he offered the opinion that perhaps the press might be more interested in some of the spicy details of a prominent person's divorce case than they might be about some dangerous product, and -- and there certainly is that chance. But I want to make clear that I don't think that we simply are talking about media access, because there are other groups. In this town, Consumers Union is a good example; Texas Consumer Association is another; public interest groups that have a sincere and continuing interest in the issue of dangerous products.

And this leads me to my next suggestion about this rule, and it has to do with how notice is given to the public that a litigant in a lawsuit at the courthouse is

proposing that the court seal records. In the initial draft, which is the only draft I have had, the idea was you post the notice at the courthouse. I don't think that's very useful. I think it's a waste of time, and I gather that --

JUSTICE GONZALEZ: What do you propose?

MR. JACKS: I would propose the following: I don't think it would be burdensome for the district clerk in every county simply to maintain a list, and any member of the public, or any group, like Consumers Union, for example, that wanted to be on the list to get notice. And it could be the Dallas Morning News, or the American Statesman, but it could also be groups of the kind I'm describing who wanted to be on the list would get notice of the hearing that is the subject of this rule. So that notice would go not only to other counsel in the case, but if there were five public interest groups and three newspapers who said, "We'd like to get notice of these hearings, too," they could get notice, or their designated attorneys could get notice.

And the burden, in fact, would be

put upon the litigant who is moving for the motion to see that the list -- which is publicly available to him -- that the people on the list get noticed. It's not a burden on the system. Put the burden on the party seeking to have records sealed, and then it's up to the newspaper or to public citizens whether they want to show up or not.

JUSTICE GONZALEZ: Do we do that in any other type of lawsuit or any other setting?

MR. JACKS: No, we don't. And again we are dealing, Justice Gonzalez, I think, with trying to protect a public interest and access to information that is not -- is not going to be protected otherwise.

We do, in our administrative agencies, publish things in the Texas Register for public comment. Any time rule making is being considered, for example, matters of public importance, and -- and those settings are -- the public is made aware of them in a different way, but that's not practical for this branch of government for the courts to do, but I believe it is practical to give better notice than pasting something up on the bulletin board over

at the -- at the courthouse.

So a second recommendation I would make is that the Court consider notice directly to those who are interested enough to want to receive it, and it -- I believe that's not burdensome, and I believe it would help protect the public interest. And, again, in the particular category of cases that I'm discussing, I think it would be of great practical use.

A third suggestion I would make is that the rule expressly address the subject of trade secrets, because in product liability cases that is the justification that is most commonly given for the protection of records; and yet as I have said, and as I strongly believe, it's abused.

And I -- I don't have for you today a definition or a standard specifically that I would urge, but once the 181 people across the lawn here go home, I would like to submit some written comments, and will do that to the committee --

JUSTICE HECHT: We may not have enough lawyers.

MR. JACKS: We -- well, I did notice that the governor is taking bets. I -- I thought it was another candidate for governor who was advocating legalized gambling, but I see that Governor Clements has gotten in the spirit of things and....

But in any event, I would urge that the court include a standard that addresses trade secrets specifically and puts some burden on the movant to show that what is sought to be protected generally is confidential trade secret or commercial information in which there is a legitimate interest in concealing from public disclosure rather than rubber stamping literally every document that is produced in discovery, which is what happens commonly. I mentioned the one case, but it -- it happens commonly.

The -- it has already been suggested that you consider an appellate standard, and that's necessary, because if there is appellate review, it's most likely going to be through the mandamus route, simply in terms of the timing of the thing. That's when it must occur, I think, and --

JUSTICE GONZALEZ: We don't need any

more writs of mandamus.

MR. JACKS: And it is -- well, it -- it seems to me that it's not something -- if we are to provide that a group that has an interest, be it a newspaper or a public interest group, is to get a hearing at the trial court stage, I would advocate that there be some method of review of that decision.

And it -- it makes little sense to postpone it and make it hinge upon whether there is an appeal of a final judgment by the parties to the case, because that's totally aside and apart from the controversy about the disclosure of the public information.

Whether you call an appeal or you call a mandamus, I would advocate a ready remedy that can be taken from that order by whoever the agreed party is. And I would say you should not utilize a mandamus standard of review, which is clear abuse of discretion, because the interest that is at stake does have constitutional ramifications.

The -- that really concludes the specific recommendations that I have. And I -- if the Court has any other questions, I'd be

happy to try to answer them now. I can't tell you how much I appreciate the opportunity to address these issues, and I can tell you that there are many, many lawyers out there like me on both sides of the docket who share this concern, certainly in this pursuit of categoried cases.

CHIEF JUSTICE PHILLIPS: Are you implying or stating that you have had lawyers say, "We won't settle unless you sign this agreed order sealing the records, but we think this is a bad deal that robs the public of their right to know, and privately we apologize to you; that's just our client's position"?

MR. JACKS: I -- Mr. Chief Justice, I will tell you that I have -- in a number of product liability cases, and it's now almost universally commonplace -- have been told that it is a condition of settlement that records either be sealed or withdrawn, and that I sent back not only the depositions I have taken of their employees, the documents I obtained from them, but also my deposition summaries, my notes from my file --

CHIEF JUSTICE PHILLIPS: I

understand that, but are --

MR. JACKS: And -- and I'm telling you that some of the lawyers representing those parties -- well, David Donaldson and I have had cases against each other, and I don't -- I don't think I can recall a case in which David and I have had that kind of an order, but I'm sure that his firm has represented products defendants who have asked that such orders be entered. And I am telling you that some of the defense lawyers with whom I deal hold their nose when they do it because they are representing their client, but they also recognize that there is important public information here that is being concealed, and as officers of the court who care about how the courts are perceived, they think it stinks, and I will tell you, yes, that I believe, and that I know.

JUSTICE HECHT: Because we are dealing with perception here, another perception is that the reason both sides of the docket don't mind disclosing the information is because it will result in more lawsuits, employing more lawyers ad infinitem to the great expense of the public. Now, that -- that is also a very

cynical perception of the populace. What -- how do we protect against that?

MR. JACKS: Well, it is -- there are other ways to protect against lawsuits being filed which should not be filed. This Court has made an effort in Rule 13 to address that issue. It is -- I would say that the Garcia against Peeples decision has taken out of the picture, at least in this state, one of the main incentives that defendants have had to see that records are sealed, because now in protective orders it is generally the case that the right is always reserved to see that those records are given to lawyers representing other victims of the same product. To that extent, I think that -- I think manufacturers are motivated by seeking to gain the advantage that they had before Garcia. Certainly, they don't like to see their dirty laundry aired in public, but I don't see -- I really don't think there is a concern on their part that if it is, there is going to be a new explosion of lawsuits about it.

You know, if -- if you have a product that's injuring hundreds or thousands of

people around the country -- three-wheelers being a current example, let's say -- those lawsuits are going to be filed and pursued regardless of whether, in particular cases, the documents that have been obtained in discovery are disclosed so that the whole story comes out. Enough of the story has come out so that victims are going to seek legal counsel, and lawyers are going to know that there is something going on there, because there are hundreds of lawsuits going on around the country.

And as a practical matter, I don't see concern about an explosion of litigation being a legitimate reason for saying we should not have openness in -- in this branch of government in these kinds of cases.

JUSTICE HECHT: Well, thank you, Mr. Jacks.

MR. JACKS: My thanks to all of you.

JUSTICE HECHT: Next up is Tom Smith.

TOM SMITH,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. SMITH: Hi, I'm Tom Smith. I'm director of Public Citizens office in Austin, Texas. Public Citizens is a national consumer organization that was founded back in the early 1970s by Ralph Nader. I'm not an attorney, and so my remarks to you this afternoon will be from that perspective, from the perspective of a person who represents the public interest, most often at the Legislature, but often in other forms.

As you would expect, being an organization founded by Ralph Nader, we're keenly concerned about product safety and, as well, the openness of governments, not only in the courts and their records, but the records that are held by regulatory agencies and other bodies.

We're delighted that you are

considering this issue and that this legislation has passed. We think it gives you an historic opportunity to once again reinforce and reaffirm some very important principles that this state and these courts have been founded on: the fact that the records are open and that they belong to the public, and that these courts belong to the public, partially because we pay for them, but most importantly because we have created them as ways to deal with the jurisdictional -- the disputes that come between us.

What you are going to be deciding in these rules are literally matters of life and death to many people, or life and breath, in some instances. There are going to be matters of great economic and political and social invitations, matters like whether or not records having to do with crash data, with what happens when an automobile is smashed into from the rear and whether those gas tanks explode, are released to the public and thereby, perhaps, preventing some 500-odd people a year from being killed in automobiles that don't have reinforced gas tanks, or whether the data that might result from litigation about cigarette smoking is

released to the public and might somehow prevent more people from smoking or from continuing to smoke who do, who might -- that might document somehow how much information the cigarette manufacturers know and how much they know about how bad cigarette smoking might be for you.

The kind of information you will be talking about and deciding about is whether or not people should know about heart valves that fail, or whether there are birth control devices that might end up -- that they're using might end up causing sterility or miscarriages, or whether they're buying a house over a toxic waste dump, or whether the nuclear plant by which they are living is safe, or whether the -- the courts and administrative agences have ended up sealing the records of complaints brought by whistle blowers about the safety of that plant.

These are the kinds of life and death issues that you-all will be deciding when you look at these rules, but there will also be other issues: issues of dollars and cents, the choice of an insurance company, and whether or not an insurance company has been settling claims fairly and rapidly, or whether an

investment counselor might possibly have conflict of interest and be sued.

The way the system is now working, parties can go together and say, "We would like to seal these records," and oftentimes do. We'll talk about why that happens in a few minutes.

Product safety and consumer information have been linked -- or have been likened to a three-legged stool. We depend on all three of these legs to remain relatively equal in order to remain in balance, and those three legs are: regulation, public awareness and ability to act on -- on what they know, and litigation to get unsafe products off the market.

Your decision on these rules will profoundly affect the ability of this tripartite system of protection to work in two ways: It will manifestly affect, obviously, the amount of information that's available to the public, but also how effective the litigation is.

You see, what's happened here is that their -- the attorneys have managed to get themselves into sort of a jam. Not being an

attorney, I -- I'm not sure I understand how all this works, but in talking to attorneys, talking to Ralph Nader and a bunch of other folks who have watched this develop around the country, the jam seems to work like this: They have a duty to represent a client and to resolve the matter that the client has brought to them as quickly and as effectively as possible and for the maximum amount of settlement, if that's what's being asked for.

So you end up suing somebody like General Motors over a defective gasoline tank. And you begin discovery, and General Motors approaches you and says, "We want you to sign a blanket protective order and we will -- or we will contest every document you ask for."

Well, you scratch your head and realize this could be a fairly easy case or this could be the case that took the rest of your life, because General Motors has significantly more assets than you do, sitting here in Austin, Texas, or wherever.

So you go ahead and sign, and you find the explosive document, the document that details that perhaps General Motors did know

that certain gas tanks in certain models of their cars would explode in rear-end collisions at certain speeds, and that they could have fixed those gas tanks for somewhere between 8 and $11, and that the risk might be 500 additional lives annually, but they went ahead and chose to market that car anyway.

And you say, "I've got this document," and they offer to settle, but the condition of settlement is: "You've got to keep your mouth shut, you've got to give us all the documents back, and you can never take another case like this."

What's the lawyer to do? Whose interest is more important: the interest of the public or the interest of his client? I think it's pretty clear to those of you who are attorneys that the interest of the client is of tantamount importance to most attorneys. That's the way they have been taught, and that's the way we have said -- said that it ought to be in this state.

What we think we ought to have happen -- ought to have happen is that you folks ought to take the bit by the horns, as it

were -- the bull by the horns, as it were, and change the rules and say that isn't the way things ought to be, that there ought not be these blanket protective orders that turn into blanket secrecy settlements or settlement agreements that end up being secret. Why?

Let's take a look at the incentives for General Motors and other people like that. If you end up finding that you have been sued and that someone is going to get this document on you and that they can win tremendous amounts of dollars against you, that's one part of their risk. The other risk is a significant loss of market share. The other things that they don't want to have happen is they want to prevent further litigation; they want to keep it from being in the press and generally spread around the United States of America that some of their cars might have been built with defective gas tanks. They also want to keep a team of expert attorneys from developing, and one way to do it is to make sure that that information isn't shared with other attorneys and that the attorney who has figured this out doesn't get to take any more cases. It allows them to polish

their defenses.

Now, earlier on, someone asked -- I think it was Justice Cook -- how many of these cases actually were occurring. We don't know the answer to that. But The Washington Post, in an article I will leave with you-all for duplication, noted that there had been 140 cases like this brought against General Motors.

One expert, at least, had testified in 140 cases. And after testifying 140 times on this kind of an issue, you get real good, especially good when you are up against an attorney who is bringing his or her first case on this kind of an issue. So that's the kind of thing that seems to be motivating a lot of big corporations to ask for sealing of these records. Is it just General Motors? No, apparently it's not.

In talking this over with other people, some of the examples that our litigation group came up with were the manufacturers of a heart valve that has been tending to fail, or cigarette manufacturers, or people who are manufacturing birth control devices -- the Robbins Company, among others.

This strategy has some bad and importance significance for those of us who are members of the public and consumers. What does it do? First of all, it keeps bad products on the market long after they should have been pulled off. Regulators, press, and ultimately the public, can't tell when a product is harmful and how badly it's damaging people.

But it additionally drives up the cost of litigation and discovery and defense. The defense costs increased dramatically, and they complain about it. They go over to the Legislature and say, "We're in the middle of a litigation explosion; look at our figures." Because every time somebody comes in on a suit like this, the plaintiffs have to go fishing and have to ask for every record in the book, everything they can possibly think of, and that's part of why the defense costs have increased so dramatically.

It appears that big corporations and folks are using these secrecy agreements more frequently. The Dallas Morning News reported in 1987 that there were, in fact, 282 cases in history since 1920 -- since they had begun

keeping records -- that showed what had been kept secret, 202 of them since 1980 alone, and 139 of them just since 1984.

We think there is a solution. As I mentioned a few minutes ago, the solution is simple. I think you-all ought to just say "no more of the secrecy," that you -- that attorneys are not -- shouldn't be allowed to sign blanket gag and protective orders as a condition of settlement.

Settlements, for example, now occur in 97 percent, or all but 15 out of some 457 of the products liability cases concluded in 1988, according to the State -- State Board of Insurance and their closed claims study. It's a staggering number. And we don't know how many of these -- these kinds of secrecy agreements were entered into.

But the point that I want to make here is that it is seldom that documents are actually brought forth to open court, and it is seldom that people really are able to -- to hear what goes on in the discussion about a particular product in open court, because settlements occur, and rapidly.

So as a result of that, we think that attorneys, as officers of the court, should maintain and allow reasonable access to all discovery, whether used or not, or filed or not in court, and that the trial court should retain continuing jurisdiction over discovery issues.

The third thing we think ought to happen is that attorneys and judges should report any apparent violations of federal or state safety, or professional licensure conditions, to the appropriate regulatory body, so when they run across a problem that indicates there may have been a failure to report a chronic failure of a heart valve or a birth control device to the Food and Drug Administration, or a generic drug that wasn't tested according to the standards established by FDA, they ought to have to be required by court rules in this state to report that to the regulatory body, or when it's apparent that someone has malpracticed either as an attorney, a doctor, a chiropractor, whatever, that ought to be reported.

We think that this -- the obvious objection to all this, of course, is that this

is going to require -- have all kinds of confidentiality problems, that people are going to be raising objections and the judges are not going to want to sit down and go through thousands of pages of documents to determine which pages may have trade secrets in them.

Well, there are two answers to this. First, we think there ought to be special masters appointed and trained to look at confidentiality issues. But most importantly --

CHIEF JUSTICE PHILLIPS: Paid for by the state or by the litigants?

MR. SMITH: By the state.

CHIEF JUSTICE PHILLIPS: Okay. We have not been able to get secretaries or law clerks, or --

MR. SMITH: Well, perhaps --

CHIEF JUSTICE PHILLIPS: -- or bailiffs or other people for these judges.

MR. SMITH: That's a sensitivity that I don't have, and I -- I appreciate you bringing that up to me. And perhaps one way that this could be dealt with is by having the parties who are contesting this contribute toward the purchase -- not the purchase, but the

hiring -- wrong word -- of a special master. And I think that has been done in certain instances.

CHIEF JUSTICE PHILLIPS: We have a vast and increasing use of special masters at the trial court level to investigate documents and such, but it -- but it is taxed against the losing party to the case, ordinarily.

MR. SMITH: I would encourage that practice to occur.

CHIEF JUSTICE PHILLIPS: It's not -- not always --

MR. SMITH: Not being an attorney, I'm not --

CHIEF JUSTICE PHILLIPS: It's not always a fair practice at $200 an hour, or whatever some of these people charge. But we are also working, on this court, towards better funding for our trial courts which, for instance, are not computerized in most areas of the state. They have no setting clerks. But that's a -- that's a -- that's a problem you can help us with in 1991.

MR. SMITH: Well, I probably will speak to that issue in 1991.

It is -- I think that there ought to be a real tight definition developed. I -- the definition developed in the proposed rule before you doesn't seem to have enough precision to satisfy my untrained eyes, and I think that they ought to be limited primarily to things like trade secrets, to family matters, and to areas like psychiatric reports where the issue of a person's psychiatric impairment is not necessarily -- isn't necessary to be brought up in the case that is before the court, and shouldn't necessarily be released.

In addition, as Tommy mentioned, I would suggest that perhaps there ought to be notice to other interested parties, folks beyond just the people in the courtroom, and it ought to be effective notice. I think that the idea of sending -- of allowing groups to file with the clerk a request to be notified whenever a particular products liabilities case came up -- or in our instance we'd probably be interested in products liability medical device cases, disciplinary actions, things of that nature -- would be very helpful. It would enable us to get effective notice. And putting a notice at

the courthouse is not effective for most of the folks in Texas these days. And as I mentioned earlier, I think we ought to keep the exemptions as tight as possible.

Those are my thoughts on this, and I think that it's important that as you consider it that you bear in mind the kinds of magnitudes of cases that are before you every day, but the kinds of data that's available in these records that are being sealed. And as we are hearing from folks, from the attorneys that we talked to, it is a problem that is increasing, and it's increasing in the big money cases, in the significant product liability cases; and those are the areas where the most folks are likely to be affected, and that's our concern and a concern we'd like to share with you.

We wish you good luck in your deliberations. And as the months go by, if there is any way we can help in the drafting of these rules, we'll be more than happy to do so. And I thank you-all for the opportunity to be here. I'll be glad to answer any questions that you-all may have.

CHIEF JUSTICE PHILLIPS: We hope

it's weeks instead of months.

MR. SMITH: I hope so, too, but from the way these things progress, I would bet the latter.

JUSTICE HECHT: Thank you for your comments, Mr. Smith.

MR. SMITH: Let me leave a copy of The Washington Post article with you that details the General Motors case down in San Antonio.

JUSTICE HECHT: Next up is Mack Kidd.

MACK KIDD,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. KIDD: May it please the Court, my name is Mack Kidd. I'm a practicing attorney here in Austin. I can assure you that I will be very brief. Some of what I was prepared to say has already been mentioned.

I will say that I am appearing here for myself, but as a governor on the Association of Trial Lawyers of America -- board of governors -- I can tell you that secrecy in judicial proceedings has become a major problem in recent years, and a problem that has been addressed by resolution of the Association of Trial Lawyers of America coming out four-square against the abuse of protective orders and other secrecy agreements that are frequently being used, especially in product liability matters. I think this has been pointed out by Tommy Jacks. They are also frequently used in other cases where you have prominent individuals involved, or sensitive matters involved, such as professional negligence, especially in the area of medical malpractice where those are the very types of cases that the public needs to know about the results of those cases and what has gone on.

I will say at the outset that one of the things that I have always admired about Justice Spears is the fact that he has always had a very good historical perspective of things involving the judiciary in cases that come

before the Court, and I'm afraid that when we go about examining institutions of government, we have a sense of losing that historical perspective, unless we are very careful.

As the Court well knows, although I am not a great judicial historian, the reason we have open courts and public trials was because of the abuses of the secrecy of the star chamber, and that's the reason why our forefathers brought that to this country. And so I would encourage you when you look at this rule to not lose that historical perspective and to think along the lines that the rule needs to be drafted in favor of the fact that all of these are open records, that these are open courts, that they are open to the public, and it's only under exceptional circumstances that we should ever permit these records to be sealed.

One of the major reasons I wanted to speak with you today is I just concluded one of these product liability cases, that Tommy was talking about, against a major automobile manufacturer.

During the course of that, the

entire discovery was surrounded by a protective order that I negotiated for one and a half months before I agreed to it. I thought it was a very well drafted protective order. As it turned out, it permitted no access to my being able to provide those materials to other lawyers, because there were always stopgap procedures that the automobile manufacturer could use to prevent that from occurring.

I had to return all the documents at the conclusion of the case. When the case was concluded -- and I use the word "concluded" because the release contained a confidentiality order in it that I can't even tell you whether there was a settlement that was concluded, and I certainly can't tell you the amount of the amount of settlement -- and finally the court judgment was sealed at the conclusion of the case. That's the type of secrecy that has become the norm --

JUSTICE GONZALEZ: What if you had not agreed --

MR. KIDD: -- rather than the exception.

JUSTICE GONZALEZ: What if you had

not agreed, Mack, to any of those terms?

MR. KIDD: Well, okay. There's --

JUSTICE GONZALES: What -- what --

MR. KIDD: There's two problems with that. And, you know, it's sort of like the war on drugs: "Just say no."

The first thing is from the standpoint of my client, and it's always very well done. I mean, defense lawyers are very, very intelligent people, and they represent very good, powerful clients.

You work out a settlement agreement with the automobile manufacturer. They are willing to pay you an amount of money which finally your client is willing to accept, and the settlement agreement is all done. And all of a sudden you get this paper work that has a gag order in it, a confidentiality agreement in it. You pick up the telephone and call him and say, "I'm not going to sign this; no way I'm going to sign this."

He says, "Well, if you don't sign that, you don't get a check. Maybe you'd better talk to your client and see whether your client wants you to reject the settlement amount or

whether your client's willing to go ahead and sign the release as it's presently drafted."

That's -- that's the problem. You are faced with a conflict of interest between your client and being an officer of the court. On the one hand you realize that your public officer-of-the-court position ought to be, "No, I'm not going to do this. I'm not going to allow my client to sign this."

But on the other hand you realize that your -- your major duty has to be to your client, and that's the reason why corporations are able to exact so much secrecy in these proceedings, is because they see the big picture. You only see one little case over here; you're only one little piece of the puzzle. And that constantly was an advantage that the automobile manufacturer had over me in that case, is because they knew about all of this. I knew about none of this.

As a practical matter, the problems that it creates is we have a hope, even where you don't have punitive damages involved, that a lawsuit will have some deterrent effect. If a manufacturer can hide all of these documents,

you lose that deterrent effect.

I can tell you that Bill Whitehurst and I have had it occur with regularity in product liability cases involving exploding tires, involving automobile manufacturers: We will have attorneys call us from across the country that we have contacted who have had similar cases, saying, "You'd better come up here and look at our documents because we are about to be placed under a confidentiality order, and you won't be able to look at anything we have got." And it's been on more than one occasion that we have gotten on an airplane and gone across the country to look at those documents.

The other thing is you have to remake the wheel. It increases the cost of all these lawsuits. The asbestos litigation was a prime example where the plaintiffs' lawyers were having to go back and reprove these things over and over and over again that had already been proved before.

In this case, I had a damaging memorandum that had actually been introduced in the trial of a case in Columbus, Ohio. I knew

from a seminar paper what the thing actually said, and yet I spent nine months trying to get ahold of it, and after the case was concluded, it went back to the automobile manufacturer. I had experts in the case that knew about the memorandum and had never seen a copy of it.

And by the way, when I got a copy of it, it looked like it had been xeroxed 101 times, that it had come off a microfilm machine. It had double red lines between it and it said, "Produced Pursuant to Protective Order" across the face of it, so that if I had wanted to make it into a trial exhibit, you know, it would have looked like trash.

JUSTICE GONZALEZ: So much for the honor system.

MR. KIDD: Huh? Yeah.

JUSTICE GONZALEZ: So much for the honor system -- and protective orders in products cases.

MR. KIDD: I really encourage you when you look at the rule to not lose sight of the overall perspective. I mean, what are we trying to do in this rule? And -- and, you know, I know the family lawyers are up here to

testify about this, and --

CHIEF JUSTICE PHILLIPS: Can you give us a way that we can protect the public interest without allowing somebody just to get in the National Enquirer because of some unfortunate private circumstances?

MR. KIDD: And I -- I think it's a difficult problem. I think the very first thing that the rule has to say is that court records are open records, and I mean that includes discovery.

Gosh knows -- I got out of law school in 1964. You-all started requiring that discovery materials were not to be filed in the -- in the mid 1980s. Over all of that time, we had judges in Travis County that were involved in divorce cases; we had public officials that were involved in all kinds of cases. I can't remember a single abuse where the Austin American-Statesman, or anybody else, went and read some confidential court documents and published some kind of salacious story regarding one of our -- our district judges that was involved in a messy divorce action.

So the first thing is you have to

start off with the overall perspective that they are open records; they are public records. Now let's build in the safeguards. And I'm willing to build in the safeguards, but the safeguards have got to be, number one, difficult, because the litigants themselves can't agree on these things. Like Tommy Jacks said, there's nobody to represent the public.

CHIEF JUSTICE PHILLIPS: Well, it's a difficult thing. For instance, in paupers' affidavits we have the district clerk brought in. On eleemosynary institutions, the attorney general is always a party on a will contest, for instance, that involves a charitable trust. But it's hard to find any one person who has the financial interest or the incentive to represent the public interest here, and on the other hand, with -- as I mentioned earlier -- more of our counties not having a computer generated system of keeping their records. And all that is quite a burden to -- for them to -- for a deputy clerk to figure out who, among newspapers in the county, and these other people who may have signed up, should be noticed in a certain case.

MR. KIDD: In The Washington Post

survey that was done when they came out with their articles entitled "Public Courts, Private Justice," they interviewd one judge in -- in Washington, D.C. His attitude was, "Private lawsuits are private business. I have never given much thought to sealing records unless it's opposed."

And what's happening, especially in the area of protective orders, and I see it now happening in the area of sealing court records, is you have the litigants coming in and they say, "This is agreed to, Judge. We don't have any opposition to this. I mean, both sides are agreed to this." And the judge, being busy and having a docket to control, says, "Well, that's fine. As long as you're agreed to it, I have no problem with it." But there is a problem; there is a problem. And so I think it's got to be left with the courts. It's got to start off with the trial judge and then it's got to be subject to some degree of scrutiny by the appellate courts.

I don't know how to tell you to draw the definition of "compelling need" or "compelling interest" or "the right of the

public," but I think that the McElhaney draft is a step in the right direction, and that is, there has got to be some sort of procedure set out whereby the litigants can provide for the sealing of records.

And gosh knows, you-all make it real tough on us, you see, when you come up with examples where any of us, were we sitting on the bench, would seal the records. I'm not suggesting to you that there ought not to be that proviso or that provision.

The family lawyers give very good examples of cases where the records ought to be sealed.

JUSTICE GONZALEZ: Why don't we hear from them so we can -- in the issue of time.

MR. KIDD: So -- so I'll conclude by saying that -- that I think what needs to be done is to provide the mechanism for it, and then with the guidelines that are drafted by this court, you will provide a way by which those records can be sealed, but only in those exceptional circumstances.

I thank Your Honors.

JUSTICE HECHT: Anybody have

questions, besides Judge Gonzalez?

Thank you.

MR. KIDD: Thank you, Your Honor. I appreciate it.

JUSTICE HECHT: Next up is Howard Nations.

HOWARD NATIONS,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. NATIONS: May it please the Court, I'm Howard Nations from Houston. I'm appearing here as a trial attorney from Houston. I'm also appearing as a member of the board of governors of the American Trial Lawyers Association and on behalf of the Texas Trial Lawyers Association. I will try to be direct, to the point, and brief in my remarks and not be repetitious of what's been said already.

I will reiterate one thing that Mack Kidd said and that is that -- in response to

your earlier inquiry, Justice Phillips -- "Is this a national problem?"

This is at the very top of the list of the Association of Trial Lawyers of America of concern. At the last board of governors meeting, there was a resolution directed to this. Most of the board of governors meeting was given over to consideration of these secrecy orders, and it is -- I anticipate that there is going to be an entire issue of Trial magazine that will come out shortly devoted solely to this issue. It's that big a problem nationwide.

And I would like to --

JUSTICE GONZALEZ: Would we go a long way in solving this problem by any member of this association taking a pledge among each other that "We will not sign another of these orders," period?

MR. NATIONS: The problem is -- that's one of the things I want to address, and that is that this is far -- this reaches much further than the attorneys.

I think a lot of what has happened has been solved in 1987 by this court in Garcia versus Peeples in the shared discovery decision.

But the -- there is a much greater interest here than the interest of attorneys. There is a much greater interest than me being able to give Tommy Jacks information. A lot of that has been taken care of by this court.

I'll -- I'll answer your question momentarily. Let me direct the -- my focus to a very specific thing, and that is the definition of "court records." I feel that discovery must be a part of court records.

Several reasons: First of all, discovery is not a part of court records just quite fortuitously because there's a rule which was adopted as -- as an administrative aid to the court clerks, having to do with storage space. But there is absolutely no doubt that if I go out and take a deposition tomorrow and the witness draws an exhibit on it, and I have custody of that exhibit and I go make changes on that exhibit, then I am tampering with court records. There is no doubt about that. The fact that I am in possession of it does not keep it from being an official court record, and as an official court record, the fact that I have possession of it does not reduce the dignity of

it to any degree less than the plaintiff's original petition which is on file at the courthouse.

So this -- if, in fact, there are constitutional arguments to be made here concerning the open courts doctrine controlling these records, then certainly the -- the rights of consumers and other groups to -- to court documents should not be sacrificed on the alter of -- of storage space. That's a totally artificial distinction; it's an administrative matter.

So we -- the first point I want to make is discovery must be a part of this. The second point is that 90 percent -- when you take into account the cases that are settled, 90 percent of discovery -- or 90 percent of the court records in most cases will be in depositions, requests for production, requests for -- and the documents that are maintained by the lawyer, they are much more than they are in the actual court record, because we're only trying 3 percent of our cases, or even less. So all those other cases where there's settlement, we end up with a much bigger portion of the file

in the lawyer's office than you do in the court. So if you -- if you don't apply this to discovery, then you're -- you're applying it to maybe 5 percent. You're addressing maybe 5 percent of the problem.

The next thing I would like to address -- and I hope this is more responsive to your question, sir -- is from an anecdotal point of view. The other side of the coin that Tommy was talking about -- and Mack was just talking about -- is what happens when you seal those court records?

I want to tell you a very quick story of what happened when a court record was not sealed. A case was tried in Hibbing, Minnesota, in which a product was involved. It was a forklift. There was a $13.8 million jury verdict. After that jury verdict -- Hibbing, Minnesota, is not known as the great plaintiffs' bar area; you don't see plaintiffs' lawyers flocking there to practice. So obviously something happened to catch the attention of the jury.

In that case, the plaintiff's lawyers and defense lawyers agreed to a

settlement, post judgment. The plaintiff's lawyers and the defense lawyers went into chambers with the Court and said, "We would like to seal this file" -- both sides.

The Court, sua sponte, said, "No. Why? I represent the public interest. I'm not going to seal this file," and he refused to do so.

Now, let me tell you what came out of that, because this is the other side of the coin. When that judge refused to seal that file -- the case is one that's been going on since 1954, where forklifts tip over.

When they tip over, they either catch people across the head and kill them; catch them a little lower and then they're a quadriplegic; catch them lower, paraplegic; or the lucky ones get thrown out just far enough that it breaks their legs.

It's been going on since 1954; there's documentation on that since 1954. Since 1954 they have been sealing documents. Since 1954 they have been having protective orders. There was obviously a smoking gun in that case. The smoking gun was left available to everyone

by the Court who refused to seal it.

As a result of that, today, two years ago, that manufacturer has now, after 25 years -- 34 years -- after 34 years of refusing to address that problem, that manufacturer has made a $35 change in that product which has now solved that problem, which may address your question earlier, Justice Hecht, which is: What happens if these records do get out? Is there an explosion of litigation?

There is not an explosion of litigation if, as a result of these records being produced, and as a result of the smoking gun being found, the manufacturer says, "Wait a minute. Everybody knows about this now; we can't hide this anymore. Let's go change our product."

So there are forklifts being driven all over -- all over this country today, made by that one manufacturer, which are infinitely safer than they were three years ago. And I -- I'll tell you now that they are infinitely safer because of the brave actions -- I mean, just the -- the totally individual action of that one judge who said, "No, I'm not going to seal this

file." And that product was changed as a result.

But it wasn't -- they didn't look at his decision and say, "Hey, we'd better change our product. What happened?" And this is where the rest of it comes in besides the lawyers. There are other people that have a considerable interest in this. Those people are consumer groups. They should have access to the precise documentation that is being sealed, right now. Consumer groups who have the consumers' interest at heart, the people who are testifying before legislative groups, this court, often say, "This is a matter for legislative mandate; we have to wait for the Legislature to take some action."

All right. Those people who are going to testify before legislatures should have access to those files that are being sealed, and if they did, they could walk into the Legislature and say, "Look, you need new regulations on this. We need new legislation to protect the public."

The -- the persons, the -- the regulatory groups who are setting industry standards should have access to these records.

The same people who testify before legislatures are the ones who testify in -- in industry standards. In that forklift industry, there's -- there's a group that sets the standard for the industry. The people who got access to those records went to the annual meeting and testified before the group that sets the industry standards and said, "These industry standards need to be changed." And now the question is: Can a whole industry now ignore that? And now that -- now that a leading manufacturer of forklifts has said, "Okay, we're going to change it," now you have got a new industry standard, and now everybody else is either going to have to get in line or they are going to be facing -- they will be facing a multiplicity of litigation; either that, or they make their product safer, which is what this is all about, which is the safety of the consumers.

So to answer your question, sir, if all the plaintiffs' lawyers got together and said, "We're just not going to sign these anymore" --

JUSTICE GONZALEZ: We'll extract the same pledge from every judge in Texas.

MR. NATIONS: No. But -- but it's still --

JUSTICE GONZALEZ: They're not going to prove any more --

MR. NATIONS: You're still not --

JUSTICE DOGGETT: That's really what this rule will do on some of these things.

MR. NATIONS: The -- the problem comes back to the one of "you can't do it because you have got the individual client that you have to represent," and if the client says to you --

JUSTICE GONZALEZ: -- "I want my money."

MR. NATIONS: You're exactly right. The client says, "Look, you know, I'm paraplegic."

JUSTICE SPEARS: "Sign what you have to. Get me the money."

MR. NATIONS: Yeah, exactly. "I'm the one sitting in the wheelchair. I'm not thinking about people that may be hurt in the future. I'm the one that's confined to a wheelchair for the rest of my life. I want my money, and I want it now."

You know, I -- I -- I have made an occasional persuasive argument in my life, but I never -- I've never been persuasive enough to persuade an eighteen-year-old paraplegic, as I had in that case, to say, "No, you sit in that wheelchair for a couple more years while I try to work this out for the good of the public," and also you turn down the extra dollars they are going to pay for the -- for the -- for the confidentiality agreement. It just can't happen. And that's where -- that's the problem. That's why we're -- I hope we're making the point that you're the one that has to do this. We can't. The plaintiffs' bar can't. The individual plaintiff's lawyer cannot do it, because we have to respond to our client's need. And the -- the group that has to do it is the group that is representing the public, and that has to be this group -- the interest of the public -- and this group is the only one that can do it.

So that's all the comments I have, and I will be glad to answer any questions if you have any more.

JUSTICE HECHT: Thank you.

MR. NATIONS: Thank you, sir.

JUSTICE HECHT: Next to last is Charles Herring.

MR. HERRING: I think I'm going to pass.

JUSTICE HECHT: All right.

MR. HERRING: I think the board has heard enough. I'm co-chair, and we're going to try to have a -- the last committee meeting on December 11th and have a rule out by the end of December, but I think you have got a good picture of what it's all about. And the good news is that there's pretty much agreement on most of the structural rule, and I think we'll have a good proposal for the Court. But thank you for your patience today.

JUSTICE HECHT: Mr. Soules signed up earlier, but he --

MR. SOULES: If I can just --

JUSTICE HECHT: All right; all right.

LUKE SOULES,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. SOULES: I'm Luke Soules. I'm here as a practicing lawyer. I don't really have a position to advocate, but there are some remarks that seem to me -- that I would like to leave on the record, at any rate.

The court system deals with the most sensitive problems of human nature, and somehow there has to be consideration to those human concerns and the need, in many of those human problems, for privacy.

In, I believe it was, Griswold versus Connecticut, Justice Douglas wrote -- and I believe that was a birth control case -- that the right to privacy --

JUSTICE GONZALEZ: Contraceptives.

MR. SOULES: Contraceptives.

-- that the right to privacy is fundamental under the Constitution of the United States. Of

course, the right -- the freedom of the press is a very definite right. But the right to be let alone and the right to privacy is also important.

My -- my practice is principally business litigation. I don't represent plaintiffs all the time; I don't represent defendants all the time. I do do a certain amount of family law work in connection with my practice, so I think that the rule that we come with needs to balance those considerations with some of the others that have been stated here.

Second, on discovery matters, this Court in 1988 wrote a very, I think, meaty rule dealing with the problem of not sharing discovery. It's contained in Rule 166b, 5 (c). It says that a trial judge is to limit dissemination of discovery only for good cause shown.

And we know that as a result of Garcia versus Peeples that outsiders can come back and decide whether -- and have a redetermination as to whether or not discovery should be open. They have standing to do that. Discovery is not open records.

The Supreme Court of the United States and the courts of this state have balanced the need for openness in discovery and keeping some of that sealed with the -- the need to -- to get cases tried; to get them prepared, tried, settled, and that sort of thing.

Any outsider has standing to challenge a record to seal, and we know that by -- because of the case of -- of Houston Chronicle versus Hardy. It arose out of nuclear power plant litigation. When Judge Hardy sealed the discovery in that case, I think principally out of regulatory concerns because the licensing of the plant ultimately was -- was very vital, and the extent to which that discovery would later be open for those purposes was -- was to be later determined.

But at any rate, the -- the Court of Appeals wrote that Judge Hardy's order sealing discovery, except for that used in open court, and on a long list of other criteria, that it was a constitutional order. It came to this court. It was writ refused, NRE. It went to the Supreme Court of the United States, cert denied.

So discovery can be handled differently, but it must be handled consistently with Rule 166b, 5 (c). The tools for discovery matters are already in the rules. What we don't have rules about are sealing records that are used in open court where matters of significant individual sensity -- sensitivities need to be taken into consideration, and that, I think, is the charge of the subcommittee, together with any other charge that this Court obviously wants to -- to put with us. And the -- the focus of this effort so far has been dealing with records that will be used in -- that have been used in court, and court judgments, and that sort of thing.

Those are my remarks, and I will stand for questions, if any.

JUSTICE GONZALEZ: Let me make sure I understand the drift of your -- your testimony. Do I hear you say that you disagree with the testimony that was given here by Mr. Tommy Jacks and Mack Kidd and Howard Nations to expand the definition of "court records" to include discovery, and you are saying do not do that? Do I hear you correctly?

MR. SOULES: I say that they are different -- discovery products are not open court records under the existing case law.

JUSTICE GONZALEZ: So you are not for the expansion of the definition of "court records" to include discovery?

MR. SOULES: Exactly.

JUSTICE GONZALEZ: I -- I wanted to make sure that I -- we were communicating.

MR. SOULES: That is correct. And I think that the tools for handling discovery products are there. Now, if the lawyers are going to agree to seal records, contrary to what the rules provide, and if the judges are willing to sign orders sealing discovery, contrary to what the rules provide, how do we deal with that by writing another rule? We have already got a rule that says that's not supposed to happen, but the lawyers and the judges are not honoring that rule. The reason that we have that rule is because in 1987 the trial lawyers wanted to raise shared discovery to a -- to a better level. Before that, I guess it didn't exist at all. And they came to the Supreme Court Advisory Committee with a suggestion, and that

suggestion, actually, I think, came from the trial lawyers through the Court and then to the advisory committee, and that rule was worked on and it had -- the advisory committee had a contingent of trial lawyers and other lawyers on it. It was worked out and was submitted by the Court and adopted by the Court that shared -- the discovery was to be shared unless there was good cause for sealing it and limiting its -- its disseminations.

JUSTICE GONZALEZ: What was that rule?

MR. SOULES: Rule 166b -- that's the major discovery rule -- Section 5, item (c). And Section 5 deals with protective orders, and Section (c) says that only for good cause is a judge to sign an order that limits dissemination of discovery or otherwise restricts the use of discovery product in a given case. And, again, Houston Chronicle versus Hardy, and Garcia versus Peeples shows us that outsiders have standing to challenge an improper discovery rule.

So just because Mr. Jacks and his defendant have -- have agreed to an order

doesn't mean that the Austin Statesman and -- and Mr. Nations and others can't come and say, "That was an improper order, and we want that discovery unsealed so we can look at it and use it."

CHIEF JUSTICE PHILLIPS: This is not to say that even if one lawyer signs a -- an agreement, he can get his friend across the street to file suit --

MR. SOULES: I don't know whether he would get his friend across the street to do it, but Mr. Nations, on his own motion, can do it, because that's the Texas law now.

JUSTICE HECHT: Any other questions?

JUSTICE GONZALEZ: Well, let me -- I don't understand your -- the rule provides: "On motion specifying the grounds and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights," et cetera. And then it says: "Specifically, the court's authority as to such

orders extends to, although it is not necessarily limited by, any of the following." And (c) is: "ordering that for good cause shown results of discovery be sealed or otherwise; that its distribution be limited; or that its disclosure be restricted."

MR. SOULES: "For good cause shown" was -- were critical words negotiated in the rule making process of that rule.

JUSTICE GONZALEZ: All right.

MR. SOULES: Thank you very much.

JUSTICE HECHT: Thank you, Mr. Soules.

Mr. Webb?

MR. WEBB: Thank you, Your Honor.

BRIAN WEBB,

appearing before the Supreme Court of Texas in administrative session to consider proposed changes to Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and Texas Rules of Civil Evidence, stated as follows:

MR. WEBB: I'm Brian Webb from Dallas. I'm here basically on my own, but I

want to speak briefly from the family law perspective.

First of all, I'm moved by the eloquence and the logic of everybody who has spoken today. I think open records basically as a concept is a good concept. I'm also impressed by the Court's concern about family law matters. I'm going to try to be brief. I know it's late in the day.

We're talking about the proposed rule as a standard of serious and imminent threat to the administration of justice. I think those of us in family law are somewhat concerned about how we would meet that standard, when what we are primarily concerned with is a right of privacy that our clients and their families have. All they're doing is presenting their personal business to the court to resolve a personal relationship. I'm talking about cases where records are sealed by agreement, for the most part, almost exclusively. I'm not talking about trying to seal records where somebody has committed a crime or a fraud, or something like that.

Somebody earlier today mentioned

Mr. Bass and the abduction attempt that was foiled on him. Without using Mr. Bass, but take somebody in his position, and look at some of the things that are available in the divorce file if you are in his position of prominence and you're subject to that sort of a threat. You not only have your entire financial life laid out in a property settlement agreement of some sort, you have all the payments that you make, all the property that you have, whatever your assets are that you own, what you have had to give to your spouse, one way or the other. You also have things as fundamental as the schedule that sets out day by day, hour by hour, week by week, as to where your kids are, who picks them up, where they are going to be at a given hour.

If you are subject to that kind of a threat from somebody out there in the public that you don't know, that's chilling information to have out there. I don't know why anybody in that position should be compelled to leave that information in the public record simply because he's gone to the courthouse to get his divorce.

There needs to be a standard, I

think, that would apply to divorce and family law cases in such a way that it would allow people to preserve their privacy and their dignity. There is no compelling public need to know what problems people have had in their marital life, again, unless there is some criminal or fraudulent activity going on. It's simply their personal business being resolved. Sealing a court file in a divorce is no more chilling to the public interest than pulling the blinds of their bedroom as they fight, or whatever.

Children are -- are always going to be impacted by a divorce, but if you have got discovery that includes depositions about what the parents have done, or not done, or accused each other of doing that remain on the public record, in those cases where parents want to seal the record by agreement, including those depositions, I submit there is no good reason to keep those depositions a matter of the public record where not only somebody else could go back and read them, but these children could go back and read them 10 years later, or 15 years later, or one year later.

There are just all sorts of considerations in the family law area that need to be addressed, I think, differently. We used to have to ask for restraining orders by alleging violent and ungovernable temper, and -- and people would pick that up sometimes in newspaper articles about prominent people. The rule was changed so you don't have to make those allegations. Family law matters are exempted from the requirements of Rule 680 for purposes of restraining orders.

Exceptions are made in the family law area all the time. It's not a matter of saying family law matters are not subject to open records or being open to the public, but whatever restraints on the ability to seal are imposed have to take into account that this is a very different kind of a situation, and I think it's critical to anybody in any position of prominence or public exposure, or -- or anyone who is just simply trying to preserve their privacy and dignity of their family and their -- their family relationship.

One thing I would like to mention -- and someone mentioned earlier -- Ken Fuller's

recommendation of an ex parte sealing order. I think that's critical in the family law area where you would ask that the record be sealed at least until the hearing. If you are going to have a hearing required as to whether to seal, you ought to have that sealing order in effect until the hearing determines that it should be lifted for some reason. If you have got allegations of abuse, or allegations of whatever, you have got subject matters that are -- are in need of being protected immediately in the family law area on a day-to-day basis.

That's really all the comments I have. Does anybody have any questions?

JUSTICE HECHT: Questions of Mr. Webb?

Thank you.

MR. WEBB: Thank you.

JUSTICE HECHT: We may have overlooked someone. I don't mean this to be encouraging, particularly at this time, but we don't mean to overlook anyone, either.

May I say that we -- the Court is deeply obliged to -- to all who have had input

today, because most of -- most of you have come at your own expense, some time, some distance, and we are very grateful for your -- for your comments.

That's all we have, Mr. Chief Justice.

CHIEF JUSTICE PHILLIPS: Anything further?

Thank you.

MR. WHITEHURST: Judge, let me say that I haven't taken up any of your time and -- and spoke with you, but I do want to thank you for this process. I think this has been really good today for the lawyers and, I hope, for the court --

CHIEF JUSTICE PHILLIPS: Well, we --

MR. WHITEHURST: -- and I think certainly for the bar and public.

And we are very appreciative of your doing it this way, and hope we'll do it in the future.

CHIEF JUSTICE PHILLIPS: We will, and we thank you, too.

We're adjourned.

(Proceedings Adjourned)

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

I, JUDITH CAROLYN COX, Certified Shorthand Reporter in Travis County for the State of Texas, do hereby certify that the facts stated by me in the caption hereof are true; that the said witnesses who came forward did make the above and foregoing statements as shown; that I did, in shorthand, report said proceedings; and that the above and foregoing typewritten pages contain a full, true and correct transcription of my shorthand notes taken on said occasion.

WITNESS my hand and signature of office this, the 18th day of December, A.D., 1989.

Judith Carolyn Cox

JUDITH CAROLYN COX, CSR, RPR
Certificate No. 2201
Expiration Date: 12-31-90

ANNA RENKEN & ASSOCIATES
3404 Guadalupe
Austin, Texas 78705
(512) 452-0009

CERTIFICATE OF CHARGES:

Charges for Preparation of

Transcript (Orig.) _____

Mileage. . . . . _____

TOTAL FEES

CHARGED TO MR LUKE SOULES . . # 1560,00

Judith Carolyn Cox

JUDITH CAROLYN COX, CSR, RPR

#000,481JC