

P R O C E E D I N G S

February 9, 1990

Afternoon Session

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

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

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

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

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

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

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

22 CHAIRMAN SOULES: Pat had a comment about
23 that.

24 MR. BEARD: Well, I have never been exposed to
25 a lawyer trying to seal something during the trial of a case.

1 If you get a protective order, you have an in camera
2 inspection, but the sealing, doesn't it come when the case is
3 over?

4 MR. DAVJS: But of what?

5 MR. BEARD: As a practical matter?

6 MR. DAVIS: What is it we are sealing or what
7 is it we are trying to protect if it is not discovery? That
8 is where I have a problem.

9 CHAIRMAN SOULES: Well, it could be the
10 evidence, some of the evidence in the case.

11 MR. HERRING: We have motions for summary
12 judgments, affidavits or attachments. That kind of thing is
13 what they talk about.

14 MR. JONES: You mean what --

15 MR. HERRING: Well, before the end of the
16 case, though, a summary judgment motion that has affidavits
17 or exhibits attached, that is one context.

18 MR. DAVIS: That is not discovery.

19 MR. HERRING: It may not be. The affidavit,
20 for example, may not have been produced in discovery. I
21 think the question is more or less difficult depending on
22 whether the rule applies to discovery, which I think Lefty is
23 saving for the end of day. That is a nice, juicy issue.

24 MR. DAVIS: That is simple.

25 MR. HERRING: Well, I figured you would think

1 it was simple, Tom, but there might be another view on that.

2 MR. DAVIS: Not legitimate.

3 CHAIRMAN SOULES: Where it has come up in our
4 practice is where we will file a motion and somebody will
5 file a response that just has scurilous material in it,
6 something just for the purpose of prejudicing the court,
7 doesn't really have that much to do with the lawsuit, and we
8 jump right on it and try to get that stuff sealed up saying
9 it is irrelevant and doesn't have anything to do with the
10 questions and somebody is going to find it and seal it up,
11 and they nearly always do. And then they look at it and look
12 at it in camera and decide whether or not it has to come out
13 and should be seen by the public, if it has any connection
14 with the cases at all. And that has happened.

15 MR. DAVIS: I don't see that there is any
16 problem there.

17 CHAIRMAN SOULES: Well, you represent a party
18 and you file a motion.

19 MR. DAVIS: No, I mean there isn't any
20 question about that. You aren't going to have the public
21 wanting to see that, you are going to have the newspaper --

22 CHAIRMAN SOULES: It depends on how profile
23 the case is. This was pretty high profile.

24 MR. DAVIS: Family cases and divorce and, yes,
25 maybe that -- I am just trying to visualize the context in

1 which it can arise. I can see family adoption and criminal
2 child abuse cases, things of that kind, but other -- in other
3 litigation, what is it other than discovery? I am just
4 having trouble with it.

5 MR. HERRING: Well, again, the trade secrets
6 lawyers would say it would be documents that show the trade
7 secrets attached to the motion.

8 MR. DAVIS: Where somebody sues somebody for
9 infringement of a patent and then you get into a question
10 of -- okay, well, it is a rather limited situation there when
11 you exclude discovery.

12 CHAIRMAN SOULES: This whole sealing thing is
13 limited. It is just really not very widespread, except when
14 it does happen, it gets a lot of notariety. Of course,
15 obviously, we have to deal with it effectively.

16 MR. DAVIS: I am trying to know what we are
17 dealing with.

18 MR. BEARD: You are talking about instances
19 where you seal during the course of a trial. I have never
20 been exposed to that.

21 MR. HERRING: Well, somebody -- and again, the
22 only one I know of that people come back to is trade secrets
23 and they -- Quincy pulled out a cite that one of the trade
24 secrets lawyers had given us to an ALR annotation which says
25 in suits in equity to enjoin wrongful use or disclosure of

1 the plaintiff's trade secrets, the courts very generally have
2 adopted the practice of taking evidence in camera where it
3 involved disclosure of the specific nature and details of the
4 plaintiff's trade secret. And there is discussion of it and
5 the case is going both ways all over the country on it in the
6 trade secret context. I don't know the others.

7 MR. BEARD: I have done that in camera, seal
8 it.

9 CHAIRMAN SOULES: That is Hadley's position,
10 which is broader than mine, that not only would the record be
11 inspected in camera and perhaps sealed, but also that the
12 evidence could be taken in camera.

13 MR. BEARD: I have had in camera hearing on
14 trade secrets.

15 MR. SPARKS (SAN ANGELO): Luke, let me ask you
16 something, and we are talking about (B)(1) under hearings,
17 whether to put in the words in camera or not?

18 CHAIRMAN SOULES: That is right.

19 MR. SPARKS (SAN ANGELO): And it would seem to
20 me like if you take Tom's language, which is labeled C in the
21 handout, that doesn't have the in camera language in it, you
22 put it in, you still have the right during the hearing to
23 file for a protective order or to file a motion to consider
24 certain evidence in camera. You still got all the
25 protections there, but the hearing is a public hearing. That

1 draft seems to be pretty good to me. But by not mentioning
2 it, you are not saying you can't do it. It is just a right
3 that you have in the presentation of evidence or accumulated.

4 CHAIRMAN SOULES: Well, that may get it if we
5 read the Locke Purnell draft, Tab C, Page 2, (2)(b)(1) I
6 guess is the number here, to be just like any other hearing
7 that if it should become desirable to seek some sort of an
8 in camera proceeding, whatever it may be, do it just like you
9 would in any other context.

10 MR. SPARKS (SAN ANGELO): Any other hearing
11 you got is what I am saying.

12 CHAIRMAN SOULES: And that our committee is
13 understanding if we are that (2)(b)(2) about this hearing,
14 that doesn't preclude the court in a sealing hearing from
15 conducting parts of the proceedings in camera as in any other
16 case where circumstances indicate. I mean if that is the
17 consensus of this committee, we make that the legislative
18 history of this, then maybe it is enough, maybe it is not.

19 MR. SPARKS (SAN ANGELO): If you are wanting
20 to make that legislative history, maybe I ought to rethink my
21 thoughts.

22 MR. DAVIS: You want to go down in history
23 correct.

24 MR. JONES: I have never seen before ever
25 quoted deliberations that this committee has ever ruled.



1 CHAIRMAN SOULES: Judge Spears has written
2 some opinions where he goes back to these proceedings. I
3 think some others too. That just comes to to mind.

4 JUSTICE HECHT: Doesn't this boil down to
5 somebody wants to file a motion for summary judgment, and
6 they want to attach an affidavit, and the affidavit has
7 something in it that they don't want to be disclosed. They
8 want it sealed, and then they are going to have a hearing on
9 it whether it is sealed or not, and their problem is they
10 want to tell why it is sealed, why it should be sealed. If
11 they tell too much about it, they are going to disclose what
12 the contents are and it wouldn't do any good to seal it. If
13 they don't tell enough about it, they may not meet their
14 burden of proof and it may not get sealed. But how many
15 times is that really going to happen? I have a hard time
16 imagining when they are really --

17 MR. HERRING: I wouldn't think it would be
18 very many. It is a problem they expressed, and I don't do
19 that full time, so I can't speak to how often. I wouldn't
20 think it would be often.

21 CHAIRMAN SOULES: Bill Dorsaneo.

22 MR. DORSANEO: It certainly is an entirely
23 different problem from this overall problem of public access
24 or nondisclosure to the public of information. We are just
25 talking about whether or not somebody can conduct part of the

1 proceedings without an adversary, and when we are talking
2 about this, we are just talking about to what extent will
3 ex parte communications with the court be permitted as part
4 of the process of determining an issue that is at issue
5 between persons or otherwise adversaries. To me, I can see
6 how the trade secret lawyers would be interested in it, but I
7 don't see how it has much to do, frankly, with the sealing of
8 court records. It is a distinct problem. We are talking
9 about keeping something from your adversary because you don't
10 want them to have it because it will be damaging to you if
11 they have the information, either because it is the same
12 information that you are trying to have determined to be
13 confidential, or because it is generally something you would
14 like to keep secret.

15 CHAIRMAN SOULES: Hadley.

16 MR. EDGAR: On the other hand, though, if you
17 are focusing upon the public's -- public access to the court
18 records, I can see how a judge looking at this without some
19 reference to an in camera inspection might be disinclined to
20 conduct an in camera inspection because of the public's right
21 to know, and therefore, it seems to me that perhaps reference
22 to an in camera inspection might clarify in the judge's mind
23 that he or she has the right to conduct an in camera
24 inspection even though he or she may have a right to do it
25 under the discovery rule. But it seems to me that this is

1 something separate and distinct from discovery and reference
2 to in camera should be provided.

3 CHAIRMAN SOULES: Well, responding to that,
4 again, I don't -- I am not advocating. A way to fix that is
5 just to say "in camera proceedings may be conducted as in
6 Rule 166(b)(4)," just not get into a lot of -- we have got
7 discovery in camera practice going now and some standards
8 about when it is done and when it is not done, reference
9 back and try to pick that up.

10 MR. BRANSON: But aren't they really talking
11 about in camera ex parte proceedings as opposed -- I mean
12 from something other than really looking at a document?

13 CHAIRMAN SOULES: Yes, and that happens in
14 discovery, of course. The judge will listen to a witness
15 answer questions and sometimes let the witness' lawyer be
16 there when the witness answers questions, but not anybody
17 else.

18 MR. BRANSON: I have never had them do that.

19 CHAIRMAN SOULES: I have. Okay, do we need to
20 do anything about this in camera? I guess that is really the
21 threshold. We have talked about, I think, most of the
22 considerations. Why don't we decide what we need. We want
23 to do anything about it, whether we are going to just leave
24 the Locke Purnell (2)(b)(1) as it is or --

25 MR. MORRIS: You are going to have to make one

1 change for sure.

2 CHAIRMAN SOULES: All right, what is that,
3 Lefty.

4 MR. MORRIS: It says "A party seeking sealing
5 shall have the burden of proving compelling need by clear and
6 convincing evidence."

7 CHAIRMAN SOULES: Well, we have already done
8 that.

9 MR. MORRIS: That needs to be stricken.

10 CHAIRMAN SOULES: By a preponderance of the
11 evidence.

12 MR. MORRIS: Well, let's just strike that. we
13 have already got this worded --

14 CHAIRMAN SOULES: I got you.

15 MR. MORRIS: We have set the burden of proof
16 up at the top.

17 CHAIRMAN SOULES: Take that sentence out.

18 MR. DAVIS: Luke --

19 CHAIRMAN SOULES: Yes, sir.

20 MR. DAVIS: With Edgar's thing, one proposal
21 is just to leave it silent and let the courts assume they
22 have in camera proceeding which they have it in everything
23 else, or as was suggested, make a limited reference to it,
24 let them know they do specifically have it just like they do
25 in other proceedings. I am inclined to see that I can't see

1 there would be any harm to at least point out that in camera
2 proceedings are available the same as they are in Rule 166,
3 at least remove any doubt in anybody's mind without really
4 getting into the details of how they conduct it or who they
5 listen to or who they don't listen to.

6 CHAIRMAN SOULES: Why don't we get a consensus
7 on that then. How many feel that we should make reference in
8 (2)(b)(1) to the availability of in camera proceedings?
9 Okay, one, two, three, four, five, six, seven, eight. How
10 many feel that there should be no such reference? Eight
11 to -- one, two, three, four, five, six, seven, eight. Okay,
12 we are going to vote again. Everybody vote this time. Take
13 a position one way or the other. It is a question of we
14 mention in camera in (2)(b)(1) or not mention in camera.

15 MR. MORRIS: May I say something?

16 CHAIRMAN SOULES: In the chair's draft, we had
17 written in there that the in camera hearing may be held --

18 MR. SPARKS (SAN ANGELO): You have got the
19 whole hearing --

20 MR. MORRIS: I know, hang on a minute --
21 reveal the information which is sought to be protected. I
22 think that that is the only place where in camera would be
23 appropriate.

24 In other words, I don't think to go back to a
25 discovery rule over on another rule. I think here we are

1 talking about sealing, and the place where in camera is
2 appropriate here is where, as Chuck said earlier, you are
3 going to let the cat out of bag in having the hearing.

4 CHAIRMAN SOULES: Do we mention in camera or
5 not in this (2)(b)(1)? Those who say we should --

6 MR. JONES: Mr. Chairman. .

7 CHAIRMAN SOULES: Yes, sir.

8 MR. JONES: I think where everybody is having
9 a problem, at least where I am having my problem, is this
10 phrase or term or whatever we want to call it of an in camera
11 hearing.

12 Now, as far as I am concerned, there aint no such
13 animal. I have never been to one. Many of you may have.

14 MR. SPARKS (SAN ANGELO): In camera evidence.

15 MR. JONES: There are in camera inspections of
16 evidence, but an in camera hearing implies to me that you go
17 hide somewhere, and I don't know who is there or exactly what
18 they do, but everybody is not there, that is for sure. And I
19 just don't think that we ought to be expanding that kind of
20 concept without knowing where we are going. I don't even
21 know whether it is constitutional.

22 CHAIRMAN SOULES: I am going to take a
23 consensus. It was eight to eight last time. Somebody didn't
24 vote. Everybody please vote this time whether or not we
25 include anything in here about the availability of in camera

1 proceedings. That is the question. How many feel we should
2 include something in here about the availability of in camera
3 proceedings. One, two, three, four, five, six, seven, eight
4 nine, 10, 11 say to include it. Those opposed to it? I hope
5 that is not 11 again. One, two, three, four, five, six,
6 seven, eight, nine, 10. Okay, 11 to 10. We are going to
7 mention.

8 MR. DORSANEO: Steve told me he votes with me.

9 CHAIRMAN SOULES: All right, 11 to 10. We are
10 going to do it. Now let's try to figure out quickly how to
11 do it so we we can get on with this.

12 MR. DAVIS: I suggest just a broad reference
13 that these proceedings can be held in camera in accordance
14 with the practice under rule so and so.

15 MR. MORRIS: Let me make a suggestion. I was
16 going to say something like "documents may be reviewed in
17 camera upon request by any party if the court finds that
18 information would be revealed which is sought to be
19 protected." In other words, what you are trying to do is
20 strictly limit to where you don't let the cat out of bag.

21 MR. EDGAR: Did you use the word record?

22 MR. MORRIS: I said documents.

23 MR. HERRING: Court records sought to be
24 sealed.

25 MR. MORRIS: I came after that colon. I put

1 "however documents may be reviewed." Can you read back what
2 I read?

3 MR. DAVIS: It is information sought to be
4 sealed.

5 MR. HERRING: Why don't we say the court
6 records sought to be sealed because the rule deals with court
7 records, whatever those are.

8 MR. MORRIS: May be reviewed in camera upon
9 request by any party if the court finds that information
10 would be revealed which is sought to be protected. How about
11 that.

12 MR. ADAMS: He has already got the power to
13 review something in camera. The court has got power to look
14 at something in camera, doesn't he, any time.

15 JUSTICE PEEPLES: Why not mention it then.

16 MR. MORRIS: This is a new proceeding,
17 Gilbert.

18 MR. EDGAR: Read it again, please.

19 MR. DAVIS: Somebody can argue that they
20 didn't say anything about it --

21 CHAIRMAN SOULES: Well, if somebody raises a
22 privileged question at this hearing, doesn't have anything to
23 do with revealing the information sought to be protected. It
24 is a privileged question, attorney/client privilege. Can the
25 Court in one of these hearings conduct in camera

1 considerations of whether or not there is, in fact, the
2 attorney/client privilege at risk.

3 MR. JONES: That is raised in privilege when
4 he first got past --

5 CHAIRMAN SOULES: This is the first time.

6 MR. JONES: -- getting ready to file a suit.

7 CHAIRMAN SOULES: This is the first time that
8 it has come up. Isn't in camera proceedings --

9 MR. MORRIS: It is not going to be the first
10 time, though, is it, Luke?

11 MR. HERRING: It may.

12 CHAIRMAN SOULES: I understand hypothetically
13 it is. I don't see the problem with just saying "in camera
14 proceedings may be conducted as provided in 166(b)(4), and
15 that is privilege, trade secret, and it is the same kinds of
16 problems really that we are dealing with here.

17 MR. ADAMS: I have got a question. Is it
18 going to be, in camera, is he just going to be looking at the
19 court records or is he going to be looking at some affidavit
20 the other party hadn't seen? What is the court going to be
21 looking at when we talk about in camera?

22 CHAIRMAN SOULES: It would be just like a
23 discovery hearing. If we go up to 166(4).

24 MR. ADAMS: It is not going to be any lawyers
25 in there.

1 CHAIRMAN SOULES: May be.

2 MR. ADAMS: He is going to be looking at
3 something that has been furnished to him by one side that the
4 other side hadn't seen like an affidavit from an engineer or
5 something like that? What is going to happen if it is in
6 camera.

7 CHAIRMAN SOULES: Judges can, and they do,
8 conduct in camera hearings about every way you can imagine,
9 sometimes both lawyers, sometimes no lawyers. Sometimes a
10 witness.

11 MR. JONES: How can something become a court
12 record in an in camera proceeding.

13 CHAIRMAN SOULES: We have voted to put in that
14 in camera proceedings are available. How do we say that?
15 That is what is on the table right now. John O'Quinn.

16 MR. O'QUINN: I think we ought to say it the
17 way you said it awhile ago. Do you remember what you said?

18 CHAIRMAN SOULES: I have said it two or three
19 ways, John, awhile ago.

20 MR. O'QUINN: Well, what I remember you said
21 while ago was that the court can proceed in camera, and then
22 you reference the rule on discovery in camera, you know, in
23 accordance with where that rule is, and it probably needs
24 some language like Lefty had been talking about, you know, if
25 there is some compelling need for that or however you put it.

1 If it is necessary in order to prevent, you know, the
2 disclosure of their information.

3 MR. MORRIS: It looks to me like we are not --
4 this isn't a discovery procedure. I think the problem is is
5 we are creating a whole new procedure or proceeding in Texas,
6 and discovery is over here and you will have your discovery
7 fights and privilege fights over here, but when it comes to
8 whether or not this is going to be sealed, it seems like the
9 only one thing the court at this stage is going to be
10 interested in, and that is whether or not he doesn't want to
11 let the cat out of bag in reviewing it when deciding whether
12 or not to seal it. And why wouldn't he, in this one
13 instance, just review it in camera to determine whether or
14 not it should be sealed in such a manner so it won't reveal
15 the information sought to be protected. I mean I think we
16 are mixing discovery with a sealing hearing.

17 MR. SPARKS (SAN ANGELO): Lefty, when he has
18 his private in camera hearing and he rules that it is
19 sealed, and I don't think it is going to be sealed, how do I
20 convince an appellate court that he abused a preponderance of
21 evidence in sealing this because I don't know what went on at
22 the hearing.

23 MR. DORSANEO: You don't know what it is.

24 MR. SPARKS (SAN ANGELO): I don't even know
25 what it is. We are getting into a problem that I think

1 Franklin points out, you can't have an in camera hearing.

2 MR. MORRIS: Says the hearing should be held
3 in open court.

4 CHAIRMAN SOULES: All right, let me propose
5 this: "The Court may conduct in camera proceedings where
6 necessary to prevent disclosure of the record sought to be
7 protected, or the substance of that record."

8 JUSTICE DOGGETT: I have the same concern as
9 Franklin has about the term in camera proceedings. It is one
10 thing to have an in camera inspection of documents. It is
11 another thing to have a proceeding that is really an ex parte
12 proceeding.

13 MR. HERRING: Also, let me point out that
14 there isn't going to be any such thing as in camera
15 proceeding if you are going to allow anybody to intervene who
16 wants to because everybody becomes not a member of the public
17 but a party to the proceeding. I would suggest we simply go
18 back -- we can't solve that proceeding problem completely --
19 we go back to inspection of documents, and we say "the court
20 may conduct an in camera inspection of the court records
21 sought to be sealed before ruling on the motion if the court
22 finds that such an inspection is necessary to avoid revealing
23 the information sought to be protected."

24 JUSTICE DOGGETT: Good proposal.

25 MR. JONES: Let's think about that a minute.

1 It may be we are all fine, if you are going to have the court
2 go look at public records secretly and decide whether to seal
3 it.

4 MR. HERRING: In most instances, if they are
5 already public records, you are not going to have this come
6 up.

7 MR. JONES: I thought that was what we were
8 dealing with.

9 MR. HERRING: This refers to court --
10 inspection of the court records sought to be sealed.

11 MR. JONES: Court records are public records.

12 MR. HERRING: What you are going to have --
13 and you are right in this sense, Franklin. You may have to
14 have your definition of court records -- and Lefty and I
15 talked about this -- refer not only to what is filed but what
16 is proposed to be filed, such as your motion for summary
17 judgment.

18 MR. SPARKS (SAN ANGELO): Or has been
19 exchanged but hasn't been filed.

20 MR. HERRING: That gets into discovery. We
21 are going to address that later.

22 MR. JONES: Then we are going to go to sealing
23 things that aren't even --

24 CHAIRMAN SOULES: How about this, the court
25 may conduct an in camera inspection of records.

1 If anybody has a formal proposal, let's get it on
2 the record. All right, how about this. "The court may
3 conduct an in camera inspection of records where necessary to
4 prevent disclosure of records sought to be protected." Now,
5 that has got it compressed down to the record. That is the
6 only thing he can look at in camera.

7 MR. DORSANEO: You still haven't defined what
8 in camera means.

9 CHAIRMAN SOULES: It says the only thing you
10 can do back there is look at a record.

11 MR. DORSANEO: By himself, by herself, with
12 one set of counsel and not the other counsel, with all
13 counsel but not the public?

14 MR. MORRIS: It says hearing may be held in
15 open court.

16 MR. BRANSON: With the exception of the
17 instance when Justice Hecht objected about the summary
18 judgment, I am trying to think of an instance where this
19 would be -- I mean you are trying to to seal something,
20 presumably, the other side has already gotten in discovery,
21 aren't you? You are not trying to seal it from the
22 adversary, you are trying to seal it from the public. Why
23 not let the adversary back there, and why not just give the
24 court the authority to conduct this hearing in his chambers
25 with nobody but the original participants there?

1 MR. DORSANEO: What the trade secret lawyers
2 really want is an ex parte proceeding, as I understand it.
3 They don't want -- they are calling it in camera. It means I
4 don't want the enemy there, and I don't think that that is
5 even constitutional.

6 MR. BRANSON: But isn't that really in
7 discovery, Bill? Aren't we to a point now where your
8 opponent has the information?

9 MR. MORRIS: You probably are.

10 MR. HERRING: Usually you are, you may not be.

11 MR. BRANSON: Why hide it from him anymore and
12 conduct something that sounds like star chambers proceeding
13 for those of us who are litigators. Why not let original
14 parties go back in the court's chambers and participate in
15 the legal process and keep the public out of that hearing.

16 JUSTICE DOGGETT: Because they are intervenors
17 at this point. They are parties, as Chuck said.

18 MR. BRANSON: But it would solve the problem
19 that we are dealing with to not treat them as an intervenor
20 for the purposes of this hearing.

21 JUSTICE HECHT: But the problem is none of the
22 parties who were originally in the case may represent the
23 interests of the public parties who are intervenors.

24 MR. BRANSON: I see.

25 CHAIRMAN SOULES: Lefty Morris.

1 MR. MORRIS: Well, what we are talking about
2 is that the judge may look at this data, make look at these
3 documents and review them, Frank. The judge may look at them
4 himself, but the hearing is then going to be held in open
5 court, and at that time, he can make his ruling. If he
6 decides he is going to let them be sealed, he has to do it in
7 such a way as to not reveal the contents. But you can't stop
8 the judge from looking at the documents in camera if he wants
9 to, but I don't think that means he goes back and has an
10 ex parte hearing.

11 MR. SPARKS (SAN ANGELO): If he seals from
12 right there, I mean it is kind of over.

13 MR. HERRING: We have in camera inspection of
14 documents now, whatever that means, under the discovery
15 procedures. And generally, in discovery, it means you don't
16 want the other side to see it because you are claiming a
17 privilege and the judge inspects them without the other side
18 being there. And for document inspection, I think we are
19 talking about the same thing.

20 MR. LOW: You have to describe the document,
21 name and day. It is just not like you don't know what it
22 was. It just doesn't give you the nitty-gritty detail, but
23 you can't just say this is bad and I won't even tell what you
24 it is.

25 MR. HERRING: That is right.

1 CHAIRMAN SOULES: We spent a long time
2 designing the in camera routine in 166(b)(4). It is probably
3 still imperfect, but at least it has got some guidelines in
4 it.

5 MR. BRANSON: What is the argument again
6 against using the previous words in 166(b)?

7 CHAIRMAN SOULES: Somebody says this is so
8 different from discovery that it shouldn't be done. I don't
9 agree with that, but that is neither here nor there.

10 MR. MORRIS: We are not in discovery. We are
11 in sealing hearing.

12 I would like to move we adopt this (B)(1) of Locke
13 Purnell on the hearing with the addition that Luke has just
14 proposed.

15 In other words, that you have everything that is in
16 here except the part referring to burden of proof, and then
17 you also put in there what Luke has just proposeed.

18 CHAIRMAN SOULES: I will read it again if you
19 like. It says "The court may conduct an in camera inspection
20 of records where necessary to prevent disclosure of records
21 sought to be protected."

22 MR. BEARD: Explain this to me. You say that
23 you are going to seal fees. Now, under this practice here,
24 are you going to give a notice and have the records down
25 there in the clerk's office, going to seal it, it is sitting

1 there. Do you seal it first under this temporary --

2 CHAIRMAN SOULES: Here is what happens: I
3 file a motion, I am trying to conduct a trial, whatever. My
4 adversary -- say it is in a divorce case -- my adversary
5 comes in and files a pleading with a lot of extraneous stuff
6 that is terribly damaging to my client but really doesn't
7 have anything to do with the lawsuit. Maybe it is a past 15,
8 20 years ago imprisonment or serious psychological problem
9 that really nobody has thought about in a long time. It is
10 very damaging, and I want that sealed. That is just done for
11 meanness.

12 I come in, I file a motion for an emergency order
13 of sealing. And I take those up and say look here, Judge.
14 The judge says fine. I am going to seal them on an emergency
15 basis, post your notices. Everybody shows up. The judge has
16 got the record, and we put on evidence that is an event that
17 happened years ago, won't have anything to do with this case.
18 If we convince the judge of that, the other side says, well,
19 when did it occur. We got to tell him when. Maybe the
20 general nature of it, not enough to disclose its contents
21 like these trade secrets people are going to have to do. And
22 finally we get all done, the Judge says, well, I am looking
23 at it and I conclude that it should be sealed permanently. I
24 believe that it is not fair to your client for this stuff to
25 be in the record so the public can find it. They are

1 using this trial proceeding as a vehicle to cause a lot of
2 problems and this is just leverage. Then if the press wants
3 to review that, they go to the appellate court. They can't
4 see what is in it. They can just say I don't think the
5 hearing was conducted right or what have you or everybody
6 knows it is a lie, the Judge made a mistake. The appellate
7 court opens it up and looks at it, and they either agree or
8 disagree. That is what we are talking about.

9 MR. BRANSON: This hearing that you are having
10 where you are describing the act --

11 CHAIRMAN SOULES: That is all open.

12 MR. BRANSON: -- but not what kind of animal
13 it is. The public shows up --

14 CHAIRMAN SOULES: They are all in there, that
15 is right. Exactly. But the animal, the fleece is still in
16 the envelope.

17 MR. McMains: Is that like proof in the
18 pudding.

19 MR. JONES: If I were a journalist, I could
20 make a lot out of that.

21 MR. LOW: There are a lot of defense lawyers
22 that wish you were a journalist.

23 CHAIRMAN SOULES: Yes, sir, Hadley.

24 MR. EDGAR: Move the question.

25 CHAIRMAN SOULES: Move the question. Okay,

1 those in favor say "Aye." Opposed?

2 MR. JONES: Opposed.

3 CHAIRMAN SOULES: House to one. All right,
4 that passes house to one, as I understand the vote.

5 MR. MORRIS: Say, Luke, are you going to
6 sandwich that into this rule there where we deleted "A party
7 seeking sealing."

8 CHAIRMAN SOULES: Is that all right with you
9 to put it there.

10 MR. MORRIS: I think that is a good place for
11 it.

12 MR. BEARD: Let me ask you one other question
13 about procedure practice. You are going to say I am going to
14 file this affidavit in connection with motion to summary
15 judgment if you seal it. If you didn't seal it, I am not
16 going to file it. Is that what we do?

17 MR. JONES: Mr. Beard, you have done voted for
18 that. You can't go back.

19 MR. BEARD: I didn't say Aye, I didn't say no.

20 CHAIRMAN SOULES: I think you would file a
21 motion for leave to file a sealed record. If the judge would
22 deny your motion, you wouldn't file it. I mean you have got
23 a vehicle here for doing that.

24 MR. RAGLAND: Let me ask you this, Luke, in
25 summary judgment context, then is the judge going to rule on

1 summary judgement based on sealed record that the opposition
2 hasn't seen?

3 CHAIRMAN SOULES: I don't see how they can
4 because that waives every privilege.

5 MR. BRANSON: Sure would be hard to have a
6 controverting affidavit.

7 CHAIRMAN SOULES: Okay, what is the next
8 objective? It is important, let's move on to the next item.
9 What is next?

10 MR. HERRING: Why don't we go back and add
11 in -- run through the language that Tom and I talked about
12 before he left about the extension of time, the extension of
13 the order, and that would be added on the temporary sealing
14 order. That would be added on the top of Page 3 where it now
15 says the first word is "notice" and then there is a comma.
16 If you struck the rest of that sentence and we are proposing
17 to put in this "and shall expire by its terms within such
18 time after signing not to exceed 14 days as the court fixes,
19 unless within the time so fixed, the order for good cause
20 shown is extended or unless all parties consent that it may
21 be extended semicolon any such extension shall not exceed an
22 additional 14 days."

23 MR. MORRIS: And then the rest of the rule.

24 MR. HERRING: The rest of the rule would stay
25 the same. We would go back under the notice provisions and

1 change the 15 days to 14 days under that paragraph.

2 MR. EDGAR: Question, Chuck, since the
3 intervenors are now parties, would they also have to agree?

4 MR. HERRING: Yes. Anyone who has intervened
5 could block and an extension.

6 MR. DAVIS: It is kind of useless, isn't it?

7 MR. SPARKS (SAN ANGELO): No, you get an
8 additional 14 days.

9 MR. DAVIS: If anybody can block it.

10 MR. BRANSON: Are these intervenors formal
11 intervenors? Have they got to file pleadings in
12 intervention.

13 MR. DAVIS: Here I am, I came all the way from
14 out of town, I want this heard. I am not going to agree to
15 any extension.

16 MR. HERRING: We already voted.

17 MR. SPARKS (SAN ANGELO): If you get the
18 14 days without any agreement, the court can give you an
19 additional 14 days. To get anything past that, you have to
20 have an agreement.

21 JUSTICE HECHT: Let's take a vote.

22 CHAIRMAN SOULES: All right, that is right out
23 of 680, Chuck? Is this parallel to 680?

24 MR. HERRING: It parallels 680, but the way it
25 works, you can only get one extension and it has got to be



...

1 for good cause or everybody agrees. If anybody disagrees,
2 you can't get an extension.

3 MR. SPARKS (SAN ANGELO): That is not what we
4 voted for earlier. We voted on earlier tracking temporary
5 restraining order Rule 680.

6 MR. HERRING: I understood we were only going
7 to do one, allow one extension.

8 CHAIRMAN SOULES: That is what 680 says.

9 MR. SPARKS (SAN ANGELO): You get something
10 past the original 14 days if there is no objection from any
11 party. That is what TROs say.

12 MR. BRANSON: Sam, he is saying these
13 intervenors are now the parties.

14 MR. SPARKS (SAN ANGELO): That is right, and
15 they can certainly stop anything past the 14 days. I
16 understand that.

17 CHAIRMAN SOULES: Let's see, does this set the
18 time?

19 MR. JONES: Extension automatically.

20 MR. HERRING: You don't think that is what it
21 was? That is what Tom and I understood.

22 MR. SPARKS (SAN ANGELO): I asked Luke
23 specifically is he tracking Rule 680 on TROs because we have
24 judges that get sick. You have got to have the first 14 days
25 upon the court's order and just having a newspaper man come

1 in and say no, I want to hear it today.

2 MR. HERRING: That was my original position,
3 but Tom didn't feel you should automatically get it, and I
4 understood this is what we went to and this is what he
5 understood as well. I don't care either way. We are just
6 trying to embody whatever the group wants to do.

7 CHAIRMAN SOULES: Here is what -- if you use
8 680 after the word "notice," it would read and "and shall
9 expire by its terms after signing, not to exceed 14 days, and
10 shall expire by its terms not to exceed 14 days after signing
11 as the court fixes, unless within the time so fixed the order
12 for good cause shown is extended for a like period or unless
13 a party gets to them, the order as directed consents that it
14 may be extended for a longer period. The reason for the
15 extension shall be entered of record. No more than one
16 extension may be granted unless subsequent extensions are
17 unopposed." That is all the language of 680. Can we just
18 use that?

19 MR. HERRING: That is fine with me.

20 CHAIRMAN SOULES: I know what it means.

21 MR. SPARKS (SAN ANGELO): That is what we
22 voted on.

23 MR. HERRING: Tom understood it was something
24 different, and it was his language, but I will be glad to go
25 with that. I prefer that.

1 MR. SPARKS (SAN ANGELO): I thought we had the
2 finalities of life pointed out here. Just make it where you
3 have to.

4 CHAIRMAN SOULES: Okay, all in favor say
5 "Aye." Opposed? It is unanimous.

6 MR. EDGAR: Luke, 680 is says for good cause
7 is extended unless the party against whom the order is
8 directed consents. Do you mean any party consents?

9 CHAIRMAN SOULES: Hold on just a second. Let
10 me see where that is. Okay.

11 MR. EDGAR: You have to change that. You just
12 can't just literally adopt 680.

13 CHAIRMAN SOULES: All right, that is right.
14 "Unless all parties consent," I guess.

15 MR. EDGAR: "Unless all parties consent that
16 it may be extended for a longer period." And that then would
17 parallel 680.

18 CHAIRMAN SOULES: "Unless the parties consent
19 that it may be extended for a longer period."

20 MR. EDGAR: Unless "all" parties.

21 CHAIRMAN SOULES: Okay, thank you. I
22 appreciate your watching over me there. Okay, what is next?

23 MR. TINDALL: Look, I have -- are we down to
24 notice? On notice, I notice that the motion must be posted
25 at a place where your open meetings law requires postings.

1 In my county, that would be difficult. The county
2 administration building is totally separate from the
3 courthouse, and I would suggest that either you post it over
4 there if you want to. I think you have to get a lock and key
5 from those who can get access to the glass bulletin board,
6 and it is very awkward to do that, or they could post at the
7 entrance to the courtroom. You have been through that issue?

8 MR. HERRING: The problem we got into with the
9 committee was which courtroom, if you have got 13 courtrooms.
10 You could post it on the foreclosure board, but in some
11 cities now we have got thousands of foreclosures. An idea
12 was this would be the cleanest other readily available
13 alternative that people could find to post it. And they will
14 have to make arrangements locally in some areas to allow it,
15 but that is the best we can come up with. You also, of
16 course, have to file it with the Supreme Court clerk.

17 MR. BISHOP: What is the purpose of sending
18 notice to the Supreme Court clerk and posting it at the
19 Supreme Court?

20 MR. HERRING: The idea was that the media,
21 most of the which have Austin offices, would be able to find
22 out if there is sealing going on. There were alternative
23 proposals such as that there would be a list filed with the
24 Supreme Court and you would have to send out notice at your
25 own expense to everybody on the list, and that was viewed to

1 be impractical.

2 JUSTICE DOGGETT: And so the court could have
3 an idea of how extensive a problem this is and how often it
4 is occurring. These are going to specify the type of case so
5 we will have the tabulation from the clerk on that. It may
6 not be something to keep permanently in the rule, but I think
7 it is a good, again, to give us an idea of how extensive --

8 MR. TINDALL: It seems to me you are upping
9 the ante. I know in my divorce practice before a client is
10 going to readily march into sealing records, I have got to
11 tell them we have to send it to the Supreme Court of Texas
12 and they are going to publish it there. Every newspaper in
13 the state is going to see it. We have got to take it up in
14 open meetings. That you up the ante so much that you have
15 destroyed any real opportunity for -- should I call it
16 discrete sealing of records in a divorce.

17 MR. HERRING: I think that was the intent,
18 really, behind this provision.

19 MR. TINDALL: That is in a child abuse case,
20 we have got to send it to the Supreme Court, got to post a
21 public meeting law. I mean I just think that --

22 MR. EDGAR: But, Harry, that is only if you
23 seek to seal something. I mean, otherwise, you don't. You
24 don't have to do it in every case.

25 MR. TINDALL: No, I am saying you have got a

1 divorce case where lots of confidential information has been
2 out. It is there, sworn inventory, the divorce decree that
3 is very detailed on their assets, and then the client says,
4 hey, is there some way I can keep this from public scrutiny?
5 Yes, but we have got to go post it over at the county
6 commissioners' office, we have got to mail it to the Supreme
7 Court. I just think that that is very unreasonable for
8 matters that don't have some bearing on public interest
9 litigation.

10 MR. LOW: Would that include a situation like
11 I am talking about, a partnership. The agreement -- they
12 want to seal, both parties do. They agree to it. Even if
13 they agree to it, are they still going to have to file all
14 this stuff?

15 CHAIRMAN SOULES: We are going to get -- in a
16 little while, we are going to get to some more serious stuff,
17 not anymore more serious maybe than this, but I mean there is
18 a whole nother dose of this. Whenever we decide whether or
19 not discovery is going to be under these same rules --
20 discovery not filed -- because discovery that is filed is
21 already under this rule, and whether or not settlement
22 agreements not filed are going to be under this rule. We
23 have got to get to those two points later.

24 MR. LOW: This is not discovery. You agree.

25 CHAIRMAN SOULES: It is a settlement

1 agreement.

2 MR. LOW: This will be a document that is the
3 whole basis of the lawsuit, and both -- and neither side
4 wants anybody else to know about what this partnership was,
5 and they will agree that you could file it and seal it, it
6 would be referred to, parties would have copies and so forth
7 and it would be on record, you know, even before it was
8 introduced as an exhibit. It is not something you have to
9 have discovery. Both sides have it, and they can't seal that
10 unless they --

11 CHAIRMAN SOULES: No, absolutely not. That is
12 what this does, not unless you post it in Austin and wherever
13 else it is.

14 MR. TINDALL: Are you open to amendments or
15 suggestions for changes?

16 CHAIRMAN SOULES: I don't know. I mean --

17 MR. HERRING: I have been foreclosed. You can
18 propose whatever --

19 MR. EDGAR: While Harry is mulling that
20 over --

21 MR. ADAMS: That is going to increase
22 arbitration.

23 MR. EDGAR: I presume that this is intended to
24 be a simultaneous transmission to the Supreme Court because I
25 can see parties delaying -- it doesn't say anything about

1 when that has to be filed with the Supreme Court. It just
2 says "shall be filed."

3 CHAIRMAN SOULES: Hadley, help me find the
4 language that we need to fix.

5 MR. EDGAR: At the bottom of (b)(2).

6 MR. COLLINS: It says immediately after
7 posting such notice, Hadley, then you have got to file with
8 the clerk of the court and with the Supreme Court clerk.

9 MR. EDGAR: All right, all right.

10 CHAIRMAN SOULES: Okay, where are we now,
11 Lefty? What is next?

12 MR. MORRIS: Well, on notice, but Chuck said
13 he mentioned it. The only change we had in there was change
14 that 15 days to 14. Did you get that?

15 CHAIRMAN SOULES: What line is that?

16 MR. MORRIS: It is down there in the body
17 about six lines, seven lines up. It says "posted at least"
18 -- it has 15 and we are changing it to -- "14 days prior to
19 the hearing." "The written motion in support of the sealing
20 request shall be filed . . . "

21 CHAIRMAN SOULES: I got you, thank you.

22 MR. MORRIS: Okay, that needs to be changed.

23 CHAIRMAN SOULES: Okay, what is the next one.

24 MR. COLLINS: I have one more question about
25 the very last sentence --

1 CHAIRMAN SOULES: John Collins.

2 MR. COLLINS: -- of (b)(2). "The notice shall
3 not be sealed, be maintained and remain open to public
4 inspection." That is at the office of the Supreme Court
5 clerk. Is that correct? If I wanted to go see the notices
6 that have been filed, is that where I go?

7 MR. HERRING: That is actually --

8 MR. TINDALL: The notice at the courthouse. I
9 read that, John --

10 MR. COLLINS: I don't know. Is that -- that
11 is both of them?

12 MR. HERRING: The way it provides is that when
13 you post your notice with the local clerk, you have to file a
14 verified copy of that notice. So is -- that is going to be
15 in your file -- verified copy in the file -- and then you are
16 going to have a copy at the Supreme Court. Both of those
17 would remain open.

18 MR. COLLINS: Will the Supreme Court clerk,
19 though, have a book or ledger or something, I assume, that
20 has that in there?

21 CHAIRMAN SOULES: When does it say that the
22 notice is to be filed?

23 MR. HERRING: "Immediately after posting such
24 notice, the moving party shall file a verified copy of the
25 posted notice with the clerk of the court," et cetera.

1 CHAIRMAN SOULES: Okay. Now, if this is going
2 to remain open to public inspection, let me ask Justice
3 Doggett, does the Supreme Court plan to keep these forever or
4 do you mean to just have it open for public inspection in the
5 court where the case is pending?

6 JUSTICE DOGGETT: Well, I guess it is going to
7 be, until this rule is changed, it is going to be kept
8 indefinitely, just like our other records are kept
9 indefinitely.

10 CHAIRMAN SOULES: Both places?

11 JUSTICE DOGGETT: That is right.

12 MR. HERRING: Yes, the media was concerned
13 that they want to go back and study, you know, malpractice
14 cases or something and they can't find the records and they
15 don't know what has been sealed.

16 JUSTICE DOGGETT: Thousands of these instead
17 of a few of these, after a year or two, we come back and
18 change the rules.

19 CHAIRMAN SOULES: I just wanted to be sure
20 that I understood it, we want it both places.

21 JUSTICE DOGGETT: There is a debate about
22 whether this is such an extensive practice that it deserves
23 attention at all, or the converse, whether it happens so much
24 when doing anything will interfere. We are going to find
25 out.

1 CHAIRMAN SOULES: Okay, what is next?

2 MR. RAGLAND: I have a question.

3 CHAIRMAN SOULES: Tom Ragland.

4 MR. RAGLAND: Still having problems
5 identifying in my mind how one of these hearings is going to
6 take place, who the players are. If the TV station gets wind
7 of a sealing hearing, may they show up and just sit and
8 listen or may they show up and put on testimony or must they
9 first be intervenors and put on testimony?

10 CHAIRMAN SOULES: They can do two out of those
11 three things. They can't do the middle one. They can show
12 up and sit and listen. Anybody can. They can intervene and
13 participate in the hearing, but they can't just show up and
14 start participating without intervention.

15 MR. RAGLAND: They have to be an intervenor
16 before they can get up and make a statement or evidence of
17 that sort?

18 CHAIRMAN SOULES: They have got to commit
19 themselves by intervention as a party to this matter so that
20 they are before the court as a party for this matter.

21 MR. RAGLAND: Well, as I understand the
22 concept here, that makes this intervention a matter of right.

23 CHAIRMAN SOULES: Yes, it is.

24 MR. RAGLAND: We may need to look at Rule 60
25 because that doesn't measure up to Rule 60, intervention

1 rule.

2 CHAIRMAN SOULES: That is with leave of the
3 court, isn't it?

4 MR. RAGLAND: Yes, where the existing parties
5 have a right to oppose it and have them kicked out.

6 MR. McMAINS: You can always intervene, but
7 you don't have a right to stay.

8 MR. RAGLAND: That is not what I understand
9 this to mean.

10 MR. McMAINS: I am talking about the ordinary
11 rule. You can intervene, but you just may be subject to
12 being stricken.

13 CHAIRMAN SOULES: Nobody can get stricken
14 under this rule.

15 MR. McMAINS: That is a problem. You have a
16 rule that expressly authorizes intervention.

17 MR. EDGAR: Under Rule 60, the court can only
18 strike you if you don't have some justiciable interest, and
19 it seems to me that what we have done under this rule is to
20 create justiciable interest. So I don't think that is a
21 problem.

22 CHAIRMAN SOULES: What is next?

23 MR. MORRIS: Chuck and I were talking that we
24 don't have any problem over here on Page 3 with anything in
25 4, which is findings, or 5, which is sealing order, or (c),

1 which is continuing jurisdiction. You have already dealt
2 with (d), and over in (e), which is on Page 4. If there is
3 no problem with that, then we are just going to move that
4 that be adopted, if need be. We weren't sure whether we had
5 already adopted everything unless it is specifically removed,
6 or whether we need to make a record on it.

7 MR. HERRING: We had some differences in those
8 provisions in our draft, but in our minds, they are not
9 sufficiently significant to take the time to talk about them.
10 If somebody else wants to talk about something in those
11 provisions, that is fine.

12 MR. MORRIS: If you want us to move the
13 adoption, we will do it.

14 CHAIRMAN SOULES: I do, except the Chair needs
15 to note on record that we may be coming back to revisit the
16 question of appeal after Rusty and Bill work on it some.

17 MR. TINDALL: Is somebody on notice? I am
18 concerned about notice.

19 MR. SPARKS (SAN ANGELO): I have another
20 question, too.

21 CHAIRMAN SOULES: Let's move --

22 MR. MORRIS: As far as the housekeeping, what
23 we are doing here, since you have already dealt with appeal,
24 we are just moving that Paragraph 4, Paragraph No. 5 and then
25 (c), which is continuing jurisdiction, and (e) over on

1 Page 4, be adopted as written.

2 MR. EDGAR: Question, continuing jurisdiction,
3 is it intended that once this rule is adopted that a party
4 would have the right to go back and look at sealed documents
5 which were sealed prior to the adoption of this rule?

6 MR. HERRING: The other way to phrase that is
7 whether someone could intervene to try to modify that. Is
8 that what you mean or do you mean --

9 MR. EDGAR: Yes, I suppose so.

10 MR. HERRING: That was definitely Tom's intent
11 with this language because I know he told us that.

12 MR. EDGAR: So that, for example, if somebody
13 made reference to medical malpractice cases, someone wanted
14 to do a study on this, to go back a year from now and look
15 back at sealed records for the last 10 or 15 years?

16 MR. HERRING: That was his intent.

17 MR. EDGAR: I understand.

18 MR. HERRING: I will defer to the expertise of
19 you and Bill, perhaps, on the effective dates and how it
20 works. But that is what Tom Leatherbury wanted to do because
21 the press does want to study issues that they can't get into
22 the files right now to study sometimes, settlements and the
23 like.

24 CHAIRMAN SOULES: This seems to do that. Are
25 you moving now that this proposed Rule 76(a), Rule 76(a), as

1 it has been amended through our discussions, be adopted or be
2 recommended by the Supreme Court for adoption.

3 MR. MORRIS: Well, that we have discussed up
4 to date as indicated by the record, yes. But I mean, in
5 other words, we obviously have more to do.

6 JUSTICE HECHT: Did you modify the court
7 records section, (a)(3)?

8 MR. McMANS: We haven't gotten to that.

9 MR. HERRING: We haven't gotten to court
10 records because we have to discuss discovery and settlements.

11 MR. MORRIS: We are saving that for last.

12 CHAIRMAN SOULES: Is there something wrong
13 with the way this is worded?

14 Okay, are you moving then that everything that we
15 have talked about in -- excuse me, are you moving now that
16 the proposed Rule of Civil Procedure 76(a) be adopted as we
17 modified in our discussion, save and except, Paragraph 2,
18 (a)(2), court records, which we need to discuss.

19 MR. MORRIS: We are not quite ready to do
20 that. Let me come at it kind of piecemeal if you don't mind.

21 All right, what I am really trying to do right now
22 is get into the record that Paragraph 4 on findings,
23 Paragraph 5 on sealing orders, Paragraph (c), continuing
24 jurisdiction, and Paragraph (e), which is no court record
25 shall be withdrawn from public files except as expressly

1 permitted by specific statute or rules, that those be adopted
2 as drafted in the Locke Purnell version.

3 CHAIRMAN SOULES: Second.

4 MR. McCONNICO: Here again, which paragraphs
5 are we looking at?

6 MR. MORRIS: Steve, I am over on Page 3.

7 MR. McCONNICO: Right.

8 MR. MORRIS: And Chuck and I just don't see
9 any real difference between what we have done in this as a
10 matter of substance, findings.

11 MR. HERRING: That is (B)(4), really.

12 MR. MORRIS: That is (B)(4). (B)(5), which is
13 sealing order --

14 MR. SPARKS (SAN ANGELO): Bingo.

15 MR. MORRIS: (c), which is continuing
16 jurisdiction, and (e), which doesn't have a title.

17 CHAIRMAN SOULES: Okay, all in favor say
18 "Aye." Opposed?

19 MR. McCONNICO: Wait just a minute. Can we
20 mark out, since we are dealing with the sealing order, and
21 then again repeat the clear and convincing evidence test
22 which we rejected earlier.

23 CHAIRMAN SOULES: Where is that --

24 MR. HERRING: So does findings.

25 MR. McCONNICO But I mean that is going to be

1 knocked out?

2 MR. MORRIS: Yes. Any place where it says
3 clear and convincing evidence is knocked out.

4 MR. HERRING: All of the references in the
5 rule to clear and convincing need to be changed to
6 preponderance of the evidence.

7 MR. MORRIS: What we are doing is striking
8 them and we are just setting the burden of proof up at the
9 top where we voted it in.

10 MR. McCONNICO: So we are not even going to
11 repeat a standard of proof?

12 MR. MORRIS: No.

13 CHAIRMAN SOULES: Tell me where to take them
14 out now because that is my job and I want to be sure I do the
15 best I can.

16 MR. MORRIS: Well, under 4, you see it there
17 under findings, you have clear and convincing evidence down
18 at the bottom line. That needs to be taken out.

19 CHAIRMAN SOULES: How?

20 MR. MORRIS: Just by striking it.

21 MR. HERRING: Strike the words "by clear and
22 convincing evidence" so it just says "has been shown."

23 MR. EDGAR: That won't quite get it because
24 you are going to have to come back in and say "And the
25 reasons for such findings have been shown."

1 MR. HERRING: All right, we can add that in.

2 MR. EDGAR: The sentence wouldn't make any
3 sense unless you change the grammar a little bit.

4 CHAIRMAN SOULES: That is what I was worried
5 about. Thank you, Hadley.

6 MR. MORRIS: Then the next on 5 where you are
7 talking about in sealing order, it says down on the third
8 line "shown by clear and convincing evidence." How will that
9 read then, Hadley? Is that all right?

10 MR. EDGAR: I don't know, I haven't looked at
11 it.

12 MR. MORRIS: All right.

13 MR. HERRING: I think we can just say "shown"
14 and put the comma there.

15 MR. EDGAR: "Has been shown comma."

16 MR. HERRING: Delete "by clear and convincing
17 evidence."

18 CHAIRMAN SOULES: Okay, all in favor say
19 "Aye."

20 MR. RAGLAND: I still have a question.

21 CHAIRMAN SOULES: I am sorry, Tom.

22 MR. RAGLAND: This Paragraph 5, the sealing
23 order part, rests with findings of fact and conclusions of
24 law, appears that it requires the trial judge to make those
25 findings at the time he enters the order, which is contrary

1 to the concept in Rule 296 and those rules. I have got an
2 idea some of the trial judges are not going to be too happy
3 to have to make those formal findings at the time the order
4 is entered.

5 JUSTICE DOGGETT: When would you have him make
6 it?

7 MR. RAGLAND: Well, it looks like if it is
8 appropriate, 296, the time table under 296 would be -- you
9 know, it has got to be requested and that sort of thing.

10 MR. EDGAR: Before you look at that, Justice
11 Doggett, we are proposing that the time limit on 296 that
12 appears in the book you are looking at be extended so it
13 would even be a longer period of time than that.

14 MR. HERRING: The media was concerned about
15 having all that immediately so they could seek review,
16 whatever the form of review is going to be, as quickly as
17 possible, and that is why they proposed it that way. That is
18 all I can say about why it is in that form.

19 MR. EDGAR: It seems to me there is a natural
20 byproduct of the expedited time table that is envisioned
21 here, but that that is just going to be a further stumbling
22 block to sealing orders, and which again, I think, carries
23 out the intent of this whole thing to open up some of the
24 records to the public.

25 MR. MORRIS: I think that is right.

1 MR. EDGAR: I think that is the intent of it.

2 MR. MORRIS: I think that is right.

3 JUSTICE DOGGETT: This is 20 days under your
4 proposal, under your proposed change that you just pointed
5 out.

6 MR. EDGAR: I have got to look, Judge. I have
7 forgotten now exactly what that time table was.

8 JUSTICE DOGGETT: That will defeat any
9 opportunity for an expedited appeal.

10 MR. MORRIS: Well, our motion is still on the
11 floor.

12 JUSTICE HECHT: Even though civil judges are
13 accustomed to having more time to make findings, criminal
14 judges are making findings when they are required to right on
15 the spot. There is no reason why they shouldn't be required
16 to make them here, or at least the same time as the order.
17 Somebody is obviously going to help prepare it, I would
18 think.

19 MR. LOW: Judge, that same day within five
20 days?

21 CHAIRMAN SOULES: It says "findings made at or
22 after the hearing." Those words are there already.

23 MR. RAGLAND: Does that mean any time for
24 appeal mandamus is expired?

25 CHAIRMAN SOULES: I don't know.

1 MR. EDGAR: Justice Doggett, it is really a
2 little longer than that because 296 says that you have to
3 make the request 20 days after the judgment is signed, and
4 then the court has 20 days after that in which to file. And
5 so you would have 40 days, in essence.

6 JUSTICE DOGGETT: As Buddy was just observing,
7 I don't have any problem in giving some additional time, but
8 I think going a month would defeat the purpose.

9 MR. EDGAR: But I am just saying that if you
10 typed Rule 296, you are really talking about 40 days rather
11 than a shorter period. That is the only point I was trying
12 to make.

13 MR. SPARKS: (EL PASO): If you wait too long
14 and the appeal is gone, it is reversible error.

15 MR. MORRIS: Once again, this isn't after a
16 trial on the merits, this is just an order on a sealing
17 hearing. You are not talking about something that is going
18 to be that complex, more than likely, to have. When you walk
19 over there for your hearing, you know how you are going to
20 want the judge to rule.

21 MR. LOW: Most judges want a day or two to be
22 sure they have dotted their I's and crossed their T's, not
23 all of them write just like they think. And most of them,
24 you know, they don't want to -- they might make a ruling, but
25 they don't want to just put everything in writing just that

1 red hot minute.

2 CHAIRMAN SOULES: Well, if I win this hearing,
3 and as tight as I have got to be about these findings, I want
4 a little time to go over these findings of fact and get them
5 over to His Honor.

6 MR. BRANSON: Would three days satisfy
7 everybody?

8 MR. LOW: Suppose it was like you hit a Friday
9 and he is getting ready to go somewhere and he can sign it
10 but, you know, going back to notice.

11 CHAIRMAN SOULES: Three days for what.

12 JUSTICE HECHT: Findings and conclusions.

13 CHAIRMAN SOULES: What portion do we put that?

14 MR. HERRING: Put it back in 4 because it now
15 says "the court shall make specific on the record findings" up
16 there.

17 MR. MORRIS: Within three days of the
18 hearing, within three days of the conclusion of the hearing.

19 MR. McMANS: Why do you need findings of rule
20 for when you have you got the findings in the sealing orders
21 rule? The sealing order rule requires the findings to be in
22 there.

23 MR. O'QUINN: Have to be in the order.

24 MR. HERRING: I think that is because the way
25 they refer to the findings in the order, that is, the sealing

1 orders rule doesn't say what the finding shall include. And
2 they have that reference in 4. In truth, I think it is again
3 Tom simply trying to be very careful. You could have
4 combined those two.

5 MR. McMains: What I am saying is since he is
6 going to be making the decision, maybe after the hearing, and
7 going to have the findings, why not just have it
8 contemporaneous with the order so you will have one document
9 as to findings in the order. It requires that it be in the
10 order anyway. So why put it two places?

11 MR. HERRING: I think his intent is that you
12 have it in the order.

13 MR. MORRIS: I think so, too.

14 CHAIRMAN SOULES: The sealing order problem --
15 this has got some more problems. It can be fixed fairly
16 easy. This doesn't differentiate between a written order and
17 a bench order, a rendition from the bench. What would be
18 the -- what problem would it cause if we said "if after
19 considering all the evidence concerning sealing the court
20 records the judge concludes a compelling need as defined
21 herein has been shown, the judge shall, within three days,
22 sign a written order.

23 MR. McMains: It shall include.

24 CHAIRMAN SOULES: And then the rest of it says
25 what goes in the written order within three days. Is that

1 all right? The judge shall within three days sign a written
2 order.

3 MR. MORRIS: But is that going to then
4 specify the findings and the reason automatically?

5 CHAIRMAN SOULES: And then the rule -- let's
6 see, this, of course, is in the -- this is in the Rules of
7 Civil Procedure. So the rule, if the court adopts a rule
8 that we ask them to on counting time, take Saturdays, Sundays
9 legal holidays out of periods less than five days, and this
10 period would be three days exclusive of Saturdays, Sundays
11 and legal holidays.

12 JUSTICE HECHT: Three days --

13 CHAIRMAN SOULES: That you don't have
14 Saturdays and Sundays and legal holidays as periods shorter
15 than five days. It will solve a lot of problems. This would
16 then become three working days. Okay, what else, John?

17 MR. O'QUINN: In light, Luke, of what you are
18 doing in Paragraph 5 concerning the sealing orders, what is
19 the necessity of Paragraph 4? Isn't that just unnecessary
20 verbage at this point?

21 CHAIRMAN SOULES: Seems to me it is.

22 MR. O'QUINN: I would like to make a motion
23 that we remove 4. If there is anything in 4 that you need to
24 add to 5, put it in 5. But I don't think there is. I don't
25 think there is any need for 4.

1 MR. DONALDSON: If I could speak to that.

2 MR. HERRING: The only -- go ahead.

3 MR. DONALDSON: I am David Donaldson, and I
4 also sat on the advisory committee. The reason for having a
5 separate section on findings, it was very important, we felt,
6 that the court should have to specify specific reasons why
7 the record was being sealed. And this separate section makes
8 it clear that those findings need to be made. And someone
9 else pointed out earlier, Paragraph 5 doesn't really go into
10 what should the finding conclude, and Paragraph 4 provides
11 what should the findings conclude.

12 MR. O'QUINN: We ought to stay off -- No. 4
13 talks about has to be shown by clear and convincing evidence.

14 MR. DONALDSON: That has been changed already.
15 That has been taken out.

16 CHAIRMAN SOULES: Actually, 4 doesn't get at
17 what you are saying there, David. That is just probably a
18 drafting error. It says here "the reason for such findings."
19 I guess the court found because he heard a contested
20 proceeding and decided to rule for sealing. What you really
21 want is the reasons for such sealing, don't you?

22 MR. HERRING: Well, the idea in 4, it does
23 make specific reference to the findings demonstrating that a
24 compelling need has been shown. And we have that defined
25 before. I think you can move that language, though, down

1 into 5, couldn't you, David?

2 MR. McMAINS: Talk about the findings being in
3 the order.

4 MR. O'QUINN: I don't think we need 4. I
5 think 5 is enough.

6 MR. HERRING: I think if your concern, David,
7 is to make sure that the findings indicate that, you could
8 move down to where the reference in the middle of Paragraph 5
9 is to the specific findings and add down there "the specific
10 findings demonstrating that a compelling need has been shown.

11 MR. DONALDSON: I think that can consolidate
12 it.

13 CHAIRMAN SOULES: Okay.

14 MR. MORRIS: What we are trying to do is
15 consolidate it, 4 and 5, without doing any destruction to
16 what was contained in 4 and/or 5. Is that right.

17 MR. DONALDSON: That is right.

18 MR. O'QUINN: Correct.

19 CHAIRMAN SOULES: So we need to move, pardon
20 me, the words findings -- oh, I mean demonstrating --

21 MR. HERRING: What I would suggest, Luke, is
22 after the word "hearing" in the middle of that Paragraph 5,
23 "the specific findings made at or after the hearing
24 demonstrating that a compelling need has been shown."

25 CHAIRMAN SOULES: Okay, I am move that

1 language to that point.

2 MR. O'QUINN: The only problem with putting it
3 there is the added words tended to define the word hearing
4 rather than the word findings. I think what David wants is
5 that it is the findings demonstrating it, not the hearing
6 that demonstrates it.

7 MR. HERRING: Well, specific findings -- put
8 it right after the word findings then.

9 MR. DONALDSON: I think that would be better.

10 CHAIRMAN SOULES: Okay.

11 MR. HERRING: And then renumber Paragraph 5
12 No. 4 and delete 4.

13 CHAIRMAN SOULES: I think so. All right, so
14 that would be 4 and that is still the last one. Okay, what
15 is next?

16 MR. MORRIS: Well, I guess have we voted to
17 adopt those things as changed?

18 CHAIRMAN SOULES: I never have got it to a
19 vote. I called for it several times, but I haven't gotten a
20 vote yet.

21 MR. MORRIS: We are talking about 4 and 5,
22 which has now been consolidated (B)(4) and (5) which has now
23 been consolidated. We are talking about (c), which is
24 continuing jurisdiction, and we are talking about (e).

25 CHAIRMAN SOULES: Okay, you move those be

1 recommended to Supreme Court as modified?

2 MR. MORRIS: Yes.

3 CHAIRMAN SOULES: Second.

4 MR. EDGAR: Second.

5 CHAIRMAN SOULES: All in favor say "Aye."

6 Opposed?

7 MR. SPARKS: (EL PASO): No.

8 CHAIRMAN SOULES: That is house to one.

9 MR. MORRIS: There is one other thing before
10 we get into the discovery issue. I don't think there was any
11 problem with it. But in Paragraph (2)(b) up at the top of
12 Page 2, there was that first sentence that he said tracked
13 the Open Records Act and that he felt like it should be in
14 here because it makes it apply specific to the judiciary.
15 Where it says "All orders of any nature and all opinions made
16 in the adjudication of the case specifically made public
17 information and should never be sealed," that whole paragraph
18 I move the adoption of all of (b), not just what I read, but
19 the whole thing.

20 CHAIRMAN SOULES: Discussion?

21 MR. MORRIS: I am talking about 2 little (b)
22 yes.

23 CHAIRMAN SOULES: Discusson? All in favor say
24 "Aye."

25 JUSTICE PEEPLES: What is the opinion made in

1 the adjudication of a case other than a Court of Appeals or
2 Supreme Court? Certainly, it doesn't include memos in the
3 court of Appeals I mean the -- or the trial court for that
4 matter. I can't believe it.

5 MR. MORRIS: It says orders.

6 JUSTICE PEEPLES: It says orders, doesn't it?

7 MR. McCONNICO: Why don't we just knock out
8 opinions? Is it really necessary?

9 MR. HERRING: Tom indicated that came from the
10 Open Records Act.

11 MR. DONALDSON: It is out the of the Open
12 Records Act like that. I understand opinions to be appellate
13 opinions. Sometimes trial courts issue opinions too, written
14 opinions that accompany their orders.

15 CHAIRMAN SOULES: Any other discussion?

16 MR. O'QUINN: Question.

17 CHAIRMAN SOULES: John.

18 MR. O'QUINN: I want to make sure what we are
19 voting on. We are voting on which paragraphs to be approved?

20 CHAIRMAN SOULES: 2(b) on Page 2 of Tab C.

21 MR. HERRING: No, we are voting on (b), just
22 (b). The way it is divided, it starts with (a). You have
23 got 1 and 2 are under (a), and then you go to (b). We are
24 just voting on that (b).

25 CHAIRMAN SOULES: We are voting on the opening

1 paragraph of (b).

2 MR. HERRING: On the opening paragraph of (b),
3 not the subdivisions, just that little old paragraph.

4 MR. SPARKS (SAN ANGELO): Second that motion.

5 CHAIRMAN SOULES: All in favor say "Aye."
6 Opposed? Carries unanimous. Next?

7 MR. MORRIS: Okay, I need for you to each
8 look at the two drafts, the co-chair draft and the Locke
9 Purnell draft I am going to call it. And you will see two
10 different ways that it has been handled regarding to the
11 specific or protectible interests.

12 In other words, in the Locke Purnell draft that we
13 have just been working from, they just say compelling need
14 means the existence of a specific interest which the
15 administration of justice is substantial enough, and it never
16 defines what those specific interests are.

17 MR. EDGAR: Where is that language in Locke
18 Purnell.

19 MR. MORRIS: That is on Page 1.

20 MR. HERRING: He is talking about the first
21 sentence in the rule.

22 MR. MORRIS: Now, if you will look at the
23 co-chairs' proposed rule, a second paragraph was set up there
24 on the front page that defines some of the protectible
25 interests. Do you see that, Hadley?

1 MR. EDGAR: Yes, I got you.

2 MR. MORRIS: This is where we specifically
3 tried to put in trade secrets. We specifically put in things
4 that would make sure that the family lawyers were more
5 comfortable with it. We got -- we don't know what we put in
6 when we had constitutional rights. We don't know what we are
7 talking about, but it probably sounded good. And I
8 don't -- other than right of privacy, we don't have any idea
9 what is in that grab bag on (2)(a). So what we need to
10 decide here, what the committee needs to decide is whether to
11 leave to the courts to determine under the draft we are
12 working on on a case-by-case basis what specific interest it
13 is that may override the presumption of open records, or will
14 it be helpful to the courts and to lawyers to define down in
15 here without limiting some protectible interest.

16 Probably the argument against doing this, putting
17 in this protectible interests is we don't want there to be an
18 inference that if you automatically have maybe, let's say,
19 trade secret, that then there could just never be a
20 compelling need that was strong enough to ever overcome it.

21 On the other hand, Steve McConnico said to me
22 earlier the thing he liked about having these specific things
23 in here was we are cutting new ground and it does give some
24 specific examples for courts to look at. But I think if we
25 are going to do that, we need to make plain that this is not

1 all that there is there.

2 So with that explanation, you are just going to
3 have to decide for yourself which one of those you like. It
4 is a matter of style because probably it is all going to be
5 about the same.

6 MR. McMAINS: The problem is, I think it is a
7 misnomer to call it a definition.

8 MR. HERRING: It is examples is really what it
9 is.

10 MR. McMAINS: It is kind of -- these are some
11 of the things we can think of, but it is not --

12 MR. HERRING: And what it was, we didn't think
13 of them. Those are the areas that we got hammered on the
14 most in the hearings.

15 MR. McMAINS: These are the people who
16 bitched.

17 MR. HERRING: Exactly.

18 MR. MORRIS: What even concerns me is under
19 (2)(a), I don't know what I am talking about.

20 MR. McMAINS: That was the ACLU that voted
21 you --

22 MR. EDGAR: It seems to me coming back to what
23 Steve said that you may not know what you are talking about
24 there, but at least it gives a trial judge more guidance than
25 just saying "which in the administration of justice is

1 substantial enough to override a presumption." It seems to
2 me that it does give some guidance, and since we are plowing
3 new ground, it would be better to be a little more specific
4 than not.

5 MR. MORRIS: Let's look here a minute,
6 Hadley. Once again, I have already confessed my ignorance.
7 When it says "but not limited to privileges," nearly
8 everything that you may want to unseal probably is going to
9 deal with some privilege, and by specifically putting that
10 word in there, are you saying this has special significance
11 which makes it where it is more prone to override the
12 compelling need because I don't think that is the intent, and
13 that is really one of the reasons I went to go over that
14 other draft this morning because I am not sure what we are
15 doing there.

16 MR. McMANS: Besides which you have got --
17 under this compelling need definition, it talks about, that
18 we started off with, it talks about a specific interest of
19 the person or entity sought to be protected.

20 MR. MORRIS: Right.

21 MR. McMANS: And then you just defined it in
22 such a way that it isn't specific anyway. Then we make
23 findings that requires that it be specific. So you have got
24 to make something up each time you get to an order anyway
25 that is more specific than even just referencing whatever the

1 category is. I really don't see that adding those
2 categories, especially with a totally open end, does
3 anything.

4 MR. MORRIS: Well, you know, I can understand,
5 just to make sure that the trade secret people aren't scared
6 to death, I can even understand where you may have some child
7 that has been sexually molested. I can see using those
8 examples. I get concerned that I don't know what I am doing
9 other than that and I don't know if this Committee knows what
10 we are doing.

11 MR. DAVIS: I second.

12 MR. HERRING: Well, I went back and forth on
13 this, and David Perry had a protectible interest category.
14 David Chamberlain did. And they were kind of on opposite
15 sides on most of the issues. I think I end up where we
16 probably shouldn't try to list it. I think there is some
17 danger that, number one, we don't know what some of this
18 means, and number two, that we may be constricting it even
19 though we say we are not, we may have that affect.

20 MR. McMANS: If you have identified certain
21 categories as being protectible interests, particularly even
22 for purposes of this one, it may have accorded them legal
23 standing in another context that make assertions that the
24 court is not all that prepared to create privileges or rights
25 or whatever for other purposes such as moving them back into

1 the discovery rules and stuff. I mean, you know, it is kind
2 of, well, I have a constitutional right to make a gas station
3 blow up or whatever.

4 MR. MORRIS: I move that we strike the
5 protectible interest part. It is not included. I just move
6 adoption of this portion of the Locke Purnell as drafted by
7 Locke Purnell that does not have the protectible interest
8 definitions or examples in it.

9 MR. SPARKS (SAN ANGELO): I will second that
10 motion.

11 CHAIRMAN SOULES: Where does the Locke Purnell
12 standard -- where is it?

13 MR. McMANS: It says specific interest.

14 MR. MORRIS: We are just adopting (a)(1) is
15 all we are doing. We are adopting (a)(1). I move the
16 adoption of (a)(1).

17 CHAIRMAN SOULES: Second.

18 UNIDENTIFIED: I will second.

19 CHAIRMAN SOULES: All in favor say "Aye."
20 Opposed?

21 MR. McCONNICO: Nay.

22 MR. SPARKS (SAN ANGELO): Did we just adopt
23 (a)(1), little (a), (b), (c) and (d) as changed earlier
24 through all of our discussions?

25 CHAIRMAN SOULES: Yes, that completes (a),

1 (a)(1). That complete (a)(1). Okay, next?

2 MR. MORRIS: We are down to the hard part.

3

4

5

Court Records

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8 MR. HERRING: He is going to get some water,
9 which shows you what an intelligent co-chair he is. Court
10 records. There are really two issues, the definition we have
11 of court records. Let me just read it out so we will know
12 what we are dealing with right now the way it is written in
13 the McElhaney version. It is paragraph (a)(2), bottom of the
14 first page, excuse me, Locke Purnell, bottom of the first
15 page, court records:

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"Purposes of this rule: The term court records shall include all documents and records of any nature filed in connection with any matter before any civil court in the state of Texas. This rule shall not apply to materials simply exchanged between the parties, or to discovery made by a party pursuant to a discovery request and not filed with the court, or to documents filed with the court in camera solely for the purpose of obtaining a ruling on the discoverability of such documents."

26

We have here -- Lefty has a draft of a different

1 version of court records that does two things, number one, it
2 adds in the definition of court records, discovery, and the
3 results of discovery. And this would be discovery and the
4 results of discovery that are not filed with record. And
5 then number two, the draft that he has that we will make him
6 pull out when he gets back also refers to settlements.

7 Let's talk about the discovery first of all, if we
8 can, and let me kind of give you the arguments pro and con
9 and the different ways of approaching it that were brought
10 before our subcommittee.

11 There, basically, were two approaches. If you
12 wanted to put discovery in here, there are two approaches to
13 doing it. Number one was to have this language added in the
14 definition of court records that simply includes a reference
15 to discovery and the results of discovery. That is one way
16 to do it.

17 Number two, the second way is to go back into our
18 other rules which no longer require the filing of discovery
19 materials and insert it in those rules, rules dealing with
20 interrogatories and the like.

21 Now, the arguments -- first of all, let me just
22 mention the arguments in favor of it that we heard the most.
23 People said, look, discovery would already be a court record
24 under this definition if we still filed it as we used to file
25 it in Texas until, I guess, the 1988 changes, which is when

1 we didn't file it. We stopped filing it, primarily, for
2 convenience of the clerks' offices because we were burying
3 them in paper was the idea, and if we hadn't made that change
4 for the convenience, it would be filed and it would be a
5 court record within this definition.

6 Secondly, they said a lot of the material that is
7 really important say that might show a public hazard comes
8 out in discovery. And unless that is a court record and
9 therefore there is going to be a presumption of public
10 access, that material is going to be hidden from the public.
11 And that is where the real nuggets lie is in discovery
12 materials. So that ought to be included. And the public
13 interest groups and plaintiffs' lawyers certainly talked
14 about that.

15 And the third thing they said was look, you
16 have got to keep those discovery documents anyway as an
17 attorney. You don't throw them away, you keep them in your
18 office. You have to keep them in your office as a practical
19 matter. So why not have access to them?

20 All right, if you include discovery within the
21 definition of court records, but you don't require discovery
22 materials to be filed with the clerk's office, then what does
23 that mean? That means they are not sealed, but to have any
24 meaningful access, the public has to be able to come in to
25 the law office and look at the discovery records. That means

1 the opponents or objectors to that approach said that means
2 that you have got to have a clean copy of your file that you
3 keep in a conference room in a case that anybody is
4 interested in seeing so the public can come in. You have got
5 to have certain hours when the public could come through your
6 office to look at it. You have got to spend a bunch of time
7 and money doing that. You have logistical and cost factors
8 that you shouldn't have to confront in dealing with discovery
9 if you are going to consider it to be a court record but you
10 are not going to have it filed in the court. That is a
11 practical objection, obviously, to defining discovery within
12 court records.

13 If you take the other approach and you go back and
14 you require us now to file the discovery with the court --
15 with the clerk -- you are going to have the clerks of the
16 state of Texas come out and shoot us all because the requests
17 for production of documents and the responses get so
18 voluminous that they can't afford to keep them anymore, and
19 that is one reason we changed the rule to not have them
20 filed.

21 Those are on a practical level the objections to
22 those two different ways to trying to include discovery in
23 the definition of court records. Beyond that, the people
24 who -- and Tom Leatherbury was one who objected to including
25 discovery -- point out that historically, if you look at the

1 cases, if you look at the Seattle Times v. Rhinehart decision
2 of the United States Supreme Court in 1984, the courts
3 traditionally have treated discovery documents as different
4 from, qualitatively different from other records or court
5 records, and have not accorded the public access to those
6 records.

7 And they have -- well, Seattle Times V. Rhinehart
8 says "Pretrial depositions and interrogatories are not public
9 components of a civil trial. Restrictions placed on
10 discovered but not yet admitted information are not a
11 restriction on traditionally public sources of information."
12 And they discuss that we didn't really have the current
13 discovery procedures until the 1983 amendments of the federal
14 rules and the like, and really try to draw the legal
15 distinction that there is historically in the law a
16 qualitative difference in discovery versus other records.

17 In kind of short form, those are the arguments and
18 alternatives. Lefty, you may want to pass around the
19 language that you had.

20 MR. BRANSON: The context that most of us run
21 into is the discovery has already been procured and may be --
22 and the court tries to seal it and the case is closed. Now
23 that is really not addressed in the problem you just called
24 up.

25 MR. HERRING: Right, and you remind me of one

1 other thing, and that is if we are going to deal with
2 discovery, we need to change Rule 166(b)(5)(c), which right
3 now specifically provides a lesser standard than what our
4 rule on sealing has, that is, it provides that -- or allows
5 the protective orders ordering that "for good cause shown,
6 results of discovery be sealed or otherwise adequately
7 protected." So we are going to have to pull that provision
8 out of Rule 166(b)(5) or change it or refer all sealing back
9 to this rule if we want to address discovery.

10 MR. BRANSON: The very same argument that
11 mandates the public have access to court documents certainly
12 mandates that other litigants have access to discovery
13 previously procured in lawsuits. And it is not -- I can see
14 no distinction at all between the two, particularly when you
15 deal with prevention for health and safety, which you have
16 already.

17 MR. HERRING: I hope we will get more
18 discussion than that. But I think I have pretty well stated
19 as well as I can the two positions as they were presented to
20 the committee.

21 MR. MORRIS: That is right, and you know,
22 there has been some thought, and Chuck and I worked to try to
23 find some middle ground where, upon a motion being filed to
24 seal -- that then at that time the documents are moved to the
25 courthouse.

1 In other words, there has got to be something
2 between the two poles. You either have to make the clerks
3 start taking it all again or people have to come to your
4 office.

5 MR. BRANSON: Let me ask this: Could we
6 address it in the manner -- in this manner and say that when
7 a party files asking to have discovery sealed, then that
8 party has to jump through the loops we have already set up.
9 Would that be possible.

10 MR. DAVIS: That would include attaching the
11 discovery that he wants sealed.

12 MR. BRANSON: Pardon?

13 MR. DAVIS: That would include in his motion
14 attaching the discovery that he wants sealed because you only
15 have to file it on those very rare occasions where they try
16 to get it sealed by filing everything.

17 MR. BRANSON: And then they would have to meet
18 the burden that we put in on the original section. Does that
19 sound reasonable to you-all.

20 MR. EDGAR: Well, let me raise a point. Am I
21 hearing that you are saying that lawyers today have enough
22 space in their offices that they can keep these discovery
23 records indefinitely?

24 MR. BRANSON: In truth and in fact, most of us
25 keep them.

1 MR. EDGAR: Then you do have a enough space?

2 MR. BRANSON: If you don't have any space, you
3 rent it out at a warehouse.

4 MR. EDGAR: Then if you don't have to do it,
5 but you do it because you want to, then there isn't any
6 prohibition against voluntary destruction. So as a practical
7 matter, it may not be available if someone wants it. Am I
8 correct? Is that a logical conclusion?

9 I mean it is unlike a court record where the courts
10 are required to keep those records indefinitely. So it
11 really stands on somewhat of a different footing, it seems to
12 me, and you need to deal with that problem also if you
13 approach it from that vantage point.

14 MR. BRANSON: We are really dealing with two
15 problems. One is the problem if someone comes in and says
16 five years after a case is settled, I need discovery in that
17 lawsuit. That is one problem.

18 The other problem is where a party at the close of
19 a lawsuit says there is some very damaging material that was
20 produced in this lawsuit, and it would really be sensitive to
21 me for it to not be sealed. And I think we can address the
22 latter problem fairly simply by merely including that in the
23 prerequisites we have set heretofor. How we cover
24 maintaining the documents for a period of time is a different
25 problem, and we may have to address it separately. Could we

1 first address how we want to deal with it when there is a
2 motion to seal it at the close of the case or after it is
3 produced in the case.

4 CHAIRMAN SOULES: Isn't there a threshold
5 question, though, is it even available. I mean I don't want
6 to be -- if I were a medical malpractice lawyer of Frank
7 Branson's stature and had done the quality of work that you
8 have done and discovery that you have done over the years --
9 and it has been superb. The results are plain. I don't want
10 to be deposed three or four days a week by lawyers that can't
11 do their work as well and have my discovery product that is
12 in my files discovered, plainly relevant, maybe about the
13 same doctor. I mean we are going to become witnesses now.
14 Our law offices are going to be the targets of records,
15 depositions on written interrogatories for records.

16 MR. BRANSON: Those are chances that I am
17 willing to take. We may have to determine how to calculate
18 an hourly wage for it.

19 CHAIRMAN SOULES: If that is the way it goes.
20 The second point that we need to address too is fair trial,
21 free press. The Houston Chronicle vs. Hardy sealed the
22 discovery -- all the discovery in that case ongoing because
23 the press was getting the discovery and publicizing it
24 widely, and the judge determined that if that continued over
25 the life of the discovery in that nuclear power plant case,

1 they wouldn't be able to pick a jury. The jurors would all
2 be contaminated by the press.

3 MR. SPARKS (SAN ANGELO): That analogy is what
4 our big problem is today really discovery you have gotten but
5 it is under a protective order.

6 In other words, you have got it for this guy. You
7 conclude that case by whatever reason -- the jury trial is
8 over, whatever. You have got that in your office, it is
9 under a protective order. Can you then disseminate it to
10 other people? Let's say that PCBs were being dumped down
11 here in the water system, and it is, you know, the public
12 needs to know that this is going on and you have got it in
13 your record through a protective order. Can you disseminate
14 that information? And I think what the consensus I am
15 hearing is yes you can unless they file a sealing motion at
16 the conclusion of the case.

17 MR. SPARKS: (EL PASO): I don't know if I
18 agree with that. I don't think the protective order just
19 dissolves with the dismissal or the judgment, and I am
20 thinking of something not as health-wise. It seemed like
21 every case that I have for a lawyer or a doctor, the first
22 thing that comes in is gross negligence and they want to know
23 the financial worth and that usually goes through a
24 protective order, and that is not to be disclosed until the
25 time of of trial or at the right time of trial except to an

1 expert or whatnot. And when the case is over, I don't see
2 any public interest in disseminating the defendant's
3 financial statement to anybody else. The protective order
4 seems to me continues on. You don't go in -- you would be
5 dumb to go in and try to get it sealed if you have to go
6 through these hurdles, but it is not anything that you are
7 going to disclose or give to the media or the enemies of the
8 defendant or, you know, competitive plaintiffs lawyers.

9 MR. SPARKS (SAN ANGELO): You shouldn't, but
10 if it is information that affects the public's health or
11 safety, then it should not be locked up under a continuing
12 protective order. I think that is what I am saying in the
13 case of cancer causing agents that are being dumped in a
14 toxic --

15 MR. SPIVEY: There is a whole -- another area
16 that touches right on this that doesn't have a thing to do
17 with public health, and that is the sharing of discovery, and
18 all of us, plaintiffs and defendants, try to get in touch
19 with groups that share -- collect and share that information.
20 Then you can become members of those groups for X dollars.
21 And one of the purposes of these groups is to save thousands
22 and thousands of dollars in discovery and to make available
23 vast amounts of information that have been recovered by
24 multiple people around the country. And there is a real
25 policy in the courts to encourage the sharing of that

1 information, and I think we can, if we are not careful, we
2 can participate in trying to draft the rule that would run
3 contrary to that policy in the efforts and clear holding in
4 court in that respect.

5 I did a paper on shared discovery, and if any of
6 you haven't read this book by Brother Harry, Confidentiality
7 Orders, it is a gold mine of information regardless of which
8 side of the bar you are on, about -- it contains a court's
9 attitude, courts right here in Texas, attitudes, and in fact,
10 in Judge Dibrell and his handling of the case -- what is
11 that -- Yamahas, no, American Honda, the American Honda case,
12 American Honda vs. Dibrell, set out the guidelines for
13 protecting the trade secrets and encouraging discovery and
14 the sharing of discovery and set out guidelines for sharing
15 of discovery. I sure would hate to see us by an afternoon's
16 casual deliberations set back a lot of fine court opinions
17 that have come out in that respect.

18 CHAIRMAN SOULES: Tom Davis, then, David, I
19 will get you.

20 MR. DAVIS: I would like to analyze with
21 you-all's' help is really, in context, what are we talking
22 about or discussing here? We have adopted rules for the
23 sealing of various documents, information, in other words,
24 keeping information away from people, whoever they might be.
25 We have got those rules for that.

1 Now, the question is, as I see it, is in what
2 situations are those rules going to apply? And particularly,
3 we are aiming on discovery. I see, one, you asked for some
4 documents. I say, okay, I will give them to you but I want
5 them sealed. That is one situation.

6 Another situation is you won't give them to me, but
7 if you are, you won't do it until they are sealed and then we
8 have to go and get the court to hear it.

9 Another situation is that I will give you these
10 documents that the court orders me to give you these
11 documents, but at the end of the trial, you have got to give
12 them all back or destroy them. That is another situation.
13 And I think it is what we have before us as to how do these
14 procedures apply to those situations? It seems to me that
15 what we are talking about is here are the rules that if you
16 want some information or some documents sealed or protected
17 from other people, then here is what you have to do in order
18 to have that done, and that would apply whether it is
19 discovery that you haven't given yet, if it is discovery you
20 have given. In all of those situations it would apply at the
21 end of the trial.

22 Now, I don't see how that has anything to do with
23 how long I keep my records. If they haven't been sealed, if
24 I have them, I guess they are available. If I don't have
25 them, they are not. The rules we have set up here haven't

1 said how long you have to keep records. We are assuming the
2 records are available. They are here and someone is asking
3 that they be sealed. So I don't know that is an issue that
4 we need to be bothered with.

5 The issue is is do we want those that want to keep
6 information away from other groups of people, do we want them
7 to have to abide by these same rules that we have set up for
8 others that want information kept from other people. And I
9 think that is the issue, and if it is not, then I would like
10 at least to decide what it is we are trying to decide. That
11 that is the way I see it.

12 CHAIRMAN SOULES: David, I said I would
13 recognize you next. David Donaldson.

14 MR. DONALDSON: I appreciate it. Let me try
15 to put this in context. One of the questions is do we want
16 to -- what do we want to happen with the court records, the
17 records that are actually on file with the court.

18 The main focus we have had so far in this procedure
19 is letting the public observe what is happening in their
20 courts, the courts that they pay for. That is one focus.

21 Then there is the second focus of do we, when we
22 get into a litigation of plaintiffs' products litigation and
23 we discover independent evidence that may or may not get into
24 court, do we want to be able to disseminate that information?

25 The position that we have been taking -- and I have

1 been dealing with Tom Leatherbury on this too -- is that
2 let's deal with the court records issue and the court
3 vis-a-vis its function as the public's entity, the public's
4 interest in finding out what is happening in its courts, and
5 solve that problem.

6 The court records that we are talking about in that
7 instance are the ones that are actually filed at the
8 courthouse, the ones that the clerks maintain, the ones that
9 they will continue to have on file and available to the
10 public.

11 Now, it may be that you would not want to have a
12 separate rule on discovery. And I think that is an issue
13 that we ought to look at. But I think we ought to accomplish
14 what we can accomplish with this court records rule and then
15 vote in a separate proceeding on a discovery rule, maybe
16 changing Rule 166(d) so that protective orders that are
17 entered cannot prevent the sharing of discovery or the
18 disclosure of matters when they affect the public health or
19 public administration. But do what you can do with court
20 records, the ones that are actually on file with the court,
21 and that is the focus that I hope that you take in this one.

22 CHAIRMAN SOULES: Rusty.

23 MR. McMAINS: Along the line of that last
24 solution, if you put -- if you stop the clock running on
25 protective orders that are issued during the course of

1 litigation, at the termination of the litigation, effective
2 orders is gone unless there is compliance with this rule
3 which would require then -- and then require basically that
4 in order to secure an extension of any protective order that
5 has previously been issued, which most of the time that is
6 what you are talking about is something that is already
7 either by agreement or by actual entry of something. Won't
8 that, by making them comply with the rule, they would then
9 have to file the documents, that is, require them to file any
10 documents they wish -- that anybody wishes to have protected
11 beyond, and you go through the process then. That gets the
12 records on file in the court and it makes fisher cut bait at
13 that time, and as to anything else, no protective order runs
14 beyond that day, and you know, at that point, it is a
15 question of you getting all the information you want from
16 anybody. Can't you do that.

17 MR. DAVIS: Well, that is a good solution for
18 part of it, but how about this protective order while the two
19 or three or four or five years that this case is going on
20 that this information cannot be shared with others without
21 having gone through some procedure such as we adopted here.

22 MR. McMAINS: I don't think we have a remedy
23 for that anyway, though, do we?

24 MR. DAVIS: If we make the discovery subject
25 to this rule before it is kept confidential or sealed or you

1 can't give it to somebody, you have got to go through these
2 steps before you can keep me from giving it to Sam.

3 MR. SPARKS (SAN ANGELO): Let's change the
4 definition of the protective orders.

5 MR. McMAINS: What I am saying is, you are
6 using this rule to open up -- to reopen up the protective
7 order rule is the problem with that.

8 MR. DAVIS: Making it subject to what we have
9 done here.

10 MR. McMAINS: I know. I mean that means --

11 MR. DAVIS: That is exactly right. You got it
12 right on the head.

13 MR. BRANSON: All you are doing is saying the
14 same theory that applies to protective orders at any stage on
15 any matter applies to discovery also, and certainly if it is
16 good in the one sense, it is good in the other.

17 MR. DAVIS: It is no different. If they can
18 show these things, then they got a right not to give them to
19 somebody. If they can't, they have no right to keep it
20 secret.

21 MR. McMAINS: All I am saying is you can't
22 ignore, if you are talking about pending litigation, pending
23 issues productively, particularly ones that were done by
24 agreement.

25 MR. DAVIS: I got another solution to that

1 too.

2 MR. McMAINS: The problem with that is that a
3 lot of times, obviously, it is easier to get it if they agree
4 to it, if we agree do it, but if that doesn't mean that
5 somebody else can't get -- then somebody else can just kind
6 of start a proceeding and subpoena to you or whatever, this
7 sealing process has to be complied with in order to conclude
8 other access to, then that really makes it real chancy for
9 anybody to enter into an agreed protective order.

10 MR. BRANSON: That is what it is intended to
11 do.

12 MR. DAVIS: That is another subject. I think
13 it ought to be unethical to do it.

14 MR. McMAINS: That, to me, I mean I think that
15 when you get to the point you are interfering with the
16 litigation with which the discovery is taking places -- the
17 progress of that or in any way stifling that.

18 MR. DAVIS: You are not interfering, you are
19 just putting more restrictions on what they can keep secret.
20 Even now they are going before a Court and everybody has got
21 their own rules and everybody has got their own standards and
22 the judge will enter the order here, now we have sets of some
23 pretty tough standards before you can keep information from
24 other people, and I don't know why information you obtain
25 during the course of a trial is any different than any of

1 those other examples that we went through, the patent cases
2 or anything else.

3 MR. BRANSON: Unless you can meet the standard
4 you have set out in the other section that allows the press
5 access to it, why should you be able to enter into a
6 protective order? I mean if you can meet those standards,
7 then there may be a reason for it. But if you can't meet
8 those standards, why should we get to hide evidence?

9 MR. McMANS: It is not a question of being
10 able to hide evidence, it is a question of whether or not the
11 discovery rules and whether or not we are going to make the
12 discovery rules such that we don't encourage any kind of
13 voluntary cooperation if that is possible.

14 MR. BRANSON: The Legislature has mandated we
15 address the problem, as far as the problem.

16 CHAIRMAN SOULES: Steve.

17 MR. McCONNICO: What we are doing now is
18 obvious we are backing in from this problem of what type
19 of -- what is the press and what they should be able to get
20 to, and if we are going all the over 166(b) and what the
21 parties among themselves can agree to to expedite discovery
22 and expedite the movement of the case. I think they are two
23 completely different matters. We are also under -- the
24 Supreme Court says they want the parties to cooperate and
25 reach agreements, make agreements among themselves, do

1 anything they can to expedite the movement of the case.

2 Now, if we are going to put discovery -- if we are
3 just going to mark out 166(b) and say this is going to be our
4 discovery rule, it isn't going to work because then we are
5 going to have to have all these hearings for every type of
6 discovery agreement that anyone enters into. And I don't
7 think that is what we want to do. I think that just
8 complicates matters more. We have been here for four hours
9 today, and it is obviously no criticism here because this is
10 very difficult, but to expect the bar to be able to operate
11 with what we are discussing for this new rule for 166(b) is
12 impossible. That won't work.

13 MR. BRANSON: Steve, why is a litigant any
14 much less the public than the press? That is what we are
15 saying if we restrict it. I mean a litigant is entitled to
16 the same public access as the press should be.

17 MR. McCONNICO: I am not saying people
18 shouldn't have access. What Broadus brought up first, I
19 think we should have access to depositions that are taken,
20 and people do today. Every time I take an expert's
21 deposition, either side of the docket, I get on a 1-800
22 number and I get every deposition he has taken. That is not
23 going to change because everyone is a member of those groups
24 and are still going to supply it. We are not impacting on
25 that at all. The only thing that we are talking about here

1 is making it restrictions where everything that we do during
2 a discovery hearing and every agreement that I reach with you
3 here on the other side, I have to go to the court and I have
4 to jump through every hoop that we have talked about under
5 this new rule, and we can't do that.

6 MR. LOW: If you do that in discovery, you
7 just -- it just cuts out agreements. I had a case with
8 Texaco, they are going to give me this investigation. There
9 is no public interest. Limitations run and everything, they
10 don't want it out. I make certain agreements, both sides
11 that we enter that we won't give it out. We get along with
12 the litigation and you could always argue a case involved
13 health or safety and, you know, that is pretty easy, but,
14 Lord, that would make so easy -- had about two hours of phone
15 calls when I could have made it in maybe two months. I
16 consider I don't disagree with Frank's philosophy.

17 MR. BRANSON: What about where you had to drag
18 it out?

19 MR. DAVIS: Don't mix up what you do by
20 agreement and what they are trying to force you to do.

21 MR. BRANSON: Let's say you had to drag it out
22 of the other side and now you drag it out and it is out there
23 and now they want to hide it again.

24 MR. LOW: I agree with you there. But I am
25 just saying that I have a fine -- I have trouble drawing the

1 line that cases say you got to submit a case a certain way.
2 The lawyers can agree. Helm and I agree a case is wide open,
3 argue anything. That is a violation of every rule. I mean,
4 you know, you can try a case the way you want to. You ought
5 to be able to make an agreement on something.

6 MR. BRANSON: Here is what happens: You get
7 to the close of the lawsuit, and the manufacturer says okay,
8 you have got all this stuff and we will pay your demand, but
9 we will only do it if you agree to seal the documents. Now,
10 all of the sudden, you are in a conflict with your client's
11 position and in a conflict with the public's position on
12 safety and welfare, and lawyers shouldn't have to be put in
13 that position. That ought to be discovered.

14 CHAIRMAN SOULES: Hold it. Wait a minute.
15 Now we have too many people talking. The court reporter
16 can't get the dialogue. Who is next? Rusty.

17 MR. McMANS: But that is the point I was
18 making. To that extent, to the extent something is not
19 subject to a protective order by agreement or otherwise, you
20 are able to share that information anyway.

21 When there is a protective order issued through the
22 life of that litigation, all your remedies and all the
23 litigant's remedies that is involved in that is right there
24 and it is under 166(b). Now, when that is over, all I am
25 saying is if you terminate the effective date of the

1 protective order at the date of the hearing, at the date of
2 the determination of the case, and then then make -- if they
3 want that to go beyond the date of the case, when the case is
4 over, if the defendant wants it to go, they have got -- if
5 they have got to go then through this procedure, they would
6 have to file it in order to extend it. I mean all you have
7 to do 166(b) is just say the protective order ends when the
8 case ends.

9 MR. BRANSON: Why shouldn't they, in order to
10 get the protective order, Rusty, you have to jump through
11 these hoops in the first places unless they can do it by
12 agreement.

13 MR. SPARKS (SAN ANGELO): Luke.

14 CHAIRMAN SOULES: Wait a minute. That is a
15 very interesting point unless they can do it by agreement.
16 This procedure permits no agreement whatsoever. You must
17 have a hearing and you must post it in Austin.

18 MR. DAVIS: We can do an exception for
19 discovery on that.

20 MR. SPARKS (SAN ANGELO): I have got a bigger
21 problem than all the of us are touching here. Now, I have
22 had a case where some very dangerous health things were
23 involved, okay, and I settled that case because they offered
24 a lot of money and I asked my clients, I represent you, you
25 hired me, you want to take this settlement or not. The

1 clients said yes, we do. But you have got an obligation to
2 the courts. We are officers of the court. We have got an
3 obligation to the society we live in, and there are things
4 going on that are going to kill people and yet by agreement
5 you are telling me that if I go drag it out of them, then we
6 have got some kind of sealing. But if I agree to it, then
7 the public has to keep dying. I mean I have got a larger
8 conflict with the philosophy of what I owe to the community I
9 live in. Do you understand? I am having problems with that,
10 and I really would like to see a rule passed that just says
11 any agreement between two people to seal a document is
12 invalid. Only a court can seal records. Is that making any
13 sense?

14 CHAIRMAN SOULES: Sure.

15 MR. SPARKS (SAN ANGELO): I don't care if it
16 is a settlement or protected discovery or agreed discovery.
17 We have got an obligation to our fellow man we live with, and
18 if we get down thinking so much in narrow scope that we are
19 willing to see people die to get money, we are no better than
20 Ford Pinto saying it is cheaper to burn them than to retool.
21 I think we have got to think about this seriously in a
22 broader aspect than just discovery versus sealing.

23 MR. McMains: Sam, what I am talking about --

24 MR. SPARKS (SAN ANGELO): I agree with you,
25 concept, mechanical --

1 MR. McMains: Sam, the problem we have got is,
2 who is going to keep these records forever? How do they get
3 there? And the point is that the person who has the interest
4 in keeping the information consealed --

5 MR. SPARKS (SAN ANGELO): I agree with you.

6 MR. McMains: -- is the person who beyond the
7 life of the case -- because that is really the only discovery
8 privilege you have is relating to that litigation. That is
9 one of the -- you know, the other issues deal with all the
10 protective orders anyway is for the purposes of that
11 litigation. Now, if you produce it in connection with
12 another piece of litigation, it is not privileged anyway.
13 So, you know, in terms of a lot of investigations and stuff.
14 So all I am saying is basically taking it in the same
15 context. When the case is over and that defendant wanted to
16 pay you a lot of money to keep you quiet, if you had this
17 procedure in place, you would say I can't do that because the
18 protective orders --

19 MR. SPARKS (SAN ANGELO): I agree with you.

20 CHAIRMAN SOULES: Let Rusty finish.

21 MR. SPARKS (SAN ANGELO): You have got to file
22 a sealing to extend it.

23 MR. McMains: To keep a protective order
24 beyond, whether by agreement or otherwise, beyond the life of
25 the litigation, you have to file it as -- you can file it

1 in camera just like we have already got the provisions for,
2 but you have got to file it and then move to seal it and jump
3 through all the hoops, and that way you don't have to worry
4 about sealing all discovery because there is not but just a
5 few things that most anybody doesn't want out anyway. But
6 you make that one fix in 166(b) where the protective order
7 ends at the life of the litigation, that encourages all the
8 agreements you want to up to the time of the litigation, and
9 then thereafter it is the responsibility of whoever wants the
10 records kept quiet, whether it is a doctor who doesn't want
11 it to talk about 32 adultery examples in cases of divorce, or
12 what.

13 MR. SPARKS (SAN ANGELO): Someone's financial
14 statement, whatever.

15 MR. McMAINS: Whatever, it doesn't matter. He
16 has to go and show and file it and then you have got it in
17 the courthouse, but it ain't all that much, and that is just
18 something that is going to have to happen.

19 MR. O'QUINN: Question.

20 CHAIRMAN SOULES: Join O'Quinn has the floor.

21 MR. O'QUINN: Rusty, what would you put in
22 this rule to do what you just said?

23 MR. McMAINS: First of all, in the protective
24 order in 166(b) -- and I would define -- and I would just put
25 in 166 the -- we take out the part over here which says that

1 discovery and results of discovery.

2 MR. O'QUINN: Take that out of the proposed
3 rule?

4 MR. McMAINS: Take it out of here which says
5 it doesn't apply because it does apply by definition as a
6 filed record, you see. And so if all you say in the 166(b)
7 is that in order to continue a protective order beyond the
8 life of the litigation, then the documents in which
9 protection are sought, or whether achieved by agreement, must
10 be filed and, you know, must be filed period. Just stop
11 right there. All of the sudden it meets the definition of
12 court records, okay, and at that point, it is filed. If they
13 want the protective order, if they didn't do that, then it is
14 not filed.

15 MR. O'QUINN: Fine. Would you be willing to
16 add one more sentence in light of what Brother Sparks said
17 that any agreements between parties --

18 MR. McMAINS: For the destruction of
19 documents.

20 MR. O'QUINN: Yes, the destruction or
21 secreting of documents, whatever the word, the problems that
22 he had is invalid.

23 JUSTICE DOGGETT: There is language on that,
24 John, in the D tab of what you have. There is "No court
25 shall make or enforce any order or agreement, civil

1 agreements, restricting public access."

2 MR. O'QUINN: Something like either what
3 Justice Doggett just said. Would you be willing to add that?

4 MR. McMAINS: Sure. I don't have a problem
5 with that. I mean I think it is the same spirit of the rule
6 that you ought not to be given something on the idea that you
7 will read it and then destroy it.

8 MR. O'QUINN: Does that satisfy the concern of
9 somebody, Rusty, does that satisfy the concern of somebody
10 that they are going to have to maintain a file in their
11 office so people can come trooping through there decades and
12 decades --

13 MR. McMAINS: The litigation is over, the
14 litigation. Then protective orders, all protective -- there
15 is no such thing as a protective order. It doesn't apply
16 anywhere.

17 MR. O'QUINN: All right, so you are saying
18 during the time of the litigation --

19 MR. McMAINS: If the defendant is worried
20 about the information getting out after the litigation is
21 about to conclude, whether by trial or whatever, it didn't
22 come out in the trial or something, then he is going to have
23 to jump through these hoops, the protective order expires by
24 its very terms when that judgement is entered.

25 MR. O'QUINN: He would have to file the

1 documents in question with the court so they would be
2 available there --

3 MR. McMAINS: And at that point, they would
4 become subject to the rules.

5 MR. O'QUINN: And thereby available to
6 interested other parties to deal with the court rather than
7 trouble the lawyers.

8 MR. DAVIS: How long do you keep the records?

9 CHAIRMAN SOULES: Let's try to get a concensus
10 on, I guess, the threshold question. How many feel that
11 parties should be able to reach agreements and have the court
12 sign protective orders in a pending case outside of the
13 purview of this sealed document standard.

14 MR. COLLINS: I would like to amend that,
15 Luke. And let's really get to the guts of this thing. We
16 have been dancing around the maypole bush here now since 8:30
17 this morning and really, the real question is are we going to
18 bring discovery documents within the definition of Court
19 records. And I think we ought to see if we can reach a
20 concensus on that issue because that is the guts of it right
21 there. The rest of it is mechanical. If we can reach an
22 agreement on that, the rest is mechanical concerning
23 agreements, concerning how long we maintain it, those things,
24 because in my opinion, if you don't include discovery
25 documents in this definition, it is a sham on the public, the

1 press and the media because, otherwise, all you have is a
2 plaintiff's original petitions, the defendant's answers and
3 special exceptions. You know, big deal. That is nothing.
4 And this whole structure is for naught if you don't include
5 discovery in the definition of court records.

6 CHAIRMAN SOULES: I think there is a --

7 MR. COLLINS: I would like to see if we can
8 reach a consensus on that.

9 CHAIRMAN SOULES: I think there is a division
10 between, though, between whether discovery can be protected
11 pending a case until it is over with, and then whether it
12 should thereafter not be protected, continue to be protected.
13 That is what I am trying to find out is are we going to write
14 one rule that deals with discovery without differentiating
15 between whether the case is pending or over with, or are we
16 going to try to treat those as two different circumstances.
17 And I think we have got to know that.

18 MR. BRANSON: Luke, can't you address the
19 threshold question John presented and then go back and carve
20 out exceptions for pending litigation and for agreements or
21 whatever?

22 CHAIRMAN SOULES: You come up here and take
23 the vote. All I am trying to do is get it organized somehow.

24 MR. DAVIS: I have a motion. John, make a
25 motion.

1 MR. COLLINS: I would move that we include
2 discovery documents of all kinds within the definition of
3 court records as found in Paragraph 2, the definition of
4 court records.

5 MR. BRANSON: Second.

6 MR. DAVIS: Second.

7 CHAIRMAN SOULES: Made and seconded. Any
8 discussion?

9 MR. O'QUINN: Just a point of clarification.
10 Is the point of your motion, John, that with respect to what
11 we now call protective orders during the discovery process
12 where the defendant or some party seeks a protective order
13 that if they give something up in discovery it can't be
14 disclosed, it is the spirit and the point of your motion that
15 that whole procedure be now covered by this new rule.

16 MR. COLLINS: That is correct.

17 CHAIRMAN SOULES: Any discussion?

18 MR. McCONNICO: Just another clarification.
19 But we are not voting under your proposal as to whether or
20 not that is binding on the parties to making an agreement
21 during the trial itself?

22 MR. COLLINS: That is correct. That agreement
23 is another separate subject matter that we can talk about in
24 trying to iron out those problems.

25 MR. O'QUINN: We are just saying where the

1 parties can't reach agreement and they are going to go to the
2 court to get the Court to make the decision, whether the
3 decision is during the trial when discovery is going on, or
4 whether the decision is to deal with what happened after the
5 case is over. It is all covered by this rule.

6 MR. COLLINS: That is correct.

7 CHAIRMAN SOULES: That won't work. This rule
8 doesn't permit that. This rule says that David Donaldson,
9 even though O'Quinn and McConnico have agreed to whatever
10 about discovery -- it has to be discovery, and I don't know
11 what the voluntary exchange of information is. I don't know
12 if that is discovery or not.

13 MR. O'QUINN: Let me amend your statement. He
14 could include that he is going to pay my client a bunch of
15 money if my client keeps his mouth shut after the lawsuit is
16 done, too. So it can include those kind of agreements.

17 CHAIRMAN SOULES: All those kinds of
18 agreements, David Donaldson could come in and say, O'Quinn, I
19 want to know the deal. And he has a right to get it unless
20 you have asked the court it seal your agreement.

21 MR. O'QUINN: Because you are saying this
22 rule, as written, does not permit agreements.

23 CHAIRMAN SOULES: Does not permit agreements.

24 MR. COLLINS: I agree. As drafted, that is
25 correct.

1 MR. DAVIS: That doesn't mean we can't add
2 that to it later.

3 MR. BRANSON: It is the concept of whether you
4 want to adopt the rule and then go back and carve out
5 exceptions for agreements.

6 MR. O'QUINN: His motion is not to prove the
7 rule is written and apply it to discovery. I perceive John's
8 motion to be do we want to have a rule -- let's get a
9 consensus -- do we want to have a rule that says absent
10 agreement, in other words, take that part out of here if you
11 can't have an agreement, absent agreement, do we use these
12 procedures to decide secrecy during discovery and even after
13 trial is over? Is that about right, John.

14 MR. COLLINS: Well, not really. My motion
15 from the philosophy standpoint includes all discovery
16 materials in the definition of court records. Then if this
17 committee so chooses, we can go back and make certain
18 exceptions or agreements or whatever we want to. But just
19 from a philosophical standpoint, that is the thrust of my
20 motion.

21 CHAIRMAN SOULES: Anymore discussion?

22 MR. O'QUINN: Can we have any brief discussion
23 on his point?

24 CHAIRMAN SOULES: Sure. That is what we want
25 to do.

1 MR. O'QUINN: As I understand John's motion, I
2 strongly favor it, because I think it is very important that
3 we confront the fact that protective orders and things of
4 that nature impact on more than just the litigants and can
5 result in very important information being bottled up and
6 sealed which needs to be -- the public needs to have access
7 to, and I think that is very important at all times. And we
8 need to confront that and come up with some rules that are
9 workable to do that. And while it may be easy to have a
10 situation where lawyers can just willie-nillie agree to these
11 things or just let courts enter them, I don't think that is a
12 good practice. I think it is bad public policy, and I think
13 there has been a lot written about it, and I think we have
14 got to confront it. I am very much moved, for example, by
15 Sam Sparks' example about it. And I favor very much what
16 John Collins just moved to do.

17 CHAIRMAN SOULES: Any further discussion?
18 Okay, all in favor say "Aye." Opposed?

19 MR. SPARKS (EL PASO): No.

20 CHAIRMAN SOULES: One dissent.

21 MR. O'QUINN: The other Sam Sparks.

22 MR. SPIVEY: Don't tell which Sam Sparks.

23 MR. SPARKS (SAN ANGELO): That is like a
24 co-chair going against his own motion.

25 MR. McCONNICO: Luke, do you want to put the

1 next one on the floor about reaching the agreements during
2 the lawsuit? That seems to be the next point.

3 CHAIRMAN SOULES: All right, does anybody have
4 a motion? Do you want to make a motion?

5 MR. McCONNICO: Yes, I move that the parties
6 during the pendency of the lawsuit can agree that certain
7 records are privileged, not disclosable, whatever, not
8 subject to this provision. I don't know what the rule number
9 is now.

10 MR. O'QUINN: It doesn't have one right now.

11 MR. McCONNICO: 76(a).

12 MR. SPARKS (SAN ANGELO): My problem -- and I
13 agree with you. It is so much easier to facilitate the
14 handling of my case, I promise you. And I do think I am the
15 most agreeable lawyer you have ever met. You don't have to
16 notice me for a deposition or anything. I will give you my
17 file, I don't care. My problem is this: I have got a case
18 pending right now that deals with ethylene oxide. I am not
19 under a protective order, okay -- where they are using
20 ethylene oxide to steralize Johnson & Johnson sutures and
21 needles and products out of San Angelo. And that stuff is
22 leaking in that plant. The problem is like asbestos. The
23 people aren't going to start dying until 10 or 15 years
24 later. That case is pending. It has been going on.

25 If they come to me and say, Sam, look, here is the

1 material. We are killing them left and right. They aren't
2 going to die for 15 years, but I am going to give it to you
3 by agreement. Now, all of the sudden, I am participating to
4 the the harm to these other people to my client's interest,
5 and really to my own financial interest because I am going to
6 get hired by those other people that start dying later on,
7 that as a matter of public policy what is right and wrong and
8 what I owe to my fellow man, Steve. I shouldn't be required
9 to bottle it up simply because it is given to me by
10 agreement. That is wrong. It is not right.

11 MR. LOW: You don't have to agree to it,
12 though, Sam, if it is an agreement.

13 MR. SPARKS (SAN ANGELO): I wasn't going to.
14 Okay, we won't give it to you, Sam. And then I can't prove
15 my client's case.

16 MR. LOW: Not every case is like that.

17 MR. SPARKS (SAN ANGELO): My problem is not
18 with the rules you are talking about, it is philosophically
19 in a much broader sense.

20 MR. BRANSON: If you require them, though, to
21 jump through these hoops, if you say, okay, I won't agree to
22 it, you have got to go through these hoops to get it
23 protected by protective order, you are got to get it through
24 the normal discovery channels, and it is not going to be
25 protected.

1 MR. SPARKS (SAN ANGELO): Perhaps.

2 CHAIRMAN SOULES: Steve McConnico.

3 MR. BRANSON: In that instance, it certainly
4 has --

5 MR. SPARKS (SAN ANGELO): Perhaps they know
6 exactly, Frank, and I don't.

7 CHAIRMAN SOULES: Steve has got the floor.

8 MR. McCONNICO: I was just going to reflect
9 what Buddy and Frank just said. You are going to get that
10 under 166(b) anyway. You are going to get it. You do not
11 have to enter into any agreement at all. But if there is one
12 thing that has been clear since we changed 166(b), and which
13 has been a consistent complaint, is we are having too many
14 hearings. They have made the bar too much adversaries to one
15 another, we are wasting too much time in discovery, and if we
16 have to everytime I reach an agreement with another
17 attorney, and I cannot reach an agreement if we transplant
18 this Rule 166(b) literally -- and I don't think I am
19 exaggerating -- we are about to triple the number of hearings
20 and time discovery takes, and we have got to be careful to
21 say bad facts make bad law. What you are saying is a very
22 exceptional situation. I think it could be handled very
23 easily by not making the agreement or you could get the
24 material anyway under 166(b). We have got to be able to let
25 the attorneys agree among themselves as to how they are going

1 to conduct discovery.

2 MR. SPARKS (SAN ANGELO): That is a valid
3 point.

4 MR. DONALDSON: Let me interject again. The
5 immediate concern that those agreements, if they are done in
6 the discovery context, is consistent with the way we practice
7 now. But if it is done in the context where everything that
8 we talk about this issue we are going to keep it private
9 between the parties, including hearings, and we tell the
10 judge, Judge, we have agreed we are going to keep this
11 private, and the judge says okay, we will close the
12 courtroom, okay, all these records are sealed. I have a real
13 concern about that. Our focus is at least don't back up.
14 The procedure now normally is that court records are
15 available. By creating a difficult process in order to
16 protect discovery materials, don't cause that to lead to even
17 more records being sealed.

18 MR. DAVIS: What is the motion?

19 CHAIRMAN SOULES: I don't know.

20 MR. MORRIS: We don't have a motion on the
21 floor.

22 MR. SPARKS (SAN ANGELO): You didn't make a
23 motion, did you?

24 MR. McCONNICO: No, I just said let's discuss
25 it. I think the motion -- of course, now we are all kind of

1 confused as to where we are as to whether or not -- I don't
2 even know if a motion needs to be made. I guess it does in
3 light of what John said last time.

4 MR. MORRIS: We still don't have language.
5 We voted on a concept.

6 MR. COLLINS: I have got language now.

7 MR. SPARKS (SAN ANGELO): Steve, on concept,
8 what you and I are talking about --

9 MR. McCONNICO: Right.

10 MR. SPARKS (SAN ANGELO): -- I can certainly
11 see in the practice of law where we get bogged down in
12 hearing after hearing after hearing. I mean I am finally put
13 in a position where I say I won't agree to it, don't give me
14 any information. You understand, I don't want to be put in
15 that position. That is not representing my client. I can
16 see the concept you are coming from on that. At the same
17 time, when you are talking about discovery that is exchanged
18 by agreement, are you including agreements to conclude the
19 case, settlements? Or are are you just talking about
20 discovery.

21 MR. McCONNICO: We are talking about
22 settlement. I think -- we are talking about discovery. I
23 think settlement is a different issue.

24 MR. SPARKS (SAN ANGELO): I will back off.

25 MR. DAVIS: Luke, I move the adoption of the

1 definition of court records (a)(3) that has been distributed,
2 and I will read it: "For purposes of this rule, the term
3 court records shall include all documents and records filed
4 of record and discovery and the results of discovery whether
5 or not filed of record in connection with any matter before
6 any civil court in the state of Texas. The term court
7 records also includes settlement agreements."

8 MR. MORRIS: You need to stop at that last
9 period.

10 MR. DAVIS: That part first.

11 MR. MORRIS: After you said state of Texas
12 period.

13 MR. DAVIS: State of Texas period. I move the
14 adoption of that as an amendment to Rule 76(a).

15 MR. BRANSON: Second.

16 MR. McMANS: Can you read it? I am sorry.
17 Can you read it.

18 CHAIRMAN SOULES: It has already been. May I
19 have a clarification on it? You intend then to make the
20 protective order practice and discovery govern -- to have
21 that governed by Rule 76(a).

22 MR. DAVIS: I think that would be the effect
23 of it.

24 CHAIRMAN SOULES: Any confidentiality order
25 has got to go through the 76(a) process.

1 MR. DAVIS: Right. Discovery is a public
2 document, or a court record, I am sorry.

3 CHAIRMAN SOULES: We are not going to kill the
4 goose that laid the golden egg when we do this, are we? We
5 are increasing litigation big time.

6 MR. McCONNICO: That is my problem.

7 MR. COLLINS: I think we are reducing
8 litigation.

9 MR. DAVIS: I think trying to seal information
10 only increases. The problem is if they will tell you the
11 truth and give it to you and not try to hide it, we wouldn't
12 have this problem.

13 MR. BRANSON: You may have a hearing, but by
14 having that hearing, you are stopping four years of
15 unnecessary discovery process in another case.

16 CHAIRMAN SOULES: My work is business work,
17 and I don't have these ongoing same experiences you-all have.
18 And this is going to be devastating to my work.

19 MR. O'QUINN: It can only come up when
20 somebody wants to seal your records.

21 CHAIRMAN SOULES: They always want to seal
22 their general ledgers and their sales records and their
23 formulas, the thing -- now, they have got to show them to the
24 judge whenever you are in one of these business disputes, but
25 they want all that kept confidential. I mean they have got

1 to show them to the experts, lost profits and all that sort
2 of thing. This is going to put highly confidential
3 commercial business information of close corporate entities
4 out in public unless there is a 76(a) proceeding in the case
5 everytime a protective order is sought. I mean if we are
6 going to lay that burden on the process, I just don't want to
7 do it without people here recognizing that is what we are
8 doing.

9 MR. DAVIS: I don't think we will have that
10 problem because there is not going to be that many people
11 that want to jump through the hoops because it is not that
12 important. It is going to be the exceptional situation where
13 you have something of extreme importance, and if you do, it
14 is justified and it ought to be sealed. But it will stop
15 this frivolous stuff of every time you turn around every
16 single thing that they produce is privileged and confidential
17 and everything else, and the protection orders are being
18 granted right and left. And I think we have got to stop it
19 or at least let the Supreme Court know that at least the
20 majority of this group would like to stop it.

21 MR. MORRIS: We have got a motion and a
22 second.

23 CHAIRMAN SOULES: Okay, motion made and
24 seconded. Discussion? Motion has been made and seconded
25 that first sentence of (a)(3) be recommend to the Supreme

1 Court for adoption. Sam Sparks.

2 MR. MORRIS: No, this -- it should be under
3 2.

4 MR. COLLINS: It should be (a)(2).

5 MR. DAVIS: Tell me where it goes.

6 MR. COLLINS: Locke Purnell draft (a)(2).

7 MR. MORRIS: What it is is your definition of
8 court records which is (a)(2).

9 CHAIRMAN SOULES: It is labeled (a)(3).
10 (A)(2).

11 MR. MORRIS: It is labeled (a)(3). I am
12 sorry. You will pardon my error, I am sure.

13 CHAIRMAN SOULES: It wasn't your error. Is
14 there discussion on this? Okay, let's let her change paper
15 and then we will get into the discussion.

16
17 (At this time there was a brief
18 discussion off the record, after which time the hearing
19 continued as follows:)

20
21 CHAIRMAN SOULES: All right, come to order.
22 And Hadley has the floor.

23 MR. EDGAR: I would just like to ask the
24 drafter of (a)(2) what is the difference between discovery
25 and the results of discovery?

1 MR. HERRING: That language -- I won't claim
2 to be the drafter -- but I think that language came out of
3 166(b) which in 5(c) refers to results of discovery and of
4 the -- I understand that the thought was that discovery is a
5 little different than results of discovery. Results might
6 just be the responses. Discovery might include the
7 interrogatories.

8 MR. DAVIS: Answers to a question on
9 deposition.

10 MR. BRANSON: Is there any disadvantage,
11 Hadley, to include both?

12 MR. MORRIS: No, there is not.

13 MR. EDGAR: I just have a question about
14 whether there is any difference between them and why be
15 redundant.

16 MR. HERRING: The reason is to be consistent
17 with Rule 166(b)(5), which is the terminology it uses,
18 recognizing it is going to have to be amended now.

19 MR. BRANSON: And discovery might be what
20 animal was it and the results might be a name.

21 MR. HERRING: Yes.

22 CHAIRMAN SOULES: Both terms are used in
23 Section 5 of 166(b).

24 MR. BRANSON: Call the question, Mr. Chairman.

25 MR. MORRIS: Let's vote.

1 MR. EDGAR: I don't see where it is found.

2 CHAIRMAN SOULES: Tom had his hand up.

3 MR. COLLINS: 166(b)(5)(c), Hadley, talks
4 about ordering that for good cause shown results of discovery
5 be sealed or otherwise adequately protected.

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

8 MR. SPARKS: (EL PASO): I want to echo Steven.
9 I see the handwriting on the wall. You know, we are talking
10 about a group of people in here who have some pretty good
11 lawsuits, big lawsuits and have some valid points, but the
12 bulk of the docket are not these types of cases.

13 Our discovery rules now are liberal. Among other
14 things, they allow a lot personal information that usually is
15 not admissible. A lot of information that if now is going to
16 become public record, you are going to get a lot more
17 objections, you are going to get a lot more court hearings.
18 I just foresee lots of problems from a defense standpoint.
19 You are just going to doubling and tripling the discovery
20 because everything is going to be at the courthouse rather
21 than on agreement because your clients do not wish that
22 personal information -- I am not talking about saving people
23 or harming people from a plant, I am talking about just
24 motion to produce personnel files. And you figure out what
25 kind of litigation we are talking about, and you are going to

1 find that people are going to start objecting to it because
2 they can't come through the loopholes, and at the end of the
3 lawsuit, when you tell people that that is public record, you
4 are just going to -- you are doubling and tripling your
5 efforts, and this is -- to me, it is making big reversal on
6 the liberal discovery and the way we have been able to move
7 discovery, and it is a mistake.

8 CHAIRMAN SOULES: Is there anybody here who
9 does much family law? Harry is not here and Ken is not here.
10 I would assume this is going to put them in apoplexy.

11 Now, then, the parties' discovery disclosures are
12 public for all time, open to the press, unless they get them
13 sealed by notice through the Supreme Court clerk's office and
14 so forth. I mean that is what we are doing.

15 MR. LOW: You can't do it just because you are
16 embarrassed.

17 MR. McCONNICO: Luke, could I add something?

18 CHAIRMAN SOULES: Yes, Steve.

19 MR. McCONNICO: We don't have anybody also
20 here from the trade secret area. I do some oil and gas
21 litigation, and there is never a piece of discovery that is
22 filed in oil and gas litigation that deals with any petroleum
23 engineering, geology, future reservoir projections, that has
24 not had a lot of time and a lot of expertise gone into it
25 that those people don't want their competitors to know the

1 operators of the offsetting leases. And to say that Exxon,
2 who I don't represent and am usually opposed to, has to jump
3 through all of these hoops because I represent some royalty
4 owner, and then we are going to put that onto the burden of
5 the district court in Chambers County or wherever where most
6 of those cases are, and they are mostly in front of rural
7 district court judges who are not used to having special
8 masters that are petroleum engineers. It is going to be an
9 unbelievable burden, and those are the facts the way that
10 type of litigation is done. And I am afraid that we are not
11 looking at the big picture and we are looking at just a few
12 precise cases -- personal injury cases that have a large
13 affect upon the general health of the public, and we are
14 doing a rule that affects those, but we are not thinking
15 about what affect this is going to have and impact on other
16 areas of litigation like family law, commercial law. And I
17 am totally in sympathy with what Sam has said, and everyone
18 else here says that we need to protect the health of the
19 public and environmental-type cases. But I think we need to
20 be very careful in doing that so we just don't cause this
21 ripple effect that is going to have a tremendous economic
22 burden on the litigation in the state in every other area.

23 MR. BEARD: Let me say my personal feeling is
24 court records is something that is filed with the court, and
25 I am much opposed to having us in charge of court records

1 other than the depositions in the course of the trial. You
2 know, how long we going to keep all these things?

3 MR. DAVIS: Nothing in there says you have to
4 keep anything.

5 MR. SPIVEY: Wait a minute. Aren't you-all
6 talking about -- you are declaring these matters court
7 records. They don't cease to be court records when that case
8 is over, and five years from now I decide to get rid of them
9 and I discard them. Somebody comes along and says I
10 destroyed public records?

11 MR. DAVIS: Yes.

12 CHAIRMAN SOULES: Yes, that is right.

13 MR. COLLINS: That is the way it is right now,
14 gentlemen, because we did not address that problem when we
15 switched the filing from the clerks back to the lawyers. We
16 didn't address that issue then so it is the same thing right
17 now.

18 CHAIRMAN SOULES: It was addressed in the
19 Seattle Times case and it is not court records. Those are
20 not court records. Discovery is not a court record unless we
21 make it a court record in this rule, and we have.

22 MR. DAVIS: Would it be made a court record
23 for the purpose of this rule?

24 CHAIRMAN SOULES: Well, it is made a court
25 record period.

1 MR. DAVIS: And not a court record in that you
2 have got to retain them and keep them and have access to the
3 public on --

4 MR. HERRING: Well, the public citizen votes,
5 that interest group that showed up, the public citizens
6 group, specifically argued that if we adopt this, they are
7 going to have the right to access --

8 MR. DAVIS: If we let them.

9 MR. HERRING: Well, they said they are going
10 to have the right to access because it then becomes a court
11 record, and, you know, how they enforce it and what your
12 rights are to keep them out of your office, or whatever,
13 become issues to deal with. But their expectation is that
14 they could use this whether they are right or wrong.

15 MR. BRANSON: Why don't we just pass the rule
16 and then say we don't have to keep them in a subsection.

17 MR. DAVIS: You say they are court records
18 only for the purpose of this rule and it doesn't have
19 anything to do with how long you keep them anymore than the
20 rule of not filing interrogatories with the clerk tells you
21 how long you have to keep something. And if you don't have
22 them -- if you have them, then I guess they are entitled to
23 see them, but if you don't have them, there is nothing there
24 that says how long you got to keep them.

25 MR. HERRING: But they are entitled to see

1 them when and if --

2 MR. DAVIS: If they exist.

3 MR. HERRING: If you have them and they are in
4 your office, they are entitled to see them. Is that 8 to 5?
5 You have got to have them in a separate room. You don't want
6 to have work product mixed in. You want to have a clean copy
7 of those. Do you have to do that in every case?

8 MR. DAVIS: I don't worry about that. Let
9 them -- I don't think they are going to flood me with
10 requests.

11 CHAIRMAN SOULES: Judge Peeples.

12 JUSTICE PEEPLES: I am like everybody in the
13 room except for one or two. I voted for John Collins'
14 motion.

15 We need to remember something, though, we are
16 cutting new ground on this. And when you do that, it is hard
17 to see the ramifications. And then lately we have started
18 talking about making what I think are probably going to be
19 major changes in the way discovery happens, and I just,
20 frankly, think that we don't have the vision to foresee how
21 this is going to impact everything. You know, we are all, I
22 think, thinking in terms of product liability cases and then
23 I did a lot of family law as a district judge, and there is a
24 lot of it, and I, frankly, don't know how all of this is
25 going to impact that. There are all kinds of -- lots of

1 litigation out there that is not personal injury. Gosh, the
2 unforeseen impact on dockets, if some of this happens, I am
3 just not sure that we can think it out in 30 minutes or two
4 hours here. I mean it could have major impact.

5 MR. BEARD: I don't think we should ever have
6 to let the public have access to our files. If they come in
7 and we have to produce it and put them in a conference room
8 and all to look at it.

9 MR. DAVIS: That is not the purpose of this
10 provision. This rule and this rule is how do you seal
11 information.

12 MR. BEARD: You have got correlate it, Tom.
13 What is the next step? If I got a court record in the sense
14 that I am going to have to give it to the --

15 MR. COLLINS: You have got court records now,
16 Pat.

17 MR. DAVIS: You have interrogatories and
18 depositions.

19 CHAIRMAN SOULES: Those are not court records.

20 MR. BEARD: I don't consider them court
21 records.

22 MR. COLLINS: I would sure like to see
23 somebody try and destroy one of them. I think I know what
24 the court would rule on that.

25 MR. BEARD: I consider it a court record, but

1 if somebody comes in to see it, I am not going to let them
2 have it.

3 MR. LOW: I had a trust case that involved --
4 the news media was constantly wanting to know certain things.
5 And we had to answer interrogatories and discovery. I would
6 spend half my time -- I can't see those people. I am trying
7 to get ready, and they say they are public records. I have
8 got to watch them. I have only got one copy, maybe they may
9 steal one. We have got 50 boxes -- more than 50 -- about 500
10 boxes. How could I handle that if they have a right to come
11 into my office and look at that? I just have to stop getting
12 ready for trial and sit down with them. That is a problem.

13 CHAIRMAN SOULES: Does anybody have anything
14 new on this that they want to bring to the discussion before
15 we vote? Justice Doggett.

16 JUSTICE DOGGETT: Go ahead, Rusty.

17 MR. McMANS: Well, perhaps I, as usual,
18 didn't make what I was trying to make as clear in terms of
19 where I was trying to make the changes to cover what I
20 thought were basically all of the concerns. But if you took
21 the rule that he has and divide it into essentially the two
22 different segments so that when you get where the underlying
23 parts where it says records filed with records in discovery
24 and the results of discovery filed of record, but does not
25 include discovery and the results of discovery not filed of

1 record in a pending case, then move to 166(b) in the
2 protective orders and say that no protective order shall
3 extend -- no protective order or agreement relating to
4 protecting disclosure -- shall extend beyond the signing of a
5 final judgment or dispositive order without filing the
6 discovery or results of discovery with the clerk of the court
7 and complying with whatever this rule number is. That takes
8 pending cases out, it keeps discovery where it is and puts
9 the burden on the party that wants to keep the wraps on
10 beyond the litigation on the party who wants to do it and
11 puts them through these hoops, then, at that time, and puts
12 the burden on the clerk to take it. Just with -- just those
13 changes. And all that does is just -- and it eliminates all
14 those problems about whose office is what and who gets into
15 whose office.

16 MR. BRANSON: John, would you accept that as
17 an amendment.

18 MR. COLLINS: I am listening.

19 MR. McMains: These are two combinations.
20 That is what I was trying to talk about is just to say there
21 is no protective order or agreement relating to protection
22 shall ever extend beyond the life of litigation without
23 filing what it is you want to protect and meeting the burden
24 under this rule. Now, if you -- and then if you filed it of
25 record, it is already here. It is already covered by the

1 definition.

2 MR. DAVIS: So far so good. But how about
3 information during the course of a five-year trial?

4 MR. McMAINS: You mean five years discovery?

5 MR. DAVIS: Yes, I mean the trial --

6 MR. McMAINS: That is why I say that is the
7 only place -- I understand, and that is what I am saying.
8 That is the only thing that that doesn't fix, and I just --

9 MR. SPARKS (SAN ANGELO): To solve my one
10 problem, could I go with you with the exception of saying
11 except for those things affecting public health or safety? I
12 think we have got to quit killing our fellow men. The more
13 it happens, the more I get hired, Rusty. But we really ought
14 to think bigger than just our practice of law.

15 MR. McCONNICO: But then I think, Sam, we get
16 back to where we did our discussing in the first place.
17 Let's be honest. We are not going to agree to anything that
18 kills anybody. I am not, you are not either. And that is
19 not going to -- I mean we are not going to enter into those
20 agreements, and even if they are, you still have 166(b) that
21 all that information is going to be discoverable anyway.

22 MR. SPARKS (SAN ANGELO): I backed off of the
23 agreement, okay.

24 MR. McMAINS: What about making an additional
25 change to 166(b) to merely provide that a party to a

1 protective agreement may move the court for relief from the
2 protected agreement. Now, if it is an order, then you have
3 already gone through the contest anyway, so the judge will
4 have told you to shut up, and you are then going to be
5 running in violation of the court. So you can move for
6 relief from a protected agreement in the event that
7 disclosure of the information beyond the bounds of the
8 agreement is necessary in the judgment of the court for the
9 health and welfare of the public.

10 Now, that puts the judge as the one who will
11 determine it. It puts the standard at some kind that he has
12 determined that it is necessary, puts it in a protective
13 context where you have mandamus remedies in the event you
14 don't have it, but it keeps all of that.

15 Now, the only problem that doesn't say, it still
16 doesn't solve Tom's problem of he wants, you know, Dave Perry
17 is in the course of discovery on some stuff, and he wants it
18 and they have agreed to a protective order and he can't give
19 it to you. It doesn't solve that problem. But if you have
20 solved that problem, you create so many more mechanical
21 problems by making us either file everything with the clerk,
22 which we have already backed off of.

23 MR. SPARKS (SAN ANGELO): Which is not
24 fileable. You couldn't even file it.

25 MR. McMAINS: That is right. Or you have to

1 keep it in your office, you know, you have to make it access
2 to the news media and everybody else through this stuff, and
3 you don't need anybody else in your business while you are
4 litigating for your client. I don't care, with all due
5 respect for Tom, if I don't want him in my office messing
6 around in my files, I don't want him in my office, and I
7 ought to not have to let them do that. And that is --

8 MR. SPARKS (SAN ANGELO): That is what Buddy
9 was saying. Reiterate again what you propose to do.

10 MR. McMAINS: The proposed amendment would
11 merely track this amendment that was proposed by -- I think
12 Lefty circulated it -- which says "For the purposes of this
13 rule, the term court record shall include all documents and
14 records filed of record" which, actually, once you comply
15 with this, you have done that anyway. But in order to make
16 it clear and discovery -- and the results of discovery filed
17 of record, go ahead and distinguish it although I think once
18 it is filed of record, it is a record. That may be
19 redundant. But just distinguish -- but does not include
20 discovery and the results of discovery not filed of record in
21 a pending case.

22 Then go to the protective order rule over here,
23 166(b), and you add another section which is just -- I put in
24 just Section D under the protective order rule which would
25 say "no protective order or agreement relating to protecting

1 disclosure shall extend beyond the signing of a final
2 judgment or dispositive order without filing the discovery or
3 results of discovery with the clerk of the court and
4 complying with rule" -- whatever this rule is.

5 MR. SPARKS (SAN ANGELO): 76(a).

6 MR. McCONNICO: Rusty, read that proposed
7 language 166(b).

8 MR. McMAINS: Okay, "No protective order or
9 agreement relating to protecting disclosure" -- now, if you
10 want to put discovery or the results of discovery -- I just,
11 it sounded cumbersome -- "shall extend beyond the signing of
12 a final judgment or dispositive order without filing the
13 discovery or results of discovery with the clerk of the court
14 and complying with Rule 76(a).

15 MR. DAVIS: When do you have a final judgment?

16 MR. McMAINS: Well, the final judgment rule
17 says when it is signed, actually.

18 MR. DAVIS: I know. When it is signed or
19 after the appeal is over?

20 MR. McMAINS: No, well, yes, the rule on final
21 judgments is when it is signed.

22 JUSTICE DOGGETT: Would that cover a nonsuit?

23 MR. McMAINS: Yes, that is what the
24 dispositive order would be designed to deal with, a nonsuit
25 or any kind of --

1 MR. BEARD: Let me ask you, Rusty, would that
2 mean the parties could not agree to destroy the discovery
3 prior to --

4 MR. McCONNICO: Parties could never destroy.

5 MR. BEARD: Why can't they?

6 MR. McMAINS: You know, it is not addressed
7 explicitly, what John's concern was. We didn't add the other
8 language.

9 MR. SPARKS (SAN ANGELO): The only thing we
10 have not covered -- there is that -- but the other thing is
11 pending litigation where you have discovery by agreement on
12 protective orders.

13 JUSTICE DOGGETT: If you have a serious toxic
14 waste problem, can you provide that information to the local
15 health department so they can do something about it or can
16 you provide it to an attorney who has a similar case
17 involving the same toxic substance? And it doesn't really
18 solve that really.

19 MR. McMAINS: No, I am just saying you add
20 another section for that. That is what I was telling him
21 that I didn't find any offense and I didn't think that even
22 Steve with his comments had any. That procedure there is to
23 simply add a new Section E which says that "a party" -- or
24 the attorney for the party -- "may move the court for relief
25 from a protective order, whether issued by order of the court

1 or by an agreement, to permit disclosure of information
2 obtained in discovery that is necessary to be disclosed for
3 the protection of the public health and welfare by the
4 court." I mean you move court for that relief.

5 JUSTICE DOGGETT: Would that permit a
6 citizens' group to intervene in a personal injury case in a
7 toxic waste dump to get that information to protect the
8 parties?

9 MR. McMAINS: Probably. Once they intervene,
10 they would be a party. If they intervened, they were a
11 party, they were denied access to the same information. You
12 know, the first thing they would do is probably resist
13 dealing with the agreement, and then the question of whether
14 or not the agreement, you know, so that then they would have
15 to be opposed by the court, which basically is the same thing
16 as going to the court and asking for relief.

17 MR. COLLINS: Rusty, you are starting from a
18 different presumption, namely, that all discovery is closed
19 unless the judge orders it open. My proposal and the
20 language that Tom has suggested has a different premise,
21 namely, that all documents are open unless the court makes a
22 specific finding that they should be closed. And that is my
23 only objection to your proposal.

24 MR. McMAINS: It is true that what I am
25 assuming is that there is some kind of an agreement for

1 protection or that there is protection.

2 MR. COLLINS: Let me stop you right there.
3 What I would like to do is to have a vote on this language
4 and then let's discuss agreements because I think that is a
5 legitimate area to talk about how to handle discovery
6 agreements between the parties to reduce hearings, to reduce
7 time and expense, and at the same time allow the public
8 access to those documents which are legitimate and which are
9 important.

10 MR. McMANS: But the driving source of the
11 controversy here is precisely home mechanics. It is not the
12 issue of agreement or nonagreement. It is the issue of
13 pending versus over. There is a difference between it being
14 pending and when it is over. When it is pending, I want
15 people out of my office. I may not want him there. He may
16 be trying to run a case out from under me. I don't want
17 people in my office when I don't want them there.

18 CHAIRMAN SOULES: Justice Doggett has the
19 floor, please.

20 JUSTICE DOGGETT: One solution, of course, is
21 just to file it at the courthouse, and there is a procedure
22 for filing at the courthouse, and then you don't have to
23 worry about them being at your office because during most of
24 your legal practice, and even most of mine, that is the way
25 it was done up until the time that the rule was changed to

1 provide discovery wouldn't be filed. And it didn't create a
2 lot of problems for people to go to the courthouse and get
3 that information. So there is an alternative way to avoid
4 the problem.

5 MR. LOW: This is discovery now instead of a
6 folder. Now, you are talking about there wasn't -- the clerk
7 didn't have enough in that antitrust case we had. They
8 didn't have -- the clerk's office couldn't hold every
9 document. I mean, you know, what are you going to do if you
10 say -- how do you file that? Where you going file it? Who
11 has room?

12 MR. DAVIS: What price we pay for the clerk's
13 problems.

14 MR. LOW: I don't know that is a problem, but
15 say, okay, I want them filed. They say, well, it is going
16 out the window down here when it gets full. I don't know
17 whose problem it is, but it is a problem when you get boxes
18 of stuff and you say, well, I will file it, and they say they
19 are not going to do it, what are you going to do?

20 MR. BEARD: I don't want the public coming
21 into my files before or after litigation and so we have to
22 have a place where we can put it.

23 MR. SPARKS (SAN ANGELO): But I think Rusty's
24 deal took care of Pat's complaint, didn't it.

25 MR. McMAINS: It took care of his complaint

1 because in order to protect it you have got to file it.

2 CHAIRMAN SOULES: Well, there has never been a
3 second to the amendment and I don't have it written down
4 really enough to read it back.

5 MR. SPARKS (SAN ANGELO): John has still got
6 this pending.

7 CHAIRMAN SOULES: I know, but there was a
8 motion to amend it. Is there any second to that motion?

9 MR. McCONNICO: I will second Rusty's, if that
10 is what is here. I don't know what is on the floor.

11 CHAIRMAN SOULES: I believe that is what
12 Rusty -- did you have --

13 MR. COLLINS: I haven't seen Rusty's, so I
14 don't know what it is.

15 JUSTICE HECHT: Here it is right here.

16 MR. McMAINS: All I did was distinguish
17 between discovery, really, in a pending case. The only
18 discovery in a pending case that I had that was discloseable
19 or that was subject to this rule regarding sealing is filed
20 discovery, and it is filed discovery in a pending case, still
21 a file of record, and it is part of a court record.

22 MR. DAVIS: 76(a) applies after final judgment
23 as defined and not before.

24 MR. McMAINS: Then I just took out discovery
25 in a pending case from the definition.

1 CHAIRMAN SOULES: Okay, here is Rusty's
2 proposed amendment, and then he will deal with it. He
3 proposes to deal with discovery differently in the new
4 166(b)(5)(d) and (e), and it is (d) and (e) that I don't have
5 written down very well, but I got what you put down on
6 (a)(2). And that was to strike the words "whether or not"
7 that appear in the forth line and then add "after the state
8 of Texas but does not" -- these words -- "but does not
9 include discovery and the results of discovery in a pending
10 case."

11 MR. COLLINS: Say that one more time, Luke.

12 CHAIRMAN SOULES: Let's go ahead and doctor
13 it, and then I will read the whole thing.

14 MR. McMAINS: I am sorry, the results of
15 discovery not filed of record in a pending case -- "but does
16 not include discovery and results of discovery not filed of
17 record in a pending case." Otherwise it is --

18 CHAIRMAN SOULES: Okay, so doctoring (a)(2)
19 first, we would take out the words "whether or not," the
20 first three words of the fourth line. I mean that is what
21 this amendment proposes to do. And then add after the word
22 "Texas" in the fifth line these words, "but does not include
23 discovery and the results of discovery not filed of record in
24 a pending case." If that is not an acceptable amendment to
25 the main motion then I guess we need to vote on the

1 amendment.

2 MR. McMAINS: It is not acceptable in and of
3 itself because it really is in combination with the others.

4 CHAIRMAN SOULES: If this passes, we would
5 have to deal with discovery someplace else.

6 MR. McCONNICO: 166(b) proposal there.

7 MR. McMAINS: I can deal with all of that, fix
8 all of the mechanics problems, I think, by the combination
9 of that plus the two sections to 166(b), which is a
10 collection --

11 CHAIRMAN SOULES: Okay, any further discussion
12 on the amendment? Essentially, it has been the same
13 discussion all along. Anything new on that? Okay, on the
14 amendment, those in favor, show by hands.

15 MR. COLLINS: If you don't mind, just read the
16 full amendment. I still am not sure I have it all.

17 CHAIRMAN SOULES: Good idea. This would be
18 the first sentence as amended if it passed.

19 "For purposes of this rule, the term court
20 records shall include all documents and records
21 filed of record, and discovery and the results of
22 discovery filed of record in connection with any
23 matter before any civil court in the state of
24 Texas, but does not include discovery and the
25 results of discovery not filed of record in a

1 pending case."

2 MR. COLLINS: I am not sure that makes too
3 much sense.

4 MR. HERRING: Why don't you read it one more
5 time.

6 CHAIRMAN SOULES: "For purposes of this
7 rule, the term court record shall include all
8 documents and records filed of record, and
9 discovery and the results of discovery filed of
10 record in connection with any matter before any
11 civil court in the state of Texas, but does not
12 include discovery and the results of discovery not
13 filed of record in a pending case."

14 MR. EDGAR: What does the clause after state
15 of Texas you just read add to what you read before that?

16 MR. McMANS: Yes, I didn't --

17 MR. EDGAR: It seems if you just strike out
18 the whether or not, you have taken care of it without adding
19 that last clause or phrase or whatever it is.

20 CHAIRMAN SOULES: That is not my amendment.

21 MR. McMANS: You mean just don't talk about
22 the fact you are not dealing with pending cases or with
23 unfiled discovery?

24 MR. SPIVEY: He said just knock out "whether
25 or not" and leave it as is.

1 MR. EDGAR: Just eliminate the "whether or
2 not," and haven't you taken care of what you are trying to
3 achieve?

4 MR. McMAINS: Well, except that his argument
5 is that it is a court record if it is in your possession. I
6 realize that is not what our definition of court records is.

7 MR. EDGAR: Well, but you just said that it --

8 MR. McMAINS: "Filed of record." I mean his
9 position is that if it is filed of record --

10 MR. EDGAR: -- isn't that right?

11 MR. McMAINS: See, the problem is, there is a
12 difference in this language of court record. Going back to
13 the other rule, it would work, going back to the original one
14 because they talk about court records as being things filed
15 with the clerk. Now, that is a limitation on what is filed.
16 This one actually doesn't have such a limitation is the only
17 reason I was trying to make it clear.

18 CHAIRMAN SOULES: Well, we have really got
19 three things. Let me see if I can get three concepts.

20 All right, there are three different things. We
21 have got discovery in a concluded case whether or not it is
22 of record -- right? We are trying to deal with three
23 different things. The first is discovery whether or not it
24 is filed of record in a concluded case, then we have got
25 discovery filed of record in a pending case, and then we have

1 got discovery not filed of record in a pending case because
2 in a concluding case -- okay, so for purposes of this rule,
3 court records -- this is, as I understand, the direction of
4 the amendment.

5 "Court records shall include all records filed
6 of record and discovery and the results of
7 discovery, whether or not filed of record in a
8 concluded case, plus discovery filed of record in a
9 pending case, but does not include discovery not
10 filed of record in a pending case."

11 MR. DAVIS: His amendment does that.

12 CHAIRMAN SOULES: That is right, that is his
13 amendment. Is that right, Rusty?

14 MR. McMains: Yes.

15 MR. BRANSON: Is that acceptable to you?

16 MR. COLLINS: No, it is not.

17 MR. McMains: My proposal, of course, includes
18 the modifications for the discovery rule.

19 CHAIRMAN SOULES: And then you would go back
20 and say that protective orders terminate when the case
21 concludes?

22 MR. McMains: Yes. No protective order shall
23 extend beyond -- no protective order or agreement relating to
24 protecting disclosure shall extend beyond the signing of the
25 final judgment or dispositive order without filing the

1 discovery or results of discovery with the clerk of the court
2 and complying with Rule 76(a).

3 MR. SPARKS (SAN ANGELO): If you want to keep
4 it protected, get it sealed.

5 MR. McMAINS: No protective order or agreement
6 to protect will ever extend beyond the life of the case.

7 MR. SPARKS (SAN ANGELO): If you want it to go
8 further, get it sealed.

9 MR. DAVIS: During the life of the case, it
10 can't be protected without going through 76(a).

11 MR. McMAINS: Correct, with one exception I
12 was attempting to write which was the E part to cover him.

13 CHAIRMAN SOULES: Public safety and public
14 health.

15 MR. McMAINS: Yes, which I --

16 CHAIRMAN SOULES: Okay, all these concepts are
17 together. So when we vote on this amendment up or down, if
18 it is -- sir?

19 MR. SPIVEY: Could we take about a five or
20 10-minute recess and let's get that typed up and look at it
21 because this is a rather important amendment.

22 CHAIRMAN SOULES: Sure. If you will write it
23 down, I will have Holly type it up and we will print it and
24 put copies around.

25

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

3
4 CHAIRMAN SOULES: Okay, this is 166(b)(5)(d)
5 and (e) that Rusty proposes if we exempt from new 76(a)
6 discovery in a pending case.

7 MR. McMAINS: Mr. Chairman, I, over the break
8 talked, with John who has refused to accept my amendment to
9 this resolution, but so -- his motion was already seconded
10 when I interjected this. Why don't we vote on his, you know,
11 if we beat that, then we can go to mine. Or if we pass it,
12 then I will try and amend it again or something.

13 CHAIRMAN SOULES: Hold it just a minute and I
14 will print your amendment so that everybody can look at that.
15 We will have it printed.

16 MR. McMAINS: I, frankly, don't think that
17 John cares about it.

18 CHAIRMAN SOULES: We will just vote on John's,
19 save us the time, I guess.

20 JUSTICE PEEPLES: Can I say this: You know,
21 we are proposing, by taking on discovery, proposing to take
22 major -- make major change in the way discovery happens in
23 Texas, and I just, I cannot, in good conscience, not speak
24 out. That kind of change shouldn't happen on the basis of an
25 afternoon's discussion.

1 Now, we have got a proposal from a subcommittee and
2 I was on it, I was at one meeting. I missed another one, but
3 there was all kinds of people that talked about these
4 provisions, and I think it is a good product. Sometimes
5 reform takes places one step at a time, and you are mistaken
6 when you try to take many steps at once.

7 I think we ought to search our souls and decide
8 whether to approve, basically, Locke Purnell and so forth
9 without going on to discovery. Maybe let's take that step,
10 and then if a year from now or later on we want to change
11 discovery, we can do it having thought about it, but I think
12 it is irresponsible of a committee with this much
13 responsibility to make significant changes -- not just in
14 sealed records but in the way discovery happens -- on the
15 basis of one afternoon's discussion.

16 We really haven't thought this out the way we ought
17 to, and I haven't heard a good answer to what I think it was
18 Luke and McConnico said, that if you increase the stakes,
19 once something is discovered, if the stakes are increased,
20 you are going to make people fight a lot harder over what is
21 discovered in the first place on the front end. And I have
22 not heard a good answer from anybody about that. And I think
23 we need to -- I am not moving to reconsider the decision to
24 go into discovery, but I think we might want to think about
25 that. I really do. Now, maybe I am the only one, but I just

1 cannot sit back and have us make this tremendous change in
2 discovery on the basis of just a couple of three hours of
3 discussion. I think it is irresponsible, I really do. That
4 is it.

5 MR. EDGAR: While Holly is completing that, I
6 sat here and, really, I haven't any ax to grind one way or
7 the other because I am not involved in it at all. But I
8 second Judge Peeples' concern here that I -- and I
9 wholeheartedly agree with the philosophy that San Angelo Sam
10 has expressed that the public concern, the health and safety
11 area, these things are very, very important. I am personally
12 concerned that parties should not helter-skelter be able to
13 agree to keep things secret when the public has a right to
14 know.

15 But again, it seems to me that we frequently make
16 decisions without full and fair and long studied
17 consideration, and I am afraid that that is about what we are
18 getting ready to do if we vote to include discovery as part
19 of court records, and I agree that we should wait and think
20 about this, go ahead and adopt the proposal that has been
21 presented to us, study this some more, and then later on make
22 the decision about whether discovery should be included.

23 CHAIRMAN SOULES: Elaine.

24 MS. CARLSON: I think I share the sentiments
25 of Judge Peeples and Professor Edgar has expressed. I also

1 think there is something else to be considered, and that is
2 when we have represented to the public that there is an
3 opportunity for input from the bench or bar on the changes
4 that are on the table, and this is a major modification. The
5 implications are far-reaching in discovery, and we haven't
6 had comment that and we have in other matters. I would also
7 like to say I think a lot of what has been said seems to have
8 sound philosophical root in the product liability, personal
9 injury or environmental concerns. But I, too, share concerns
10 in other kinds of litigation and the effect that this
11 proposal would have in those other areas.

12 CHAIRMAN SOULES: Chuck, go ahead.

13 MR. HERRING: Let me just echo that because I
14 don't want to do the job that I guess we were supposed to do
15 and sit and do all the -- we have kind of been through this
16 before, Lefty and I, repeatedly. I mean we have heard almost
17 everything that we have heard today, except we don't really
18 have anybody here from the intellectual property bar, and if
19 you got the mailout that we did and you look under Tab I, you
20 will find letter after letter after letter from the chairman
21 of the intellectual property section of the state bar and
22 from other practitioners who say if you do this, it may make
23 sense -- a lot of sense -- and be the thing to do in some
24 context, but if you do it in their practice, you are going to
25 revolutionize their practice, and the revolution is going to

1 be one of increased litigation costs and increased numbers of
2 hearings because they are going to be at the courthouse all
3 the time because they are dealing with trade secrets, which
4 trade secrets inherently, and I don't think that is the abuse
5 John even wants to address, but I think that is a problem,
6 and I am very reluctant to change somebody else's practice of
7 law in a major, major way without really them having an
8 impact on it at this point. I just want to make sure you
9 know that that is their sentiment and they are going go to go
10 through the roof if we do it this way without giving them
11 some kind of relief on this. I just I want to make sure we
12 have expressed that as clearly as we can.

13 MR. McMAINS: That is true with everything we
14 passed so far, right?

15 MR. HERRING: More so with this, I mean the
16 discovery. If you are going into discovery, that is a --
17 that is something, they are, they are just extremely intense
18 on, and I think you put them at the courthouse every week in
19 their practice, and they are going to be billing their
20 clients for that, you are going to be increasing the cost of
21 what they do for a living.

22 MR. DAVIS: Chuck, all these bad things that
23 are going to happen, how do we know this?

24 MR. HERRING: I don't. I mean I don't -- I
25 tried two trade secrets cases and have had had problems with

1 it, but I don't do it day in and day out as a steady living
2 and a steady diet. And that is the problem, nobody else here
3 does. And I just --

4 MR. JONES: What about Luke Soules, doesn't
5 he?

6 MR. HERRING: No, Luke can talk to that.

7 MR. JONES: Steve?

8 MR. McCONNICO: Franklin, I don't do any trade
9 secrets. The only involvement I have with anything that
10 would impact on this is oil and gas, and I can tell you if
11 any of your discovery where you go and you get someone else's
12 logs, which they keep in highest confidence, or if you go and
13 you get your petroleum, their reservoir analysis, which they
14 keep in highest confidence, and then you -- and even at the
15 Railroad Commission they have special procedures where
16 reservoir engineers can see those and the other side cannot
17 see them, and they have it set up there right now where they
18 protect that. And if you get it where you cannot protect any
19 of that information without going through all of the
20 procedures that we have outlined earlier today, every oil and
21 gas case that I can imagine being tried where you have either
22 damage to a reservoir, drainage from that reservoir, or
23 whatever, you are going to have to go through every one of
24 the procedures that we have discussed here, and that is going
25 to add a lot of expense and time. That is the only exposure

1 I have had to it.

2 MR. DAVIS: We are only referring to discovery
3 that are discoverable. I mean those things that are
4 protected and nondiscoverable have no application to that
5 here.

6 MR. McCONNICO: But they are all discoverable.
7 You can't try a reservoir damage case and say my reservoir
8 has been damaged this amount showing what your reserves are.
9 They are obviously going to be discoverable. What you try to
10 do is to keep everyone else that is not involved in that
11 litigation that has offsetting leases from finding all that
12 information out because you have spent hundred of thousands
13 of dollars sometimes collecting that information.

14 MR. DAVIS: That may be a reason for
15 nondiscoverable, but if it is discoverable, then it is at
16 least according to whatever studies and everything we are
17 doing here. It should be public knowledge if the public
18 wants it. I think we are --

19 MR. McCONNICO: We are not dealing with
20 health, you know. That has no impact on the health of the
21 public or anything like that.

22 MR. DAVIS: I just can't see a swarm of
23 newspaper reporters and cameras suddenly coming in to
24 everybody's office as soon as we pass this thing here.

25 MR. McCONNICO: You won't be.

1 MR. DAVIS: You are looking at extreme
2 situations that are going to very rarely occur.

3 MR. McCONNICO: Newspaper people won't come.
4 People that will come will be attorneys, other petroleum
5 engineers and other geologists. Newspapers could care less.

6 MR. DAVIS: Well, maybe you can get an
7 exclusion.

8 MR. McCONNICO: The problem is, you have got
9 to make an exclusion for every type of practice that impacts
10 on. I don't know anything about patents or trademarks.

11 CHAIRMAN SOULES: Well, of course -- Buddy
12 Low. Excuse me.

13 MR. LOW: I tend to agree that it is a pretty
14 good bite, however, we can't just cut it off there because we
15 have got to state whether it does pertain to discovery or
16 not.

17 In other words, if we just take the report and say
18 it passed and it is open, it wouldn't pertain to discovery
19 unless we so state because we have got to give a definition.
20 I tend to like what Rusty said and I tend to agree with it,
21 but I also know there is a lot I don't know about it and
22 perhaps need further study, and maybe we could make some
23 recommendations to a subcommittee to consider what Rusty
24 says.

25 CHAIRMAN SOULES: What the newspapers through

1 their lawyers, the media lawyers, who have been in this fight
2 for a long time, and the subcommittee that had held three
3 full days of public hearings and heard everybody that wanted
4 to come, and then another day where there was several hours
5 of testimony before the Supreme Court down in the courtroom.
6 What they all came up with and brought here was a rule that
7 covered records filed in courts did not cover discovery at
8 all.

9 MR. LOW: But see we have to define so that
10 that draft doesn't include that if that is what we plan to
11 do.

12 CHAIRMAN SOULES: They brought to us drafts
13 that clearly did not include discovery.

14 MR. MORRIS: Luke, what if -- I mean I have
15 heard Hadley and Elaine and Steve and everyone saying that
16 the Tort cases or environment case or something like that is
17 different, but what if we said, for purposes of this rule,
18 "the term court records shall include all documents and
19 records filed of record" and this is not artful wording, but
20 then -- "and discovery and the results of discovery, whether
21 or not filed of record pertaining to public health or safety
22 out of the administration of public office." So that we are
23 not getting off into some field where we accidentally bump into
24 something that we are not wanting to get into. In other
25 words, we are just limiting the discovery that would have

1 knowledge of public health or safety or public
2 administration.

3 CHAIRMAN SOULES: Steve.

4 MR. McCONNICO: Well, again, and it is kind of
5 echoing what Chuck said. The problem that I see getting into
6 that -- and I know absolutely nothing about patent and
7 trademarks, don't know anything, but I do know that it seems
8 that a lot of that is done in the health field. Then we get
9 into somebody is trying to get a patent on a special vial,
10 medical prosthesis, or some type of new drug or whatever.
11 That has to do with health and science, that has to do with
12 public welfare. And I think maybe what we are doing is we
13 are stepping into another swamp that none of us here are
14 really very familiar with, and we are trying to make a rule
15 something that could have a lot of impact that we can't
16 foresee. Do you understand what I am saying?

17 CHAIRMAN SOULES: Broadus Spivey.

18 MR. SPIVEY: I have been persuaded again by
19 Luke. It appears to me that this has been studied, and
20 studied thoroughly. Number one, I, personally, have a lot of
21 reservations about it, but number two, addressing your
22 problem whether it goes to health or what you are really
23 talking about, (inaudible) or ideas. We are not -- we can't
24 assume that either the Supreme Court is going to operate in a
25 vaccuum or that a trial court is going to operate in a

1 vacuum when it is confronted with an issue. If an issue has
2 significant enough concerns about confidentiality that it
3 ought to be brought before the judge, we have got -- there is
4 a vehicle in this to do that.

5 What I am concerned about here is we are sitting
6 here assuming that we have got a lot more power than we do.
7 We are an advisory group. My recommendation is that we go
8 back to the basics, as Willie and Wayland say, and take
9 this -- what is it called -- take the Locke Purnell and then
10 we will see what their firm does with that, by the way --
11 take the Locke Purnell idea, put the amendment that is
12 talking about that is essential on it, get it on there and
13 get it to the Supreme Court, let them mull it over, then we
14 can blame Judge Hecht and Judge Doggett and the rest of the
15 judges. But about all we can do is argue this. Our argument
16 is of record. They have got to sense of our concerns about
17 it. They know that there are other people that are
18 concerned, and they can build into the rules special
19 provisions if they want to. But I sure hate to be a, number
20 one, negative influence, and number two, we have got a
21 legislative mandate that we are looking down the throat of.
22 I would rather take the study that has been done in the
23 Locke Purnell revision than my own ideas of what is right. I
24 recommend that we get it on the road and get it on up to the
25 Supreme Court.

1 MR. McCONNICO: I agree with that with the
2 changes we made in the Locke Purnell version this morning.

3 MR. BRANSON: You are not telling us the
4 Supreme Court can change what we recommend?

5 CHAIRMAN SOULES: Sam Sparks.

6 MR. SPARKS (SAN ANGELO): You can call me
7 El Paso Sam too, if you want to. I have got an office out
8 there too. Down in Luckenbach too.

9 Let me tell you one of the problems that I have got
10 that I see here. We are an advisory committee. Whatever we
11 advise the Supreme Court doesn't mean it is going to get
12 passed. They do that. We advise. We are in a position
13 where we have got a legislative mandate. We are existing in
14 a time and a place where the legal profession, and not just
15 plaintiff lawyers, the legal profession is probably in its
16 lowest esteem that it has ever been. One of the reasons is
17 we hide things from the public that are not privileged to
18 what should be public information. We don't really have open
19 documents. We have been told do something with the sealing
20 of documents, and we have got an extreme problem with it in
21 the area of public health and safety because what plaintiffs
22 lawyers are getting accused of is having information that is
23 killing people, not divulging it so more people can get
24 killed so they can have more cases. And I want to go on the
25 record that I am in favor of doing away with that. I think

1 we owe an obligation to the community and society we live in
2 to protect them from known harm somewhere down the road, and
3 we are not meeting our obligation by stepping out on the edge
4 of what is right and wrong and telling the Supreme Court how
5 we feel about it if we duck and dodge and say, "Well, it is
6 going to make my practice a little harder. I am going to
7 have to work at discovery a little more." I think we are
8 making a serious mistake, to ourselves, to our profession,
9 and to the society we live in, if we don't recognize a
10 responsibility and step out and tell the Supreme Court this
11 is what we think at least when public health and safety is
12 involved. And we better think about it pretty seriously
13 before we dodge it. That is my feeling.

14 MR. BRANSON: Sam, you ought to pass the hat
15 after this.

16 MR. DAVIS: Have a vote.

17 MR. SPARKS (SAN ANGELO): Well, I am not going
18 to have any cases.

19 MR. SPIVEY: Before somebody else goes into a
20 long-winded tirade, why don't we vote?

21 CHAIRMAN SOULES: What are we going to vote
22 on, whether we put discovery in or not put discovery in.

23 MR. McMANS: That is John's --

24 MR. DAVIS: The motion before us is the
25 adoption of this (2)(a)(2).



1 CHAIRMAN SOULES: Okay.

2 CHAIRMAN SOULES: All in favor show hands.
3 One, two, three, four, five, six, seven. Opposed, show
4 hands. One, two, three, four, five, six, seven, eight, nine,
5 10, 11. It fails 11 to seven.

6 MR. DAVIS: Now we have the amendment,
7 McMains' proposed amendment.

8 JUSTICE PEEPLES: Luke, I want to move to
9 table until some time further the extension of the sealed
10 records Locke Purnell proposal to discovery.

11 CHAIRMAN SOULES: Motion tabled, seconded.
12 Not available. Those in favor say "Aye." Opposed? All
13 right, I will have to see a show of hands on that. Let me
14 see a show of hands on that. Those who are in favor of
15 tabling the question of discovery in new 76(a) for further
16 discussion.

17 MR. DAVIS: In effect, what you are doing is
18 you are adopting their proposal that says that discovery is
19 not in there.

20 CHAIRMAN SOULES: Not debatable. I need a
21 show of hands. Show of hands. How many agree to table?
22 One, two, three, four, five, six, seven, eight, nine, 10, 11.
23 Those who oppose the motion to table. One, two, three, four,
24 five, six, seven, eight, nine. Motion to table carries
25 11 to nine. And that then takes care of Rusty's motions

1 except to deliver them to Steve McConnico's subcommittee for
2 work and development, and if you will be a special member
3 ever that subcommittee, Rusty, I will appreciate.

4 MR. SPARKS (SAN ANGELO): We had already
5 passed one motion, Luke, that was to the effect that the
6 discovery was included. Now, can you table something that
7 has already been passed? I don't know parliamentary
8 procedure.

9 CHAIRMAN SOULES: We have got another
10 important part of this, though, that is in the legislative
11 mandate. The legislative mandate is silent on discovery.
12 The legislative mandate is expressed on settlements, and we
13 need to get that done today because I know the committee has
14 voted to adjourn tomorrow at noon. That is going to be
15 pretty hard to do because that means our 1989 work product
16 will never get a final pass. And I guess we won't have a
17 report for the Court after working for a year because we
18 can't get that done in three or four hours in the morning.
19 So unless you are willing to stay here all day tomorrow, we
20 are not going to have a report to the Supreme Court on a hard
21 year's work.

22 MR. BRANSON: Mr. Chairman, I think we voted
23 on that this morning.

24 CHAIRMAN SOULES: You did. I would like to
25 persuade you to change your mind and work with us tomorrow to

1 help get a report to the Court because we can't get one any
2 other way.

3 MR. BRANSON: It was a unanimous vote this
4 morning.

5 CHAIRMAN SOULES: Well, it was not a unanimous
6 vote. There have already been some people that expressed to
7 me that they saw they were beat and didn't vote. Anyway
8 settlements. The Court needs our help. We have a
9 responsibility when we sit on this Committee to do our work
10 for the court, and they want this out -- they want this back
11 by Friday, two weeks from today. I am going to do everything
12 I can to meet that choice whether anybody else does or not.
13 That is my job as chairman. I want it on the record. And I
14 will send a report from the Chair on what I think should be
15 done with public comment, whether I have your help or not,
16 whether -- if I do not have your help. If I have your help,
17 I will send to the court a report from the Committee. But I
18 will have a report to the court two weeks from today, as I
19 have been asked to do.

20 Okay, next is settlement.

21 MR. JONES: What time do you propose to
22 adjourn tonight?

23 CHAIRMAN SOULES: When we get done with this
24 settlement discussion is when we are going to adjourn.

25 MR. McMAINS: I move we exclude settlements.

1 CHAIRMAN SOULES: Now, that is a way to deal
2 with it. I don't mean that facetiously. I mean I think that
3 addresses the legislative mandate to discuss it and decide
4 whether or not to include.

5 We have got settlement agreements filed of record.
6 I think there are three kinds of settlement agreements. This
7 came up in the hearing. Settlement agreements not filed of
8 record reached contractually between the parties where the
9 case ends with a judgment that doesn't even speak to there
10 being a settlement agreement, nonsuit, take nothing,
11 whatever. So that is just a contractual settlement agreement
12 with private releases, not brought to the court's
13 consideration.

14 Second is a settlement agreement which gets court
15 activity approval made the judgment of the court, whatever
16 those recitations are, where it really is not placed in the
17 file.

18 MR. SPARKS (SAN ANGELO): Premises.

19 CHAIRMAN SOULES: It is a side deal, but the
20 Court, in its order, speaks about it. It says the parties
21 have settled the case, the court approves the settlement and
22 dismisses with prejudice, or something else, something like
23 that. There is something else something like that.

24 And then there is the settlement agreement that
25 gets filed of record and gets acted on somehow. The 76(a) as

1 we passed it here already takes care of the last one where
2 that agreements itself in full text is filed of record or
3 some memorandum of it, then a memorandum. But we have not
4 addressed a situation where the agreement is not filed of
5 record, either discussed by the court, or you can't find
6 anything about it. Those are the two things that we need to
7 bring up. Rusty -- there may be something more than that.

8 MR. McMANS: The thing is that I don't agree
9 that we were really voting on whether or not settlement
10 agreements filed of record should be included.

11 CHAIRMAN SOULES: Well, they are.

12 MR. McMANS: I understand -- well, I
13 understand that until we take them out.

14 CHAIRMAN SOULES: Okay.

15 MR. McMANS: The point is that they can be
16 taken out real easily.

17 CHAIRMAN SOULES: Yes, true.

18 MR. McMANS: And of having to comply with
19 this rule. And there are numerous problems with regards to
20 the sealing, or inability to seal with any kind of ease,
21 settlements that I think are of much more consequence than
22 most of it.

23 CHAIRMAN SOULES: Chuck, do you and Lefty have
24 a report of some kind on this point?

25 MR. HERRING: Tell you what, there is a draft

1 circulating around here that just refers to it. The
2 discussion in the committee was there was presentation from a
3 number of plaintiffs lawyers who said, look, you know, we
4 agreed to seal settlement agreements because we settled for
5 an amount and we are not in a negotiating position at that
6 point with our client, vis-a-vis the defendant, to agree not
7 to conceal or have confidential certain settlements
8 agreements or terms.

9 There was a competing body that argued that part of
10 the policy of the law is to encourage settlements, and we
11 need to do that, and if you can't have private parties
12 contracting privately to agree not to disclose settlement
13 agreements, you are going to discourage settlements. You are
14 going to make it hard to settle the small cases that maybe
15 other nuisance cases or small settlement cases a defendant
16 can afford to settle if they are not going to have everybody
17 else come out of the woodwork to file a similar but basically
18 frivolous case against them. And there are lots of other
19 reasons people talked about as to when they have used
20 settlements in the past, and I think there was a pretty good
21 debate on the issue, but we concluded that settlement
22 agreements, at least those that are not filed, were not
23 included, should not be included.

24 Initially, when Tom and John McElhaney drew up the
25 rule, the first draft, they understood the settlement

1 agreements that were not filed would not be covered. And
2 Representative Orlando Garcia, who authored the bill, came
3 and said to us it just wasn't clear or maybe they should be
4 included. It wasn't just an absolute no you don't have them
5 in there. So he kind of left the issue open from his own
6 individual legislative intent perspective, whatever that is
7 worth.

8 The language of the statute, as you see, is not
9 entirely unambiguous. It says,

10 "The records in a civil case, including
11 settlements, should be sealed."

12 That is what you are supposed to determine the rule for.
13 Well, are they records in a civil case to start off with if
14 they are not filed? That is pretty much the input we have
15 got, I guess. Lefty, do you have anything to add?

16 MR. MORRIS: I think that is about it.

17 CHAIRMAN SOULES: Okay, nothing else, Lefty,
18 on that. Frank.

19 MR. BRANSON: The argument that it encourages
20 settlement of frivolous lawsuits, I find disquieting as a
21 plaintiffs lawyers. Frivolous lawsuits -- we passed a rule
22 here to discourage filing frivolous lawsuits. There are
23 penalties in the rules now for the defendant to come forward
24 when frivolous lawsuits are filed. I don't want to do
25 anything to encourage them, and people who are filing them

1 ought to have to try the things. And to not address
2 settlements when we are addressing so much other public need
3 would really be abandoning our duties and responsibilities
4 here.

5 If products or other matters are injuring people
6 and maiming people and killing people and manufacturers are
7 acknowledging that by way of compromise settlements, then
8 that should be known to the rest of the public who may well
9 be buying that product, or who may well be injured by that
10 product and not know about it -- about the cause of their
11 injury. Or if it is a physician who has a drug or alcohol
12 problem who is injuring it, that should be known too so his
13 patients can avoid treatment by that physician until he gets
14 treatment or she gets treatment. And the efforts by the
15 defense -- I won't say the defense bar -- but the defense
16 community, the manufacturers and the medical community, to
17 quiet the plaintiffs who they have been injured by buying
18 their (inaudible), historically puts the plaintiffs lawyer in
19 exactly the same ethical conflict that Sam Sparks was
20 describing earlier. All such agreements, in my opinion,
21 should be void as against public policy. And I think there
22 is absolutely no reason to exclude them from the conduct of
23 this Committee or the actions of the Supreme Court.

24 MR. DAVIS: Luke.

25 CHAIRMAN SOULES: Tom Davis.

1 MR. DAVIS: I move that we add to, as
2 Paragraph (a)(2), I believe we decided on the Purnell draft,
3 the following language under Court record.

4 "For purposes of this rule, the term court
5 records includes settlement agreements whether or
6 not filed of record."

7 MR. BRANSON: Second.

8 CHAIRMAN SOULES: Okay, a motion has been made
9 and seconded. Discussion.

10 MR. McCONNICO: Could I hear it again? I am
11 sorry.

12 CHAIRMAN SOULES: The motion is that --

13 MR. DAVIS: "The term court records includes
14 settlement agreements whether or not filed of record."

15 CHAIRMAN SOULES: Discussion.

16 MR. LOW: I have one question.

17 CHAIRMAN SOULES: Everybody have the motion in
18 their mind? It has been made and seconded. Buddy Low.

19 MR. LOW: I have a question. There is a
20 difference in saying I have never entered in one where I
21 didn't say they settled, they paid me. The thing is how
22 much. You know, and I have had a number -- I don't have a
23 lot of big clients or anything, but I have had a number of
24 them that did not want somebody knowing how much money they
25 got, so insurance people, salesmen, real estate people would

1 be hounding them. So it works the other way around. I just
2 settled one the other day, and they don't want nobody to know
3 what they got. And I just feel they ought to have that
4 privacy.

5 MR. McMAINS: You also have divorce cases,
6 paternity suits and judgments, agreements. There are all
7 kinds of agreements that are entered into, and one of the
8 greatest problems in a lot of the commercial area, if you are
9 dealing with publicly-traded corporations is when it is that
10 you are talking about this thing applying because basically
11 what you are doing is putting in another step of going and
12 getting a temporary sealing order. And the problem is, once
13 you do that, you have got to put notice of something. What
14 is your temporary sealing order, when you have got a proposed
15 judgment? You are not sure that the judge is going to sign
16 off on to it. You have got to propose settlement in an SEC
17 traded trade case, and you are not ready to disclose it. I
18 have had that come up three times this year, and we don't
19 even tell the judge why we are postponing a particular
20 proceeding while we are working on the settlement documents
21 because it cannot -- because their SEC lawyers have told them
22 they are in serious jeopardy even if it leaks out through
23 him.

24 There are enumerable reasons to seal settlement
25 documents, and when the parties agree to seal settlement

1 documents to the extent that they should have the power to do
2 so, in terms of amounts, whether they are amounts paid, the
3 fact of settlement, is a different issue.

4 Now, I have a problem with the idea of you got an
5 order saying the case is settled. That ought to be known.
6 People ought to be able to know that when the order itself is
7 actually entered. But the agreement itself may well have a
8 lot of things in it that there is just absolutely no reason
9 to be jumping through these hoops. And that is in 90 percent
10 of the cases other than personal injury is absolutely true,
11 and not just at the insistence of defendants. It is at the
12 insistence of 90 percent of my clients on the plaintiff's
13 side in the non-PI hearings. And I just -- I feel that is a
14 very, very serious error to make you jump through these hoops
15 with regards to trying to resolve something amicably by a
16 settlement and you run afoul of so many different problems.

17 I think, in fact, that there may well be a legality
18 problem with the federal law in some of it with regards to
19 the SEC and certain other proceedings. You can violate
20 consent decrees or with regards to certain disclosures and
21 things. There are just enumerable hassles here.

22 And the notion that, well, then just don't file it
23 of record, that will fix. Of course, they are usurping that
24 by saying, well, you can go get anybody's settlement, go find
25 out what all is in it. It doesn't make any difference. Just

1 go ask for it, which, again, invades my office trying to find
2 out what my settlement agreements are and how I structured
3 them and how my particular work product is done so that they
4 don't have to go through the hassle of drafting. They can go
5 find somebody else who has done it and did it a particular
6 way and they worked it and it worked for them, And so you can
7 just go see somebody else's work product. Well, that is
8 hogwash, and I don't see that there is absolutely any
9 interest whatsoever that either the press, or certainly that
10 any other lawyers had, with regards to knowing the details of
11 any particular settlement agreements. I do not think that is
12 at the same level with with regards to public disclosure.

13 CHAIRMAN SOULES: Sam Sparks-El Paso.

14 MR. SPARKS (EL PASO): You know, there are a
15 lot of reasons to settle. Sometimes it is not totally on the
16 merits of the plaintiff's case. You can have two cases going
17 on at the same part of the country and you can't get the
18 witnesses. There are just lots of reasons that you end up
19 settling the case. It may mean the difference of paying a
20 certain amount of money. And all that doesn't go into a
21 settlement agreement. And the silliest things I have seen in
22 the last couple of years, particularly in the medical
23 malpractice cases, are summary judgments which are not
24 anymore valid than a man in the moon when you get an agreed
25 summary judgment entered and take a little release for there

1 not to be an appeal to avoid that, or you take some long
2 judgment that the doctor never did do anything wrong but the
3 insurance company wants to pay and that type of thing. And I
4 don't think you get the true picture in settlement agreements
5 anyway. I don't see that just getting the settlement
6 agreement is going to be of any public benefit. I agree with
7 Rusty. I don't see the applicability to settlement
8 agreements.

9 MR. MORRIS: Luke, I am back to where I was a
10 little earlier. It seems to me like what we are really
11 trying to deal with is settlement agreements that restrict
12 public access to information pertained in matters of public
13 health or safety or malfeasance in office, just for lack of a
14 better word.

15 I mean it seems to me like that that is where, as a
16 matter of public policy, we shouldn't be a party to sealing
17 up information as to how much or somebody's paternity things
18 or any of that information, I agree with you, Russ, but I
19 think that we need to deal with -- and I think -- because I
20 don't think we did it, and I am disappointed, frankly, with
21 what we ended up doing a minute ago on discovery because I
22 don't think we did the right thing with regard to public
23 health and safety and the administration of public office.
24 And I think we ought to let the Supreme Court -- at least
25 give them the recommendation. They may decide they don't

1 agree with us. But at least give them the recommendation
2 that on settlement agreements that will restrict public
3 access to matters pertaining to public health or safety, the
4 administration of public office, that that is something that
5 we should recommend an action that they take. Because I
6 think that is really the evil we are trying to get to. We
7 are trying to not hide things that are learned in the
8 peoples' courts that could hurt them. And we ought to not
9 even be the least bit bashful about just recommending that to
10 the Court. But as far as opening up our offices into private
11 things involving private litigants or oil companies that are
12 private matters, the hard work they have done for years, that
13 they ought to be entitled to just by getting in litigation.
14 Sometimes you can't help it, you get sued. That shouldn't
15 mean it exposes all your stuff. But we need to cut with a
16 razor and excise the evil and deal with it. And I think we
17 ought to do it right here on settlements.

18 UNIDENTIFIED SPEAKER: Was that an amendment?

19 MR. MORRIS: Well, I didn't -- what is the
20 motion?

21 MR. DAVIS: The motion was the term court
22 records can include settlement agreements whether or not
23 filed of record.

24 MR. MORRIS: Well, okay, then, "that restrict
25 public access to information pertaining to matters of public

1 health or safety or the administration of public office."

2 MR. DAVIS: Accept the amendment.

3 MR. EDGAR: You mean "and" rather than "or."

4 MR. MORRIS: Okay, "and." Those are two things
5 that we ought not be able to hide.

6 MR. McMAINS: You are talking about whether
7 those are filed of record or not?

8 MR. MORRIS: Yes.

9 MR. McMAINS: I am not sure, though, that in
10 this context because of what has been done, you then go back
11 to the mechanical problem. What do you do with the ones that
12 ain't in the record?

13 MR. MORRIS: Well, there has got to be a
14 mechanism where it -- let's say that, you know, the Dallas
15 Morning News or the Austin American-Statesman decides that
16 they want to invoke this rule that we are working on, then we
17 can surely come up with a mechanism where those documents are
18 transmitted to the court to be reviewed -- they are going to
19 be reviewed in the hearing by the court anyway. They are
20 going to be taken over there for the judge to look at before
21 the determination is made, Russ. That isn't -- I don't want
22 people trucking through my office, but that is no reason to
23 hide from a responsibility that we have on these two
24 important areas.

25 MR. BEARD: If the settlement agreement just

1 says they are going to pay a million dollars --

2 MR. MORRIS: If you want to exclude sums,
3 let's just specifically say "excluding sums of money."

4 MR. BEARD: Let me make sure. I am agreeing
5 to do certain corrective matters, or what is it you want
6 to --

7 MR. MORRIS: Okay, all I am doing is this:
8 And I think that that is all that this this says. It doesn't
9 say they know how much -- how much money, it doesn't say they
10 get to know something about paternity. It just says on
11 matters that -- where the settlement restricts public access
12 to information pertaining to public health or safety of the
13 administration of public office.

14 MR. McMAINS: No. My question, though, is
15 does that put a duty upon the trial judge before entering
16 -- let's say that the parties are both adults, they are both
17 entering an out of court settlement. Would the agreement
18 being out of court to tendering to the judge a document that
19 only reflects a dismissal or taking nothing or whatever.
20 Does this impose a duty on the judge to find out whether or
21 not --

22 MR. MORRIS: I don't think so. I don't
23 envision it that way. I have thought it through, but, to me,
24 it doesn't. But what it does allow us to do is to hide
25 something that is clearly in this vital, significant, you

1 know, area, these two areas.

2 MR. McMAINS: Well, I am just thinking about
3 in terms of the judges, though, if, you know, the power of
4 the press, because if there is some controversial figure that
5 has been indicted or whatever and they have some kind of --
6 or, you know, there is something going on, accused of
7 stealing and done in a civil context and they go and solve
8 the thing with a take nothing judgment, the judge doesn't
9 find out what the deal is. The press over there goes to the
10 judge and says, well, what is the deal, and the judge says,
11 well, I don't know, it is none of my business. He is liable
12 to get pretty well reamed by the press just --

13 MR. MORRIS: We are not changing the
14 settlement procedure.

15 CHAIRMAN SOULES: But this is whether or not
16 filed of record, right? Let me see if I have got it. You
17 are saying -- is this the essence of it -- that the rule
18 about sealing court records shall not apply to settlement
19 agreements, except settlement agreements made in cases
20 involving public health and safety or malfeasance in public
21 office, whether or not filed of record.

22 MR. MORRIS: Yes. That is not exactly how I
23 would ultimately end up wanting to word it, but that is what
24 I am saying.

25 CHAIRMAN SOULES: Okay. That is open to

1 discussion. That is the motion.

2 MR. MORRIS: That is my amendment.

3 MR. DAVIS: Amendment is acceptable to replace
4 the original motion.

5 JUSTICE PEEPLES: If there is an argument
6 against that, I would like to hear it.

7 MR. DAVIS: Just a minute, you may.

8 CHAIRMAN SOULES: Steve McConnico and then
9 Bill.

10 MR. McCONNICO: I don't have an argument
11 against it, but I don't know if we are talking about
12 something that really isn't a problem because Rule 166(b), I
13 guess now we are saying the parties can't ever agree to it
14 and it is separate, but Rule 166(b) as it is now you can
15 discover all settlement agreements. There is no question
16 that they are discoverable. And 166(b), I don't know if that
17 doesn't solve our problem with it being its present status.

18 MR. MORRIS: We just got through for one thing
19 voting that discoverable stuff doesn't matter.

20 MR. McCONNICO: Well, doesn't come under this,
21 and that is what I am saying because under Rule 166(b) --
22 where this is going to come up is you want to see all of the
23 settlement agreements that GM has entered into in a like
24 case, right? That is where it is going to come up. Okay,
25 under 166(b) that says you can discover those settlement

1 agreements. Now, if the parties say this is confidential and
2 it is between us and no one else, I don't know if they can
3 get around that by 166(b) saying they are discoverable
4 because parties can't agree to make something
5 nondiscoverable. You understand what I am saying?

6 MR. DAVIS: It can be discoverable and still
7 protected.

8 MR. SPARKS (SAN ANGELO): How about the
9 situation where somebody comes to me and they said they are
10 going to pay you a million dollars but you have to give the
11 money back if you ever tell what you got it for --
12 cancer causing agent, something of that nature. I am talking
13 about public health and safety. They got a problem, they
14 just don't want anybody else to know about it so they don't
15 ever want to have to pay. So you go to your client and you
16 say this is the deal they have made, you know, pretty good
17 sum for what you have got wrong with you. But you have got
18 to promise to keep it quiet because that really is what we
19 are talking about should we make void those type of
20 settlements.

21 MR. McCONNICO: And I don't have any problem
22 with those being void. All I am saying is then you get back
23 to what Sam Sparks was talking about earlier, from El Paso,
24 they are going to structure and draft settlement agreements
25 where they are really meaningless. So all you are going to

1 discover is settlement documents that are full of a bunch of
2 meaning rhetoric.

3 MR. SPARKS (SAN ANGELO): But when a newspaper
4 reporter walks into my office and says, you know, we have
5 discovered you settled here for something, now what did you
6 settle for? Well, they were causing cancer out here and they
7 paid a million dollars for it because they really got a
8 problem. The public ought to know about it. I don't want to
9 have to pay the money back to them.

10 MR. McCONNICO: That is the point we are
11 talking about.

12 MR. McMAINS: You would agree as long as you
13 get to keep the money.

14 MR. SPARKS (SAN ANGELO): I think this is the
15 public's access to information that is safety and health. It
16 is hurting them out there, Steve. That was the whole point
17 about the discovery rules too.

18 MR. McCONNICO: I think you can solve that
19 without saying that all of these have to be filed of record
20 and they are all part of the record in the case, completely
21 discoverable by anybody who comes by us.

22 CHAIRMAN SOULES: Bill Dorsaneo. He had
23 something to respond, I think.

24 MR. DORSANEO: It is really a small point if
25 you end up saying that what we are concerned about is

1 concealing information, then the information isn't -- is that
2 what you are after?

3 MR. MORRIS: Yes, only the information that is
4 of a public nature, Bill.

5 MR. DORSANEO: But it won't be in the
6 settlement agreement. So you are back to discovery,
7 effectively.

8 MR. MORRIS: I said "restricting public
9 access." Of course, sometimes in a settlement agreement, you
10 do make as part -- if it is not in writing somewhere, I guess
11 then there is no restriction on you, but I think that the
12 Supreme Court should be able to tell the lawyers of the state
13 you are operating under the courts paid for by the peoples'
14 taxes that we are not going to let you restrict public access
15 to these two vital areas of information.

16 MR. DORSANEO: All I am saying is that is not
17 going to be in the settlement agreements.

18 MR. O'QUINN: The answer to that is is what
19 they make us agree to, Bill.

20 MR. SPARKS (SAN ANGELO): That is right.

21 MR. O'QUINN: Not only will we not let them
22 read the four corners of the documents, but we won't even
23 talk to them about what happened.

24 MR. MORRIS: Right.

25 MR. O'QUINN: Is trying to get to both points,

1 I think.

2 MR. SPARKS (SAN ANGELO): Any agreement that
3 restricts public access to these areas is void.

4 MR. MORRIS: It doesn't say it is void. That
5 is not the issue.

6 CHAIRMAN SOULES: Lefty, read me your words
7 again slow so I can write them down here. Here is the
8 proposition. All right, the proposition is --

9 MR. MORRIS: "The term court records also
10 includes settlement agreements whether or not" --

11 CHAIRMAN SOULES: Hold it right there.

12 MR. MORRIS: -- "filed of record" --.

13 CHAIRMAN SOULES: Okay.

14 MR. MORRIS: -- "which restricts public access
15 to information" -- make that "matters" -- "to matters
16 concerning public health or safety or to information
17 concerning the administration of public office."

18 MR. McMAINS: I have a question.

19 CHAIRMAN SOULES: Okay, what is the question?

20 MR. McMAINS: One verifying question. Is the
21 function of this proposal and amendment to make settlement
22 agreements otherwise not discoverable?

23 MR. MORRIS: Yes. No, not -- we are not
24 dealing with discovery here. We are dealing with --

25 MR. McMAINS: I don't mean discoverable, I

1 mean subject to this rule. What I am getting at is you say
2 that court records mean -- court records already is defined
3 to cover filed settlement documents. It is filed settlement
4 documents, in part, that I want to seal. So you have got to
5 take them out. You have got one step further to go if you
6 are going to cover -- if you are going to put that in but
7 take the filed settlement documents out.

8 MR. MORRIS: Well, I don't think you are -- in
9 other words, I just said "whether or not filed" in my
10 definition, and which would mean that is the new definition as
11 pertaining to the settlements of what court records --

12 CHAIRMAN SOULES: May we add this sentence,
13 Rusty, may we add this sentence to meet your concern and will
14 Lefty accept it. We will just expressly say "otherwise, the
15 term court records does not include settlement agreements
16 whether or not filed of record."

17 MR. MORRIS: Yes.

18 CHAIRMAN SOULES: That is okay.

19 MR. MORRIS: That is what I am trying to get.

20 MR. McMANS: That is what I thought you were
21 getting at, but it is not --

22 MR. BRANSON: How is that again? I didn't
23 follow you.

24 CHAIRMAN SOULES: All right, if --

25 "the term court record also includes

1 settlement agreements, whether or not filed of
2 record, which restrict public access to matters
3 concerning public health and safety, or to
4 information concerning the administration of public
5 office; otherwise, the term court record does not
6 include settlement agreements whether or not filed
7 of record," is the whole text.

8 MR. MORRIS: I think that is fine.

9 CHAIRMAN SOULES: Okay, any opposition to
10 that?

11 MR. SPARKS (SAN ANGELO): Aren't you trying to
12 say the term does not include settlement agreements excpet
13 those affecting public health and safety, which --

14 CHAIRMAN SOULES: I will have Holly type this
15 tomorrow, and if we want to reverse the grammar -- all right,
16 is the consensus that we do it this way or not.

17 MR. TINDALL: A more forecful way of saying
18 it, it does not include, unless it affects public health and
19 safety.

20 MR. BRANSON: We are talking now about
21 settlement agreements where, historically, the defendant has
22 said okay, I am going to pay this amount of money, and the
23 plaintiff has said, okay, I will take it and will not
24 disseminate the information."

25 CHAIRMAN SOULES: Yes.

1 MR. BRANSON: We are not doing anything, I
2 hope -- and let me make sure I understand it, that would
3 encourage a defendant to be able to come in and ask a court
4 to seal this settlement, or the amount of it or anything
5 about it, without the plaintiff's agreement. Is that
6 correct?

7 CHAIRMAN SOULES: That is correct.

8 JUSTICE PEEPLES: We are talking about the
9 document itself or something more?

10 CHAIRMAN SOULES: We are saying that an
11 agreement.

12 JUSTICE PEEPLES: I mean the real document
13 that has the terms.

14 CHAIRMAN SOULES: That is not the end of it.

15 JUSTICE PEEPLES: Okay.

16 CHAIRMAN SOULES: If the document -- the
17 document may be discoverable, or may not be sealed, but also
18 the any agreement -- that is right, any -- we are talking
19 about a record, okay, you can't seal a record -- you can't
20 seal a record that restricts access to information that
21 includes an agreement that restricts access to information
22 about these things.

23 MR. MORRIS: Those two things.

24 CHAIRMAN SOULES: Okay, any opposition to
25 that? All right, that will stand then passed by unanimity,

1 if we want to reverse the orders so that it says it doesn't
2 include settlement agreements except these -- we will work
3 that out tomorrow with subcommittee and get it in the draft.

4 We will stand then adjourned until 8:30 unless
5 you-all want to start at 8 or 7:30 -- what time do you want
6 to start? Eight o'clock.

7 (At this time the hearing
8 recessed at 5:40 p.m., to reconvene on Saturday,
9 February 10th, 1990, at 8 o'clock a.m.)

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