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BEFORE THE  
SUPREME COURT ADVISORY COMMITTEE  
AUSTIN, TEXAS

VOL. 1

FEBRUARY 16, 1990

Austin, Texas

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HEARING HELD IN AUSTIN, TEXAS, ON FEBRUARY 16, 1990

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B-E-F-O-R-E

LUTHER H. (LUKE) SOULES, III  
CHAIRMAN

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SUPREME COURT:  
Justice Lloyd Doggett  
Justice Nathan Hecht

COARCE CHAIR:  
Doak Bishop

OTHER COMMITTEE MEMBERS:

Gilbert T. Adams, Jr.  
Pat Beard  
Flaine Carlson  
John E. Collins  
Tom H. Davis  
J. Hadley Edgar  
Charles F. Herring  
Franklin Jones, Jr.  
Russell McMains  
Charles (Lefty) Morris  
Tom L. Ragland  
Broadus A. Spivey  
Harry L. Tindall  
Anthony J. Sadberry  
Kenneth D. Fuller  
David J. Beck

Sam D. Sparks (San Angelo)

OTHER SPEAKERS:

Pat Hazel  
Tom Leatherbury

*Rule 76a - p. 107-125*

P R O C E E D I N G S

Friday, February 16, 1990

Morning Session

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CHAIRMAN SOULES: Let's come to order, and I thank everyone for being here at ten after 8:00 on Friday morning. We will send a sign-up sheet around a little bit later.

What I thought we would do by way of approaching this thing this morning would be to try to finish our old business, which includes sealed records and the charge, first. Now, Lefty is doing a redraft of the sealed records now. I believe he and Holly are working on that together. And Hadley and Elaine and I finished Wednesday afternoon, I guess it was --

MR. EDGAR: Late.

CHAIRMAN SOULES: Pardon?

MR. EDGAR: Late Wednesday.

CHAIRMAN SOULES: Late Wednesday afternoon after having some good conversations through the week together, the draft of the charge rules. And in fairness, I would approach this that we would put those later in the morning so that everybody has a chance, whenever you can catch a moment, to look at those and see how you kind of feel

1 about them, and understand and absorb them before we talk  
2 about them. If that is all right with the Committee, then  
3 the only other old business that we have is in the agenda in  
4 the front part of the big book.

5 With that in mind, then what we would -- I would  
6 propose is that we would start with probably -- well, Harry  
7 has got something that is rewritten, too. We need to come  
8 back to that. Maybe we will wait and take a look at that,  
9 but he certainly needs to have that done this morning --  
10 start with the 1989 rules that we did not finish last time,  
11 and then next, in whatever order we want to take them up, do  
12 the sealed records, the charge, and Harry's 167 -- is it A,  
13 Harry?

14 MR. TINDALL: Right.

15 CHAIRMAN SOULES: And I am open for anybody's  
16 comments on how you think maybe better we could organize this  
17 morning.

18 MR. EDGAR: Mr. Chairman, I move that we  
19 proceed as you just outlined.

20 CHAIRMAN SOULES: Been moved. Is there a  
21 second?

22 MR. TINDALL: Second.

23 CHAIRMAN SOULES: Okay. Those in favor say  
24 "Aye."

25 (RESPONDED AYE)

1 CHAIRMAN SOULES: Opposed? Okay.

2 MR. DAVIS: Start off with noncontroversial  
3 things, right?

4 MR. TINDALL: Court's charge.

5 MR. DAVIS: No, that isn't what I said. You  
6 misunderstood.

7 CHAIRMAN SOULES: We have done 169, and we  
8 were over to -- let me see. I have "Okay, it says, is on  
9 208," and we had -- let me get my check list here to try to  
10 get where we were, and you-all can help me.

11 Now, let's see, the last one I checked off was 201,  
12 but let me see. Then there is a rule on 324. Did we pass on  
13 that one?

14 Subcommittee recommended no change on that one.  
15 All in agreement say "Aye."

16 (RESPONDED AYE)

17 CHAIRMAN SOULES: Opposed? That is  
18 unanimously approved then.

19 MR. TINDALL: What page are you on?

20 CHAIRMAN SOULES: I am on Page 324, Harry.

21 MR. TINDALL: Okay.

22 CHAIRMAN SOULES: And if you need to have an  
23 index, if you kind of go back to the, let's see, I guess it  
24 is the third sheet in the book, it says "Written and oral  
25 comments to TRCP, TRAP and TRCE." These are the comments to

1 the last -- to the '89 work. We have just now done the  
2 last -- finished the last item on the first page, and that  
3 goes on for two-and-a-half pages.

4 MR. EDGAR: What page is Rule 324 on?

5 CHAIRMAN SOULES: Well, now, wait a minute.  
6 No, that was -- let me get straight with you, Hadley. That  
7 was Rule 206 on Page 324. Now we are going to Rule 208 on  
8 Page 327, and we passed on that last time and said that was  
9 okay as is. So I must have skipped one.

10 And so now we are to two -- Rule 216 on Page 332.  
11 And let's see, David, I guess this is your subcommittee,  
12 isn't it?

13 MR. EDGAR: No, it is mine.

14 MR. BECK: No.

15 CHAIRMAN SOULES: Oh, Hadley's. Okay,  
16 Hadley.

17 MR. EDGAR: I have passed -- every one of you  
18 should have before you a letter from me to the Committee  
19 dated today concerning Rules 216 and 214.

20 The matter on Page 332 goes back, and this runs  
21 through a number of rules, as to how to spell "jury," is it  
22 hyphenated or not. My dictionary hyphenates it. I don't  
23 know about anybody else's, but --

24 MR. TINDALL: Mine just offers one common  
25 word, just n-o-n-j-u-r-y, without a space or a hyphen.

1 MR. EDGAR: Well, I will let -- I will leave  
2 that to the grammarians, but, anyhow, that is what the  
3 purpose of this page is about.

4 CHAIRMAN SOULES: All right. What do you  
5 recommend?

6 MR. SPARKS (SAN ANGELO): Well, we have got to  
7 do it right or --

8 MR. TINDALL: My unabridged dictionary at the  
9 office has no hyphen or space, Hadley. Did you use --

10 MR. EDGAR: Well, I used Webster's Collegiate.  
11 I don't know.

12 MR. TINDALL: That was raised in a number of  
13 letters we got about the spelling of it.

14 CHAIRMAN SOULES: Where is it?

15 MR. TINDALL: It is spelled both -- there are  
16 a number of places where it is with a hyphen and there are a  
17 number of places where it is one word without a space.

18 CHAIRMAN SOULES: All right. Well, I will  
19 assign that to every subcommittee jointly, if you will meet  
20 in the interim in the next biannual and decide some uniform  
21 way to do it, and we will get on Word Search and we will find  
22 every place it is in the rules and fix it.

23 MR. TINDALL: I concur with that.

24 CHAIRMAN SOULES: Anybody want to change this?  
25 There being no hands --

1 MS. CARLSON: Well, also, the TRAP  
2 subcommittee suggested the same modification without the  
3 hyphen.

4 MR. TINDALL: Without the hyphen is --

5 CHAIRMAN SOULES: All right. Well, let's  
6 go -- that goes to the TRAP rules and everybody else, all the  
7 other rules. We can make it uniform at least because we do  
8 have these rules on disk now.

9 Okay. No change to 216. In favor say "Aye".

10 (RESPONDED AYE)

11 CHAIRMAN SOULES: Opposed? There will be no  
12 change to 216.

13 MR. EDGAR: The letter on Page 335 refers to  
14 simply the spelling of a -- of the comment -- of the word and  
15 the comment on Page 334, and points out that it should be to  
16 preclude a default judgment "in" a case, but the bar journal  
17 incorrectly used "is" instead of "in."

18 CHAIRMAN SOULES: We have got it fixed.

19 MR. EDGAR: All right. So we don't need to  
20 take any action on that.

21 CHAIRMAN SOULES: That is right.

22 MR. EDGAR: On Page 336, Rule 245, one letter  
23 on Page 337 says the 45-day notice is too short, and another,  
24 on Page 339, says not long enough.

25 Now, Judge Morris, in a letter on Page 341, says



1 that at least one appellate court has ruled that forfeiture  
2 cases must be set within 30 days after the answer date. This  
3 creates a conflict, he points out.

4 Now, I would like to go out of order just a moment,  
5 if I might, because in a letter to me after the Committee  
6 met, and as a result of the hearing that the Court held,  
7 Franklin Jones pointed out that there was a conflict -- I  
8 don't know whether Franklin did it or someone in his office.  
9 I am giving him the benefit of the doubt -- that -- I have  
10 that in the material to be presented later, but perhaps we  
11 ought to take it up now, that --

12 CHAIRMAN SOULES: Hadley, is this your  
13 February 16 letter that you are referring us to now?

14 MR. EDGAR: What I did -- yes. What I did,  
15 you don't have -- you don't have what I am about to comment  
16 on before you because this is in the material which arose as  
17 a result of comments subsequent to the public hearing. But  
18 Franklin pointed out that why shouldn't the notice period  
19 correspond with the 30-day period in Rule 216 for paying a  
20 jury fee. Also, that the 45-day notice will interfere with  
21 the docket control of many district courts which have monthly  
22 docket call.

23 Then he also points out that Rule 216 provides that  
24 a party must request a jury trial and pay a jury fee not less  
25 than 30 days in advance of trial. The 45-day trial notice

1 requirement in Rule 245 will result in the parties obtaining  
2 an automatic continuance when the parties request for a jury  
3 within the 15 days lead period and the case must be moved  
4 from the nonjury to the jury docket. In some districts this  
5 will be an exceptionally long delay to jury trial.

6 I simply point that out to you asking whether or  
7 not you want to simply go back and reconsider this 45-day  
8 period in the matter which is to be taken up later because of  
9 the order of business which we earlier decided to proceed  
10 upon.

11 CHAIRMAN SOULERS: The reason, if you remember,  
12 the agenda where this 245 got changed, the problem that we  
13 were addressing -- and we had letters from the  
14 practitioners -- a court could set a case on 10-day notice,  
15 but you had to make a jury demand 30 days out. So what was  
16 happening was the courts were setting cases on 10 days notice  
17 and then saying, "You waived your jury demand, even though  
18 you didn't even know when the case was going to be set 30  
19 days ago."

20 And the reason that a 45-day period was put in  
21 place was that this meant that the first time a court set a  
22 case, there would still be time to make a jury demand, rather  
23 than the first time the court sets a case, there is -- time  
24 for jury demand is expired. And we just picked 45 days  
25 saying, "Well, in that 15 days, if you want a jury, you ought

1 to be able to make up your mind and get it done." All I want  
2 to do is remind you-all why we made this change because for  
3 some other reasons now, there is some reconsideration.

4 And, Hadley, how would we harmonize all that?

5 MR. EDGAR: I don't know.

6 MR. JONES: The problem I saw with it was that  
7 it picked up in my office that I think --

8 CHAIRMAN SOULES: Stop that a minute. He's  
9 talking and we can't hear.

10 I am sorry, Franklin, we are not getting you.

11 MR. JONES: The problem that we picked up in  
12 my office that I think was a valid point and I really think  
13 we ought not to build this into the rules, and that is a  
14 party can get an automatic continuance unless these two rules  
15 are harmonized, that is, the rule of setting the case for  
16 trial and the rule of jury demand.

17 Now, there is no -- I don't see any problem it  
18 being either 30 or 45 days. The problem is if you set a case  
19 either 30 or 45 days out on a nonjury docket, then a party  
20 can come in within that 15-day lapse period and demand a jury  
21 and he has got an automatic continuance on a motion in rural  
22 courts that I know anything about. And that is a problem my  
23 office has picked up on and I really don't see any reason for  
24 that.

25 CHAIRMAN SOULES: I didn't know you ever set

1 nonjury cases.

2 MR. JONES: I am usually the one wanting a  
3 jury, but occasionally I have a problem that doesn't appeal  
4 to a jury for some reason.

5 CHAIRMAN SOULES: Franklin, if -- there is no  
6 15-day period if the case is set 30 days out. When the case  
7 is set at that very day, that is the last day you can demand  
8 a jury and you may not even know it got set.

9 MR. SPIVEY: Judges don't always -- don't read  
10 it all that way, though, they really don't.

11 CHAIRMAN SOULES: I am sorry.

12 MR. SPIVEY: Judges look at it as a  
13 discretionary thing and that is what the appellate courts  
14 pretty well uphold.

15 CHAIRMAN SOULES: To give a jury.

16 MR. SPIVEY: Yes.

17 CHAIRMAN SOULES: But we don't want it  
18 discretionary. We want them to have to give a jury and that  
19 is -- I mean the way the Committee voted last time, I say  
20 "we," I mean we took this position that a judge who set --  
21 first sets a cases on a nonjury docket without a jury fee  
22 having been demanded, at that point in time should be enough  
23 in advance of the minimum jury demand period that a party  
24 could demand a jury and have a right to it no matter what.

25 That is the reason that we changed 245 to read the

1 way it does now and not be discretionary with the court  
2 whether or not you get a jury because you don't even know  
3 that setting is there until the judge does it, and if your  
4 30 days is already shot, you have got -- you are in a  
5 discretionary period.

6 Some judges -- trial judges in San Antonio believe  
7 that the constitutional right to a jury trial means you can't  
8 use these rules to manipulate. Others say that is what the  
9 rules say. So we can do what we want to do about it. So  
10 there it is. And -- but the judges have raised a question  
11 about a 30-day forfeiture case.

12 MR. EDGAR: Well, on Page 341 of your book --

13 CHAIRMAN SOULES: Right, in a forfeiture case.

14 MR. EDGAR: -- Judge Morris raises the  
15 question, he says at least one appellate court, without  
16 giving us a citation, has ruled that forfeiture cases must be  
17 set within 30 days after answer date. And I know that there  
18 certainly are some provisions for forfeiture under certain  
19 circumstances, but I really don't know the case to which he  
20 referred.

21 And if the rule would change to 45 days, it would  
22 seem to me that a court would have difficulty in ordering  
23 that a forfeiture case would be set for 30 days when the rule  
24 says at least 45, but that is all we have and I just wanted  
25 to call that to the Committee's attention.

1 CHAIRMAN SOULES: Well, we have -- and on many  
2 occasions, this Committee has written standardized rules  
3 where some court of appeals maybe started a trend that the  
4 Committee felt was inappropriate. I don't know. Of course,  
5 I don't know what case Judge Morris was talking about either.  
6 It is not cited.

7 What is your recommendation in the circumstances?

8 MR. EDGAR: I recommend that we leave it, just  
9 leave it as it is.

10 MR. BEARD: I second that.

11 CHAIRMAN SOULES: Moved and seconded. Those  
12 in favor say "Aye."

13 (RESPONDED AYE)

14 CHAIRMAN SOULES: Opposed?

15 MR. JONES: Opposed.

16 CHAIRMAN SOULES: Okay. The "ayes" have it  
17 house to one.

18 MR. EDGAR: All right. The next rule we have  
19 listed here is Rule 296. If you will turn to Page 420 in  
20 your book, you will find that Justice Hecht raised a question  
21 that the court had concerning the treatment to be given a  
22 request under Rule 296, which was filed before the judgment  
23 was signed.

24 CHAIRMAN SOULES: Go ahead.

25 MR. EDGAR: And I just raised the question

1 here that I think that probably is provided for in Rule  
2 306(c). And the question he addresses is how to treat a  
3 request which is filed before the judgment is signed. And I  
4 think that Rule 306(c) currently takes care of that because  
5 it basically says that it will be deemed filed on the date  
6 of, but subsequent to the date of signing the judgment.

7 CHAIRMAN SOULES: 306(c)?

8 MR. EDGAR: Yes. I wish he were here. Maybe  
9 I didn't really understand the nature of his question.

10 CHAIRMAN SOULES: Did we make a change to  
11 306(c)?

12 MR. RECK: No.

13 CHAIRMAN SOULES: Did not.

14 Where did we put -- well, this used to be a bigger  
15 problem, and I don't know whether this is looking at a case  
16 that is pre '84, but in 1984, the Committee recommended to  
17 the Court, and the Court adopted, an amendment to 306(c) that  
18 put premature file findings of fact and conclusions of law  
19 within its ambit. Prior to that, there was a problem. They  
20 were not within the ambit of 306(c).

21 MR. EDGAR: Well, with respect to the query  
22 that he raises, though, on Page 420 --

23 CHAIRMAN SOULES: Okay.

24 MR. EDGAR: -- it seems to me that Rule 306(c)  
25 solves that problem.

1 CHAIRMAN SOULES: As a result of an '84  
2 amendment.

3 MR. EDGAR: Yes. So I don't know whether I  
4 have missed something that he is raising, but absent that, I  
5 recommend no change because I think it is already cured.

6 CHAIRMAN SOULES: We did make a change to  
7 306(c) and I don't know where it is. I know we did.

8 MR. ADAMS: It wasn't published.

9 CHAIRMAN SOULES: It is not in the book, but I  
10 know we did because you see -- and I can show you where we  
11 did it. You will probably remember this. If you have got a  
12 rule book, if you look in the fifth line of 306(c), every  
13 such motion shall be deemed to have filed on the date of but  
14 subsequent to the date of. And we changed that on the "date"  
15 of but subsequent to the "time" of.

16 Now, I don't know why it's not -- I haven't got it  
17 before you, but we voted to do that in 1989.

18 MR. BECK: It wasn't published, Luke.

19 CHAIRMAN SOULES: Well, that is probably  
20 because it -- I dropped it in my office. But that was  
21 very -- it was even -- not even discussed really. It was  
22 obviously --

23 MR. EDGAR: It should be changed to be the  
24 time of.

25 CHAIRMAN SOULES: I know. I remember us doing



1 it, and it will be in our minutes, but it is not in the -- it  
2 was not published, but that is very noncontroversial.

3 MR. TINDALL: Two places, Luke.

4 CHAIRMAN SOULES: I know.

5 MR. TINDALL: It has got to be changed.

6 CHAIRMAN SOULES: I will get that fixed and I  
7 apologize that that didn't make it. That is part of your  
8 work. I promise.

9 All right, we are going to change, in Rule 306(c),  
10 in the fifth line of the West Version, the word "date" to  
11 "time," "date of signing of the judgment" to "time of signing  
12 of the judgment." And then, likewise, in the very last line,  
13 exactly the same change. Change "date of signing of the  
14 judgment" to "time of signing of the judgment."

15 All in favor say "Aye."

16 (RESPONDED AYE)

17 CHAIRMAN SOULES: Opposed? Okay.

18 Are you making a note we have got a 306(c) change?

19 MR. EDGAR: Then on Page 421, 422, there is a  
20 Fifth Court of Appeals memo suggesting that the comment be  
21 clarified to Rule 296. And we, as a Committee, have never  
22 really worked with the comments, Luke. Did you want -- do  
23 you want to take that up here or --

24 CHAIRMAN SOULES: That would be fine. Let me  
25 get my paper straight. Did you recommend then no change to

1 298?

2 MR. EDGAR: Well, I haven't gotten to that.

3 CHAIRMAN SOULES: You haven't gotten there  
4 yet.

5 MR. EDGAR: I am talking about 296.

6 CHAIRMAN SOULES: 296. Okay. Is that -- is  
7 that what we are still discussing?

8 MR. EDGAR: The memo on Page 421, 422 suggests  
9 clarification of a comment. And I just wanted to call that  
10 to the Chair's attention.

11 CHAIRMAN SOULES: Okay. Hadley, what would we  
12 do to clarify it and what pages should we look at for  
13 comment?

14 MR. EDGAR: Well, on Page 421.

15 CHAIRMAN SOULES: 421. Is the rule in the  
16 book anywhere?

17 MR. EDGAR: The rule is on Page 415.

18 CHAIRMAN SOULES: 415.

19 MR. EDGAR: Four one five.

20 CHAIRMAN SOULES: And the -- they want us to  
21 write the comment to say what?

22 MR. EDGAR: Well, he doesn't tell you what.  
23 He just says he has a problem with it, as was frequently the  
24 case in these comments, pointing out that one could construe  
25 the comment to mean that findings of fact and conclusions of

1 law are -- well, pardon me.

2 CHAIRMAN SOULES: That is not what the comment  
3 says.

4 MR. EDGAR: Well, you are right. Just a  
5 moment.

6 CHAIRMAN SOULES: They may have published it  
7 wrong in the bar journal, but our comment does not say that.

8 MR. EDGAR: He also refers to Rule 41(a) and I  
9 am -- along with that, and I am wondering maybe if that  
10 comment to 41(a) is not the comment to which he referred. I  
11 will look right quick.

12 CHAIRMAN SOULES: Is that TRAP 49(a)?

13 MR. EDGAR: 41(a).

14 CHAIRMAN SOULES: 41(a). That is it.

15 MR. EDGAR: Yes. He is really referring to  
16 that one, so I will leave that up to Dorsaneo's Committee.

17 CHAIRMAN SOULES: Okay.

18 MR. EDGAR: But, anyhow, the point he raises,  
19 I think, is legally correct, but I don't know which one of  
20 those comments.

21 CHAIRMAN SOULES: Could we -- when we get  
22 there, could you remind us to revisit this? Thank you,  
23 Hadley.

24

25

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

4 MR. EDGAR: All right. Luke, on --

5 CHAIRMAN SOULES: Okay. Have we finished that  
6 item now? Tom Davis.

7 MR. DAVIS: As a matter of information, who  
8 does write the comments?

9 CHAIRMAN SOULES: We sometimes write them  
10 here, I sometimes try to write them, and before -- and they  
11 come to the Committee in the report. So sometimes they are  
12 written here, and sometimes I write them, sometimes they are  
13 in the proposals that come. So there is not any real --

14 MR. DAVIS: When we adopt the rule, we should  
15 also consider the comments, too, right?

16 CHAIRMAN SOULES: Well, we always do. We  
17 have -- as a matter of fact, and many times we have decided  
18 to write a rule and then the Committee has said, "Put in a  
19 comment that we did it for this reason." So that is our  
20 practice now.

21 MR. EDGAR: On Page 423, Judge Star raises a  
22 question concerning Rule 298, which appears on Page 418. And  
23 you will --

24 CHAIRMAN SOULES: Hadley, are we --

25 MR. EDGAR: We are talking about Rule 298.

1 CHAIRMAN SOULES: Okay. So --

2 MR. EDGAR: It appears on Page 418.

3 CHAIRMAN SOULES: Okay. I do not have a  
4 consensus on 297 and 296. Is it your motion that there be  
5 no change to the '89 work product or do we need to look at  
6 this --

7 MR. EDGAR: No.

8 CHAIRMAN SOULES: -- before we do that?

9 MR. EDGAR: Yes, except as respects the  
10 comment to Rule 41(a), but as far as 296 is concerned,  
11 recommend no change.

12 CHAIRMAN SOULES: And 297?

13 MR. EDGAR: Well, there was no concerns voiced  
14 to 297.

15 CHAIRMAN SOULES: Okay. All in favor of no  
16 change to the recommended version of 296 and 297, say "Aye."

17 (RESPONDED AYE)

18 CHAIRMAN SOULES: Opposed? Okay. Thank you.

19 MR. EDGAR: All right. Rule 298, appearing on  
20 Pages 418 and 419, you notice that what we did in Rule 298  
21 was require notice in accordance with Rule 21(a), and this  
22 gets us back to certified and registered mail. Apparently,  
23 lawyers are sending these to the court, which we are now  
24 going to require in addition to sending it to the clerk,  
25 certified registered mail, return receipt requested, which

1 means that the court then has to interrupt its proceedings to  
2 receive what the -- what Judge Starr calls, on Page 423, "a  
3 \$10 envelope."

4 And I think he has got a valid point. To interrupt  
5 court proceedings to have to receive mail to comply -- and I  
6 am not sure that Rule 21(a) requires that delivery to the  
7 court or to the clerk be by certified mail. I think it only  
8 is to opposing parties, but yet that is his concern.

9 This then goes back to Rule 21(a), which I have had  
10 some personal frustration with for a long time. But we voted  
11 to do what we did and I don't know that we can -- whether we  
12 want to undo that or not.

13 CHAIRMAN SOULES: The Committee, in its '89  
14 deliberations, put in the certified mail service on judges  
15 because of the time periods from -- during which a judge must  
16 act after receipt of findings of fact and conclusions of law.  
17 And it was our discussion that it was fair -- only fair to  
18 the judge for them -- for there to be proof that he got those  
19 findings of facts and conclusions of law on a given date and  
20 not -- so that there is a time from which it starts running.

21 And if you remember, we -- this is not just filing  
22 with the clerk where you would have a file stamp because the  
23 judges say, "Well, that doesn't help us any, it lays over  
24 there in the file jacket and we don't get a chance to look at  
25 it, we may not even know it is there while our time is

1 ticking."

2           So we say, "Well, fine. We will deliver them to  
3 the judge." Well, what proof do you have that the judge got  
4 them delivered? And this was put in there to give judges  
5 some sort of a safety valve that really does -- where you got  
6 to prove you got them, you have got to have a green card.

7           Now, it doesn't matter to me, but that is why  
8 we did it this way.

9           MR. EDGAR: The problem -- the problem,  
10 however, is that I don't think that Rule 21(a) requires that  
11 the court be served by certified registered mail.

12           CHAIRMAN SOULES: It doesn't.

13           MR. EDGAR: It talks about serving a party.  
14 And, apparently, lawyers have, by making this reference to  
15 Rule 21(a) and not discerning that difference, simply send  
16 everybody -- serve them by certified or registered mail.

17           And perhaps this problem that you are presenting  
18 could be solved if we made some effort to make it clear in  
19 Rule 21(a) that neither the clerk nor the court need to  
20 receive notice by certified or registered mail in order to  
21 comply with that rule. This goes back to Rule 21(a), I  
22 think, and, frankly --

23           MR. FULLER: That is the evil right there, is  
24 trying to utilize 21(a).

25           MR. EDGAR: Well, we did that because that is

1 such a shorthand way of doing it.

2 MR. FULLER: It didn't work.

3 MR. EDGAR: And I can see how this is going to  
4 create problems with a busy court in a jury trial and having  
5 to interrupt the proceedings to receive certified mail.

6 CHAIRMAN SOULES: Well, that seems to me  
7 that -- is that a real problem? I haven't been in a  
8 courtroom in a long time where -- during trial where there is  
9 not some employee of the court outside of the courtroom doing  
10 something.

11 MR. EDGAR: Yes, but this has to be delivered  
12 to the court, the judge.

13 CHAIRMAN SOULES: But any -- doesn't any  
14 representative --

15 MR. EDGAR: If it goes to addressee only, it  
16 does.

17 CHAIRMAN SOULES: If it is addressee only.  
18 Tom Ragland.

19 MR. RAGLAND: I was on the subcommittee that  
20 worked on this, and my recollection the reason we put that  
21 about serving the judge is because if you had a visiting  
22 judge, the clerk couldn't deliver that copy of it and,  
23 therefore, that visiting judge would be given a certified  
24 copy.

25 CHAIRMAN SOULES: That was another part of the



1 discussion, no question.

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

5 MR. RAGLAND: Okay. Could we address that  
6 comment, service on the judge no longer necessary?

7 CHAIRMAN SOULES: I am not -- I am reluctant  
8 to leave it that way, but that is up to the Committee.

9 MR. EDGAR: Should we get on the record --

10 CHAIRMAN SOULES: Okay.

11 MR. EDGAR: -- the suggestion I made, or just  
12 go ahead and reconsider it, or leave like it is, or --

13 CHAIRMAN SOULES: We are on 290 -- Rule 298 --

14 MR. EDGAR: 298(a).

15 CHAIRMAN SOULES: -- on Page 418. And Hadley  
16 has a suggestion for change in 298(a) in response to the  
17 public comment coming in from -- who was it, from Judge  
18 Starr?

19 MR. EDGAR: Yes.

20 CHAIRMAN SOULES: And, Hadley, what is that  
21 suggestion?

22 MR. EDGAR: The suggestion to cure his concern  
23 would be to, in the last sentence of four -- of 298(a),  
24 change it to read as follows: "The party making the request  
25 shall also deliver a copy to the judge who tried the case and

1 indicate thereon the date and manner of delivery period".

2 MR. SPIVEY: You are encouraging ex parte  
3 communication. Most of my problems don't need any  
4 encouragement.

5 CHAIRMAN SOULES: Well, it has been mandated  
6 before.

7 MR. BECK: Hadley, wouldn't you make the same  
8 suggestion in 296?

9 CHAIRMAN SOULES: Yes, we have got to go back.  
10 Whatever we do here, we have got to go back and do it on 296.  
11 You are right, David.

12 MR. EDGAR: But that is the issue that we have  
13 before us. And why don't you go ahead and voice your concern  
14 again, David, so that we can get it on the record.

15 MR. BECK: Well, I think I would say that the  
16 language proposed by Hadley certainly corrects the problem  
17 that Judge Starr raised. However, I think that we have got  
18 to go back to the original reason as to why we even amended  
19 this rule in the first place, which was to deal with the case  
20 law which says that to preserve error you had to call your  
21 request for findings of fact and conclusions of law to the  
22 trial judge. And so our original concern was, well, let's  
23 put in the rule a requirement to that effect and put  
24 something express with respect to how you can document that.

25 And what I am saying is that if we make this

1 amendment, although we have corrected Judge Starr's concern,  
2 we have undone the original purpose, which was to provide a  
3 means for documenting that the trial judge received a copy of  
4 the request for findings of fact and conclusions of law.

5 That is my concern.

6 And maybe it is enough just to simply require that  
7 the party provide a copy to the judge and just, you know,  
8 leave the party to his or her own devices if the issue ever  
9 arises that the trial judge never got it.

10 MR. RAGLAND: May I offer -- may I offer this?

11 CHAIRMAN SOULES: Tom Ragland.

12 MR. RAGLAND: Before -- this will be a new  
13 last sentence, 298(a), "Service on the judge who tried the  
14 case is not required, but the party making the request shall  
15 deliver a copy to the judge who tried the case and indicate  
16 thereon the date and the manner of delivery."

17 CHAIRMAN SOULES: In 21(a), we use the concept  
18 that a statement of service is prima facie evidence of the  
19 delivery. Could we use that here?

20 In other words, it would say, "The party making the  
21 request shall also deliver a copy to the judge who tried the  
22 case and state thereon the date and the manner of delivery.  
23 Such statement shall be prima facie evidence of the fact of  
24 delivery."

25 MR. FULLER: I will buy that.

1           MR. RAGLAND: Luke, then that is going to make  
2 it sound like delivery to the judge is required just like we  
3 had under the old rules. We are not getting anywhere, just  
4 getting a new, longer rule that says -- or means the same  
5 thing.

6           CHAIRMAN SOULES: All right. Further  
7 comments? Elaine Carlson.

8           MS. CARLSON: Yes. I just want to point out  
9 that the way we proposed to amend 296 last August was that it  
10 now requires or states that such requests shall be entitled  
11 requests for findings and conclusions, shall be filed with  
12 the clerk, who shall immediately call such request to the  
13 attention of the judge who tried the case.

14           So back on Rule 296, we have the requirement that  
15 the clerk notify the judge. And I agree with Tom, that maybe  
16 the proper place is for this to come in the comment.

17           MR. BEARD: What if we just looked at this as  
18 an adversary system, and if the lawyers don't protect the  
19 judge, they just get reversed, and ignore the court -- notice  
20 to the court problem. As a practical matter, the lawyers  
21 draw the findings of fact and conclusions of law except on  
22 very rare occasions.

23           So why don't we just take the judge out of this  
24 thing and leave it in the adversary system. And if the  
25 opposing counsel doesn't get it to the judge, it is just too

1 bad.

2 MR. RAGLAND: I think, Pat, what we were  
3 trying to address was to eliminate the necessity to prove our  
4 delivery or anything else with the judge by filing with the  
5 clerk --

6 MR. BEARD: Well, just take any notice to the  
7 judge out. Just file it with the clerk, and notice to the  
8 other side, and go on.

9 CHAIRMAN SOULES: The district judges are not  
10 going to be happy with that.

11 MR. BECK: Isn't the issue here who is going  
12 to have the burden of seeing that the judge addresses these  
13 things? In Rule 296, we say that the clerk has got the  
14 burden of calling it to the judge's attention. And then in  
15 the next section we say, "Oh, by the way, provide a copy to  
16 the judge."

17 If the Committee's view is that the burden ought to  
18 be on the clerk once that document is filed, then you don't  
19 even need the last sentence because really what the purpose  
20 of the last sentence is is to provide a courtesy copy to the  
21 judge, and essentially that is what it is.

22 MR. BISHOP: But that is not what it says.

23 MR. BECK: Exactly. I agree with you, that is  
24 not what it says.

25 MR. BISHOP: The problem is that here you are

1 creating a situation where you have to file with the clerk  
2 and with the judge.

3 MR. BECK: Exactly. And I can see the court  
4 saying that you did not serve the judge and, therefore,  
5 somehow you have not satisfied all the requisite steps.

6 So my question is do we need that last sentence in  
7 Rule 296 and in 298(a)?

8 MR. FULLER: I don't have a problem --

9 MR. BISHOP: To get around that --

10 CHAIRMAN SOULES: Wait a minute. One at a  
11 time. Who wants the floor? Ken Fuller and then Doke Bishop.

12 MR. FULLER: My only problem is, and we have  
13 this problem in Dallas a lot, we get so darn many visiting  
14 judges, and half the time, the clerks don't even know who the  
15 visiting judge was on a given day. And that -- I have got a  
16 problem with that.

17 CHAIRMAN SOULES: Doak Bishop.

18 MR. BISHOP: If the purpose of the last  
19 sentence is to say that we need to give a courtesy copy to  
20 the judge, then I think what you ought to say is that we  
21 "should" provide a copy to the judge instead of "shall" and  
22 that might get around that problem.

23 MR. RAGLAND: Well, let me -- let me explain.  
24 When this was first rewritten and submitted to the Committee,  
25 this sentence that appears on the last line of 296 wasn't in

1 there, nor was the sentence that we have been talking about  
2 here about delivering it to the judge. That was not in there  
3 anywhere. But at the Committee meeting, the question about  
4 visiting judges came up and that is how that language got in  
5 there.

6 But it was the subcommittee's view that if you want  
7 to get away from proof of delivery of service on a judge, you  
8 need to take any reference out to delivery or service on a  
9 judge and make it count from the date it is filed with the  
10 clerk and put the burden on the clerk to deliver it to the  
11 judge.

12 MR. BISHOP: Okay. Would you put this  
13 sentence in there which indicates you still have to deliver  
14 it to the judge?

15 CHAIRMAN SOULES: Well, we had judges here at  
16 that meeting and, unfortunately, they are not here -- I mean  
17 our trial judges that -- we had Judge Rivera and Judge  
18 Casseb, and they were pretty vocal that they wanted a  
19 requirement that the judge that tried the case get delivery  
20 in his hand, her hand, of the proposed findings and  
21 conclusions because they then had duties to perform as a  
22 result of that receipt.

23 And the case law and the former rules, at least,  
24 seem to react to the -- a perception that the responsibility  
25 lodged solely in the district clerk's office for getting

1 these to the judges is something that did not work, and the  
2 judges did not want it left that way, and the rules were not  
3 that way, and the cases were not that way.

4 I don't know whether it would work if the -- if the  
5 clerks had sole responsibility or not, but up to now, no one  
6 in the Texas jurisprudence has presumed that that would work.  
7 And even in this full Committee in 1989, we were not  
8 comfortable, or at least having heard from those judges, in  
9 leaving it solely with the clerk to do that.

10 Whether we want to do that now or not is up to  
11 you-all, but I am afraid we are going to get another swell of  
12 comment from the district judges if we don't provide some  
13 requirement that they get delivery of a copy of the request  
14 from the lawyer that makes the request. It is up to you-all.  
15 And I --

16 Okay. Doak, and then David Reck.

17 MR. BISHOP: Let me make a suggestion that  
18 might get around this. If we look at old Rule 298, it says,  
19 "After the judge so files written findings of fact and  
20 conclusions of law, either party may, within five days,  
21 request of him specified further findings."

22 What we might do is say there, "Deliver to the  
23 judge's office, and obtain a receipt therefor, a request for  
24 further additional or amended findings." That way you are  
25 not having to prove that you served it on the judge himself,



1 just that you served it to the judge's office, which gets  
2 around one problem, and you don't have to go to the more  
3 cumbersome problem of filing it with the clerk and doing all  
4 of this.

5 CHAIRMAN SOULES: Where is the judge's office?

6 MR. BEARD: The visiting judge is in Hawaii.

7 MR. EDGAR: The visiting judge is the problem  
8 we have. Your concern and your solution, I don't think,  
9 solves that problem.

10 CHAIRMAN SOULES: Remember, we had -- we  
11 debated on whether to put "court" or "judge" here. This was  
12 the one place where we voted not to put "court" and to put  
13 "judge" because we were talking about serving the individual  
14 who tried the case and not the court as a body corporate,  
15 whatever it is. David Beck.

16 MR. BECK: The only comment I was going to  
17 make is I am in favor of Hadley's language. If we want to  
18 address the proof problem, we could add language in the rule  
19 to the extent -- and let me just make a suggestion here -- we  
20 add the phrase, quote, "with adequate proof of delivery"  
21 somewhere in that last sentence.

22 But the only problem with adding that kind of  
23 language is we get right back to Judge Starr's concern  
24 because when you start talking about adequate proof, the  
25 immediate -- the thought that immediately comes to an

1 attorney's mind is certified mail.

2 MR. EDGAR: Mr. Chairman --

3 CHAIRMAN SOULES: I think what we have got is  
4 Judge Starr against -- I mean Judge Starr says, "I don't want  
5 to be bothered with getting these things and having to  
6 receipt for them." Other judges say, "We not only want to be  
7 bothered, we want to be sure that we get them, and we are  
8 willing to give a receipt for them."

9 MR. EDGAR: May I suggest that --

10 CHAIRMAN SOULES: Hadley Edgar.

11 MR. EDGAR: -- we leave the rule exactly as it  
12 is, and then if Judge Starr and others have a problem as a  
13 result of this rule, then certainly they will let us know and  
14 we should then respond to that concern.

15 MR. JONES: I can testify that Judge Starr  
16 will let you know.

17 CHAIRMAN SOULES: I know he will.

18 MR. BECK: May I ask one question?

19 CHAIRMAN SOULES: David Beck.

20 MR. BECK: If the problem here is the visiting  
21 judge, would it make sense to have this sentence only apply  
22 in the instance of a visiting judge? I take it by your  
23 silence that there is none.

24 MR. SADBERRY: No second.

25 MR. FULLER: Luke, if it is in order, I would

1 like to put Hadley's last comment in the form of a motion.

2 MR. JONES: I second.

3 CHAIRMAN SOULES: Okay. And Franklin seconds  
4 it.

5 And, Hadley, will you restate it? Hadley, will you  
6 restate your language? It has been moved that your language  
7 be adopted and seconded, but I am not sure I have it down  
8 exactly.

9 MR. FULLER: No. No. His last comment was  
10 basically leave it as it is, it ain't broke.

11 CHAIRMAN SOULES: Oh, leave it as it is. Is  
12 that the -- is that the motion?

13 MR. FULLER: Yes, that is my motion.

14 CHAIRMAN SOULES: The motion is that 296 and  
15 298, insofar as they require -- the last sentence of 298(a)  
16 and the last sentence of 296 --

17 MR. EDGAR: Basically, Luke, we are just  
18 recommending that these rules be adopted as presented.

19 CHAIRMAN SOULES: Okay. That is the motion.  
20 There is a second. 296, 297, 298, stay as they were  
21 initially recommended. All in favor say "Aye."

22 (RESPONDED AYE)

23 MR. JONES: One question.

24 CHAIRMAN SOULES: One question from Franklin  
25 Jones.

1 MR. JONES: I am sorry, Mr. Chairman.

2 Hadley, is this the rule my office got that  
3 provision in that it was subject to the interpretation of the  
4 court?

5 MR. EDGAR: Oh, let me look just a minute.

6 MR. JONES: I thought we were -- I didn't know  
7 we were voting on the whole rule.

8 MR. EDGAR: Yes, all right. You are right.  
9 If you will look at Rule 298(b), 298(b) on Page 418, 419,  
10 Franklin's office raised a question subsequent to our meeting  
11 that the language of 298(b) seems to indicate that the court  
12 has a mandatory duty to file findings -- additional or  
13 amended findings of fact and conclusions of law whether  
14 requested or not. I don't really construe it that way when  
15 you look at 298(a).

16 However, if that is a concern, I think that it  
17 could be easily corrected by simply inserting, after the  
18 words -- after the word, "conclusions comma if required  
19 comma", so that Rule 298(b) would read "The court shall make  
20 and file any additional or amended findings and conclusions  
21 comma if required comma within 10 days after such request is  
22 filed", et cetera.

23 MR. JONES: Mr. Chairman, I think I seconded  
24 the motion on that rule. If it is in order, I would like to  
25 move that that -- I guess it is Ken's motion, be amended to

1 include that provision that Hadley just referred to.

2 MR. FULLER: I am going to accept the  
3 amendment. I will accept the amendment, right.

4 CHAIRMAN SOULES: Okay. Let me -- I am trying  
5 be a grammarian when I probably shouldn't be. I don't know  
6 whether that "when required" is going to --

7 MR. EDGAR: "If required."

8 CHAIRMAN SOULES: "If required."

9 How about this: "The Court, when necessary,  
10 shall make and file any additional or amended" -- I am  
11 trying to get the modifier in the right spot in the  
12 sentence and I don't know where to put it. Maybe I  
13 ought to just not even debate it.

14 MR. JONES: I have no problem either way.

15 MR. EDGAR: Well, I guess it would probably be  
16 after "file," wouldn't it, "shall make and file, if  
17 required".

18 CHAIRMAN SOULES: Does that pick up "make"? I  
19 don't know, or is that just "filed when necessary"?

20 MR. FULLER: May I suggest a way to do that?  
21 After the word "any" -- after the word "any" after "file,"  
22 could we just say "required"? "The court shall make and  
23 filed any required additional or amended findings."

24 JUSTICE HECHT: What are required?

25 CHAIRMAN SOULES: That is the problem, is what

1 is required? What may be necessary? I don't know.

2 MR. BISHOP: I would like to --

3 CHAIRMAN SOULES: Doak Bishop.

4 MR. BISHOP: I would like to suggest a  
5 suggestion for that -- a substitute for that language. After  
6 "conclusions," put "that he deems appropriate" instead of "if  
7 required" because the word "required" may have other  
8 connotations.

9 CHAIRMAN SOULES: How about, "The court, when  
10 appropriate, shall make" and so forth.

11 MR. JONES: Well, you sure get into a big  
12 hassle over what is appropriate.

13 CHAIRMAN SOULES: Well, isn't that, though --

14 MR. BISHOP: Then that leaves it within the  
15 discretion of the judge.

16 JUSTICE HECHT: It is up to the trial judge.  
17 If he doesn't want to make it, it doesn't make any difference  
18 whether it is required or not.

19 MR. BISHOP: I mean that is what -- I think  
20 that is what we are trying to say is that he is not required  
21 to make them, but he can make them if they are appropriate.

22 JUSTICE HECHT: He doesn't have to do  
23 anything.

24 MR. JONES: When you get to the second go  
25 round, you have already done everything in the discussion.

1 CHAIRMAN SOULES: All right. I will take it  
2 any way somebody -- somebody that feels like they have got it  
3 gramatically in order, give me a spot and I will put it in  
4 and we will vote.

5 MR. BISHOP: Well, I would put after "findings  
6 and conclusions" in the second line, "that he deems  
7 appropriate."

8 MR. JONES: Mr. Chairman, I think I like the  
9 mandatory language better and I think we had it in Ken's last  
10 suggestion.

11 Ken, would you restate that?

12 MR. FULLER: Yes. "The court shall make and  
13 file any required additions."

14 CHAIRMAN SOULES: Well, but --

15 MR. JONES: I don't know how to get that  
16 motion before the house, but I want to do it.

17 CHAIRMAN SOULES: Well, but Justice Hecht  
18 pointed out that it is not -- there is not any requirements.  
19 I mean what is "required"? "Required" doesn't fit. The word  
20 doesn't fit.

21 MR. EDGAR: The purpose of this suggestion was  
22 to make it clear that the court is not required to make  
23 additional or amended findings without someone requesting it.  
24 I mean there has to be something to trigger it. That was the  
25 purpose -- that is the purpose of the suggested amendment.

1 CHAIRMAN SOULES: Well, how about starting it  
2 out "Upon such request, then the court" --

3 MR. EDGAR: Or "If requested the court shall"  
4 or "if properly" or something, but --

5 CHAIRMAN SOULES: The court shall, if the  
6 court -- "the court, if requested, shall make."

7 MR. DAVIS: You are saying he has got to make  
8 it.

9 MR. JONES: It all started out, Mr. Chairman,  
10 that we were afraid that this position would compel the court  
11 to make additional findings, and that is what we are trying  
12 to avoid.

13 JUSTICE HECHT: It looks like the word "any"  
14 does that.

15 MR. BISHOP: That is why I suggested my  
16 amendment.

17 CHAIRMAN SOULES: Well, we will put it in  
18 there.

19 JUSTICE HECHT: Wouldn't that avoid the --

20 MR. FULLER: Well, you see, that is what I  
21 feel like all the time, "if any," did that conditional.

22 CHAIRMAN SOULES: The reason the word "any" is  
23 in there is that is the way we put that -- that is the way we  
24 thought we had it fixed, but we may not have. At least one  
25 judge has expressed concern that we didn't get it fixed,



1 and --

2 MR. FULLER: That is a good thought. Would  
3 changing the word "shall" to "may," would that do it?

4 MR. DAVIS: He made it, he has got to file  
5 them if he makes them. If he makes them, he shall file them.

6 MR. FULLER: Well, I think if you change  
7 "shall" to "may," it looks to me like that would -- "The  
8 court may make and file any," et cetera.

9 MR. SPARKS (SAN ANGELO): Well, it is your  
10 amendment. Amend your own amendment.

11 CHAIRMAN SOULES: Let's get on with it here.  
12 What should we do?

13 MR. FULLER: Okay. May I -- may I suggest an  
14 amendment to my second amendment, I suppose. "The court may  
15 make and file any requested additional or amended findings  
16 and conclusions within 10 days."

17 MR. BEARD: Well, but if he has omitted an  
18 essential fact you want found, I mean he just doesn't find  
19 it, I don't think it is --

20 MR. BISHOP: That is the language --

21 MR. BEARD: There are certain things that  
22 should be discretionary.

23 CHAIRMAN SOULES: Hold on. Wait a minute.  
24 Pat has got the floor in response.

25 What is it, Pat?

1 MR. BEARD: You know there could be certain  
2 additional requests that should be mandatory after you  
3 respond to it and just not in discretion.

4 CHAJRMAN SOULES: Ken, you had remarks to  
5 that?

6 MR. FULLER: Yes. What I am saying is this:  
7 That that is what makes the error if the court does not. We  
8 are just saying if he is going to make any additional ones  
9 that he has got to do it within 10 days. He can't wait  
10 30 days, or 40 days, or whatever.

11 MR. JONES: He doesn't have to make any.

12 MR. FULLER: All we are doing is setting a  
13 time limit for the court's action.

14 MR. BEARD: Well, I was just saying the word  
15 "may," it would seem to me that he didn't have to do it in  
16 certain cases.

17 MR. BISHOP: Mr. Chairman, I think that my  
18 language does what we are trying to do without creating this  
19 problem.

20 CHAIRMAN SOULES: Anybody want to hear it  
21 again?

22 MS. CARLSON: Yes.

23 CHAIRMAN SOULES: Okay. Let's hear Doke's  
24 language again.

25 MR. BISHOP: "The court shall make and file

1 any additional or amended findings and conclusions" --  
2 insert -- "that he deems appropriate, within 10 days."

3 MR. JONES: I accept that amendment to my --  
4 the amendment to the amendment.

5 MR. EDGAR: "Which it deems appropriate."

6 MR. BISHOP: Okay. I will accept that.

7 CHAIRMAN SOULES: How about "that are  
8 appropriate"?

9 MR. JONES: Well, that invades his discretion  
10 a little bit.

11 CHAIRMAN SOULES: Yes. I don't think it got a  
12 whole lot here.

13 JUSTICE HECHT: Sort of knocks it down.

14 CHAIRMAN SOULES: Is that all right with you,  
15 "that are appropriate"?

16 MR. BISHOP: That is fine.

17 CHAIRMAN SOULES: Okay. We would then insert  
18 in the second line -- as I understand Doak's motion, it is  
19 that we insert in the second line of 298(b), as it appears on  
20 Page 418 of the materials, after the words "findings and  
21 conclusions" these words: "that are appropriate", without  
22 any punctuation, and then pick up "within 10 days after", and  
23 that would be the change.

24 Is that your motion?

25 MR. BISHOP: Yes.

1 CHAIRMAN SOULES: Second?

2 MR. FULLER: Second it.

3 CHAIRMAN SOULES: In favor say "Aye."

4 (RESPONDED AYE)

5 CHAIRMAN SOULES: Opposed? That is unanimously  
6 approved, then, as changed.

7 MR. FULLER: A point of order.

8 CHAIRMAN SOULES: Yes, sir.

9 MR. FULLER: Mr. Chairman, does the prior vote  
10 as to 298(a) still stand, though? That was my motion. I  
11 was -- made the motion and I misstated. I really meant it to  
12 apply only to 298(a) when this question came up.

13 CHAIRMAN SOULES: All right. Are we now then  
14 ready to vote?

15 All in favor of 296, 297, and 298, as changed,  
16 and 298(b), please say "aye."

17 (RESPONDED AYE)

18 CHAIRMAN SOULES: Opposed? Okay. That is  
19 done.

20 Does that take care of that, Ken, for you?

21 MR. FULLER: Yes, that took care of it.

22 CHAIRMAN SOULES: Okay. The next item is on  
23 Page 425, Rule 305, I believe, isn't it, Hadley?

24 MR. EDGAR: This, I think, is something we  
25 need to address. If you will look at Rule 305 on Page 425,

1 you will notice that it doesn't -- I mean we have some  
2 default judgment problems we need to consider with respect to  
3 this rule because the rule would literally require a party on  
4 default judgment to notify the party against whom the  
5 judgment is being taken of the proposed judgment.

6 And the -- I recommend that this problem can be  
7 remedied, unless we want to change the default judgment  
8 practice, to simply state that in the second paragraph,  
9 second line, after "parties," to state -- or to insert the  
10 words, the -- "on all other parties who have filed an  
11 answer."

12 CHAIRMAN SOULES: "Who have appeared"?

13 MR. FULLER: Well, they have appeared, really  
14 there has been a return of citation.

15 MR. BEARD: No, they don't have to answer.

16 MR. EDGAR: If a party -- if a party has filed  
17 a motion to transfer venue, it has not filed an answer and  
18 if --

19 MR. BEARD: Make a special appearance.

20 MR. EDGAR: -- the court overrules the motion  
21 to transfer venue, is the party obtaining the judgment  
22 required to notify the opposite party under the current law?

23 CHAIRMAN SOULES: I think so.

24 MR. EDGAR: You think so?

25 CHAIRMAN SOULES: I think the only time you

1 don't notify a party is where there is absolutely nothing on  
2 the record.

3 MR. EDGAR: And then we want to say who have  
4 filed -- "who have made an appearance," right?

5 CHAIRMAN SOULES: And that seems fair. That  
6 is -- really, the default judgment is no appearance  
7 situation.

8 JUSTICE HECHT: Well, or a late answer.

9 MR. EDGAR: Well, now, we have got some  
10 postanswer defaults now, at least that is what the Supreme  
11 Court calls them.

12 CHAIRMAN SOULES: I don't have any problem  
13 with having 305 service of proposed judgment on a -- in a  
14 postanswer default situation. I think it ought to be. To  
15 me, that is the right thing to do, if it is a postanswer  
16 default.

17 MR. EDGAR: Then we would say who has -- "who  
18 have made an appearance." That would be --

19 CHAIRMAN SOULES: All in favor say "aye."

20 (RESPONDED AYE)

21 CHAIRMAN SOULES: Opposed?

22 MR. EDGAR: All right. Then after the --  
23 after the word "parties," in the second line of the second  
24 paragraph --

25 CHAIRMAN SOULES: "Who have appeared."

1 MR. EDGAR: -- "who have appeared." So that  
2 it would read, "Each party who submits a proposed judgment  
3 for signature shall serve the proposed judgment on all other  
4 parties who have appeared and certify thereon," et cetera.

5 CHAIRMAN SOULES: Okay. And that is what we  
6 voted on. Everybody understands. That stands unanimously  
7 recommended as -- oh, are there any other changes to  
8 Rule 305?

9 MR. RAGLAND: On that phrase that goes down  
10 here --

11 CHAIRMAN SOULES: Tom Ragland.

12 MR. RAGLAND: -- in another place, Luke. In  
13 the last -- next to the last line of that same paragraph,  
14 been served on each party --

15 CHAIRMAN SOULES: Each attorney and the pro se  
16 party --

17 MR. EDGAR: It would be after "to the suit."

18 MR. RAGLAND: Yes, "who have appeared" --  
19 "parties to the suit who have appeared."

20 MR. EDGAR: In both places.

21 CHAIRMAN SOULES: How about just "has been so  
22 served" or "copy has been served" -- well, okay. Help me  
23 with this. We don't want to -- we don't want to have to  
24 serve every attorney who has appeared because a lot of them  
25 have been substituted out. And I am trying to come up with

1 really not repeating this again.

2 MR. FULLER: How about "opposing counsel"?

3 MR. RAGLAND: "Counsel of record."

4 MR. FULLER: Yes, something a little more  
5 generic.

6 MR. DAVIS: If they weren't required to serve  
7 them, then why would that even apply, that next sentence  
8 there? It is obviously referring to those that you have to  
9 serve.

10 MR. FULLER: Luke, there is something else  
11 that bothers me about this, also. I don't much like to use  
12 this word "serve" because we are really talking about  
13 "notice." To "serve" --

14 CHAIRMAN SOULES: We voted to use "serve" in  
15 this rule.

16 MR. FULLER: We did?

17 CHAIRMAN SOULES: Yes, we did.

18 MR. FULLER: Well --

19 MR. RAGLAND: I beg the Chair's pardon.

20 CHAIRMAN SOULES: Okay. Tom Ragland.

21 MR. RAGLAND: Again, I was on the subcommittee  
22 that drafted the rule, and we voted on it in Committee and it  
23 came out "notice," and then whenever it came out in printed  
24 form, it came out "service." I don't know where the  
25 transition was made there.



1                   CHAIRMAN SOULES: "Shall notice the proposed  
2 judgment"?

3                   MR. RAGLAND: Well, the idea -- the whole  
4 question came up because of a complaint that a bench trial or  
5 jury trial was had and a judgment was entered without the  
6 losing party knowing about it. And that is the reason for  
7 the rule. And we discussed at length about service on a  
8 judgment, and that wasn't indicated.

9                   And the way the rule was originally written, that  
10 is we will give them -- deliver them a copy of it. That last  
11 phrase in --

12                   CHAIRMAN SOULES: Yes.

13                   MR. RAGLAND: -- Paragraph 2 there read  
14 something like, "indicate thereon the date and manner of  
15 delivery." And at one time it had the first draft -- the  
16 printed draft came out with Rule 21 in it, and I called that  
17 to your office's attention, Luke, and then it came back  
18 "service." So that is the history of that rule, as I recall  
19 it.

20                   CHAIRMAN SOULES: Okay. A way to fix this is  
21 to where we have added the words "who have appeared," to just  
22 put a period and let 21(a) take care of what has to be in the  
23 statement of service, if we are going to leave it "service."

24                   MR. SPARKS (SAN ANGELO): You could go on and  
25 say, "And certify thereon each attorney or pro se party to

1 the suit who has appeared and indicate thereon the date and  
2 manner of notice."

3 CHAIRMAN SOULES: Well, that 21(a) requires  
4 that.

5 MR. SPARKS (SAN ANGELO): So just stop it  
6 right there.

7 CHAIRMAN SOULES: Stop it at "appeared"?

8 MR. SPARKS (SAN ANGELO): Yes.

9 MR. EDGAR: Well, I would say "who have  
10 appeared, and indicate thereon the date and manner of  
11 service."

12 CHAIRMAN SOULES: That is required by 21(a).

13 MR. EDGAR: That is right.

14 MR. BISHOP: I would so move, Mr. Chairman.

15 MR. BEARD: Second.

16 CHAIRMAN SOULES: Moved and seconded that  
17 we --

18 MR. FULLER: Hold it. I have a question I  
19 would like to ask before we vote.

20 CHAIRMAN SOULES: All right. Please, do.

21 That is Ken Fuller.

22 MR. FULLER: What I understand you are saying  
23 is that you are requiring this notice to be given to every  
24 attorney who has ever been in the lawsuit?

25 CHAIRMAN SOULES: No. We have just changed

1 that.

2 MR. FULLER: All right. Then tell me the  
3 exact language you are talking about using.

4 CHAIRMAN SOULES: All right. The second  
5 sentence --

6 MR. FULLER: Yes.

7 CHAIRMAN SOULES: -- which is, of course, the  
8 second paragraph of 305, would be this, and it is short:  
9 "Each party who submits a proposed judgment for signature  
10 shall serve the proposed judgment on all other parties who  
11 have appeared."

12 MR. FULLER: Okay. And then just leave it to  
13 21(a) from there on?

14 CHAIRMAN SOULES: On how that is accomplished.

15 MR. FULLER: That is good. That is good.

16 MR. EDGAR: Ken just raised the question,  
17 though, about what about parties who have appeared and are no  
18 longer in the suit at the time the proposed judgment is  
19 submitted?

20 MR. RAGLAND: That was back there.

21 MR. EDGAR: Well, no, but that is the question  
22 Ken just raised. As long as we understand that, but that  
23 wasn't addressed a moment ago.

24 MR. RAGLAND: That is literally what it  
25 requires.

1 MR. DAVIS: "All other parties who are" --

2 MR. SPARKS (SAN ANGELO): "All parties who  
3 have appeared and are still a party to the case."

4 MR. BISHOP: "Who have appeared and who are  
5 affected by the judgment."

6 MR. FULLER: How about "the current parties,"  
7 "the current parties"?

8 MR. BISHOP: You could say, "who have appeared  
9 and who are affected by the judgment."

10 CHAIRMAN SOULES: Does that put us back to  
11 default judgments? That is what -- I was kind of running  
12 that through my mind.

13 MR. EDGAR: Not if you have appeared and  
14 because they haven't appeared.

15 MR. BISHOP: That is right.

16 MR. EDGAR: You are requiring that they appear  
17 and are affected by the judgment.

18 MR. DAVIS: Who decides whether they are  
19 affected or not?

20 JUSTICE HRCHT: That is a good question.

21 CHAIRMAN SOULES: How about "who have appeared  
22 and are parties to the judgment"? No, that doesn't work.

23 MR. DAVIS: Why don't you just leave the thing  
24 alone like you proposed it. This is the kind of a thing that  
25 doesn't occur every day and we can't solve every evil. And

1 if they are no longer in the case and they don't get a copy  
2 of the judgment, then they are not going to complain anyway.

3 MR. SPARKS (SAN ANGELO): But the defaulting  
4 party might say, "The default judgment is no good because you  
5 didn't sign this document." I am just technical.

6 MR. EDGAR: Yeah. You have got -- you know,  
7 on default judgments, you have got to literally comply or run  
8 the risk of --

9 MR. RAGLAND: There is another rule about  
10 judgments on default. There is another rule. This wasn't  
11 continuing as addressed --

12 MR. FULLER: Would "a current party to the  
13 lawsuit" do it, you know "who have appeared and are current  
14 parties to the lawsuit"?

15 MR. BEARD: You can have parties that haven't  
16 been served yet while you are taking a default judgment.

17 MR. DAVIS: "Parties to the suit who have  
18 appeared."

19 JUSTICE HECHT: That is good.

20 JUSTICE DOGGETT: Leave it at that.

21 MR. FULLER: Nobody said it was going to be  
22 easy, did they?

23 MR. BEARD: I am like Tom. I just say, say  
24 "who have appeared," and I don't believe -- let the -- I  
25 believe the courts will so construe that that people who are

1 no longer parties are unnecessary.

2 CHAIRMAN SOULES: All right. Somebody might  
3 want to continue to think about this a bit and see if there  
4 is a simple way to write the words "still before the court."

5 Is "before the court," does that mean  
6 anything?

7 MR. DAVIS: Luke --

8 CHAIRMAN SOULES: What I am thinking of is  
9 "who have appeared and are before the court at the time of  
10 the judgment."

11 MR. DAVIS: Luke --

12 CHAIRMAN SOULES: Tom Davis.

13 MR. DAVIS: -- how about this: "Shall serve a  
14 proposed judgment on all parties to the suit who have  
15 appeared"? "Parties to the suit who have appeared," that  
16 could be both parties to the suit and they have got to have  
17 appeared.

18 MR. FULLER: That would mean that people had  
19 been dismissed --

20 MR. DAVIS: They are not parties to the suit.

21 MR. FULLER: "Who are," okay. Not "who have."  
22 "Who are."

23 MR. DAVIS: "Who are parties to the suit and  
24 have appeared."

25 MR. FULLER: That would do it, I believe.

1 CHAIRMAN SOULES: Okay. So it would read:  
2 "Each party who submits a proposed judgment for signature  
3 shall serve the proposed judgment on all other parties to the  
4 suit who have appears."

5 MR. DAVIS: Yes, "appeared."

6 CHAJRMAN SOULES: Okay. All in favor say  
7 "Aye."

8 Opposed?

9 MR. TINDALL: I think "all other parties who  
10 have" -- I think there was a correction that Ken was saying,  
11 "All other parties who have appeared"?

12 MR. FULLER: "All other parties who" -- "all  
13 others who are parties to the suit that have appeared." We  
14 are trying to talk about just current parties and not have to  
15 give notice to people that may have been dismissed, severed  
16 out, whatever.

17 MR. BEARD: They are not parties anymore.

18 CHAIRMAN SOULES: I think that Tom's language  
19 pretty much gets it. They are not parties to the suit if  
20 they are out.

21 MR. EDGAR: I think "all other parties to the  
22 suit who have appeared period", is adequate.

23 CHAIRMAN SOULES: That is Tom's motion.

24 MR. FULLER: Okay. All right.

25 CHAJRMAN SOULES: Your second, Hadley.

1 MR. FULLER: Okay. I withdraw my comment.

2 CHAIRMAN SOULES: Those in favor say "Aye."

3 (RESPONDED AYE)

4 CHAIRMAN SOULES: Opposed? Okay. That is  
5 unanimously approved as changed.

6 MR. RAGLAND: Luke.

7 CHAIRMAN SOULES: Yes. Just one second. Let  
8 me make a note here unless it is about this rule.

9 MR. EDGAR: And then we strike the balance of  
10 that sentence. Is that correct?

11 CHAIRMAN SOULES: That is correct. The  
12 second -- the first and last sentences of the rule would stay  
13 the same. The middle sentence would read as follows: "Each  
14 party who submits a proposed judgment for signature shall  
15 serve the proposed judgment on all other parties to the suit  
16 who have appeared period". And the balance of the second  
17 sentence would be deleted. That is what we voted on.  
18 Everybody understand?

19 Okay. That is unanimous.

20 MR. RAGLAND: May I add something --

21 CHAIRMAN SOULES: Tom Ragland.

22 MR. RAGLAND: -- for the record, in case  
23 anybody ever reads this stuff.

24 There is not any question that this Rule 305 is not  
25 intended to address default judgments. The default judgments



1 are controlled by Rules 239, 239(a), and 240. Is that  
2 correct? I mean is that --

3 CHAIRMAN SOULES: That is correct. Anyone  
4 understand it differently?

5 No one does.

6 Also, it is not designed to cause any requirement  
7 for notice to parties that have -- that are already out of  
8 the case.

9 MR. FULLER: Would that be an appropriate  
10 comment? I think it would be helpful, Luke, in the comment  
11 section.

12 CHAIRMAN SOULES: Okay. I will work on that.  
13 Why don't we move and I will come back and see if I can  
14 doctor the comment and bring it to your attention in a  
15 moment.

16 What is the next --

17 MR. EDGAR: On Rule 308(a) --

18 CHAIRMAN SOULES: 308(a). I will try to  
19 listen and write on the comment here at the same time.

20 Hadley.

21 MR. EDGAR: Rule 308(a) begins on Pages 428,  
22 429. The first comment on Page 431 points out that the first  
23 clause in the third sentence was omitted by the bar journal.  
24 However, our copy, on Page 429, is correct. And I don't know  
25 whether West will pick up what is on Page 429 or what is in

1 the bar journal, but that needs to be called to the Chair's  
2 attention.

3 CHAIRMAN SOULES: Well, West will pick up what  
4 is in the court's order --

5 MR. EDGAR: All right. Well --

6 CHAIRMAN SOULES: -- and we should have it  
7 fixed here.

8 MR. EDGAR: -- the bar journal -- the bar  
9 journal dropped a sentence.

10 CHAIRMAN SOULES: Yes, they made -- there were  
11 several mistakes in what got printed there.

12 MR. EDGAR: All right. So we don't -- no  
13 action is required on that now.

14 CHAIRMAN SOULES: No, we have got that fixed  
15 and it should stay fixed.

16 MR. EDGAR: Now, the suggestion is made on  
17 Page 430 that a possible solution to solving the problem that  
18 we tried to handle in 308(a), could be obtained by appointing  
19 a special master in family law to avoid unnecessary fees or  
20 duplication of effort where a master is already available.

21 And my comment here is that we just simply need Ken  
22 and Harry to help us on this, whether or not that any  
23 consideration is to be given to that.

24 MR. TINDALL: Well, it wouldn't fit. I don't  
25 think it is the kind of thing we are getting at in 308(a),

1 and I suggest we reject it.

2 MR. EDGAR: Do you second that, Ken?

3 MR. FULLER: Yes. I am -- 308(a). Okay. And  
4 if you start tinkering with appointing special masters and  
5 you get into all kinds of other rules and statutes, it is  
6 just over complicated, in my opinion.

7 MR. EDGAR: You have a motion and a second,  
8 Mr. Chairman, that 308(a) remain the same.

9 CHAIRMAN SOULES: Motion and second 308(a)  
10 remain the same. In favor say "Aye."

11 (RESPONDED AYE)

12 CHAIRMAN SOULES: Opposed? That is  
13 unanimously the same.

14 MR. EDGAR: That concludes our interim report.

15 CHAIRMAN SOULES: Okay. Back, if you will,  
16 with me to Page 425. I propose to add the following sentence  
17 to the comment: "There is no requirement to give any notice  
18 under this rule to parties previously disposed of and no  
19 longer parties to the case at the time of the proposed  
20 judgment."

21 MR. FULLER: How about the comment -- that  
22 part is okay. How about the default portion?

23 CHAIRMAN SOULES: All right. Now, there is --  
24 "There is no requirement to give any notice under this rule  
25 to parties who have not appeared."

1 MR. FULLER: Okay. That is just one, but  
2 there is another really that has got to be --

3 CHAIRMAN SOULES: Wait a minute. So -- Okay.  
4 "There is no requirement to give any notice" -- and I will  
5 change this in a minute -- "notice under this rule of a  
6 proposed default judgment against a party who has not  
7 appeared." Is that all right with everybody?

8 Okay. All in favor "Aye."

9 (RESPONDED AYE)

10 CHAIRMAN SOULES: Opposed? Okay. That  
11 comment adjustment will be made.

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

15 CHAIRMAN SOULES: The next item is, let's  
16 see. That got us -- let me get myself straight here now on  
17 that 305, 308(a). That takes us to Rule 534 on Page 432.

18 Okay. Before we do that, I guess, do we have  
19 comments, Franklin, to Rule 200?

20 MR. JONES: Mr. Chairman, you have got a  
21 letter from Buddy Low.

22 CHAIRMAN SOULES: This will be on Page 312. I  
23 guess we are going back to 312 and looking at 200.

24 MR. JONES: Actually, he just asked me to  
25 report on Rule 200 and Rule 614 and 703 of the evidence

1 rules. And if you will look at your letter, which was  
2 written yesterday or just recently, he said his law partner,  
3 Franklin Jones, was going to make this report.

4 MR. COLLINS: I didn't know you-all were  
5 partners.

6 MR. JONES: If I am his partner, I am now  
7 fixing to assume the role of his senior partner because a  
8 little bit of me feels like an old coon dog, there is not  
9 enough of me to not make me do what I want to do. And that  
10 is I have got to oppose part of what Buddy and, apparently,  
11 his subcommittee are suggesting here.

12 MR. EDGAR: What rule are we talking about?

13 CHAIRMAN SOULES: We are talking about  
14 Rule 200 and Rule 614, Rules of Evidence, and this had to do  
15 with taking -- the rule, and whether or not The Rule applies  
16 in depositions. That is generally the subject matter.

17 MR. JONES: And the proposal is to, if I  
18 interpret it correctly -- and not me -- I have asked my  
19 lawyer, Rosemary Snider, to look at it, and her  
20 interpretation of it is that what we are doing here is  
21 abolishing the rule, the witness rule, in deposition. And I  
22 am vehemently opposed to that.

23 I was not here when this rule was considered by the  
24 Committee generally and I don't know what right was advanced  
25 in favor of it at that point in time, but this, at least in

1 my practice, is a universal rule which we routinely use. I  
2 think in the years I have been practicing law, we have seen  
3 the deposition practice develop almost into a trial practice.  
4 And the deposition rule is, I think, extremely valuable to  
5 all parties when they are deposing, and I don't think we  
6 ought to abolish it.

7 Now, in deference to Ruddy and his subcommittee, I  
8 am not prepared to move yet, at least, that we scuttle this  
9 rule, and I would like perhaps for it to be reassigned for  
10 further consideration or at least fully debated before we  
11 talk about it, and I know we have got much more important  
12 things here to deal with, perhaps, than this problem, but,  
13 Mr. Chairman, I cannot move the adoption of the language  
14 which they propose to add to begin the rule -- the Evidence  
15 Rule 614.

16 I have no problem with the requiring notice in the  
17 deposition notice as to people who will attend the  
18 deposition. There may have been -- there, perhaps, is good  
19 cause for that. But to say that in deposition proceedings a  
20 party can bring everybody to the deposition he plans to use  
21 at the time of trial and let them hear everybody's witnesses  
22 and get ready on their testimony, I think does violence to  
23 the trial practice as we know it.

24 And I oppose that and would move that the Committee  
25 further consider it before adoption.

1 MR. BEARD: Well, Franklin, I think you are  
2 talking about --

3 CHAIRMAN SOULES: This is Pat Beard.

4 MR. BEARD: -- talking about a custom that I  
5 have been involved in depositions where they attempt to  
6 invoke the rule to exclude the witnesses, and they say the  
7 rule doesn't apply, and you are left with the debate on that  
8 and threaten to walk out. So you are talking about a custom  
9 and I don't think any rule.

10 MR. JONES: Well, you might call it a custom,  
11 but anytime that I have a party who doesn't want to admit  
12 that the rule applies, I say, "Well, let's go see the judge,"  
13 and he does. I think the judge right now has discretion --

14 MR. BEARD: Well, that may --

15 MR. JONES: -- to impose the rule of  
16 witnesses, and I certainly don't think we ought to destroy  
17 that.

18 CHAIRMAN SOULES: Justice Hecht.

19 JUSTICE HECHT: Franklin, to summarize what I  
20 recall was the debate, and very extensive debate last summer,  
21 the question was whether to presume that it applied --  
22 applies or presume that it doesn't apply in a deposition, but  
23 to leave open the possibility that you could go and get a  
24 protective order if you -- if you, in effect, wanted the rule  
25 to apply to a particular deposition.

1 I think that is where the -- there was no question,  
2 as I recall in the debate, that the rule should not apply in  
3 some depositions. Everybody seemed to think that it should,  
4 and everybody seemed to think that there ought to be cases in  
5 which it should not apply in a deposition. So the question  
6 was rather than go see the judge every time, which way should  
7 the presumption be.

8 Now, I am kind of like you. As far as I knew, in  
9 Dallas, the presumption was that the rule applied in  
10 depositions. But this -- the proposal changes that. It  
11 doesn't abolish it, but it changes the presumption that if  
12 you don't want somebody in a deposition who is named in the  
13 notice, then it is you who has to go get the protective order  
14 from the trial judge rather than the other side who has to go  
15 get an order and say, "Let me have so and so sit in at the  
16 deposition."

17 And I am not -- I am not commenting on it.  
18 Just the sum -- I think that is a summary of what was  
19 discussed. And the people talked about practices around the  
20 state, but I thought the practice, when I was on the trial  
21 bench, was that the rule applied in depositions.

22 MR. JONES: Well, I think, Judge, and I hope I  
23 am not disagreeing with you, as a matter of fact, I wouldn't.  
24 But my humble opinion is that we ought not to change the  
25 custom right now as it exists, and we ought to burden the



1 party who wants to flipflop how we are going to handle  
2 depositions goes to the judge.

3 JUSTICE HECHT: Well, I personally, and for  
4 what -- as the liaison, I mean that is the way I lean myself,  
5 but the comments last summer were that is not the uniform  
6 custom in the state, that there are places in the state where  
7 that is not true. Now, I don't know.

8 CHAIRMAN SOULS: David Beck. Excuse me. I  
9 am trying to firm this.

10 MR. BECK: The concern is -- I mean I share  
11 Franklin's views in the sense that at least in my practice, I  
12 have always assumed that the rule did apply in depositions.  
13 I think the problem is that by adding this last sentence to  
14 the proposal, that is clearly giving an indication, in my  
15 judgment, that the rule does not apply in discovery  
16 proceedings, which may have an affect on your ability to have  
17 witnesses present, to get a protective order, and so on.

18 So my concern is that by adding that sentence in  
19 there we are, in effect, making a statement that the rule  
20 probably does not apply in discovery proceedings, which I  
21 think is a clear change in the status quo.

22 CHAIRMAN SOULS: All right. That change, for  
23 the benefit of everybody that doesn't have it located right  
24 now, is on Page 589. There is not anything on Page 312 about  
25 that, but it is on Page 589, which is Rule of Evidence 614.

1 So we have got to really kind of have two pages open here.

2 Sam Sparks and then Ken Fuller.

3 MR. SPARKS (SAN ANGELO): I happen to agree  
4 with Justice Hecht and with Franklin Jones on the comments on  
5 it, not all of it most assuredly, but I always assumed the  
6 opposite, and that is that the rule did not apply. But very  
7 simply because it is not stated in there, you invoke the rule  
8 not dealing with protective orders, but really just  
9 practicing law by agreement. You look at the other side and  
10 everybody is going to sit in, you say, "Well, then it gives  
11 me a question of who noticed who and who gets to go first."

12 And with this comment in there, you are going to  
13 really throw depositions into a scramble for more technical  
14 proceedings. And when things can be done by agreement, they  
15 should be done by agreement. I just don't think you need the  
16 comment in there. It ought to be left like it is now, and  
17 people who want protection go get it.

18 MR. BEARD: Well, all the -- all we have  
19 talked about is the rule applies just to the extent that the  
20 other witness can't be present. The rule doesn't apply to  
21 the extent you can't talk to absolutely anyone but the  
22 lawyers. No one has ever considered that, have they? You  
23 are just talking about excluding witnesses.

24 MR. SPARKS (SAN ANGELO): Just on a straight  
25 up car wreck, you got the drivers of two cars. I take them

1 with the other party out of the room totally by agreement  
2 because I don't think they ought to sit and listen to each  
3 other and change their facts accordingly. And you do that by  
4 agreement because it doesn't say anything in here.

5 The problem is, if it says the rule doesn't apply,  
6 then you have got the race to see who gets out the first  
7 notice and who are we going to do first.

8 MR. BEARD: But if you say the rule applies,  
9 then if you -- how far does it go --

10 MR. SPARKS (SAN ANGELO): I said no comment --

11 MR. BEARD: -- if the court instructed the  
12 witness?

13 MR. SPARKS (SAN ANGELO): I said no comment  
14 either way whether the rule applies or it doesn't apply, just  
15 don't put the sentence in there.

16 MR. JONES: That is a proposal --

17 CHAIRMAN SOULES: Franklin, let me get those  
18 with hands up, Franklin, and I will get to you. Excuse me.

19 Harry Tindall.

20 MR. TJNDALL: I have had a series of discovery  
21 fights about trying to have an accountant sit in on a party's  
22 deposition to help you, to have an expert mental health care  
23 professional, and you run into this problem constantly.  
24 Maybe this says it too harshly, it doesn't apply, but  
25 couldn't we say something here about subject to protective

1 order being entered, the rule doesn't apply, something like  
2 that so that if you do get notice and it says that an  
3 accountant will be present or a doctor will be present when  
4 the other party's deposition is being taken, if you don't  
5 like that, you can get it -- maybe this is too harsh the way  
6 it is written.

7 CHAIRMAN SOULES: If I am understanding what  
8 is before the house, it is to delete the material -- the  
9 sentence that was added to 614, and otherwise leave the 200  
10 and 208 alone. That is really all we are debating, is do we  
11 say or not say anything about 614's applicability to  
12 depositions.

13 MR. TINDALL: Well, you run into another  
14 problem, though, of witnesses reading depositions before they  
15 are called to trial. How do you stop that?

16 CHAIRMAN SOULES: Well, I am not going to stop  
17 that. I am not going to stop doing that.

18 MR. SPARKS (SAN ANGELO): Your accountant can  
19 go read it afterward. He doesn't have to sit and listen.

20 MR. TINDALL: Hey, you need him there.

21 MR. SPARKS: Why?

22 MR. BEARD: Well, I have always -- an expert  
23 can sit in the courtroom during the trial of the case. And I  
24 have always considered an expert could sit in on a  
25 deposition, and I have never had any problem.

1 MR. FULLER: Luke, I am going to bust if I  
2 don't get to say something.

3 CHAIRMAN SOULES: Okay. Ken Fuller. I am  
4 sorry. Go ahead.

5 MR. FULLER: I tell you, this is a major,  
6 major problem for us. I don't know how much it affects you,  
7 but if you have done much family law, you get real excited  
8 about what we are talking about. I don't know anyone who is  
9 victimized by this more than me. I have been to Court to try  
10 to get relief and I have been told, "There ain't no rule  
11 covers that. You are just on your own."

12 The girlfriend's deposition is going to be  
13 taken, they show up with four deacons from the church,  
14 we have got to do something.

15 CHAIRMAN SOULES: We have got it -- Ken, we  
16 have got it fixed. That is all fixed.

17 MR. FULLER: Okay.

18 CHAIRMAN SOULES: It is all fixed in 200 and  
19 208 the way it stands right now. The only thing we are  
20 talking about is deleting the last sentence of 614.

21 MR. FULLER: Okay. You are talking about --

22 CHAIRMAN SOULES: That is all that is before  
23 the house. All that is before the house is deleting the last  
24 sentence of 614.

25 MR. SPARKS (SAN ANGELO): Luke, I am sitting

1 here looking at Buddy Low's proposal, and the last sentence  
2 is underlined there.

3 CHAIRMAN SOULES: On Page 589?

4 MR. SPARKS (SAN ANGELO): And that is what I  
5 needed to know.

6 CHAIRMAN SOULES: Is there a motion to delete  
7 the last sentence or to rescind the recommended change to  
8 614?

9 MR. ADAMS: So moved.

10 MR. SPARKS (SAN ANGELO): Second.

11 CHAIRMAN SOULES: Okay. The motion has been  
12 made that we rescind the earlier vote on 614 and recommend to  
13 the Supreme Court no change in 614. Is there a second?

14 MR. SPARKS (SAN ANGELO): Yes.

15 CHAIRMAN SOULES: That is Sam Sparks' second.  
16 Any further discussion?

17 All in favor say "Aye."

18 (RESPONDED AYE)

19 CHAIRMAN SOULES: Opposed?

20 Okay. It is unanimous that we not change 614. And  
21 then we have already voted on 200 and 208 to leave them the  
22 way they were, or have we, Judge?

23 JUSTICE HECHT: Well, I still don't -- I just  
24 need to know, are -- does the rule apply to depositions or  
25 not? I mean I -- and by changing this, we still left it in

1 limbo, which is where we were last summer. If you take the  
2 sentence out, then you still don't know. And we ought to  
3 either say that it does or it doesn't.

4 MR. JONES: Well, I agree with Justice Hecht,  
5 and I think we ought to say that it does, subject to the --  
6 subject to the court having discretion to change it, which,  
7 of course, he has under the current law.

8 Now, if the Chair would like to have a Committee  
9 further look at that, a subcommittee look at it, it would be  
10 fine with me, but I am prepared to recommend to the Committee  
11 as a whole that in substance we keep the rule of -- or  
12 perhaps that is not a good phraseology, that we declare that  
13 the rule applies in depositions unless otherwise altered by  
14 the court. But I don't want us to do something without  
15 adequate study if the Chair feels like we need to do that.

16 MR. BEARD: Well, Franklin, we can't just say  
17 the rule applies if you are going -- if it is going to go to  
18 standard instructions from the court that they are not to  
19 talk to any other parties except the attorneys or any of the  
20 other witnesses, because that is not our practice at  
21 depositions. You may exclude the witness from the  
22 deposition, but he may read the deposition, he may talk to  
23 the witness. At least, that is the way I would do it.

24 MR. JONES: Yes, he could do that.

25 MR. BEARD: But if you said the rule applied,



7



1 the standard instruction is he doesn't talk with anybody but  
2 the lawyers, and I don't think we intend that, do we?

3 CHAIRMAN SOULES: Now, so now the vote  
4 is, as I understand where this stands before the house,  
5 200 and 208 remain as recommended, and we take out the  
6 last sentence of 614. Is that the case?

7 MR. FULLER: Can you direct us to where 200  
8 and 208 are in this book?

9 CHAIRMAN SOULES: Okay. Yes, I will.

10 MR. FULLER: I have been trying to find it and  
11 I can't find it.

12 CHAIRMAN SOULES: Okay. Well, if -- let me  
13 tell you how to find things and then -- and then, also -- but  
14 that is not to keep you from calling on me because,  
15 obviously, Holly and I are more familiar with these materials  
16 than somebody else.

17 In the front of the book on the third page, you  
18 will see numbers, and then the rule behind them. Those are  
19 the page numbers, is where this -- the index page.

20 MR. FULLER: Yes. Right.

21 CHAIRMAN SOULES: So if you will put your --  
22 take one finger and mark Page 312, and another one and mark  
23 Page 327, 312 and 327 -- everybody with me? -- then the last  
24 one is 589. Now you have got all three rules. It is like  
25 working a tax code. So you would still give notice if you

1 plan to have anybody else at a deposition other than the  
2 party's counsel, employee and counsel, and the officer --  
3 let's see, other than the witness parties, spouses of  
4 parties, counsel, employees of counsel, and the officer to  
5 take the deposition, your notice would have to state that.

6 JUSTICE HRCHT: And if it does, then you can  
7 bring them.

8 CHAIRMAN SOULES: Unless somebody opposes  
9 them.

10 MR. BECK: Unless you have a court order  
11 saying you can't.

12 CHAIRMAN SOULES: And then if the person  
13 receiving the notice is going to have somebody there besides  
14 that list, that person receiving the notice has to tell the  
15 other side, who gave the notice, "I plan to bring some extra  
16 people to the deposition that you noticed." And then unless  
17 there is opposition to that, the respondent could bring  
18 additional people.

19 Now, we talked about, you know, taking depositions  
20 out of state, traveling, that we need to get these things  
21 resolved before people are on the road and in circumstances  
22 where a dispute arises. And we had a fairly extensive debate  
23 about this, if you-all picked up on it at the time.

24 MR. JONES: Mr. Chairman, I move the adoption  
25 of the recommendation.

1 CHAIRMAN SOULES: Okay.

2 MR. TINDALL: Luke, can we see where 200 is  
3 before we move on to --

4 CHAIRMAN SOULES: Well, it is right on Page  
5 312.

6 MR. TINDALL: 312. Okay.

7 CHAIRMAN SOULES: Okay?

8 MR. TINDALL: Okay. yes.

9 CHAIRMAN SOULES: Okay. So look -- with your  
10 fingers marking the pages, here is where I understand the  
11 matter to be, and I will get your vote on whether or not I  
12 understand it correctly, that 200 and 208, as recommended  
13 by -- to the court, remain as they are, as they appear on  
14 Page 312 and 327. But that the last sentence, the sentence  
15 that we voted earlier to add to 614, that that not be made.

16 So repeating, that we make the changes to 200 that  
17 we voted on, that we make the changes to 208 that we voted  
18 on, but we not make the change to 614 that we voted on.

19 All in favor say "Aye."

20 (RESPONDED AYE)

21 CHAIRMAN SOULES: Opposed? Okay. Does that  
22 resolve it?

23 JUSTICE HECHT: Yes, I think so.

24 MR. SPARKS (SAN ANGELO): Luke, just as a  
25 matter of inquiry --

1 CHAIRMAN SOULES: Sam Sparks.

2 MR. SPARKS (SAN ANGELO): -- is there a place  
3 in the rules that gives you the opportunity to contest who  
4 can attend? In other words, it says, "If you are going to  
5 bring other people, tell us who it is," other than these?

6 CHAIRMAN SOULES: Sure, 166(b)(5), protective  
7 orders.

8 MR. SPARKS (SAN ANGELO): Then you can go to  
9 the court and say, "Well, Judge, this is just like the trial,  
10 I want you to exclude them unless they show it is necessary."

11 CHAIRMAN SOULES: Sure. You can -- you know,  
12 you can oppose any deposition notice by filing a protective  
13 order or objections to it. This would just be --

14 MR. TINDALL: Luke, would we do violence to  
15 the 200 if we added "experts"? That may cure about  
16 98 percent of the fights.

17 CHAIRMAN SOULES: Well, if you are going to  
18 take an expert, you have got to tell the person in advance.  
19 That is the way we voted last time.

20 Franklin Jones.

21 MR. JONES: Mr. Chairman, the rest of this  
22 report is purely --

23 CHAIRMAN SOULES: Excuse me. Franklin Jones  
24 has the floor for the balance of his report, Buddy Low's  
25 report.

1                   And it deals with what rule, Franklin?

2                   MR. JONES: This deals with Evidence Rule 703.

3                   CHAIRMAN SOULES: Well, why don't we go ahead  
4 and do that so Franklin can get this report wrapped up.

5                   703 appears in the materials at Page --

6                   MR. BISHOP: Excuse me, Luke.

7                   CHAIRMAN SOULES: -- 593.

8                   MR. BISHOP: Before we go to that, if 614 is  
9 going to apply to discovery proceedings, as I understand our  
10 vote --

11                   CHAIRMAN SOULES: Our vote is that it doesn't  
12 say one way or the other.

13                   MR. BISHOP: Well, but I think what we have  
14 been discussing is that impliedly, then, it is going to  
15 apply.

16                   CHAIRMAN SOULES: It implies -- it is implied  
17 like it is right know. It does not in San Antonio, it does  
18 in Dallas, it does not in San Angelo, it does some place  
19 else. We are making -- not making any change on that. We  
20 voted to rescind the change.

21                   MR. EDGAR: What page is that?

22                   CHAIRMAN SOULES: Does somebody want to do  
23 that differently?

24                   MR. JONES: 593.

25                   CHAIRMAN SOULES: Okay. 703 is on Page 593.

1 MR. JONES: Mr. Chairman, I move the adoption  
2 of this rule.

3 CHAIRMAN SOULES: I believe it is -- they  
4 recommend we leave it as it is.

5 MR. JONES: I move that then.

6 CHAIRMAN SOULES: All right. Any -- all in  
7 favor say "Aye."

8 (RESPONDED AYE)

9 CHAIRMAN SOULES: All right.

10 MR. BECK: Wait. Wait. Wait. What are we  
11 voting on?

12 CHAIRMAN SOULES: We are voting to reaffirm  
13 593 the way it is written.

14 MR. JONES: How is it written? I would --

15 CHAIRMAN SOULES: Look at the --

16 MR. EDGAR: You said 593. You mean 703?

17 MR. TINDALL: I think --

18 CHAIRMAN SOULES: I am sorry. I have got  
19 confusion. At Page 593, Rule 703. Okay?

20 MR. JONES: My notebook indicates we are  
21 making some minor changes, Mr. Chairman.

22 CHAIRMAN SOULES: It says -- the last sentence  
23 says, "I recommend the rule as amended and as it appeared in  
24 the bar journal," which is exactly the way it is at Page 593.

25 MR. SPARKS (SAN ANGELO): Is that reviewed by

1 the expert?

2 CHAIRMAN SOULES: Yes. Okay. All in favor of  
3 leaving 593 -- Page 593, Rule 703, evidence rule as it  
4 appears on Page 593, say "Aye."

5 (RESPONDED AYE)

6 CHAIRMAN SOULES: Opposed? Okay. Does that  
7 complete Buddy Low's report?

8 MR. JONES: Yes.

9 CHAIRMAN SOULES: Would you express our  
10 appreciation to his law partner?

11 MR. JONES: I bet he shows the next time.

12 CHAIRMAN SOULES: Okay. We are going back now  
13 to \_\_ the next rule that we will look at is 534 on -- this is  
14 Rule 534, and it is on Page 432. Page 432, issuance and form  
15 of citation.

16 And, Tony SADBERRY, isn't this your study?

17 MR. SADBERRY: That is right, Mr. Chairman.

18 CHAIRMAN SOULES: Okay.

19 MR. SADBERRY: And, Mr. Chairman, this is  
20 Page 432 of the material, and this has to do with the justice  
21 court practice. And I am apologizing for not being here in  
22 the last meeting and presuming that there was no discussion  
23 or action on any of these rules or any of these proposals at  
24 the last meeting. If I am correct in that, then I will  
25 proceed.

1                   CHAIRMAN SOULES: No, these have all been  
2 recommended to the court for adoption.

3                   MR. SADBERRY: That is right. And this is  
4 just to discuss the interim --

5                   CHAIRMAN SOULES: The public comments.

6                   MR. SADBERRY: -- public comments --

7                   CHAIRMAN SOULES: Right. Okay.

8                   MR. SADBERRY: -- and our subcommittee's  
9 response to that. In the 1988 changes in the district and  
10 county court practices, certain changes occurred that did not  
11 get made in the justice court. So the last time around, in  
12 1989, in the work of this full Committee, we made some  
13 proposed changes to the justice court rules essentially to  
14 conform them to the district and county court practice.

15                   Now, we have gotten public comments and our  
16 subcommittee has met on those, and we have, what I believe,  
17 are just some, I believe, noncontroversial changes in 534.

18                   There is a -- in my booklet, there is a -- some  
19 loose material that is placed in the book that I hope that  
20 you all have because there are some changes from what exists  
21 on Page 432. Let me know if you don't have that.

22                   CHAIRMAN SOULES: Can you tell us what they  
23 are?

24                   MR. SADBERRY: Well, briefly, in Subpart (a),  
25 we found that the -- what is now the next to the last



1 sentence in the proposal beginning "It shall state the number  
2 of the suit" and going forward, actually, substantially all  
3 of that had already been picked up in Subpart (b). The only  
4 thing that had not been picked up in Subpart (b) out of that  
5 sentence is "the nature of the plaintiff's demand."

6 And the change would be to put that in Part 7,  
7 Subpart 7 under (b). 7 under (b) would read "State the  
8 nature of the plaintiff's demand." All other provisions in  
9 that sentence have been picked up already in the materials  
10 that exist on Page 432.

11 Then we combined 6 and 7 as it exists in your  
12 materials before you, and states that -- the existing  
13 proposed 6 would now state, "show file number and names of  
14 parties," which would be what it would be in 6 and 7 in the  
15 current materials. We didn't want to have -- we still wanted  
16 to have 12 subparts.

17 The other change under Subpart (b), Part 2 thereof,  
18 as the materials show currently, is be signed by the clerk  
19 under seal of court. There was commentary correctly stated  
20 that some justices of the peace do not have clerks nor a  
21 seal of the court because of the legislature -- the  
22 legislative provision that we understood in the past and, in  
23 fact, did not pass, would be out there, and modified the  
24 language proposed to the court is under Subpart 2 of (b), we  
25 would state "be signed by the justice of the peace or by the

1 clerk of the court under seal" -- or "by the clerk under the  
2 seal of the court," which would allow the justice of the  
3 peace to sign the citation and address the problem of the  
4 courts who do not have clerks or a seal of the court.

5 And those would be, we think, some drafting changes  
6 that we would propose to the court, and I have that and I can  
7 get copies made if you don't have that.

8 CHAIRMAN SOULES: Why don't we leave the words  
9 "under seal of the court" in there. The justices of the  
10 peace all told us they don't have any seals, no authorized  
11 seals.

12 MR. EDGAR: The thought was, Luke, that up on  
13 that subcommittee --

14 MR. SADBERRY: Right.

15 MR. EDGAR: -- that the Legislature might  
16 ultimately authorize a seal of court, and if they did then --  
17 because this was before the Legislature in its last session,  
18 and we simply wouldn't have to come back and amend the rule  
19 to conform to it. That was our reason for doing it that way.

20 MR. SADBERRY: That is right. We would hope  
21 the disjunctive would clear up that if there is a clerk with  
22 the seal of the court, the Legislature adopts that, that we  
23 don't have to come back, but in the meantime, the disjunctive  
24 allows the justice of the peace to sign, and we don't have a  
25 problem, which is a problem we created by a previous change

1 and in anticipation of this. This is going to have to come  
2 back. We have several members of that subcommittee here.

3 Tom, you were on there, too.

4 MR. RAGLAND: Yes, I was, and I never was  
5 certain whether some JPs have clerks or they just have office  
6 personnel.

7 MS. CARLSON: They do now, don't they?

8 CHAIRMAN SOULES: Okay.

9 MR. SADBERRY: Well, some of the comments, it  
10 is really a twofold problem: None have seals and some do  
11 have clerks, and some don't, apparently.

12 CHAIRMAN SOULES: Okay. I am going to -- I am  
13 going to ask to relocate the insert to put "by the clerk  
14 under seal of court" and then add to that "or by the justice  
15 of the peace" so that you cannot -- we won't have somebody  
16 saying that "seal of court" modifies both.

17 MR. EDGAR: Good point.

18 MR. RAGLAND: Does that mean that if they have  
19 got a clerk that they must have the seal of court before the  
20 clerk can sign it?

21 CHAIRMAN SOULES: That is right, the way this  
22 is written. The way this is written --

23 MR. SPARKS (SAN ANGELO): Actually, for right  
24 now --

25 CHAIRMAN SOULES: Excuse me.

1 MR. SPARKS (SAN ANGELO): -- it is written "it  
2 shall be signed by the justice of the peace."

3 MR. RAGLAND: Well, I want to get this right.  
4 You understand that the JP practice --

5 MR. SPARKS (SAN ANGELO): Right.

6 MR. RAGLAND: -- is going to become more  
7 important.

8 MR. FULLER: Luke, may I ask a question?

9 CHAIRMAN SOULES: All right. Ken Fuller.

10 MR. FULLER: I have a --

11 CHAIRMAN SOULES: The court reporter can't get  
12 this record with the chatter.

13 MR. FULLER: Okay. I have a question about --

14 MR. SPARKS (SAN ANGELO): We don't want that  
15 on the record.

16 MR. FULLER: I have a question about some of  
17 the stuff in the brackets on (a) on Page 432. It probably  
18 makes sense to you all who know what you are doing, but I  
19 don't. And it says, "And deliver the citation as directed by  
20 the requested party." What is that supposed to mean? What  
21 does that mean?

22 MR. RAGLAND: Either the constable or the  
23 sheriff or --

24 CHAIRMAN SOULES: Private process server,  
25 whomever.

1 MR. SADBERRY: Ken, let me point out that as  
2 the public comments correctly pointed out, none of the  
3 members of the subcommittee have extensive practice in the  
4 justice court either, but that is correct. The response to  
5 your question is we have allowed, in our recommendation to  
6 the Supreme Court, and they have temporarily adopted service  
7 by private process, which heretofore was not the practice of  
8 the justice courts. And that is another rule, okay, which  
9 also had some public comment.

10 Our subcommittee, in looking at it, did not  
11 recommend rescinding allowing private process in a justice  
12 court proceeding, and that proviso is to pick up that the  
13 requesting party, if a private process server is to serve the  
14 citation on the requested party --

15 MR. FULLER: Okay. My problem is with that  
16 concept is, are you going to put the burden on the clerk to  
17 deliver the citation as directed? What if Joe Schmuck goes  
18 up and says, "I have got John Jones, private process server.  
19 He is on the other side of town. Ms. Clerk, you take it over  
20 there to him." That is the part that is worrying me.

21 CHAIRMAN SOULES: Well, that is exactly what  
22 Rule 99 provides for the district clerks.

23 MR. FULLER: Okay.

24 CHAIRMAN SOULES: See, these are the same  
25 words.

1 MR. FULLER: Lots of luck, but I mean that is  
2 fine.

3 MR. SADBERRY: That was really part of our  
4 charge in '89, was to get as close as we could to the extent  
5 that --

6 MR. FULLER: Okay. That answers my question.

7 MR. SADBERRY: -- it is focused to the  
8 district and county court practices.

9 CHAIRMAN SOULES: All right. So as I  
10 understand those two changes, one would be to put in (b) in  
11 the second line after the word "court" the words "or by the  
12 justice of the peace comma", and then do 3 and finish the  
13 sentence.

14 In the same Paragraph 534(b), in the line one, two,  
15 three, four -- fifth from the top, we would delete the comma,  
16 the parenthesis 7, close parenthesis, and the word "show,"  
17 simply substitute for those words the conjunctive "and," so  
18 that 6 would read "show file number and names of parties."

19 MR. SADBERRY: That is right.

20 CHAIRMAN SOULES: Then after the comma after  
21 the word "parties," we would insert the words "state the  
22 nature of plaintiff's demand comma" --

23 MR. SADBERRY: Correct. That was --

24 CHAIRMAN SOULES: -- preceded by parenthesis  
25 7, close parenthesis.

1 MR. SADBERRY: That is correct.

2 CHAIRMAN SOULES: And then after the comma,  
3 start 8 and run it sequentially to the end.

4 MR. SADBERRY: That is correct.

5 CHAIRMAN SOULES: That is all of (b).

6 And in 538(a), correspondingly, we would take  
7 out -- three, four, five, six, seven, eight, nine, 10, 11, 12  
8 and 13 -- in Lines 11, 12, and 13, where text is still  
9 readable between the other hash marks and the other  
10 deletions, we would delete all of that as well.

11 And what is left of 534 would be the first and  
12 second sentences that appear at the top and the very last  
13 sentence at the very bottom.

14 MR. SADBERRY: That is right.

15 CHAIRMAN SOULES: Is that your motion, Tony?

16 MR. SADBERRY: That is my motion on 534.

17 CHAIRMAN SOULES: Second?

18 MR. DAVIS: Second.

19 CHAIRMAN SOULES: Opposed? I mean all in favor  
20 say "Aye."

21 (RESPONDED AYE)

22 CHAIRMAN SOULES: Opposed?

23 Okay. Those changes will be recommended to the  
24 court that way and I have got them in my notes.

25 Next, Tony.

1 MR. SADBERRY: Now, Mr. Chairman, we have  
2 changed -- we have made no proposals for any additional  
3 changes. To complete the report, we might point out the  
4 areas that we did address for the purpose of the minutes and  
5 the court.

6 In 534, you will see in what is on Page 432, which  
7 was the next to the last sentence, providing that the  
8 citation is not served within 90 days shall be returned  
9 unserved. The '89 work was to remove that provision to  
10 conform with the district and county courts. However, there  
11 was some commentary from the public, and I am mentioning that  
12 our subcommittee unanimously recommends that we leave that as  
13 this Committee recommended it to the court, that is to remove  
14 the 90-day provision. So we are recommending no change in  
15 what exists on Page 432.

16 CHAIRMAN SOULES: Discussion?

17 All in favor say "Aye."

18 (RESPONDED AYE)

19 CHAIRMAN SOULES: Opposed?

20 MR. SADBERRY: And, finally, we have already  
21 got into this to some extent, and that is the use of private  
22 process servers. That would appear in Rule 536 and 536(a).  
23 And, similarly, our subcommittee recommends that we do not  
24 change the previous recommendation which permits the use of  
25 private process servers.



1 MR. DAVIS: What page does that appear on,  
2 Tony?

3 MR. SADBERRY: Well, actually, the -- let me  
4 see. The 536 --

5 CHAIRMAN SOULES: It is at -- it is on Page  
6 441. 441.

7 MR. SADBERRY: That is how it came out of the  
8 '89 work and we just haven't done anything to change any of  
9 that. I note that Harry was present at the public --

10 MR. TINDALL: The December meeting.

11 MR. SADBERRY: -- the December meeting. And I  
12 didn't get a chance to talk with Harry.

13 Harry, does that comport with what you  
14 understood --

15 MR. TINDALL: Yes, no changes.

16 MR. SADBERRY: -- with how there is no change?  
17 That is how our subcommittee went on that.

18 CHAIRMAN SOULES: Discussion?

19 Okay. All in favor of no change say "Aye."

20 (RESPONDED AYE)

21 CHAIRMAN SOULES: Opposed?

22 There will be no change in our recommendation  
23 to the Court on 536.

24 Did that also include 536(a)?

25 MR. SADBERRY: Well, I think it was 536, is

1 who may serve.

2 CHAIRMAN SOULES: Okay. 536(a) --

3 MR. SADBERRY: 536(a) only has to do with  
4 return of service.

5 CHAIRMAN SOULRS: All right.

6 MR. SADBERRY: And I think that may be  
7 impacted.

8 CHAIRMAN SOULES: That is on Page 451. Did  
9 you have a -- did you recommend a change in our work as it  
10 appears on Page 451, Rule 536(a)?

11 MR. SADBERRY: No change.

12 CHAIRMAN SOULES: Discussion?

13 All in favor of 536(a) as it appears on Page 451  
14 say "Aye."

15 (RESPONDED AYE)

16 CHAIRMAN SOULES: Opposed?

17 Okay. That is unanimously recommended.

18 MR. SADBERRY: And the final point, I believe,  
19 although I wasn't here, that Ken Fuller's subcommittee should  
20 have already picked this up. My understanding was that the  
21 issue of whether the time counted, under Rule 4, excluding  
22 Saturdays, Sundays, and holidays, may have affected some of  
23 the justice court rules, but that the Rule 4 subcommittee --

24 MR. FULLER: We took it out.

25 MR. SADBERRY: -- would make that

1 recommendation and has already been --

2 MR. FULLER: Did that pass? I wasn't here the  
3 last --

4 MS. CARLSON: Yes, it did.

5 MR. TINDALL: Yes, it passed the last time.

6 MR. FULLER: Okay. Okay. I knew that is what  
7 we recommended, but I didn't make the meeting, so --

8 CHAIRMAN SOULES: Okay.

9 MR. SADBERRY: Okay. And that is all that we  
10 saw, Mr. Chairman, from the public comments that --

11 MR. EDGAR: Mr. Chairman, I think if you will  
12 look at Pages 440 and 450, you will find that Carol Baker  
13 pointed out to us a number of punctuation corrections, and we  
14 really ought to have somebody like that on this Committee.  
15 But, anyhow, I think all of her points were well taken and I  
16 think that -- I don't really know how we handle that, Tony,  
17 but she just pointed out that --

18 MR. SADBERRY: I had not seen that, but to the  
19 extent she has done that work, I would certainly be amenable  
20 to it. Does it change anything substantially or  
21 substantively?

22 MR. EDGAR: No. Look on Page 440.

23 MR. SADBERRY: I am looking at it now.

24 MR. EDGAR: And, for example, on Page 432,  
25 this is just a typographical error, we didn't put a quotation

1 mark after Texas. She points that out.

2 MR. SADBERRY: Right.

3 MR. EDGAR: Just to be consistent, I think  
4 that the Chair should --

5 MR. FULLER: Is there an editorial license for  
6 that type of thing?

7 MR. EDGAR: I don't know, but she did a lot --  
8 it took a lot of work for her to go through this and her  
9 points were well taken.

10 MR. DAVIS: Can we adopt the recommendations?

11 MR. SADBERRY: I would have no problem. I  
12 haven't had a chance to study them carefully, but I take it,  
13 from what I am looking at on 440, she has picked up the  
14 deletions that we have made and she has also added some  
15 things.

16 CHAIRMAN SOULES: May I suggest this to you,  
17 and it is up to you-all, but I have looked at a lot of these  
18 technical changes and, by far, most of these -- for example,  
19 the ones we got from the COAJ, I guess we got 20 technical  
20 corrections, one of them just flat was wrong, but the other  
21 19 were absolutely right.

22 The only way I know how to handle that, I don't  
23 want to -- I don't want to get a resolution that we just  
24 adopt Carol Baker's work product, there might be something  
25 there that is not correct --

1 MR. EDGAR: I am just simply referring this to  
2 the Chair to Pages 440 and 450.

3 CHAIRMAN SOULES: Okay. Well, I thought we  
4 were talking about her whole letter, which was lengthy.

5 MR. EDGAR: No. I am just talking about 440  
6 and 450.

7 CHAIRMAN SOULES: Okay. Now, there is no -- I  
8 don't see any problem with those.

9 MR. EDGAR: I think she is correct in those.

10 CHAIRMAN SOULES: I think she is, too.

11 Could we assign to someone to read Carol Baker's  
12 letter and decide which ones should be done and which ones  
13 should not be done? If they are technical corrections, we  
14 will do them. And if there is anything substantive to them,  
15 I think we would omit them because we never have discussed  
16 them unless we do it now.

17 What do you-all suggest we do?

18 MR. SPIVEY: I think your suggestion is right.

19 CHAIRMAN SOULES: Okay.

20 MR. SPIVEY: Pick our best grammarian, if  
21 there is one, and let them work on it.

22 CHAIRMAN SOULES: Who wants to? Anybody want  
23 to volunteer?

24 MR. EDGAR: Luke, do you have all of her  
25 letters in one place?

1 CHAIRMAN SOULES: Yes. We have a complete  
2 copy of her letter, you see, in the file. We can just get it  
3 out.

4 MR. EDGAR: Well, I will try and look over it  
5 tonight.

6 MR. DAVIS: Don't you check this anyway for  
7 things like that?

8 CHAIRMAN SOULES: I try to, but --

9 MR. DAVIS: Is it an extra burden to check  
10 hers at the same time?

11 CHAIRMAN SOULES: Can we leave this to, for  
12 example, me and Hadley? Do you want to --

13 MR. TINDALL: I so move.

14 MR. EDGAR: I would be happy to leave it to  
15 the Chair.

16 CHAIRMAN SOULES: No. I was trying to give  
17 him that.

18 MR. EDGAR: Well, I will be happy to look over  
19 them tonight, if you have them all in one place.

20 CHAIRMAN SOULES: We will see. Do we have  
21 Carol Baker's letter intact?

22 MS. HALFACRE: Not here.

23 CHAIRMAN SOULES: Can I send it to you --

24 MR. EDGAR: Sure.

25 CHAIRMAN SOULES: -- and we will just share

1 that and get after we -- okay. As we go into final copy, we  
2 will -- Hadley and Holly and I will do that together, if that  
3 is okay.

4 If anybody else wants to volunteer, I will be happy  
5 to get it to you. Anybody else want to look at Carol Baker's  
6 letter intact?

7 Okay. That will be me and Hadley and Holly, and we  
8 will do -- we will exercise our best judgment on it.

9 And I do want to make a record that Carol Baker did  
10 a splendid job of going through this and picking out the  
11 important things that needed to be changed.

12 MR. TINDALL: Does anyone know her? I mean  
13 that is incredible work she did.

14 CHAIRMAN SOULES: Sure is. And I know we all  
15 express our appreciation and we might as well do it on the  
16 record here together.

17 The next is 749(c) on Page 454. This will be -- I  
18 guess this is the last Rule of Civil Procedure that we  
19 address, except for the charge rules and the sealed  
20 documents. So we will go from there to the TRAP rules and  
21 then to the -- then we have got the evidence rules all done.

22 749(c). Who reports? Elaine. Thank you.

23 MS. CARLSON: We recommended to the Supreme  
24 Court last August, after our deliberations, that 749(c) be  
25 amended so as to delete the requirement that a tenant who is

1 appealing by a trial de novo out of the justice court, in a  
2 forcible entry and detainer case as a pauper, put up one  
3 month's rent as a prerequisite to perfect the appeal. The  
4 concern was that that requirement perhaps might abridge open  
5 court constitutional protection that is afforded to all  
6 litigants.

7 We have received, since that time, some  
8 correspondence, which is included in your materials following  
9 Page 458 through approximately 464, predominantly from  
10 landlords and justices of the peace who question two things:  
11 One, the economic implication of that recommendation, and  
12 two, whether the rules, as amended, sufficiently protect the  
13 landlord when a tenant is appealing in that fashion.

14 The concern was that the tenant would be proceeding  
15 without having to, in effect, put up a supersedaes. The  
16 correspondence suggested that perhaps the supersedaes rules  
17 in the TRAP provisions would not be applicable to the de novo  
18 appeal out of the county court.

19 And so it really comes down to a question of  
20 whether the rules, as amended, one, are constitutional, two,  
21 whether they provide sufficient speed in the FR&D proceedings  
22 to protect all litigants on both sides, the tenant and the  
23 landlord, and, third, the fundamental right of any party who  
24 wins at the trial court level to have protection on the  
25 appeal as the successful judgment creditor.



1           The request was made that -- from the JPs -- that  
2           our subcommittee interface with the JPs, and we did that. I  
3           spoke at great length with Tom Lawrence, who is the chair of  
4           the State Bar Committee on JPs and, also, at the JP  
5           Legislative Liaison. And we went through the rules very  
6           extensively. And, Tom, I am sorry you weren't there to  
7           participate since you are enlarging your practice in this  
8           area, you would have enjoyed it, but his suggestions were  
9           that the rules be streamlined a little bit further to perhaps  
10          address the economic implications of our August  
11          recommendations to 749(c).

12                 So beginning on Page 455, you see those proposals  
13          before you, and I will just -- the words that are underlined  
14          are the proposed changes. The first one under 749(a) would  
15          require that a party filing a pauper's affidavit do so with  
16          the court or the clerk because now many JPs do have clerks.  
17          In fact, this JP suggested that JPs have clerks, so I am not  
18          sure if there are some who don't now by legislative fiat.  
19          And that once there is filing of the pauper's affidavit, that  
20          out of the JP's clerk's office or from the JP, notice be  
21          given to opposing parties of that affidavit of inability  
22          within one working day of its filing. That would accomplish  
23          speed in the process.

24                 Also, you see in the bottom of Page 455, there is a  
25          proposal that when the pauper's affidavit is timely

1 contested, that the justice is required to hold a hearing and  
2 rule within a finite period of days. The suggestion is five  
3 days.

4 On 456, the suggestion is made in the top paragraph  
5 on Page 456 that if the JP disapproves the pauper's  
6 affidavit, as the practice currently is, the pauper has the  
7 right to seek review again out of a county court on the  
8 ruling of the inability to proceed as a pauper and that the  
9 county judge then have five days, as opposed to currently  
10 10 days, to make a hearing on that.

11 And the final two changes in 749 address the writ  
12 of possession because it -- it now reads writ of restitution,  
13 which is no longer a writ, I am told, in this context.

14 Further down in 751, there is a proposal made that  
15 sums that have been tendered to the JP under 749(b), because  
16 the tenant is required to keep paying into the registry of  
17 the court rent that is accruing during the appeal of the  
18 FE&D, that the JP be required to tender the clerk -- tender  
19 those sums that come into the JP court to the county court  
20 when there is a de novo appeal because the right of the JP to  
21 act, including as to those funds, terminates upon perfection  
22 of the appeal.

23 So Judge Warren suggested that if you allow for the  
24 filing with the justice of future rent with a JP court under  
25 749(b), that they then don't really have the authority to act

1 once there is perfection to the county court, and so his  
2 suggestion was that all those funds be tendered to the county  
3 court. And that is the new and improved scheme we are  
4 proposing.

5 CHAIRMAN SOULES: Does -- under this scheme,  
6 new scheme and proposal, does a party have to deposit rent  
7 even if he is appealing under a pauper's affidavit?

8 MS. CARLSON: Yes, you still do under 749(b)  
9 and that is how the rule currently reads. You no longer,  
10 under our suggestion, suggested change of 749(c), have to put  
11 up rent as a predicate to appeal. Okay?

12 CHAIRMAN SOULES: Under this proposal, you  
13 would not have to put up rent as a predicate to appeal?

14 MS. CARLSON: Right. You can appeal without  
15 doing that, but 749(b) requires the party, throughout the  
16 appeal -- and it is in the nature of a supersedaes, really --  
17 to continue to tender into the court not the past due rent  
18 that is owed or that is in contest, but the rent that is  
19 accruing throughout the appeal.

20 CHAIRMAN SOULES: And that is in current  
21 749(b)?

22 MS. CARLSON: Yes.

23 CHAIRMAN SOULES: So we don't need to make any  
24 changes there?

25 MS. CARLSON: We would not.

1 CHAIRMAN SOULES: We would be changing 749(a),  
2 not (b). We would change 749(c), what, to read as it does on  
3 455?

4 MS. CARLSON: Right. And that just simply  
5 kind of streamlines the two methods by which the appeal might  
6 be perfected.

7 JUSTICE HECHT: What is it on 454? Where is  
8 it on --

9 CHAIRMAN SOULES: Now, this -- I guess it is  
10 here.

11 JUSTICE HECHT: That is not it.

12 CHAIRMAN SOULES: That is not it?

13 JUSTICE HECHT: That is just comment.

14 CHAIRMAN SOULES: That is what I am trying  
15 to -- where is the change, Elaine? Let's see. 454 is the  
16 way we voted it out in the 1989 sessions.

17 MS. CARLSON: Right. And this is suggesting a  
18 further modification on Page 456 to simply say there are two  
19 ways to perfect the appeal, when an appeal has been -- appeal  
20 bond is timely filed among 456 and 749(c), we might insert  
21 the words "in conformity with Rule 749" or "a pauper's  
22 affidavit approved in conformity with 749(a), the appeal is  
23 perfected."

24 CHAIRMAN SOULES: Well, so what language will  
25 be in 749(c)?

1 MS. CARLSON: The language on Page 456.

2 MR. FULLER: Is that new language, Elaine?

3 MS. CARLSON: Yes.

4 MR. FULLER: Oh, but it is not underlined.

5 MS. CARLSON: I am sorry. You are right. It  
6 is all -- it is totally new language.

7 MR. FULLER: It is totally new language.  
8 Okay. Now I understand.

9 MS. CARLSON: Because really if you look at  
10 749(a), it addresses the mechanics of how you proceed in an  
11 FE&D as a pauper. So 749(c) simply sets forth these -- look  
12 at these two rules to see your options and how you go about  
13 perfecting the appeal.

14 CHAIRMAN SOULES: Okay.

15 JUSTICE HECHT: So you would replace 454 with  
16 the language on 456 --

17 MS. CARLSON: That is correct.

18 JUSTICE HECHT: -- all together.

19 MS. CARLSON: That is correct.

20 CHAIRMAN SOULES: Okay. So the motion is that  
21 we change 749(a), as underscored on Page 455 and 456, and  
22 that we -- well, I guess we vote on these one at a time,  
23 maybe that will help.

24 Any discussion?

25 All in favor say "Aye."

1 (RESPONDED AYE)

2 CHAIRMAN SOULES: Okay. 749(a) then, as shown  
3 on 455, will be recommended unanimously.

4 Then the next proposal is that we delete all of the  
5 language in current 749(c) and replace it with the sentence  
6 that appears in the center of the page of 456.

7 Discussion?

8 MR. FULLER: A comment, if I may.

9 CHAIRMAN SOULES: Yes.

10 MR. FULLER: She did mention that there be, in  
11 the first line here of the proposed -- when an appeal bond  
12 has been timely filed -- and you said as required by section  
13 what?

14 MS. CARLSON: "In conformity with Rule 749."

15 MR. FULLER: "In conformity with Rule 749"?

16 MS. CARLSON: Yes.

17 MR. FULLER: And I think that should go in  
18 there.

19 CHAIRMAN SOULES: All right. I am making that  
20 change unless I hear opposition.

21 There is none, so it will be made.

22 Now, does the pauper's affidavit have to be filed?

23 MS. CARLSON: Oh, yeah.

24 CHAIRMAN SOULES: Well, why -- it seems -- I  
25 am not sure we have got this written right. It says "When it

1 is approved the appeal is perfected."

2 MS. CARLSON: Yes.

3 CHAIRMAN SOULES: Doesn't that mean approved  
4 and filed?

5 MS. CARLSON: Because when you look at  
6 749(a) --

7 CHAIRMAN SOULES: Okay.

8 MS. CARLSON: -- that is the way it works out.

9 CHAIRMAN SOULES: The appeal is perfected  
10 whether or not the bond is filed -- the affidavit is filed?

11 MS. CARLSON: When it is approved.

12 CHAIRMAN SOULES: What if it is never filed?

13 MS. CARLSON: Well, then you have to file an  
14 appeal bond. Those are your choices, either proceed under  
15 749 by filing an appeal bond or file a pauper's affidavit and  
16 getting it approved in 749(a).

17 MR. SADBERRY: It is already filed. It has to  
18 be filed in order to be approved.

19 CHAIRMAN SOULES: I got you.

20 MR. SADBERRY: So it is already filed. It is  
21 the approval that may have a time lag.

22 CHAIRMAN SOULES: I got you. Okay. Thank you  
23 for that help.

24 MS. CARLSON: Because that gives the JP the  
25 authority to act in the case until that takes place --

1 CHAIRMAN SOULES: Okay.

2 MS. CARLSON: -- because we have got Rule 751,  
3 which cuts off the justice court's jurisdiction upon  
4 perfection.

5 CHAIRMAN SOULES: Okay. The -- then those in  
6 favor of 749(c) as it appears on Page 456 with the change  
7 added in conformity with Rule 749 where we discussed it, say  
8 "Aye".

9 (RESPONDED AYR)

10 CHAIRMAN SOULES: Opposed?

11 That is unanimously approved.

12 And then the next is that we, what, take out all of  
13 751 as it presently appears and replace it with the language  
14 on 456?

15 MS. CARLSON: No. Luke, it would only be an  
16 addition of those underlying --

17 CHAIRMAN SOULES: Okay.

18 MS. CARLSON: -- phrases, including some  
19 tendered pursuant to Rule 749(b)(1).

20 CHAIRMAN SOULES: Okay.

21 MS. CARLSON: The underlined words --

22 CHAIRMAN SOULES: So just to add those words  
23 in current Rule 751?

24 MS. CARLSON: That is correct. That is the  
25 proposal.



1 CHAIRMAN SOULES: The proposal is made.  
2 Second?

3 MR. DAVIS: Second.

4 CHAIRMAN SOULES: Made and seconded.  
5 Everybody had a chance to look at that?  
6 Those in favor say "Aye."

7 (RESPONDED AYE)

8 CHAIRMAN SOULES: Opposed?  
9 Okay. That will be unanimously recommended then  
10 for 751.

11 Anything else, Elaine, on your series of rules?

12 MS. CARLSON: Back at 730 -- 730 and 731,  
13 there is a minor --

14 MR. EDGAR: What page is that on, Elaine?  
15 What page are you on?

16 MS. CARLSON: We are now switching forward to  
17 Page 730 and Page 731.

18 CHAIRMAN SOULES: Elaine, we are going to have  
19 to get to that whenever we get to the new stuff, unless it  
20 really does pertain to this.

21 MS. CARLSON: No, it doesn't.

22 CHAIRMAN SOULES: Okay. We will get to  
23 that --

24 MS. CARLSON: Okay.

25 CHAIRMAN SOULES: -- when we get to the new

1 agenda.

2 MR. FULLER: I have a query about the part of  
3 751 here where the clerk notifies the appellant about the  
4 filing of the transcript separate. Should there not also be  
5 a requirement that the clerk notify the prevailing party  
6 about the sums that were deposited with them?

7 If I understand the first part of 751 and the --  
8 and the added language, the JP sends the transcript and  
9 everything with any monies that have been paid in. Should  
10 that not also be included in that notice to the -- to the  
11 prevailing party that "Hey, we have got some money up here"?

12 MS. CARLSON: That would probably be a  
13 positive improvement. I think there is --

14 CHAIRMAN SOULES: Where would it go?

15 MR. FULLER: Well, I am not up there having to  
16 do this, but it looks like it would be fair to let them know.

17 CHAIRMAN SOULES: Where would it go?

18 MR. FULLER: It would be -- includes -- let's  
19 see. The clerk shall -- it is the second paragraph. "The  
20 clerk shall immediately notify both appellant and adverse  
21 party of date of receipt of the transcript," and somewhere  
22 along in there, "and any sums of money received in connection  
23 therewith" or something to that effect.

24 MR. EDGAR: Well, this rule, though, is for  
25 filing the transcript. It doesn't have anything -- this is

1 an appellate process, and it seems to me like notifying them  
2 that money has been deposited doesn't belong there. I am not  
3 saying that maybe the clerk shouldn't notify them, but it  
4 just doesn't seem to me like it belongs in a transcript.

5 MR. FULLER: Well, that could be said, also,  
6 about including the sums tendered. I just think you ought to  
7 be consistent. People ought to know where their money is, it  
8 seems to me, who the estate holder is.

9 MR. EDGAR: I am not denying that, Ken. I am  
10 just questioning whether or not that information belongs in  
11 the appellate record.

12 CHAIRMAN SOULERS: Could you-all discuss that  
13 and resolve it maybe over a break?

14 MR. FULLER: Yes, that would be easiest  
15 because, Hadley, I am easy on that.

16 CHAIRMAN SOULERS: Okay. Now we are ready for  
17 for the TRAP report and that -- the TRAP rules begin on  
18 Page 465. Bill was unable to return today, but gave us a  
19 written report. And I don't know whether someone else is --  
20 is Rusty going to or is some other member of that Committee  
21 going to make the report?

22 Could we take a short break here, five, 10 minutes,  
23 and then get back and finish these TRAP rules? We should be  
24 able to get this done by noon. They are not that -- as Bill  
25 said, there are really not that many significant changes if

1 we don't take a long break.

2

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

6

7 CHAIRMAN SOULES: Okay. We are ready to  
8 proceed. Let's get everybody back in.

9 We are ready to proceed now, as the vote was  
10 this morning to move then to the TRAP rules, and the Chair  
11 recognizes Lefty.

12 MR. MORRIS: Well, Luke, as you know, we  
13 discussed in the interim, I would like to move at this time  
14 to go ahead and proceed to the sealing of court records so we  
15 can get this over with and not have to deal with it again  
16 perhaps tonight or even possibly tomorrow, while everyone is  
17 still fresh. I understand in the TRAP rules it is not going  
18 to be much controversy and there may be a great deal of  
19 discussion on sealing court records. For that reason, I move  
20 that we proceed at this time.

21 MR. FULLER: Second.

22 MR. SPARKS (SAN ANGELO): First, does your  
23 motion include changes to do with -- necessarily with 166?

24 MR. MORRIS: No. At this time, Sam, just  
25 sealing the court records that I have got in front of me.

1 MR. BEARD: Mr. Chairman --

2 CHAIRMAN SOULES: Let me -- Okay. Pat Beard.

3 MR. BEARD: -- I think we ought to get rid of  
4 everything else. We spent, what, four hours on sealing of  
5 records, or longer, the other day?

6 MR. HERRING: Right hours.

7 MR. BEARD: Eight. Whatever. Let's get all  
8 of this stuff out of the way and then go back to something we  
9 have already spent all that time on.

10 CHAIRMAN SOULES: The motion has been made and  
11 seconded to change the agenda from the way we voted this  
12 morning, was which was to proceed through the old rules and  
13 then take sealed records, charge, and this 167(a) item.

14 MR. SPIVY: I thought the motion was to take  
15 it up. Wasn't that Lefty's motion?

16 CHAIRMAN SOULES: And the motion now is to  
17 change that order to take up sealed records presently.

18 MR. DAVIS: Yes, the motion to take up sealed  
19 records, right.

20 CHAIRMAN SOULES: Okay. Let me see by hands  
21 how many want to vary from this morning. One, two, three,  
22 four, five, six, seven -- I am sorry, I lost count. One,  
23 two, three, four, five, six, seven, eight, nine, ten.

24 How many want to stay with what we had? All right.  
25 I would like to have -- does anyone want to make a motion

1 that we put time constraints on the upcoming records debate  
2 on sealed records --

3 MR. COLLINS: Why do we want --

4 CHAIRMAN SOULES: -- so that we do not run out  
5 of time?

6 MR. COLLINS: Why do we want to do that,  
7 Mr. Chairman? We haven't put any time constraints on  
8 anything else.

9 CHAIRMAN SOULES: Well, because we haven't  
10 gotten to so many other things, that is why. And if you  
11 don't want to do it, you don't have to do it.

12 MR. SPIVEY: I have got a problem. Let's  
13 don't get into a technical battle and tabling the thing.  
14 Let's get it up, vote it up or down, and get it over with.

15 CHAIRMAN SOULES: All right. As I understand,  
16 lefty, you want to take up now the text of the rule that is  
17 before us, 7 -- Rule 76(a) --

18 MR. MORRIS: Yes.

19 CHAIRMAN SOULES: -- and to proceed with that  
20 and not yet take up the discovery points, I mean the 166(b)  
21 and so forth.

22 MR. MORRIS: I think that is part of it.

23 CHAIRMAN SOULES: Okay.

24 MR. DAVIS: That is part of it.

25 CHAIRMAN SOULES: Okay. Let's proceed then

1 with your motion, your motion as it was voted on.

2 MR. EDGAR: May I ask a question of the  
3 co-Chairs? How does the proposal we now have before us  
4 differ from the proposal which we debated last week?

5 MR. MORRIS: This is what we have passed.

6 MR. EDGAR: In toto?

7 MR. MORRIS: This is in toto. This is exactly  
8 what -- we have the record here, these are the minutes, this  
9 is what passed. So everything in here is something we have  
10 already voted on and voted for. That doesn't mean it is in  
11 concrete, but this is what you are looking at.

12 CHAIRMAN SOULERS: All right. For the  
13 record -- for the record, 76(a), that you have on your desk  
14 in front of you, is the composite of our votes last Friday  
15 and Saturday relating to sealed records.

16 MR. DAVIS: What are we going to be asked to  
17 do?

18 CHAIRMAN SOULERS: And I don't know.

19 MR. HERRING: We have a few things we didn't  
20 get to last time dealing with the draft, the overall draft.  
21 We have a few technical corrections based on the way it has  
22 ended up being printed out.

23 Well, let me run through a couple of things quickly  
24 that I don't think there is much controversy about. There  
25 was some language that Dorsaneo had put together that was

1 circulated around that deals with continuing jurisdiction,  
2 and that is Paragraph C, I believe, in the rule, which is on  
3 the next to the last page of the packet that was handed out.

4           And I think our recommendation is Bill had proposed  
5 a change in that continuing jurisdiction. I think it worked  
6 with Justice Doggett. If you have that single page that was  
7 handed around, it has continuing jurisdiction and appeal.  
8 They had worked on that, but I think in our discussion this  
9 morning, we decided we ought to just keep C as it appears in  
10 the draft that is circulated with one exception, and that is  
11 on the third line from the bottom, and this is the next to  
12 the last page, we have that introductory clause which I think  
13 we determined is not necessary, which says, "Notwithstanding  
14 the rights of appeal provided in this Rule," and we would  
15 simply strike that clause and capitalize the next word, which  
16 is "A."

17           So it would now read "A court that renders a  
18 sealing order maintains continuing jurisdiction to enforce,  
19 alter, or vacate that order." Bill had a little bit  
20 different language, but in talking about it, we really can't  
21 see that we need to make any change in C unless someone else  
22 feels differently.

23           CHAIRMAN SOULERS: Okay.

24           MR. HERRING: So we would -- we would move  
25 that we strike that language I just referred to, Luke, and



1 adopt C as it is written in the draft otherwise.

2 MR. MORRIS: I second.

3 CHAIRMAN SOULES: Moved and seconded.

4 Discussion? Rusty.

5 MR. McMANS: What you are asking is C as it  
6 is in the printed version?

7 MR. HERRING: That one clause coming out,  
8 Rusty, in the third line from the bottom, the introductory  
9 clause.

10 MR. McMANS: The -- whether or not you do,  
11 whether or not you have that language or the language of Bill  
12 primarily depends on what it is you are talking about being  
13 able to appeal from, because the problem I have is that when  
14 you say down here that "A court that renders the sealing  
15 order maintains continuing jurisdiction to enforce, alter, or  
16 vacate," then to the extent you have any rights to appeal  
17 based on any decisions, you could have a continuing sequence  
18 of appeals by a number of different parties, integrally  
19 related issues between dealing with how you characterize  
20 continuing jurisdiction and how you -- how you effectuate the  
21 appellate process.

22 So I mean I understand what you are trying to  
23 say from the standpoint of the continuing jurisdiction, but  
24 when you then try and figure out some way to make it a final  
25 judgment or a judgment that is appealable in some fashion,

1 any order that they render by any -- you could have 18  
2 different appeals by 18 different intervenors if each come in  
3 at different times. And that -- I am really not sure anybody  
4 wants that much clogging going down the pike.

5 MR. HERRING: Well, I think we felt that there  
6 probably wasn't that much difference between Bill's language  
7 and ours that deal with a separate issue and really didn't  
8 anticipate that you are likely to have 18 separate appeals.  
9 We were going to try to open it up, let everybody intervene.  
10 If they want to appeal, have an appeal.

11 The big problem the press has faced, as you  
12 know, is that in every case that has been decided by an  
13 appellate court in Texas, they have found that plenary  
14 jurisdiction in the trial court has expired and there has  
15 been no meaningful review, and the press has not found out  
16 until afterwards. And so we are trying to open it up and  
17 maybe it goes too far and maybe it poses that danger. I  
18 think we were willing to take that risk.

19 MR. McMANS: It is kind of temporary. I  
20 mean it is like a -- it is like a forever temporary  
21 injunction.

22 MR. HERRING: That is right.

23 MR. McMANS: And I just think that is -- I  
24 really think that is overstating the access that is intended  
25 to be accomplished. Bill was going to try and, I think, do a

1 proposal in his alternative C, which I think people have.

2 MR. HERRING: It should be on this single  
3 sheet.

4 MR. McMAJNS: Yes, on the single sheet, where  
5 it just describes the continuing jurisdiction, "has  
6 continuing jurisdiction before or after judgment to determine  
7 claims of access to court records." I realize that leaves it  
8 open, but when you are so specific as to say that "to  
9 enforce, alter, or vacate the order," first of all, that  
10 doesn't give you any standard.

11 I mean do you have to have -- if you have got a  
12 motion, let's say that he didn't seal it. Then the party is  
13 going to start the process over again, you start all of the  
14 notices over again, and everything else just by moving to  
15 vacate the order refusing to seal. You go through another  
16 proceeding. I mean --

17 MR. HERRING: I think this draft is about as  
18 wide open as it can be to allow -- to allow appeals. And if  
19 you want to cut it back, if you can -- if you can describe  
20 for us how the second sentence -- Bill's first sentence is  
21 inconsistent with the intervention right as it had been  
22 created earlier in the rules, so that is why we didn't go  
23 with that. The second sentence --

24 MR. McMAJNS: Yes, I wasn't worried about the  
25 first sentence.

1 MR. HERRING: Right.

2 MR. McMANS: Just the second sentence.

3 MR. HERRING: Just the second sentence. You  
4 might describe how you understand that would limit the  
5 appeals and we can talk about that.

6 MR. McMANS: Well, all this does is indicate  
7 the court has continuing jurisdiction, but it doesn't attempt  
8 to define, you know, to enforce, alter, or vacate in language  
9 that is so much akin to temporary injunctions. I mean I  
10 think the limiting part should be in the appeal remedy.

11 MR. HERRING: Well, we haven't gotten to the  
12 appeal section yet.

13 MR. McMANS: I understand that, but the point  
14 is that I -- any appeal remedy that you try and do is going  
15 to be related to an order, and if you authorize all of these  
16 things expressly by order here under the aegis of continuing  
17 jurisdiction, each separate ruling will be appealable. You  
18 can't limit it.

19 And all I am trying to do is to not say what orders  
20 you are talking about until we get to the appeal rights so  
21 that we can be clear as to what your remedy is when there is  
22 something done, because I think that it will be the sense of  
23 the Committee, and I am pretty confident of the Court, that  
24 they don't want 85 appeals coming down the pike on a single  
25 piece of litigation.

1 MR. HERRING: Well, I don't think  
2 realistically they are going to get 85 appeals.

3 MR. McMAINS: Why should -- why should one  
4 person in the press -- I mean why should all the people in  
5 the press do it at the same time? I mean why not one  
6 newspaper take a crack at it, then if they fail, another  
7 newspaper take a crack at it. And so I mean when you --  
8 after about the fifth time that you have to jump through all  
9 of these hoops, the judge is probably just going to give up  
10 and say "Take it."

11 MR. HERRING: Well, you know, the value of  
12 that, I suppose --

13 MR. McMAINS: You know, you can have the whole  
14 shooting match.

15 MR. HERRING: The great value of that is, I  
16 suppose, that appellate experts like yourself, would be  
17 hired all the time, but apart from that --

18 MR. SPIVEY: Does that solve your problem,  
19 Rusty?

20 MR. HERRING: But apart from that, Rusty, if  
21 you have got -- if you feel strongly about the language that  
22 Bill had drafted and can explain to me, or to Tom, or Lefty,  
23 how that limits it further, the appeals, we are not opposed  
24 to this language.

25 MR. McMAINS: I am not saying that it limits

1 it per se. I am saying that any limitation specifically  
2 should be in what it is that we are appealing from.

3 MR. HERRING: Which is the next section of the  
4 rule.

5 MR. McMAJNS: I understand that, but when you  
6 put this language in here, this makes it look exactly like a  
7 temporary injunction. The cases do hold that you can go  
8 back and move to modify, you can move to vacate, and  
9 each one of those is separately appealable. There is no  
10 way to draft an order for definition purposes in the  
11 appeal part that is going to be able to be limited if  
12 you have got this explicit language as to what the judge  
13 can do.

14 I am not -- I am not saying that it is a per se  
15 limitation. I am just saying that it is inconvenient to use  
16 this so explicitly that it is just that wide open. The  
17 argument can always be made that it is that way.

18 MR. COLLINS: What language would you  
19 recommend?

20 MR. McMAJNS: Well, I mean the language he has  
21 got, it just says that "It has continuing jurisdiction before  
22 or after judgment to determine claims of access" --

23 MR. COLLINS: You mean on the single sheet?

24 MR. McMAJNS: Right.

25 MR. HERRING: Yes, on the handout, Dorsaneo's

1 wording.

2 MR. McMANS: -- "to determine claims of  
3 access to sealed court records and to enforce the court's  
4 order." That is all it says.

5 Now, I realize that you can make the argument that  
6 that is the same thing, but this one is done much the way  
7 that the temporary injunction stuff is done. It is kind  
8 of -- I just think that if you -- once you get into the final  
9 judgment, you will see -- I mean into the appeal, if the  
10 way we are going it treat it that --

11 MR. HERRING: Let's go on down to appeals and  
12 we can take them both together. How about that?

13 MR. McMANS: Well, I just wanted you to  
14 understand how related they are.

15 MR. HERRING: Fine. Well, let's take them  
16 together. And the appeal language is on the single sheet.  
17 There is no appeal provision in the rule printout that you  
18 have. That was printed out from what we did last time  
19 because we never put any appeal language in.

20 And this language, again, is a product, I believe,  
21 of Bill, who is not here, and Justice Doggett, and if Judge  
22 Doggett is going to talking about it, we may defer to him and  
23 let him explain what they were trying to do.

24 CHAIRMAN SOULES: Could we have an  
25 understanding of that from Your Honor?

1 JUSTICE DOGGETT: Basically, the section on  
2 appeal, I think, was discussed and then voted down with no  
3 substitute last time. And Bill and I just went back and  
4 looked at that section and recognized that we do need a way  
5 other than mandamus to get this issue up to the appellate  
6 courts and try to revise what was in the original draft  
7 slightly to accomplish that.

8 I do think, in terms of the continuing  
9 jurisdiction, that there was a concern that you will remember  
10 Chuck expressed in the Committee that there could well be  
11 circumstances where Rusty has talked as if there might be two  
12 appeals at the same time. There might be circumstances where  
13 there is a need to go back and deal with this issue a year  
14 after the case has been finally resolved. That is why the  
15 continuing jurisdiction matter is there, when perhaps a  
16 problem with public health and safety is first brought to the  
17 attention of the public, and so there may be a need for  
18 multiple appeals, for multiple orders.

19 MR. HERRING: Rusty, why don't you talk about  
20 this language? This was not our language, I guess it was  
21 Bill's, and you might analyze that in light of your concern.

22 MR. McMANS: Basically you may recall we had  
23 basic -- there are three notions for possible appellate  
24 avenues. One is just don't say anything about it, but allow  
25 it, in some manner it is enforced by mandamus jurisdiction or



1 whatever, bring it within the aegis of mandamus rule. And  
2 that you are not talking about appeal at all.

3 The other is to try and wrap it into what, in  
4 essence, is the interlocutory appeal time table, or the  
5 accelerated appeal provision. That is an expedited process.  
6 It is quicker and it gets expedited determination, for that  
7 matter, in the courts themselves.

8 The third is just to severe an intervention because  
9 the only people that are going to be appealing are people who  
10 formally appear as parties, feel strongly enough to pay their  
11 filing fees and actually show up, whatever. They are the  
12 only people trying to participate anyway in the hearing, I  
13 think is our -- the way, other than just watch, so was to  
14 make that a final judgment, a determination of the  
15 intervenor's case, a final judgment, and treat it as an  
16 ordinary case to be controlled by that.

17 That was kind of the option that everybody --  
18 I mean that we had talked about amongst ourselves, if you  
19 were going to provide an appellate group, that kind of made  
20 perhaps a little more sense than the expedited stuff because  
21 you are just dealing with a different time table, it is a  
22 whole lot shorter fuse, and it is a little -- it also gets  
23 extra treatment from the courts of appeals who probably  
24 aren't all that excited about that.

25 Now, this is the first time I have seen this thing

1 actually typed out. The only problem I have -- this doesn't  
2 give, and maybe it was intended and perhaps you can speak to  
3 that -- this doesn't give any remedies in terms of the denial  
4 of sealing by appeal. It is only if there are sealing. I  
5 mean this particular appeal provision. It just says "Any  
6 order sealing court records and denying access to an  
7 intervenor," finally disposes of the claim of the intervenor  
8 to have access to the records, severs the intervenor's claim  
9 from any other claim and is appealable as a final judgment.

10 Now, it doesn't -- so if it ain't sealed, I mean if  
11 the judge's determination is not to seal it, then there is no  
12 remedy provided, which I assume means then that the remedy  
13 there is by mandamus, and it is the only thing you can go on.

14 MR. FULLER: And then just stay in limbo.

15 MR. McMANS: There isn't any provision for  
16 the temporary sealing part to apply beyond the date of the  
17 hearing. So I mean the point is from that time on -- now,  
18 you can theoretically, under mandamus practice, move for  
19 temporary emergency relief from the court of appeals, but  
20 you -- you know, for the order of temporary sealing, I  
21 suppose, in conjunction with this mandamus jurisdiction.  
22 That is -- this is a one-way appeal if they seal as opposed  
23 to not.

24 MR. HERRING: Yes. And I don't know if --

25 MR. McMANS: I suppose that was the theory --

1 one theory behind maybe you limit the appeal to some extent  
2 because if you have been unsuccessful at sealing the records,  
3 since he has continuing jurisdiction, you just go back and do  
4 it again.

5 MR. EDGAR: Justice Doggett, was it intended  
6 to deny the right of this appeal to that type of situation or  
7 was this --

8 JUSTICE DOGGETT: It was apparently intended  
9 in the original draft we were working off of.

10 MR. McMAINS: That maybe well be.

11 JUSTICE DOGGETT: The focus of the whole rule  
12 was to provide a remedy to obtain openness. There is still  
13 the right to mandamus, a trial judge and to seek a stay while  
14 that mandamus is determined if records have not been sealed  
15 which should have been sealed, but I don't have strong  
16 feelings about the issue, and I think it is one of those kind  
17 of issues we need the advice of the Committee as to whether  
18 you want to include it both ways.

19 MR. HERRING: I don't think the original draft  
20 was limited to appeals from orders just denying sealing, at  
21 least as I understood it. It had "any order granting or  
22 overruling the motion to alter, vacate or enforce."

23 JUSTICE DOGGETT: Well, let's go with that  
24 language.

25 CHAIRMAN SOULES: I have got Justice Doggett

1 suggests maybe that we pick up that language from the  
2 original proposal so that there would be appeals in either  
3 the granting of sealing or the denial of sealing.

4 MR. EDGAR: Do you want a consensus on that?

5 CHAIRMAN SOULES: And I guess we need a  
6 consensus. How many feel there should be appeals either way,  
7 both ways? Four, five, six, seven, eight, nine, 10, 11, 12,  
8 13 -- 14, and that does not count Harry twice, even though he  
9 had both hands up.

10 MR. TINDALL: Sorry.

11 CHAIRMAN SOULES: How many feel it should be  
12 only if sealing is granted should there be an appeal?

13 Well, that is unanimous, then, it should be  
14 balanced both ways.

15 MR. EDGAR: I have a second question then.

16 CHAIRMAN SOULES: Okay. Hadley Edgar.

17 MR. EDGAR: Rusty --

18 MR. McMAINS: Yes.

19 MR. EDGAR: -- did I understand you to make  
20 reference here to accelerated appeals?

21 MR. McMAINS: Well, it is not in here. I am  
22 saying we had -- there were -- there were three things we  
23 talked about as to how avenue. One is if we left it silent,  
24 would we just be going by way of mandamus. If we have a  
25 specific appeal provision, then we could either try and do it

1 by way of an interlocutory thing or we could try and do it  
2 final and go through the regular final appeal system. This  
3 was the one that was essentially opted for.

4 MR. FULLER: Luke --

5 CHAIRMAN SOULES: Ken Fuller.

6 MR. FULLER: -- I think that we have  
7 been -- at least my mind set on this thing has sort of  
8 been postjudgment in my thinking since that is where  
9 most of the cases seem to come up. But I worry about  
10 what I just voted for, and that is how about during the  
11 pendency of the suit, one of the parties to the action  
12 says, "Okay. Judge, we would like to have the records  
13 sealed." And let's assume further that the people who  
14 appear on it are only the parties to the lawsuit. I am  
15 thinking of divorce cases, you don't have the paper  
16 particularly interested one way or the other.

17 Are we going to create then a right of appeals by  
18 one of the parties during the lawsuit that I don't think they  
19 had before?

20 MR. McMAINS: Well, I think that is --

21 MR. FULLER: Are we creating another remedy  
22 for the litigants --

23 MR. McMAINS: I think an intervenor is  
24 anybody, including probably one of the original parties.

25 MR. FULLER: No. I am talking about what has

1 gone on. The only people in it are the parties.

2 CHAIRMAN SOULERS: Well, if that is true, we  
3 are going to create the right of appeal to all parties, not  
4 just some of them because --

5 MR. EDGAR: This says an intervenor. An  
6 intervenor is not a party.

7 MR. McMAJNS: Yes, I understand. One wonders,  
8 though, why an intervenor should be given a superior --

9 MR. EDGAR: Well, I am not saying that. I am  
10 just saying that -- I am trying to meet Ken's objection that  
11 the rule as currently written would not allow an appeal --  
12 this type of appeal by a party. That is all I am trying to  
13 say. •

14 CHAIRMAN SOULERS: Well, may I have that  
15 language read back that was in the original because I didn't  
16 understand that to be limited to intervenors. Was it?

17 JUSTICE HEHCT: It wasn't.

18 MR. HERRING: No, the original language  
19 completely says --

20 MR. McMANS: No. The original was not.

21 MR. HERRING: -- "Any sealing order, any  
22 sealing provision contained in any judgment in any order  
23 granting or overruling a motion to alter, vacate, or enforce  
24 a sealing order shall be deemed to be a separate and  
25 independent final judgment and shall be subject to an

1 immediate and independent appeal by any party or intervenor  
2 who has requested, supported, or opposed any sealing order."

3 JUSTICE DOGGETT: And that was the one thing  
4 that the co-Chairs continued to agree about. Isn't that  
5 right? Isn't that what -- wasn't that in your original  
6 report, that language?

7 JUSTICE HECHT: I think it was.

8 CHAIRMAN SOULES: Okay. How many feel that  
9 the appeal -- right of appeal should be limited to parties  
10 who are not parties to the controversy at court, as opposed  
11 to just parties that are involved in the sealings issue? I  
12 mean I don't know whether I am articulating that very well,  
13 but we say intervenors are parties that become parties  
14 interested solely in the question of sealing. That is what I  
15 am going to mean by intervenors in this question. And then  
16 the real parties in interest or the parties to the conflict  
17 is going to be decided by final judgment.

18 How many feel that the --

19 MR. MORRIS: I don't understand what Dorsaneo  
20 was doing.

21 CHAIRMAN SOULES: -- that the appeal right  
22 should be limited to intervenors and the parties should be  
23 prohibited from an interlocutory appeal?

24 Just one, two.

25 MR. SPARKS (SAN ANGELO): No, Luke, I hear

1 this differently.

2 CHAIRMAN SOULERS: Okay.

3 MR. SPARKS (SAN ANGELO): I think the concern  
4 we had last time was that you cannot determine that something  
5 is a final judgment just per se. You had the right of appeal  
6 by mandamus. And I think what Dorsaneo was doing here, we  
7 had already determined that the parties have the right of  
8 mandamus over the court's order. And that is why we leave  
9 the appeal out.

10 What you are doing here is saying the intervenor,  
11 as opposed to a party, to the intervenor it is final, it is  
12 severed, the intervenor's claim, and gives the intervenor a  
13 right of appeal as a severed final cause because they are not  
14 parties to the case and they don't have to wait till the  
15 conclusion. So technically, I think that is the mechanics we  
16 are dealing with.

17 Did I miss something, Judge Hecht? Isn't that what  
18 we were talking about last time?

19 JUSTICE HECHT: That was the -- yes. The  
20 issue was can you just make it final by saying so in the  
21 rule.

22 MR. SPARKS (SAN ANGELO): That is right. And  
23 I think what Dorsaneo is doing is saying as far as  
24 intervenors are concerned, we can't because they have no  
25 other claim.



1 MR. EDGAR: Well, we haven't addressed the  
2 issue yet as far as --

3 MR. SPARKS (SAN ANGELO): As far as parties,  
4 you still have the right of mandamus with any court order.

5 CHAIRMAN SOULES: Okay. Who is next?

6 Hadley, did you have a comment, and then Rusty.

7 MR. EDGAR: I was going to just follow up on  
8 what Justice Hecht said a moment ago. Just because a rule  
9 says it is final, I am not sure it is final. I need to think  
10 about that a little bit because you haven't disposed of all  
11 the issues and all the parties. The Government Code gives  
12 you a right of interlocutory appeal, so we can't go up there  
13 unless the statute is amended.

14 And I kind of come back to what I was thinking last  
15 time, that perhaps a right of -- or an opportunity for  
16 appellate review by mandamus should be available to the  
17 parties and should also be the only method of availability to  
18 the intervenors. I don't really know why we have to  
19 segregate -- if a party has an interest in wanting these  
20 records sealed and is going to complain of a trial court  
21 order and must proceed by mandamus, I don't know why we need  
22 to segregate the intervenor and give him a right of appeal.

23 Now, I haven't had anybody explain that to me yet.

24 CHAIRMAN SOULES: Well, the party -- the real  
25 party in interest is going to, in most cases, is probably

1 going to be an appellee. He is going to be a party to the  
2 appeal --

3 MR. EDGAR: Well, but I am talking about --

4 CHAIRMAN SOULES: -- while he is a party in  
5 the trial Court.

6 MR. EDGAR: Yes, but I am talking about let's  
7 assume we don't have an intervenor, we just have these two  
8 parties, a divorce case. One party wants to complain to the  
9 court's order on sealing. Well, as I understand it, the only  
10 method available, and even under this proposal that would be  
11 available, would be a right of mandamus.

12 Now, if that is true, then why should we give an  
13 intervenor any additional avenue of appellate review? Why  
14 not require him to go up on mandamus as well? Now, so I  
15 really don't -- I would like somebody to explain the  
16 dichotomy there.

17 JUSTICE HECHT: Well --

18 CHAIRMAN SOULES: Justice Hecht.

19 JUSTICE HECHT: -- let me just add a word. It  
20 could -- seemed like it could be either way. I mean if you  
21 had a sealing order or a refusal to seal, an order refusing a  
22 motion to seal, the judge could sever that order and then  
23 whether it was party or intervenor, it is going to be a final  
24 order, just like you would sever a summary judgment on  
25 limitations, or on a DTPA claim, or anything else.

1           And so it seems to me that if you could structure  
2 it in such a way that you could challenge the ruling of the  
3 trial judge on appeal either by appeal or by mandamus, then  
4 if you wrote the rule in such a way -- for example, Dorsaneo  
5 has put in here "impliedly severs," and that is what we were  
6 talking about last time because I don't know if you can  
7 require the trial judge to severe an order, but if you could,  
8 then it seems to me that that order would be finally  
9 appealable at the point that it is severed, just like any  
10 other order in the case. Of course, you have got a rule that  
11 doesn't -- that generally doesn't favor severances.

12           But then the next question we got into was which is  
13 the most expedient way of achieving full review of the trial  
14 court's ruling, is it by appeal or by mandamus? And there is  
15 obviously appellate consequences to which remedy that you  
16 take. For example, just pick an obvious one, on mandamus,  
17 you are not -- the jurisdiction doesn't lie to correct  
18 disputed issues of fact, and they are going to be disputed  
19 issues of fact in these cases.

20           So if you go up by mandamus and there is a great  
21 big dispute in the record, then what is the standard of --  
22 what is going to be the standard of review? And so how it --  
23 how the review is structured seems to me there is a lot of  
24 latitude there, but what happens to you after you get to the  
25 court of appeals is more consequential.

1 MR. EDGAR: Well, are you suggesting by that,  
2 then, that whether a provision is made for either mandamus,  
3 or appeal, or both, that it should apply equally to parties  
4 and intervenors, or not?

5 JUSTICE HECHT: Well, I mean --

6 MR. EDGAR: I mean I am asking the question  
7 because that was the question I had. I don't -- whether  
8 we -- whether we can -- if we can carve out some type of  
9 appellate process, it seems to me that either party should  
10 have that avenue available, rather than saying the intervenor  
11 has it but a party doesn't.

12 JUSTICE HECHT: Well, that obviously has the  
13 virtue of simplicity.

14 MR. EDGAR: And I -- and that is the question  
15 that I would like for the proponents and the antagonists to  
16 address.

17 CHAIRMAN SOULES: One thing that, I don't  
18 know, I never have heard articulated, maybe it has been. I  
19 mean if there is no right to interim appeal, that doesn't  
20 mean that the intervenors can't appeal. It just means they  
21 have to wait like everybody else until final judgment and  
22 then they can appeal and unseal the records. So if the case  
23 is ongoing, it is just a matter of delayed appeal, it is not  
24 a matter of never having appellate review.

25 JUSTICE DOGGETT: And that was what we were

1 trying to stop. We wanted, because there is a public policy  
2 interest or we wouldn't be doing this in the first place,  
3 that goes broader than the lawsuit involved, to be able to  
4 get that issue up for review, and we were aware of the fact  
5 that with one possible exception, Tom, I don't think any  
6 appellate court has ever mandamus a trial judge to unseal  
7 documents.

8 MR. LEATHERBURY: I am not aware of.

9 CHAIRMAN SOULES: So we are focusing on -- we  
10 are focusing on the pending trial period and how to get the  
11 question to the appellate court, whether that would be --  
12 whether there is a vehicle other than mandamus that could be  
13 provided.

14 Rusty.

15 MR. McMAINS: First, with regards to whether a  
16 party is included, there is nothing in the -- our definition  
17 of intervenor, just -- because we don't really define  
18 intervenor. What we say is, which is in -- on this page  
19 sheet at the hearing. It says, "A hearing shall be held in  
20 open court open for the public at which any person desiring  
21 to support or oppose the sealing of court records whether or  
22 not a party to the suit may intervene for the limited  
23 purposes."

24 Now, that means that if he is party to the  
25 suit, then he may also intervene. Okay. That is what it

1 says.

2 MR. EDGAR: That language ought to be changed.

3 MR. McMAINS: Yes. Well, I am just telling  
4 you --

5 CHAIRMAN SOULERS: Where is that, Rusty?

6 MR. HERRING: Second page, (b)(1).

7 MR. McMAINS: (b)(1).

8 That is why -- when I said everybody is an  
9 intervenor for purposes of this issue as it was  
10 contemplated when we were doing this appeal thing, but  
11 that is what it says.

12 MR. HERRING: What we could do is say "Any  
13 person who is not a party" -- "Any person not a party who  
14 desires to support or oppose."

15 CHAIRMAN SOULERS: Really what we need is two  
16 separate sentences. We can say "nonparties may intervene for  
17 the limited purpose of participating at the hearing." Strike  
18 "whether or not a party" and just say, "nonparties may  
19 intervene."

20 And it should be "desiring to" should be struck and  
21 put "may support it."

22 "Hearing shall be held in open court open to the  
23 public at which any person may support or oppose the sealing  
24 of court records." Next would be "Nonparties may intervene  
25 for the limited purpose of participating at the hearing."

1 MR. SPARKS (SAN ANGELO): Luke, what page are  
2 you on?

3 CHAIRMAN SOULES: Well, this is (b)(1).

4 MR. HERRING: The second page.

5 MR. FULLER: Would you read that again, Luke?

6 CHAIRMAN SOULES: All right. The first  
7 sentence would be "A hearing shall be held in open court,  
8 open to the public, at which any person may support or oppose  
9 the sealing of court records." Take out "desiring to" and  
10 substitute "may."

11 MR. FULLER: Got that.

12 CHAIRMAN SOULES: Then you would strike the  
13 words "whether or not a party to the suit." Now, there would  
14 be a period after "court records."

15 MR. FULLER: A period after "court records"?

16 CHAIRMAN SOULES: That is right.

17 MR. McMANS: You don't want to make the  
18 hearing open to everybody unless they intervene.

19 CHAIRMAN SOULES: I will get to that in a  
20 minute, Rusty. Then it starts -- the next sentence would  
21 start by putting in the words "Nonparties" --

22 MR. FULLER: Got you.

23 CHAIRMAN SOULES: -- "may intervene for the  
24 limited purpose of participating at the hearing."

25 MR. FULLER: Now, by that, I take it they

1 can't just show up on hearing day and say, "I want to be  
2 heard." They have got to file an intervention.

3 MR. SPARKS (SAN ANGELO): That is right.

4 CHAIRMAN SOULES: Now we have got to get back  
5 to Rusty's point, and that is we are not talking about any  
6 person. We are talking about -- how about "at which any  
7 party or intervenor may support or oppose the sealing of  
8 court records"? It is a little bit redundant, but --

9 MR. FULLER: Okay. "At which any party or  
10 intervenor"?

11 CHAIRMAN SOULES: That is a bit redundant, but  
12 it is perhaps clarifying.

13 JUSTICE HECHT: An intervenor becomes a party.

14 JUSTICE DOGGETT: Well, an intervenor becomes  
15 a party, doesn't it?

16 CHAIRMAN SOULES: Well, that is why I say it  
17 is -- that is redundant, but it is -- maybe it helps because  
18 what we are talking about if we just say "party," I am  
19 concerned that they would say that --

20 JUSTICE DOGGETT: "Any party including an  
21 intervenor."

22 CHAIRMAN SOULES: "Any party including an  
23 intervenor." "Any party including an intervenor," "including  
24 any intervenor"? Should it be that way?

25 Am I messing up?



1 Justice Doggett.

2 JUSTICE DOGGETT: I am not sure it reads very  
3 well in either event, but it may be a slight improvement.

4 MR. FULLER: Luke, as I understand the law of  
5 intervention, we don't have to give them the right to  
6 intervene here. In Texas, they can intervene. They are  
7 intervened until you strike them --

8 CHAIRMAN SOULES: Well, but --

9 MR. FULLER: -- so do we have to say that?

10 JUSTICE DOGGETT: We do need to say that, to  
11 make it clear that they have the right to intervene for this  
12 limited purpose.

13 CHAIRMAN SOULES: Okay. So the first sentence  
14 would say, "A hearing shall be held in open court open to the  
15 public at which any party, including an intervenor, may  
16 support or oppose the sealing of court records period". "And  
17 nonparties may intervene for the limited purpose of  
18 participating in the hearing."

19 Okay. Does that fix the concern of a moment ago?

20 Okay. Well, assume we do that. What is next?

21 MR. EDGAR: Well, I still have trouble about  
22 this -- making this a final judgment in a severance. I would  
23 just like to raise the question for discussion about whether  
24 or not this should be for both parties and intervenors, the  
25 right to appeal, and provide that this is an interlocutory

1 appeal. And, therefore, it puts it on a faster time track  
2 and you get over the problem of trying to argue that this is  
3 a final judgment when, in fact, it isn't.

4 MR. COLLINS: And if it is severed and the  
5 only issue relates to the sealing or unsealing, and it is  
6 severed into a new cause of action, then isn't that final as  
7 to that issue since that is the only issue to be disposed of?

8 MR. EDGAR: Well, the final judgment goes to  
9 all issues and all parties.

10 MR. COLLINS: Well, it will in that situation  
11 after the severance.

12 JUSTICE HECHT: The problem is making it  
13 interlocutory won't cure it because the right to an  
14 interlocutory appeal is governed by statute.

15 MR. EDGAR: Yes, I understand that.

16 MR. McMANS: We didn't think we could act as  
17 the Legislature. We have been accused of that before, but --

18 MR. FULLER: Well, you know, something else  
19 that bothers me in a family law context. If there is an  
20 appeal pending, let's just say of the issue of opening or  
21 sealing the records, it is conceivable this case would be  
22 over on the merits and two years later they would still be  
23 fighting over whether or not to seal or unseal the records  
24 and you ain't got no divorce.

25 JUSTICE DOGGETT: That may well be --

1 MR. FULLER: This wording disturbs me. You  
2 can't have a separate divorce.

3 JUSTICE DOGGETT: That may well be, as Sam  
4 articulated it, why Bill limited this particular appeal  
5 section to intervenors, recognizing that the parties could go  
6 up by mandamus if they felt it was essential to their case,  
7 and otherwise, they would raise it as a part of their appeal  
8 on the merits.

9 MR. McMAJNS: Let me -- let me say this: I  
10 think I have no problem with the concept of a party who has  
11 lost on a sealing order in terms of he wanted it -- was  
12 opposing the sealing, but it got sealed, that he should have  
13 to wait. I have a bigger problem with a party who tries to  
14 get it sealed with the enhanced burdens that we have placed  
15 on them and doesn't get it sealed, ain't going to have any  
16 remedy on mandamus, period, not going to get fact  
17 determinations made on a mandamus.

18 MR. EDGAR: Well, that just --

19 MR. McMAJNS: That just basically means if you  
20 take parties out, then a party moving to seal has never an  
21 appellate remedy, in my judgment. Now, that is -- the other  
22 way, I don't see any particular injury to the party who, if  
23 he wants -- if you want to wait because they are being  
24 sealed, it is something he may want to complain about later  
25 on or whatever, but that is -- he can do that at a later

1 time. But the party to whom a sealing order is denied has no  
2 effective remedy by mandamus, in my judgment.

3 MR. EDGAR: Well, the converse argument of  
4 that was made in discovery a long time ago and the court, by  
5 its lucid or more relaxed construction of abuse of  
6 discretion, has given both parties, in discovery, whether it  
7 is denied or granted, a mandamus.

8 MR. McMAINS: Yes, but they -- but not in  
9 terms of -- not on the issue of where there is a fact  
10 question to be determined.

11 MR. EDGAR: Well, I understand that.

12 MR. McMAINS: And that is what I am saying.  
13 That is all what this does. All this rule -- what this rule  
14 does, from start to finish, is impose very specific burdens  
15 with regards to establishing fact questions by preponderance  
16 of the evidence. What that means is that once you have  
17 requested a sealing order and you don't get it, that is it,  
18 because it is going to be open to the public. There is no  
19 point. You don't have any other remedy other than by an  
20 immediate mandamus, and you can't possibly determine whether  
21 you have established your issues by a preponderance of the  
22 evidence on a mandamus --

23 MR. EDGAR: True.

24 MR. McMAINS: -- even under the relaxed  
25 notions of abuse of discretion.

1 MR. COLLINS: But isn't that why the original  
2 language, in a sense of fairness, is preferable to this, the  
3 language on the single sheet?

4 MR. McMains: Well, now, the language on  
5 the -- on this sheet gives the party suffering the sealing.  
6 I am actually going at it the other way.

7 MR. COLLINS: Oh, I understand.

8 MR. SPARKS (SAN ANGELO): But, Rusty, right  
9 now today as we sit here, you request a sealing order and it  
10 is denied.

11 MR. McMAJNS: Right.

12 MR. SPARKS (SAN ANGELO): What right you got?  
13 Mandamus.

14 MR. McMAJNS: That is right.

15 MR. SPARKS (SAN ANGELO): That is it.

16 MR. McMains: I agree.

17 MR. SPARKS (SAN ANGELO): Now, what -- all we  
18 are saying here is the parties to the case -- and I think  
19 that is why Dorsaneo wrote it this way -- we can't legislate.  
20 We cannot write law. And that is already there.

21 What he is saying is if it won't interfere with the  
22 trial of the case, the parties are bound by whatever rules  
23 you have got. It can't delay the case sealing or unsealing,  
24 either way. But as far as intervenors, public rights to  
25 access, that may take longer than the trial. That is what we

1 were just talking about. That is separate and apart from  
2 this. I mean I --

3 MR. McMAJNS: I don't have any problem with  
4 that. I am just saying --

5 MR. SPARKS (SAN ANGELO): I just don't think  
6 we can --

7 MR. McMAJNS: -- that Hadley's question is  
8 well put.

9 MR. SPARKS (SAN ANGELO): I don't think we can  
10 solve your problem no matter what we do because we can't  
11 legislate.

12 MR. McMAJNS: No, that is -- but that is not  
13 true.

14 CHAIRMAN SOULES: Well --

15 MR. McMAJNS: In terms of making it -- making  
16 the entire issue a severable claim with regards to sealing --

17 CHAIRMAN SOULES: That is the point right  
18 there.

19 MR. McMAJNS: -- that is doable.

20 CHAIRMAN SOULES: Yes.

21 MR. McMAJNS: And it doesn't matter whether you are  
22 a party or an intervenor to have that determined. And any  
23 appeal determination, frankly, based on the single -- on a  
24 particular notice of hearing, ought to bind everybody who had  
25 intervened or was there or had opportunity to intervene at

1 that -- at that time.

2 Now, postjudgment is a different thing. It seems  
3 to me that we are dealing -- we are basically dealing with  
4 two different contexts, one prejudgment, one postjudgment.  
5 We are now dealing -- and really what I had formulated kind  
6 of a category, our real problem was the prejudgment because,  
7 frankly, I think that in a postjudgment context, given a  
8 right to intervene once it is disposed of, it is a final  
9 judgment. That is just like a turnover order and it is --  
10 there ain't nothing left pending, and that probably is  
11 appealable now as a final judgment.

12 So what we are talking about is prejudgment  
13 sealing, who gets to be -- is there going to be an  
14 intermediate remedy, who is going to have it? And the  
15 question Hadley posed is why should the public have more  
16 rights than the parties.

17 CHAIRMAN SOULES: That would be different from  
18 any severance concept of theories that I know of anywhere in  
19 the law because when there is a severed item, it is a cause  
20 of action. We don't severe issues. You cannot severe  
21 issues. You must severe complete causes of action. And when  
22 you do, you severe all the parties to that dispute with the  
23 cause. And certainly the parties at interest, the real  
24 parties at interest, are parties to the sealing dispute.

25 So if you severe the sealing dispute as a cause of

1 action, the real parties of interest are severed in that  
2 severance as well. And if that becomes final, then can't  
3 everybody appeal? I mean if we are really going to use the  
4 concept of severance, I guess we are going to use -- unless  
5 we are going to create a new concept of severance, we are  
6 going to use the classical one.

7 MR. McMANS: The party moving to seal is the  
8 party who has the interest anyway, is going to be a party --  
9 I mean if he is successful in the sealing, he is going to be  
10 a party to the appeal. He is going to be the one saying,  
11 "Don't turn this around." He is going to have to be in the  
12 appeal anyway if he gets an order sealing.

13 CHAIRMAN SOULES: That is what I meant  
14 earlier, he is going to be an appellee if he is not an  
15 appellant. And in order to try to capture the concept of  
16 severance without really trying to do anything beyond that by  
17 way of suggestion, but just to try to capture that, I wrote  
18 these words that says, "The motion and proceedings constitute  
19 a separate cause of action."

20 Now, the court can say that. They have told  
21 us forever what causes of action are. And it is sometimes  
22 hard to really tell one from another, but they can certainly  
23 say what that is. "The motion and proceedings constitute a  
24 separate cause of action, which is automatically severed and  
25 appealable by the order disposing of the motion."



1           Now, there is a concept. Do we want it? Do we  
2 like it? Does it make sense? I don't know.

3           MR. BEARD: Are we talking about changing our  
4 protective order practice?

5           CHAIRMAN SOULES: Well, we are not there yet.

6           MR. BEARD: Well --

7           CHAIRMAN SOULES: Well, we have changed --  
8 yes, we are. That is -- we are.

9           MR. BEARD: In other words, if you get a  
10 protective order, that is really a sealing order and you have  
11 got to go through all that? I thought the other day that we  
12 did not change that.

13          CHAIRMAN SOULES: Not yet, not yet.

14          MR. SPARKS (SAN ANGELO): There are many times  
15 I get documents that are under protective order that are not  
16 sealed. I have got them, but they are not sealed. I just  
17 can't give them to anybody.

18          MR. BEARD: Well, the question is are we  
19 trying to take this -- is the effect of temporary sealing  
20 whether you get that?

21          MR. SPARKS (SAN ANGELO) There is a difference  
22 between sealing and protecting. I haven't got to protect it  
23 yet, but I want to.

24          CHAIRMAN SOULES: Can we get any help from  
25 either Justice Hehct or Justice Doggett on what kind of a

1 procedural vehicle do we contemplate here, or is it just  
2 going to be a rule that says we are going to do this and not  
3 worry about whether it is really a severance or what?

4 MR. SPARKS (SAN ANGELO): I like the cause of  
5 action.

6 JUSTICE HECHT: Well, I don't think it is  
7 necessary to spell out our theory of how come this is an  
8 appealable order.

9 MR. McMAINS: Right.

10 JUSTICE HECHT: It seems a little defensive to  
11 me to say, "Just in case somebody out there doesn't think  
12 this is appealable, here is why we think it is." I mean it  
13 seems like we ought to just say it and leave it at that, but  
14 I don't have strong feelings about it. And it sounds like  
15 that appeal -- the review by appeal is the way to go rather  
16 than by mandamus. And in all fairness, every party ought to  
17 have it.

18 And so it is not too much different from the  
19 language that was in the first proposal. Of course, that  
20 doesn't get back to Rusty's original comment that led into  
21 all of this, and that is do we want -- is this going to  
22 result in a flood of appeals.

23 MR. McMAINS: Yes. That is a separate  
24 problem.

25 JUSTICE HECHT: That is a separate problem.

1 MR. McMains: But I do think, like I say, I  
2 have less problems with the notion of the -- of a party being  
3 aggrieved by an order sealing during the pendency of the  
4 case.

5 CHAIRMAN SOULES: John Collins, you had your  
6 hand up.

7 MR. COLLINS: I have a motion.

8 CHAIRMAN SOULES: All right.

9 MR. COLLINS: I move that we adopt the  
10 original language found understand Tab C dealing with the  
11 appeals, and that is on Pages 3 and 4 of the original  
12 proposal, D, appeal, and E. And the only -- the only two  
13 words that I would add would be in the third line -- or the  
14 bottom line on Page 3, the phrase "a sealing order shall be  
15 deemed," right there I would say "a sealing order shall be  
16 severed and deemed." And that would be the only change that  
17 we would make in the original language. It simply severs  
18 whatever order the courts make. As I interpret that, any  
19 party, any person appearing, anybody could appeal.

20 CHAIRMAN SOULES: Give me the language again.  
21 We are looking on Tab C, Page 3.

22 MR. COLLINS: Page 3. This is the original  
23 language, Page 3 down at the bottom.

24 MR. SPARKS (SAN ANGELO): We got it.

25 MR. COLLINS: All right. Luke, at the bottom

1 line, beginning there in the center of the bottom line, "or  
2 enforce a sealing order shall be deemed," the new language  
3 will read "a sealing order shall be severed and deemed."  
4 After the word "be," just put "severed and deemed."

5 MR. FULLER: It is just a sealing order that  
6 constitutes a severance and not --

7  
8 (At this time there was a  
9 brief discussion off the record, after which time the  
10 hearing continued as follows:)

11  
12 CHAIRMAN SOULES: Okay. Thank you, Judge.

13 Okay. The appeal provision then would be -- would  
14 read any sealing order -- "any sealing provision contained in  
15 any judgment and any order granting or overruling a motion to  
16 alter, vacate, or enforce a sealing order shall be deemed to  
17 be" --

18 Sam, I think one problem we are having is -- and  
19 maybe I am not understanding Justice Hecht's comment, well,  
20 we don't need to try to pick up something like severances and  
21 anchor -- and anchor this into. Just say it is appealable,  
22 period, or John.

23 And it really isn't a severance probably because if  
24 you look back up into the list of things that you are  
25 modifying, you are talking about a sealing provision

1 contained in the judgment. And you are not -- we are not  
2 going to severe that.

3 JUSTICE DOGGETT: It might --

4 CHAIRMAN SOULES: Pardon me.

5 JUSTICE DOGGETT: Luke, it may be necessary to  
6 use the term "severe." I think what we were --

7 MR. COLLINS: I think everybody is familiar  
8 with that terminology.

9 JUSTICE DOGGETT: -- we were talking about was  
10 not going the additional step of saying it is a separate  
11 cause of action, that that rationale is probably not  
12 necessary. But just saying it is deemed and severed,  
13 "severance" is a concept that the court would be familiar  
14 with.

15 CHAIRMAN SOULES: Okay. I got you.

16 What about, Your Honor, this -- it says "Any  
17 sealing provision contained in any judgment." Does that need  
18 to be dealt with somehow separately? That doesn't seem to me  
19 to fit that concept of severance, but maybe it does. Maybe  
20 it is.

21 JUSTICE HECHT: Oh, yes. That shouldn't be  
22 severed. You don't sever that.

23 CHAIRMAN SOULES: Why do we need to say "any  
24 sealing provision containing any judgment" in here, because  
25 that is -- that is appealable as a part of the final

1 judgment. We could just leave that out.

2 JUSTICE HECHT: Well, but the time is -- what  
3 about timing?

4 JUSTICE DOGGETT: If it is contained in the  
5 final judgment as distinguished from a specific order, that  
6 one particular aspect of the judgment can be appealed under  
7 this. The parties might choose not to appeal the final  
8 judgment.

9 MR. EDGAR: We can't hear -- we can't hear  
10 down here.

11 CHAIRMAN SOULES: Okay. Justice Doggett is  
12 helping us understand or helping me understand, anyway,  
13 something here about this "any sealing provision contained in  
14 any judgment," what if the sealing provision is right there  
15 in the final judgment. And I didn't understand the meaning  
16 of that or the full perforce of it and I had asked a question  
17 to get some explanation. Judge Doggett was giving that to  
18 us.

19 JUSTICE DOGGETT: And I was just saying that  
20 the concern there was you might -- and I think this is, in  
21 fact, what has happened in the two reported cases, you have  
22 an agreed judgment and the parties agree to the judgment, but  
23 the intervenor wants to appeal that section concerning  
24 sealing even though it is not contained in a separate order.  
25 That is why the language is there.

1 MR. EDGAR: And it would seem to me that there  
2 might be a situation in which one of the parties might want  
3 to appeal only that part of the judgment to which the sealing  
4 order applies --

5 JUSTICE DOGGETT: Right.

6 MR. EDGAR: -- and this would provide for that  
7 as well.

8 JUSTICE DOGGETT: I think that language is  
9 okay as it was originally included there.

10 Are you content with it, Ken?

11 MR. FULLER: Yes.

12 CHAIRMAN SOULES: I don't have any problem  
13 with it except how it fits the concept of severance, and  
14 maybe I am just --

15 MR. McMAINS: The additional problem, though,  
16 is the notion of severance we had with regards to severing  
17 this claim is that when you have encompassed, which this  
18 particular provision does, motions to alter, overrule,  
19 vacate, then you are talking about the claim cropping up, and  
20 even though it supposedly went over there, it got back in  
21 here again and it just keeps flowing. And that is what  
22 doesn't make any sense from a severance standpoint.

23 What I think we were trying to do, by way of the  
24 severance, was to basically say we are only going to have one  
25 hearing or anticipate basically we are going to have one

1 hearing on the sealing order before the judgment, and I am  
2 talking about this aspect of it, and that is subject to being  
3 appealed.

4 CHAIRMAN SOULES: The entire litigation  
5 process could be taking one newspaper at a time coming in to  
6 moving to vacate. The parties could litigate this again, and  
7 again, and again.

8 MR. McMANS: I understand they can under this  
9 proposal.

10 CHAIRMAN SOULES: Yes.

11 MR. McMANS: What I am saying, what I think  
12 we -- what I think Bill was trying to do, as a lead-in, was  
13 to basically say "Look. We have given the notice, we have  
14 jumped through the hoops. People have had a chance to come  
15 in and reverse the sealing order."

16 We have got two different situations, one before  
17 judgment, one after judgment. Now, I guess a third, during  
18 judgment, or in the judgment, which I really treat as being  
19 postjudgment in the sense that it is contained within that.  
20 In the prejudgment phase, it just really -- this is the thing  
21 I am worried about is this continuing sequencing of appeals  
22 that you have that is authorized by just continuing to  
23 revisit the issue, and either way, I mean whether it is  
24 granted or denied.

25 And this notion of severance doesn't really fit



1 well unless what you severe is the issue of sealing. Once  
2 that is severed there, it is going to determine everybody's  
3 rights. And assuming that you have complied with the notice  
4 provisions and did everything so that all of that stuff is  
5 not void, everybody has got to be diligent enough to  
6 intervene at that time --

7 CHAIRMAN SOULES: Well -- I am sorry.

8 MR. McMANS: -- before judgment.

9 CHAIRMAN SOULES: Excuse me.

10 MR. McMANS: I mean that is -- that was the  
11 notion we were talking about in terms of giving an immediate  
12 appellate remedy to anybody who is paying attention.

13 CHAIRMAN SOULES: Tom Leatherbury.

14 MR. LEATHERBURY: Well, Rusty, I just wanted  
15 to point out that the unique thing about sealing is that the  
16 need for sealing, if once recognized by the court, can  
17 evaporate over time, so you can have a situation where a  
18 sealing order is, in fact, appropriate to be entered before  
19 judgment, but at some time before judgment, something  
20 happens, the cat gets out of the bag some other way, there is  
21 other publicity about it, and it is no longer appropriate for  
22 the sealing -- the court to enforce that sealing order.

23 So you want a situation where even the same parties  
24 and certainly a different party who wasn't at the first  
25 hearing, can go back and reapply to the court and say,

1 "Circumstances have changed, even though it is still before  
2 judgment."

3 I just wanted to know if you had envisioned that  
4 circumstance because it is something that happens quite  
5 frequently.

6 MR. McMains: No, I understand that. And I --  
7 I mean I understand that is the concern. And the real  
8 concern and the question is how much burden -- and, of  
9 course, we have no earthly idea, but how much burden are we  
10 willing to put on the system? If we are talking about  
11 putting this in the rules for two years, and for two years we  
12 are going to say everybody has got an unqualified right to go  
13 start this litigation and an endless succession of appeals,  
14 we are going to be back here before two years, I guarantee  
15 you, if that were to happen.

16 CHAIRMAN SOULERS: I wrote this down that as a  
17 bit of a stopgap on C, continuing jurisdiction, continuing --  
18 "The court that renders a sealing order maintains continuing  
19 jurisdiction to enforce, alter, or vacate an order," and I  
20 thought it ought to say, "as a result of changed  
21 circumstances," which is sort of the test for modifying child  
22 support or custody.

23 Are we going to revisit again and again, just  
24 because the Statesman decided not to get involved when the  
25 Chronicle did in the first hearing, they want to come in now

1 and move to vacate and they want to retry the same  
2 circumstances they have had notice of. I don't know.

3 MR. McMANS: Now, the problem with that is --  
4 and I -- and I sympathize totally with that. What I am  
5 trying to do is trying to talk about what Bill and my basic  
6 notions were that we really do have two different  
7 circumstances, one that we have got litigation that is  
8 ongoing, and it seems to me that one of the problems is that  
9 the parties are going to be involved in their own litigation  
10 and should they have to fight everybody and his mother over  
11 some of these other issues to distract them from that piece  
12 of litigation. And all the solo practitioners aren't going  
13 to be too happy about that --

14 MR. SPARKS (SAN ANGELO): Well --

15 MR. McMANS: -- when they spend their time  
16 doing that.

17 CHAIRMAN SOULES: Let me let Rusty finish and  
18 then I will get you.

19 MR. McMANS: Second, now, once you get to the  
20 judgment, now, it may be that some years later, I mean this  
21 person -- a person involved in this particular proceeding may  
22 be running for public office. Many, many years later, you  
23 want to go back in and do something else. Postjudgment is a  
24 different issue and you shouldn't have a changed circumstance  
25 requirement for whatever the sealing is there and here.

1           So the only window we are really talking about and  
2 what I was attempting to kind of strike a balance, is let's  
3 not burden the system with one appeal of the sealing issue  
4 before judgment. After judgment, every time you want to go  
5 in, whoever it is, for whatever reason, they can go try and  
6 appeal that. And that doesn't bother me as much.

7           First of all, I think that is an appealable order  
8 if we give the courts continuing jurisdiction. I think once  
9 somebody wants to go in, go to the trouble of filing an  
10 intervention, go try and get it done, and he loses, doesn't  
11 get it undone, goes up to the court of appeals, I don't think  
12 there is a problem with that.

13           CHAIRMAN SOULES: Sam Sparks, San Angelo.

14           MR. SPARKS (SAN ANGELO): Just a point of  
15 order, and I agree with what Rusty is saying and I hear it.  
16 We have a motion on Subsection D made by Mr. Collins to take  
17 the original draft on appeal, insert on the third line  
18 "enforce a sealing order shall be severed and deemed," and  
19 then continue with the original language. That has been  
20 seconded. If it hasn't, I will second it, and I think  
21 Rusty's discussion is on C, continuing jurisdiction. So I  
22 think we should vote on appeals and then do something with  
23 continuing jurisdiction, which is a separate question.

24           CHAIRMAN SOULES: Discussion on --

25           MR. SPARKS (SAN ANGELO): What I am saying is

1 point of order, we are discussing another section other than  
2 the section --

3 CHAIRMAN SOULES: Okay. My perception was it  
4 was a part of the same thing, and I don't know whether that  
5 is right or wrong.

6 MR. SPARKS (SAN ANGELO): Well, appeal is a  
7 different time. Continuing jurisdiction is the right of  
8 appeal when you do it. They are separate questions.

9 MR. McMAJNS: No, they aren't separate  
10 questions.

11 CHAIRMAN SOULES: Rusty says --

12 MR. SPARKS (SAN ANGELO): I want to severe D  
13 and C.

14 CHAIRMAN SOULES: All right. Rusty says they  
15 are not separate and if they -- Rusty, make your remarks. If  
16 you will, address them to the motion, which is whether to use  
17 for the appeal provision the proposal that has now been moved  
18 and seconded. And whatever discussion there needs to be  
19 about that, let's have it.

20 MR. McMAJNS: All right. My point is that  
21 this -- that the section on the appeal says "any sealing  
22 order" -- "any sealing provision contained in any judgment  
23 and any order granting or overruling a motion to alter,  
24 vacate, or enforce a sealing order shall be severed and  
25 deemed," and then it goes on to be a separate and independent

1 final judgment. The point is every order on a motion to  
2 vacate or whatever, it is a -- there is nothing to limit in  
3 any fashion whatsoever a continuing sequence.

4 MR. SPARKS (SAN ANGELO): Yes, there is. You  
5 just get one appeal on that. The only way you have a number  
6 of appeals --

7 MR. McMAINS: No.

8 CHAIRMAN SOULES: Wait a minute. You-all have  
9 got to talk --

10 MR. McMAINS: Wrong --

11 CHAIRMAN SOULES: You-all are off the record.  
12 Court reporter stop.

13 Now, who wants to speak? It can be Rusty or it can  
14 be Sam or it can be John.

15 John has got his hand up. He can speak.

16 MR. COLLINS: Okay. I have got one quick  
17 comment.

18 Rusty, right now there is no limits on the number  
19 of mandamus orders that you can take from discovery right  
20 now. That is not being abused.

21 MR. McMAINS: The hell it isn't.

22 MR. COLLINS: Well, in my experience -- in my  
23 experience it is not, in my practice it is not, Rusty, and so  
24 I don't think we are going to be able to cure every  
25 conceivable ill here. I mean we have been knocking discovery

1 around now in this state for 20 years and we ain't anywhere  
2 close to solving the problem. So I think we have got to get  
3 something that we can work from, something that we can start  
4 with.

5 And I move the question.

6 CHAIRMAN SOULES: Hadley.

7 MR. EDGAR: I just wanted to raise -- I have  
8 no problem with the question. I just -- the wording of the  
9 question is the only thing I would like to direct my comments  
10 to.

11 I think that when you say, "shall be deemed a  
12 separate and final -- independent final judgment," we use the  
13 term "final judgment" in this state and we all know what that  
14 means. And, also, "shall be subject to immediate and  
15 independent appeal," I think to me is superfluous, and I  
16 would suggest that we just change the language to say, "shall  
17 be severed and deemed a final appealable judgment by any  
18 party." That says everything we want to say and doesn't add  
19 a bunch of words that nobody ever uses.

20 CHAIRMAN SOULES: Okay. It is John's motion.  
21 Is that an acceptable --

22 MR. COLLINS: I second that amendment.

23 CHAIRMAN SOULES: All right. Read the words  
24 that we are fixing to vote on.

25 MR. EDGAR: At the bottom of --

1 CHAIRMAN SOULES: Read the entire -- read the  
2 entire -- from starting with the word "appeal colon".

3 MR. EDGAR: "Appeal: Any sealing order, any  
4 sealing provision contained in any judgment and any order  
5 granting or overruling a motion to alter, vacate, or enforce  
6 a sealing order shall be severed and deemed a final comma  
7 appealable judgment by any party or intervenor who has  
8 requested", et cetera, et cetera, on to the end of that  
9 paragraph.

10 MR. COLLINS: That is acceptable.

11 CHAIRMAN SOULES: All right. Who has got a  
12 clean one of these they can mark up that way for the Chair?

13 MR. DAVIS: Let's vote on it.

14 CHAIRMAN SOULES: Somebody -- I just want -- I  
15 just want one marked up right now that I can read.

16 MR. FULLER: Yes. Will you read it one more  
17 time, Luke?

18 CHAIRMAN SOULES: Okay.

19 MR. FULLER: Some of us don't have copies  
20 here.

21 CHAIRMAN SOULES: Okay. I am going to read  
22 it. This will be D, Appeal. All right. This is going to go  
23 into Lefty's 76(a) at --

24 MR. HERRING: At D.

25 CHAIRMAN SOULES: -- at D.



1 MR. HERRING: Between C and D, we don't have  
2 anything in now.

3 CHAIRMAN SOULES: Between the current C and R  
4 on the last -- next to the last pages. D, Appeal. "Any  
5 sealing order comma any sealing provision contained in any  
6 judgment comma and any order granting or overruling a motion  
7 to alter comma vacate comma or enforce a sealing order shall  
8 be severed and deemed a final appealable judgment."

9 MR. FULLER: Asking for point of  
10 clarification --

11 MR. EDGAR: "As to any party or intervenor,"  
12 and then continue on to the end of that paragraph.

13 CHAIRMAN SOULES: "Which may be appealed."

14 MR. EDGAR: No. Just it will be deemed a  
15 final appealable judgment, and then if it is a final  
16 appealable judgment, people can appeal it or they can just go  
17 on about their business.

18 CHAIRMAN SOULES: It is going to be so deemed  
19 by a party?

20 MR. COLLINS: Yes.

21 MR. SPARKS (SAN ANGELO): It is not deemed by  
22 a party.

23 CHAIRMAN SOULES: Well, that is what this  
24 language says.

25 MR. EDGAR: You are right. "Shall be deemed a

1 final appealable judgment."

2 CHAIRMAN SOULERS: "Which may be appealed."

3 MR. EDGAR: "Which may be appealed." Yes.

4 Thank you.

5 CHAIRMAN SOULERS: "Which may be appealed by  
6 any party or intervenor who has requested, supported, or  
7 opposed any sealing order period". And then the second  
8 sentence of that and the third sentence of that, which second  
9 and third sentence make up the entire balance of the  
10 paragraph, are unchanged.

11 Okay. That is the motion. It has been seconded.

12 MR. FULLER: Okay. Now, clarification before  
13 we vote on it. I want to ask a question, not a -- not a  
14 criticism, but a question. My reading of what you are  
15 proposing does not give a person who had been denied a -- who  
16 has been denied a sealing order the right of appeal.

17 CHAIRMAN SOULERS: It does. It says -- this  
18 gives -- this is mutual.

19 MR. FULLER: Okay. You are assuring me it is  
20 a mutual right of appeal.

21 CHAIRMAN SOULERS: Well, it says, "granting or  
22 overruling."

23 MR. McMANS: That is granting or overruling a  
24 motion to vacate. He is talking about the sealing order, I  
25 think, where it says "sealing order," Luke. The question is

1 does that mean an order sealing it or does that mean an order  
2 on the sealing issue?

3 CHAIRMAN SOULERS: Let me say --

4 MR. COLLINS: I think the original intent was  
5 to give everybody the right to appeal.

6 MR. MORRIS: Down there in the bottom line,  
7 Luke, you could put "motion to seal or alter" --

8 CHAIRMAN SOULERS: Hold on. Hold on just a  
9 moment, please. Let me take them one at a time because we  
10 are down to -- we are down to real particularities now.

11 Who wants to speak? Lefty, did you have something?

12 MR. MORRIS: I was just going to say there in  
13 the bottom line, put "motion to seal comma alter," and just  
14 continue on. That should take care of that.

15 MR. FULLER: I concede it is mutual with that  
16 language.

17 MR. SPARKS (SAN ANGELO): I don't think you  
18 can --

19 MR. COLLINS: What did you do, Lefty? Say  
20 that again.

21 MR. MORRIS: I just added the word "seal."  
22 "Motion to seal comma alter comma vacate."

23 MR. HERRING: Maybe we ought to say "motion to  
24 seal or to alter," otherwise it would be --

25 MR. MORRIS: All right. Put "motion to seal

1 or to alter."

2 MR. HERRING: Yes.

3 MR. COLLINS: That is acceptable.

4 CHAIRMAN SOULS: Okay. So the -- I am going  
5 to read the first sentence again. The rest of it is all  
6 right. So we have it one place in the record from beginning  
7 to end.

8 "D, Appeal: Any sealing order comma any sealing  
9 provision contained in any judgment comma and any order  
10 granting or overruling a motion to seal comma" --

11 MR. MORRIS: "Or to."

12 CHAIRMAN SOULS: -- "or to alter comma vacate  
13 comma or enforce a sealing order shall be severed and deemed  
14 a final appealable judgment which may be appealed by any  
15 party or intervenor who has requested comma supported comma  
16 or opposed any sealing order period".

17 Okay. That is the motion.

18 Gilbert Adams.

19 MR. ADAMS: I have got a suggestion. What  
20 about -- what about saying, "shall be deemed severed," rather  
21 than "shall be severed and deemed." It saves the necessity  
22 for filing a separate motion.

23 CHAIRMAN SOULS: Okay. Is that all right,  
24 John?

25 MR. COLLINS: Yes, sir.

1 MR. EDGAR: How does that read now?

2 CHAJRMAN SOULES: All right. I am going to do  
3 it again. Is there anybody else got any small changes?

4 MR. BEARD: I want to say I think that Rusty's  
5 point is well taken that there should be only one bite at the  
6 apple here during the trial of this case except for good  
7 cause shown, to let one newspaper after another, or  
8 whoever --

9 CHAIRMAN SOULES: All right. You can make  
10 that motion next.

11 MR. BEARD: All right.

12 CHAIRMAN SOULES: I have got a point of order  
13 that I have got to nail down and all I am doing here is  
14 getting Collins' words like they are supposed to be before we  
15 vote. I guess I am permitted to do that even under the --  
16 questions haven't been called.

17 Okay. Now, read it again. We want it right next  
18 to our vote the way we pass it, and so we will try to get it  
19 there again. If we don't, we will keep working at it.

20 "Any sealing order comma any sealing provision  
21 contained in any judgment comma and any order granting or  
22 overruling a motion to seal comma or to alter comma vacate  
23 comma or enforce a sealing order shall be deemed severed and  
24 a final appealable judgment comma which may be appealed by  
25 any party or intervenor who has requested comma supported

1 comma or opposed any sealing order period".

2 MR. COLLINS: That is correct.

3 CHAIRMAN SOULES: Anything else on wording?

4 MR. BISHOP: "Shall be deemed severed in a  
5 final appealable judgment." Does that make sense?

6 CHAIRMAN SOULES: Anything else on wording?

7 All right. Those in favor show by hand.

8 Two, three, four -- let me start over again. One,  
9 two, three, four, five, six, seven, eight, nine, 10 -- there  
10 is 11 votes for.

11 Against? One, two votes, three votes, four  
12 votes -- four votes only against.

13 Eleven to four to include Paragraph D between C and  
14 E in the draft that Lefty and Chuck have provided us.

15 Okay. What is is next on sealing court records?

16 MR. HERRING: Well, we haven't --

17 MR. MORRIS: Let's do C.

18 MR. HERRING: -- we haven't done C and that  
19 comes back to now Rusty's question.

20 In light of this D, Rusty, what do you want -- what  
21 do you want to do about C?

22 MR. McMAINS: Well, at that point, it doesn't  
23 make any difference. You have just given them a right to  
24 appeal to every goddamn order you can imagine.

25 MR. HERRING: Well, in light of that then I

1 move that we adopt C.

2 MR. McMAINS: It won't matter what you put  
3 down there.

4 MR. HERRING: In light of that, then I would  
5 move that we adopt C.

6 MR. COLLINS: Which C do you want to adopt? C  
7 as done by you, Chuck?

8 MR. HERRING: C as we had read it out when we  
9 started this discussion earlier this morning, which is C as  
10 appears in the draft, you know, in the draft circulated with  
11 the deletion of the language on the third line, which read  
12 "Notwithstanding the rights of appeal provided in this rule."  
13 That is the third line from the bottom. We would delete that  
14 and put a capital A. And, otherwise, it reads the same as it  
15 appears in the multipage draft handed out.

16 CHAIRMAN SOULES: All right. Then is there no  
17 limit to the number of motions and appeals for motions  
18 regarding sealed records during the course of the pendency of  
19 a case? We might as well say it if that is what we are --

20 MR. COLLINS: That is correct.

21 CHAIRMAN SOULES: -- if we are saying it,  
22 let's say it.

23 MR. BEARD: That is what it says.

24 MR. COLLINS: I think that is correct,  
25 Mr. Chairman, because the circumstances are going to differ

1 and change with each case and we can't anticipate right now  
2 what may or may not come up during the course of the case.

3 CHAIRMAN SOULES: Okay.

4 MR. COLLINS: We are not talking about  
5 traditional litigation here between two parties. We are  
6 talking about press, public members, other interested  
7 parties, intervenors. And so the answer to the question is,  
8 yes, there are unlimited appeals right now.

9 CHAIRMAN SOULES: Let me have another -- let  
10 me ask a slightly different question on that. Are we saying  
11 then that even -- all right. The motion to seal is filed and  
12 posted under the rule, and the hearing is held, and the  
13 ruling is made, and the Statesman, Austin Statesman, didn't  
14 come. Then, whatever, there is an appeal or not an appeal.  
15 Then the -- in the same litigation, with nothing changed  
16 whatsoever, the Statesman shows up days or weeks later and  
17 presents for determination the exact same question decided by  
18 the trial court the first time that they had public notice  
19 of, but they file a motion to alter. No change has occurred  
20 that they can show.

21 MR. MORRIS: We have got a free pleading  
22 provision already that I think that would apply to.

23 MR. EDGAR: Mr. Chairman --

24 CHAIRMAN SOULES: What if it doesn't?

25 MR. EDGAR: Mr. Chairman --



1 CHAIRMAN SOULERS: Yes, sir.

2 MR. EDGAR: -- we -- there is some authority  
3 that would give rise to the application of a compulsory  
4 intervention and, thus, impose claim preclusion in a case  
5 like that. And if they had notice and failed to take  
6 advantage of it, then res judicata should apply and bar the  
7 relitigation of that issue.

8 MR. DAVIS: And if there is no --

9 MR. EDGAR: Well, that doesn't bother me.

10 MR. COLLINS: I second Chuck's motion, if that  
11 has not been done.

12 CHAIRMAN SOULERS: Well, suppose it is a good  
13 motion, but the parties that tried it the first time shanked  
14 it. That frivolous pleading doesn't help there. I don't  
15 care. I just want us to know -- very plainly to state what  
16 we are doing --

17 MR. MORRIS: Let me point out --

18 CHAIRMAN SOULERS: -- so that there is some  
19 guidance on it.

20 MR. MORRIS: -- our motion, this has already  
21 passed.

22 CHAIRMAN SOULERS: Yes.

23 MR. MORRIS: Everything before you has already  
24 been voted on, and passed, in sealed, and all we have asked  
25 to do is to amend C by striking the clause "Notwithstanding

1 the rights of appeal provided in this rule period", and then  
2 putting a capital A. That is all.

3 CHAIRMAN SOULES: Moved.

4 Seconded? Was it seconded, Lefty?

5 MR. MORRIS: Yes.

6 MR. HERRING: Second.

7 CHAIRMAN SOULES: Moved and seconded.

8 All in favor say "Aye."

9 (RESPONDED AYE)

10 CHAIRMAN SOULES: Opposed?

11 Okay. That is done.

12 C will be, then, included in the draft of -- just  
13 as it is printed on Lefty's February 16 draft, except the  
14 words "notwithstanding," all the way down through "rule" will  
15 be deleted in the fourth line, and A will be capitalized and  
16 that change will be made.

17 MR. FULLER: Luke, question.

18 CHAIRMAN SOULES: Ken Fuller.

19 MR. FULLER: I know we have dealt with this  
20 from the standpoint of unsealing records, but we are  
21 operating under the general mandate of the Legislature to  
22 enact rules governing the sealing of court records.

23 And my question to the Committee or to the Chairman  
24 is this: Does this rule, as we have presently enacted it or  
25 written it and are going to recommend it to the court, deal

1 with the standing of third parties who want to come in and  
2 seal these records?

3 We have talked about unsealing them. Now, have we  
4 dealt with the grandmother or the grandfather who doesn't  
5 want you talking about their mentally retarded 18 year old  
6 who sexually assaulted someone and they want to come in and  
7 seal?

8 CHAIRMAN SOULES: I don't know. I guess it  
9 is, you know --

10 MR. FULLER: Well, I raise that question  
11 because I think it is part and parcel of the same thing.

12 CHAIRMAN SOULES: David Beck.

13 MR. BECK: I would like to say something for  
14 the record, and the first time I saw this proposal is this  
15 morning because I could not attend the meeting last week. I  
16 am not opposed to what we have done in concept, but I am very  
17 troubled about the way we have done it. This represents a  
18 very material change in our Rules of Civil Procedure and our  
19 general practices.

20 The bench and the bar have not seen this, to my  
21 knowledge. The first time this was ever presented to the  
22 general Committee was at the meeting last week with the  
23 exception of the subcommittee that was working on this, and I  
24 think they have done an excellent job in working on it, but  
25 what I am concerned about is the potential problems that we

1 may not even anticipate, like John Collins was saying.

2 We are trying to write a rule that applies in all  
3 cases, and I notice there is some references in the rule to  
4 public safety and health, but we use some terminology in that  
5 rule that we passed that is very, very broad, and I don't  
6 know what some of these provisions mean. And I suspect that  
7 some of the members of the bar are going to have some real  
8 questions about some of the terms.

9 For example, we include the term "settlement  
10 agreement" -- or excuse me, "a settlement agreement in the  
11 term court records." It talks about how a settlement  
12 agreement is included which restricts public access, quote,  
13 "to matters concerning public health and safety." Well, what  
14 does a matter concerning public health or safety mean? Does  
15 it include the amount of a settlement? I mean I think a good  
16 argument can be made that if a defendant pays a million  
17 dollars as opposed to a thousand dollars, that arguably is a  
18 matter that somehow concerns public health and safety in a  
19 products liability suit.

20 And my concern is that not every case we have got  
21 is a personal injury case and not every case we have got is a  
22 product liability case. There are patent suits out there,  
23 there are domestic relations suits, there are breach of  
24 contract suits, that have very critical pieces of information  
25 that the parties want to keep private.

1           And so one of the concerns I have, and I just use  
2 this by way of an example, is when we start including  
3 settlement agreements in the term court record, when it is  
4 not filed of record, historically the parties in Texas have  
5 always had the right and the opportunity to contract on  
6 almost anything as long as it is legitimate and not illegal.  
7 We are taking that right away of the parties to contract, or  
8 if we do, it is a matter of public record. I guess my view  
9 would be if a party doesn't want to agree to something, they  
10 don't have to agree to do it.

11           And I am just concerned that we are doing this so  
12 quickly, with such limited review opportunities, by such a  
13 comparatively few members of even this Committee, that I am  
14 concerned we are going to come up with a result that is going  
15 to cause us a lot of problems on down the line. I just  
16 wanted to say that for the record.

17           MR. DAVIS: Luke --

18           CHAIRMAN SOULES: Tom Davis.

19           MR. DAVIS: -- we are not proposing anything.  
20 We are making recommendations to the Supreme Court and they  
21 will decide what to propose depending upon our  
22 recommendations. And our recommendations may not be  
23 unanimous. We may have one group that recommends this and  
24 another group recommends that, and the Supreme Court will sit  
25 there and decide which one and they may take the middle

1 ground, so -- but we are under a time restraint.

2 As I understand it, the Supreme Court has to come  
3 up with something by a certain time and we are asked to do  
4 the best we can and nothing is perfect. We can't cover every  
5 situation that could arise and we are just doing the best we  
6 can in the time. We recommend to them this is our best and  
7 then they take it from there.

8 MR. BECK: Well, what are our time limits?

9 CHAIRMAN SOULES: Well --

10 MR. SPARKS (SAN ANGELO): This is it.

11 CHAIRMAN SOULES: -- this is it.

12 I would like to have a motion that we accept 76(a)  
13 as it has been concluded today just by that last vote, in its  
14 entirety, and then --

15 MR. HERRING: We are not finished yet.

16 MR. MORRIS: We have got a couple of more.

17 CHAIRMAN SOULES: Oh, you do? I am sorry. I  
18 thought we were done.

19 MR. FULLER: We have got a few remaining.

20 CHAIRMAN SOULES: Broadus.

21 MR. SPIVEY: I agree with you and I think it  
22 is time to move on, except I want the record to reflect a  
23 response to Davis Beck's oratory there. And I can understand  
24 his concern, but one of the basic problems is people have  
25 elected to take their private disputes into a public forum.

1 And I face that every time a defendant wants my client to  
2 produce income tax returns, and that settles cases sometimes.  
3 That is one of the hazards of entering into litigation or  
4 being drawn into litigation, and that is just something we  
5 have to deal with.

6 MR. BISHOP: That doesn't make it a matter of  
7 the public domain.

8 CHAIRMAN SOULERS: What else on 76(a)? Next  
9 paragraph.

10 MR. SPIVEY: Move the question.

11 MR. MORRIS: Well, we have a --

12 CHAIRMAN SOULERS: No. I have been told by the  
13 subcommittee that we are not ready yet for the general  
14 motion.

15 MR. MORRIS: We are not quite through our  
16 report.

17 CHAIRMAN SOULERS: Okay.

18 MR. MORRIS: We have, on page -- we have made  
19 the changes on the copies you have, but I want the record to  
20 reflect that on the second page, we have stricken the word  
21 "if" after the word "document period". And we have started  
22 that sentence with a "the." And it should read, "The term,"  
23 quote, "'court records'" -- that is "records," plural, close  
24 quote.

25 CHAIRMAN SOULERS: Got that. What else?

1 MR. HERRING: At the end of that same page,  
2 second page, Paragraph (b)(1), the last sentence, this is  
3 a -- Lefty Morris is proposing this amendment, which  
4 basically would require that if affidavit evidence is going  
5 to be considered, that the affiant be present and available  
6 for cross-examination. So the new language in the last  
7 sentence on that page would read, "At the hearing the court  
8 must consider all evidence presented comma which may include  
9 affidavit evidence if the affiant is present and available  
10 for cross-examination." And that is Lefty's proposal.

11 CHAIRMAN SOULES: Okay. And you move with  
12 those two additional changes that A through F, including  
13 the --

14 MR. HERRING: No. We just move right there  
15 on -- for that change. I believe that is the motion, Lefty's  
16 motion, and I second it.

17 CHAIRMAN SOULES: What other changes are there  
18 in the text?

19 MR. HERRING: The next page, which is  
20 Paragraph (b)(3), the last line, the word "complaint" should  
21 be changed to "petition," "verifying petition" instead of  
22 "complaint."

23 MR. EDGAR: Where is that? I am sorry.

24 MR. HERRING: The last line on the third page,  
25 Paragraph (b)(3), the second to the last word, the word



1 "complaint" would be changed to "petition."

2 CHAIRMAN SOULES: It is the last line?

3 MR. HERRING: Yes, second to the last word.

4 CHAIRMAN SOULES: Okay.

5 MR. HERRING: On the next page, the last line,  
6 the fifth word, which is "he," would be changed to "the  
7 party."

8 CHAIRMAN SOULES: All right.

9 MR. HERRING: All right. Those are the only  
10 changes we have to the text before the Committee right now.

11 CHAIRMAN SOULES: Okay. The Chair will  
12 entertain a motion to adopt 76(a) as now drafted and with the  
13 comments just made, all the paragraphs submitted by the  
14 subcommittee, as adjusted by today's discussion, and, also,  
15 to include the appeal provision that we voted on earlier.

16 Is there a motion? Is there a motion?

17 MR. MORRIS: I move.

18 CHAIRMAN SOULES: Lefty has moved.

19 Is there a second?

20 MR. BISHOP: Second.

21 CHAIRMAN SOULES: Any new discussion on this?

22 MR. DAVIS: I would like to be heard on this.

23 CHAIRMAN SOULES: Yes, sir. Tom Davis.

24 MR. DAVIS: It was my impression at the last  
25 meeting that this group was almost unanimously in favor of

1 the proposition that information concerning the  
2 administration of matters relating to public health or safety  
3 or the administration of government should not be hidden or  
4 concealed. I think our disagreement arose as to whether or  
5 not provisions should be put in 76(a) that would make  
6 discovery not filed with the court a public record. People  
7 were concerned about how long they would have to keep it and  
8 things of that nature.

9 I have what I think is a solution to that problem  
10 which would solve both, which I think would make 76(a) more  
11 acceptable to some of us here. I would propose that we amend  
12 166(b)(5) by adding a little (d) -- do you want to pass these  
13 out, John?

14 MR. COLLINS: Yes.

15 CHAIRMAN SOULES: All right. Anything else on  
16 76(a)?

17 MR. DAVIS: Well, I mean --

18 CHAIRMAN SOULES: I understand this is 166(b),  
19 but --

20 MR. DAVIS: This relates to how I vote on  
21 76(a) and what other amendments I may make to change it.

22 CHAIRMAN SOULES: Well --

23 MR. DAVIS: I am trying to avoid doing that.  
24 But if you will allow me to proceed, I think you will see  
25 that I am trying to clarify some things and move this thing

1 on: That if we adopt 166(b)(5) little (d), to read that "No  
2 protective order or agreement relating to protecting  
3 disclosure of information concerning matters of public health  
4 or safety or information concerning administration of public  
5 office or the operation of government shall be valid unless  
6 the parties seeking protection files the discovery or results  
7 of discovery with the clerk of the court in compliance with  
8 Rule 76(a)."

9           What this says is, to begin with, at the bottom  
10 line, there will be no protective orders or agreements on  
11 this one particular area unless the one wanting the  
12 protection files it of record. When it is then a matter of  
13 public record, it falls under the definition of 76(a) and  
14 then they have to proceed there. This doesn't say that the  
15 documents you have in your file, or anything else we were  
16 concerned about, is a matter of public record. It only  
17 becomes a public record if someone wants to seal it and they  
18 would then have to file it.

19           And it also recognizes the priority of the thought  
20 that matters of public health or safety or the administration  
21 of government should either not be sealed, or concealed, or  
22 hidden, or whatever you want to call it. And I think this  
23 solves both things.

24           It starts off and says it isn't, but it only falls  
25 into 76(a) when someone wants to protect it and move to it,

1 then it is filed, then it is a public record, but not until  
2 then. And we are not concerned with what we have in our  
3 files as a public record or how long we have to keep it or  
4 anything. I think this solves both problems, and with this  
5 amendment to 166(a), I, in good conscious, would vote for  
6 76(a) as presented.

7 CHAIRMAN SOULERS: All right. Well, I will  
8 take this up next.

9 But at the moment, all those in favor of 76(a) show  
10 by hands.

11 MR. DAVIS: Wait a minute. What are we on?

12 CHAIRMAN SOULERS: One, two, three -- we are  
13 voting on whether to accept 76(a). I have got a motion  
14 and -- one, two -- those of favor of 76(a) as now before the  
15 Committee, show by hands. Chuck is not. Lefty is. One --  
16 hands up if you favor it. One, two, three, four, five, six,  
17 seven, eight, nine, 10, 11, 12.

18 Those opposed hold your hands up. One, two, three.  
19 Three.

20 MR. DAVIS: Am I allowed to point out some  
21 more things wrong with it before we vote it?

22 CHAIRMAN SOULERS: We have voted.

23 MR. DAVIS: Well, you have got some errors in  
24 it and I would like to get the errors out.

25 MR. SPIVEY: That is administrative.

1 CHAIRMAN SOULES: Now --

2 MR. SPARKS (SAN ANGELO): Since we have just  
3 brought that up, my understanding was that -- and I was at  
4 the last meeting -- was that the vote was pretty strong to  
5 exactly what Tom Davis just said, that matters affecting  
6 public health and safety or information concerning  
7 administration of public office or operation of government,  
8 not be hidden from the public. Then we came back and later  
9 there was a motion to table the particular discussion about  
10 Rule 166(b) or the discovery process.

11 I would at this time make a motion to again discuss  
12 Rule 166(b) for the purpose of considering Tom Davis' motion.

13 CHAIRMAN SOULES: Okay. Let me see.

14 Holly, have you got my agenda there?

15 MR. SPARKS (SAN ANGELO): Since it was not  
16 tabled to a time specific, I think I am entitled to that.

17 CHAIRMAN SOULES: I don't have any problem  
18 with taking it up anyway, Sam. I don't think anybody does.  
19 I mean I think -- we are going to have to -- all right. I  
20 am going to take this last item out of order and then we are  
21 going to go back and do the TRAP rules and we are going to --  
22 then we are going to get to the new rules and we have got --  
23 obviously, we have a lot of responsibility here to discharge,  
24 and I know we have really worked hard to do it and I am very  
25 pleased with the performance. I don't mean in any way to

1 criticize that. It is just, I guess, I am cracking the whip  
2 a little bit, and if I am out of line, I apologize to you.

3 We will move now to 166(b)(5)(d), I think it is,  
4 and there are -- there is more than one comment to this and  
5 they fit, maybe, together. I don't know. If you -- let's  
6 see. In the new agenda on Page 640 and 641 in the materials,  
7 640 and 641, I propose -- Tom has given us 166(b)(5)(d),  
8 which speaks to one of our discussions, some of our  
9 discussion, and then this is my proposal on 640 to try to  
10 deal with the situation where a trial court has lost its  
11 plenary power.

12 And have we fixed that in 76(a)? I don't think so  
13 because 76(a) does not reach all discovery. Even under  
14 166(b)(5)(d), it doesn't reach all discovery. And 166(b) --  
15 and that is the reason I am putting them together. What I  
16 propose, on Page 640, is that a trial court shall have  
17 continuing jurisdiction beyond its plenary power over the  
18 merits of a case to rule on motions of any party or nonparty  
19 to a case seeking to rescind any order related to discovery.

20 And we have got cases, you know, the Times-Herald  
21 case, they tried to get in, unseal some discovery, I guess it  
22 was a Dallas court or maybe -- I don't know whether it was  
23 the Supreme Court. I don't remember who --

24 MR. LEATHERBURY: They actually weren't after  
25 discovery in that case. That was pleadings.

1 CHAIRMAN SOULES: It was pleadings.

2 MR. LEATHERBURY: Well, upon appeal it became  
3 pleadings. They abandoned the claim for discovery on appeal.

4 CHAIRMAN SOULES: All right. I don't know  
5 whether we want to do this or not, or whether we want to do  
6 them together, but that is all the -- this is the entire  
7 information on 166(b)(5)(d), and we are open for discussion.

8 MR. DAVIS: Fine. (d) is fine, just make mine  
9 (e) then.

10 CHAIRMAN SOULES: Or either way. It doesn't  
11 matter to me. Do we -- do we want to do this on 640? It is  
12 up --

13 MR. DAVIS: I think they ought to be separate  
14 sections.

15 CHAIRMAN SOULES: All right. Do we even want  
16 to do the -- my proposal on 166(b)(d)?

17 MR. DAVIS: I have no objection to that.

18 MR. HERRING: You wouldn't call it (d), would  
19 you, Luke?

20 MR. ADAMS: I so move, Mr. Chairman, or second  
21 it or whatever needs to be done.

22 MR. DAVIS: Second.

23 CHAIRMAN SOULES: I am getting my -- I am  
24 getting some help here from Chuck on maybe getting it to  
25 where it fits. Is that right?

1 MR. HERRING: Yes. I think you just add his  
2 paragraph after (d).

3 MR. DAVIS: (e) is fine because we get no (d)  
4 now.

5 CHAIRMAN SOULES: Oh, it is 166(b)(5)(d). I  
6 am sorry.

7 MR. DAVIS: (b)(5). There is no (d) now.

8 MR. HERRING: Yes, but look at the structure  
9 of the way that sentence is set up.

10 MR. DAVIS: Yes. I understand your proposal.  
11 I can make mine (e).

12 MR. HERRING: See how it is set up with a, b,  
13 c? See the introductory clause there? I think what you  
14 wanted to do is add it as Paragraph (2)(b)(5) --

15 CHAIRMAN SOULES: I see.

16 MR. HERRING: -- rather than making it a (d)  
17 or an (e).

18 JUSTICE DOGGETT: Luke, may I inquire there,  
19 are you -- is this a vote that is coming up to add the  
20 proposed (d) on 640?

21 CHAIRMAN SOULES: Yes.

22 JUSTICE DOGGETT: There was a position  
23 advocated, which may or may not be correct, I think by Rusty  
24 last time, that protective orders die with the final  
25 judgment. I gather that is not -- and then he drew an



1 amendment, which was on the table, which I have got a copy  
2 of, that we wanted to codify that in the rule.

3 CHAIRMAN SOULES: I didn't -- I don't have  
4 that, Judge. I don't know why I don't have it.

5 JUSTICE DOGGETT: This is the only one I have  
6 got and I don't know whether he is urging that.

7 MR. BECK: Luke, the only comment I would make  
8 on that is most of the protective orders I have seen have, as  
9 an integral provision, the return of the records so that it  
10 almost becomes academic unless you have an agreement that  
11 doesn't have a provision like that.

12 CHAIRMAN SOULES: I guess run copies of that,  
13 if you will, and we will spread it around.

14 MR. DAVJS: Luke, do we have before us your  
15 suggested change? Isn't that what is up?

16 CHAIRMAN SOULES: Justice Doggett has brought  
17 up an alternative to this, I guess. I don't know.

18 JUSTICE DOGGETT: Well, it is not even -- it  
19 is not even necessarily my alternative. It is an attempt to  
20 seek clarification about this provision. Is Rusty coming  
21 back?

22 CHAIRMAN SOULES: I don't know.

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

1 CHAIRMAN SOULES: Okay. Okay. Those in favor  
2 of Tom Davis' suggestion that we add a (b)(5) -- a  
3 166(b)(5)(d) in the text of his handout. There has been a  
4 motion. Tom moved.

5 Did somebody else second?

6 MR. SPIVEY: Second.

7 CHAIRMAN SOULES: Broadus seconds.

8 MR. EDGAR: Let me -- let me talk about --

9 CHAIRMAN SOULES: Discussion.

10 MR. EDGAR: I would just like to talk about  
11 the structure of it. (a), (b) and (c) talk about the court's  
12 authority, and then says it is limited to any one of the  
13 following, and then it lists three things. And the wording  
14 of this really doesn't fit in to one of those provisos. And  
15 it just seems to me that perhaps it -- we should say,  
16 "provided, however," or something like that, if that is -- in  
17 order to carry out the intent of this proposal.

18 MR. DAVIS: I find nothing wrong with the  
19 form.

20 MR. EDGAR: Well, I understand you don't, but  
21 if we adopt your motion, then we automatically adopt the  
22 form, Tom, and I was just trying to cure that.

23 MR. DAVIS: What is the matter with the form?  
24 Let's go with it.

25 Where do you think it ought to be put, Hadley?

1 MR. EDGAR: Well, I don't even know that  
2 you -- it would be a (d). I would just say semicolon after  
3 (c) and say, "provided, however, no protective order." And  
4 that way then it would apply to both (b) and (c). Now, that,  
5 to me, is the logical way to do it.

6 MR. DAVIS: That is fine.

7 CHAIRMAN SOULES: What are you going to do  
8 now?

9 MR. FULLER: Following (c), put a semicolon  
10 and then, without a number, "provided, however," and then go  
11 with this language because it applies to all the protective  
12 orders.

13 CHAIRMAN SOULES: All right. The form --  
14 well, it would just be another unnumbered paragraph then of  
15 5?

16 MR. FULLER: Yes.

17 MR. EDGAR: Unlettered paragraph.

18 MR. FULLER: Unnumbered paragraph.

19 MR. SPARKS (SAN ANGELO): As part of the body  
20 of 5.

21 MR. EDGAR: Just part of the body of 5.

22 MR. SPARKS (SAN ANGELO): Do you go back over  
23 to the original 1?

24 CHAIRMAN SOULES: Okay.

25 MR. EDGAR: Now, as a matter of grammar, you

1 would have to put semicolons after (a), (b) and (c).

2 CHAIRMAN SOULES: Well, not really. I mean we  
3 do this so many ways, we could just block this paragraph up  
4 with a capital N back to the margin and go with it.

5 MR. EDGAR: All right. Or you could say that,  
6 too. That is right.

7 MR. DAVIS: However you want to put it in  
8 there, I don't care.

9 CHAIRMAN SOULES: We will back to the margin  
10 and block without any indention.

11 Okay. Do we have lunch out there?

12 JUSTICE DOGGETT: It is sitting out in the  
13 hallway.

14 MR. DAVIS: Let's vote.

15 CHAIRMAN SOULES: David Beck.

16 MR. BECK: Yes, I want to make this comment.  
17 I want to make sure everybody understands what we are doing  
18 here, and I know I am in the minority. There are only two  
19 people here that I count that do essentially defense work,  
20 but what this does, it makes -- it makes certain that no  
21 protective order is valid unless you file the discovery with  
22 the court. And what we just passed a few moments ago says  
23 that if you file it with the court, then you can't seal it.

24 So basically, what this means is, is coupled with  
25 what we did a few moments ago, we are making any protective

1 order virtually meaningless, it seems to me, because you have  
2 got to file the documents with the court and then the sealed  
3 records piece of -- or the rule that we just passed says that  
4 you can't seal that information. So I want to make sure  
5 everybody knows that.

6 And, again, the comment I want to make is that this  
7 represents a radical departure from what we have historically  
8 done, and I am just real concerned that we are doing this at  
9 the last minute with very little opportunity for input from  
10 the bench and the bar, as we have done with all these other  
11 rules. And I am going to oppose it.

12 CHAIRMAN SOULES: Well, do you propose or make  
13 a motion that we submit this -- publish it and submit it for  
14 public comment before it is adopted? I don't know whether to  
15 do that or not. I am trying to --

16 MR. BECK: Well, I asked a question a while  
17 ago, Luke, about what are our time constraints, and somebody  
18 said we had to do this immediately, and I don't know what --

19 CHAIRMAN SOULES: Well, with or without --

20 MR. BECK: -- I don't know what the  
21 Legislature -- excuse me.

22 MR. DAVIS: The motion before the board is to  
23 adopt this.

24 CHAIRMAN SOULES: The motion is --

25 MR. BECK: To adopt it.

1 MR. DAVIS: That is right.

2 MR. BECK: The motion on the floor is to adopt  
3 this as written.

4 MR. DAVIS: Right now, as written, and as we  
5 decided where it should fit, the motion is to adopt it.

6 CHAIRMAN SOULES: I understand. And we are  
7 having discussion.

8 Doak Bishop.

9 MR. BISHOP: I don't think that we are under  
10 time constraints to make this particular change. We are  
11 under a time constraint to make the change to 76(a) because  
12 the Legislature acted on it and they asked for guidelines  
13 from the Texas Supreme Court.

14 But I really think that a change like this needs to  
15 be studied by the Administration of Justice Committee, which  
16 has never seen this. Judge Peeples was here last week. He  
17 made a very eloquent plea why we should not be moving so  
18 rapidly when people have not had a chance to study these  
19 things to determine what the implications are. And I  
20 certainly think that we ought to send this to the  
21 Administration of Justice Committee first to see what their  
22 work is. They have never seen this proposal.

23 CHAIRMAN SOULES: Any further discussion?

24 Those in favor of a new final paragraph to  
25 166(b)(5) as set forth in Tom's proposal, show by hands.

1           Those opposed show by hands. One, two --

2           I am sorry. Hold your hands up, please. I am not  
3 getting them all. One, two, three, four, five, six, seven.

4           Okay. Did everybody vote? The vote right now is  
5 eight to seven in favor, and I don't -- I think there are  
6 fewer -- there are more people here.

7           MR. JONES: I was standing behind, Mr.  
8 Chairman.

9           CHAIRMAN SOULES: Okay. I am sorry. From the  
10 movement in the --

11          MR. DAVIS: Let's vote again.

12          CHAIRMAN SOULES: May I -- may I ask for a  
13 recount because I am not sure I counted them right.

14          I guess everybody knows what the proposition is  
15 that we adopt the language in Tom Davis' handout as a new  
16 final paragraph to 166(b)(5). That is the proposition.

17          Those in favor show by hands. One, two, three,  
18 four, five, six, seven, eight, nine, ten.

19          Those opposed. One, two, three, four, five, six,  
20 seven.

21          Ten to seven, it carries. Okay. Let's have lunch.  
22 Let's try to hold it -- let's try to hold it to 30 minutes,  
23 if possible. I will see you-all about 1:15.

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