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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 17, 2016

(SATURDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, on the 17th day of September, 2016, between the hours of 8:59 a.m. and 12:15 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

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Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

Documents referenced in this session

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CHAIRMAN BABCOCK: All right. Let's go on the record, and here's some announcements regarding scheduling. We're going to take up Rule 49, TRAP Rule 49 this morning first thing because Justice Busby has to leave a little bit early, so we'll do that and then we'll get back to the discovery rules. Bobby Meadows is itching to go, and there's been a motion or a plea. I guess it was a plea, and we had some debate about whether it was proper as a plea as opposed to a motion, but in any event, it's been granted. The plea was that we cancel the November meeting since it is the Friday and Saturday before Thanksgiving, and so the powers that be have conferred, and we will cancel that meeting, so we'll come back on December 16th, but not to do discovery, but rather to do deep thoughts, and with somebody -- some people from the Legislature.

PROFESSOR DORSANEO: We can celebrate my birthday, too.

CHAIRMAN BABCOCK: It's your birthday?

PROFESSOR DORSANEO: Well, the next day.

CHAIRMAN BABCOCK: The 17th?

PROFESSOR DORSANEO: Yes.

CHAIRMAN BABCOCK: Well, maybe we should stay for the second day.

PROFESSOR CARLSON: Will it be two days?

CHAIRMAN BABCOCK: No, just one day, December 16th, so no November meeting. Marti will send out a notice so that those that are not here will find out about it, and she'll talk to the TAB and let them know, and so we'll see each other again on December 16th. Bobby.

MR. MEADOWS: So no discussion continuation of discovery rule discussion on the 16th?

CHAIRMAN BABCOCK: That's correct. We'll wait for the new year to take that up again.

PROFESSOR CARLSON: Something to look forward to.

CHAIRMAN BABCOCK: So if Professor Dorsaneo and Justice Busby will quit muttering among themselves we'll go to the TRAP rule.

HONORABLE BRETT BUSBY: All right. Thank you, Chip, and good morning. This is a follow-up to the discussion at our last meeting about how to fix the "when permitted" ambiguity in Rule 49, and per the instructions that we received last time we prepared two different drafts, and they're labeled "first alternative" and "second alternative." They are tabs (K) and (L) in your materials. The only difference between the two -- and really the focus here is on 49.7 and 49.8. Those are

all -- those are the only places that are being changed. Everything else is remaining the same, and I didn't include the later parts of the rule. They would just be renumbered. Nothing else on that.

So the change in 49.7 in one -- I had prepared a slightly different version of this that was changed after I did it, so you have to look at the comments rather than looking at a redline, but the "when permitted" language has been taken out in both versions; and in order to deal with what happens when you want to file a second motion for en banc reconsideration, there is a second -- a new subdivision, 49.8, that has been added that is very similar to what 49.5 looks like for motions for panel rehearing prescribing when those further motion for en banc reconsideration can be filed. Instead of using the word "when permitted" in 49.7, we've just broken that out in 49.8 to make it clear. So that's the same in both versions.

The only real difference between both versions is that, per our discussion last time, one version adopts the Federal practice of requiring the panel rehearing motion and the en banc reconsideration motion to be filed concurrently, and that's tab (L). The second alternative version requires them to be filed concurrently. Tab (K), the first alternative version

that's labeled "First alternative" at the top requires -- still allows the panel rehearing motion to be filed, and if that's filed then an en banc reconsideration can be filed even if no changes were made in response to the panel rehearing motion. So -- and the way that that was accomplished was by deleting the words "or en banc reconsideration" at the end of the sentence where it says in the middle there, if you're looking at the consecutive version, "The motion must be filed within 15 days after the court of appeals judgment or order is rendered or" -- and then we've deleted in both versions "when permitted within 15 days after the denial of the last timely filed motion for rehearing," and in the -- in one version we deleted "or en banc reconsideration" there, so that to make clear that -- that they need to be filed concurrently.

Also, as this was being transcribed from the version that I saw, I think that an error has crept in. In 49.8(a) it says "modifies the judgment." I think for clarity that should say "modifies its judgment" to make sure that we're talking about the court of appeals modifying its judgment, not the court of appeals modifying the trial court's judgment. So I think that explains what we've done. We welcome any comments.

CHAIRMAN BABCOCK: Okay. Justice Bland, I

know you feel strongly about these issues. Do you have any comments?

HONORABLE JANE BLAND: I wave the white flag and concede to the Federal rule. I think it will be clear now to everybody that they have got to file it.

CHAIRMAN BABCOCK: Okay. Pam.

MS. BARON: I'm sorry I missed the last meeting, but it conflicted with the UT appellate seminar, but I feel very strongly that these motions should be filed seriatim and not at the same time, not contemporaneously. They're very different motions. They serve different purposes. If you want a panel rehearing, you're making a very different argument than you're making to an en banc panel. My experience is that the practice is not abused. I don't think a lot of people file en banc rehearing. Maybe some of the justices here might correct me on that, but I don't think they're being used to delay cases substantially. They serve an important role. I do know that the Supreme Court, at least on cases I've tracked, does grant extension motions from the later filed en banc motion, so it does at least consider them now timely filed if they're filed after panel rehearing is denied.

So I would -- the Federal practice is a problem both at the same time. I don't like it.

HONORABLE JANE BLAND: I don't either but --
MS. BARON: Okay.
CHAIRMAN BABCOCK: But you wave the white flag.
HONORABLE JANE BLAND: I waved the white flag.
CHAIRMAN BABCOCK: Pam is not waving the white flag.
MS. BARON: I'm not waving the white flag.
CHAIRMAN BABCOCK: Frank.
MR. GILSTRAP: I agree with Pam. In a perfect world that's how you would do it. You would file your motion for panel rehearing, and if it's just overruled without an opinion or without change then you file your motion for en banc reconsideration. As to whether it is abused it's probably not abused now because the rule is not clear. You know, it's not clear that you can do it seriatim from the rule to me, because that, you know, "when permitted" is kind of scary. If we do do it in this pure seriatim way, I think it may be abused. I'm sitting up here, I just lost, I've got a huge judgment against my client, and I can file a second motion and get another two, three -- two or three weeks, maybe a month. So the chance for abuse is there, but the proper way to do it is there, and as a person who writes appellate briefs I

would like to do it there. I'll hasten to add that we can vote on it, and I don't think it's going to make any difference. I think the Supreme Court is going to do what they want and as to -- and have some reason for doing it, and it's not going to make any difference what we say, but I think we ought to talk about it.

CHAIRMAN BABCOCK: No, I think it makes a difference what we say. That's why we're giving them advice.

MR. GILSTRAP: I understand.

CHAIRMAN BABCOCK: They don't have to take the advice, but it does matter what we say. All right. Who else feels strongly about this? Bill, you feel strongly?

PROFESSOR DORSANEO: I agree with Pam. I mean, as a -- I do a lot of appellate work. People may not know that. I don't do motions for en banc reconsideration very often. I won't do them very often because the standard is very rigorous under Rule 41, but this doesn't -- this doesn't make sense for me to do them both together since they seem to want to operate on the basis of the standards applicable to each one. It's serious, you know, not in combination.

CHAIRMAN BABCOCK: Yeah. That's your billboard on North Central and Mockingbird, right?

"Dorsaneo, he's appealing."

PROFESSOR DORSANEO: No, I thought about that, but I would get in trouble with the university if I --

CHAIRMAN BABCOCK: That's probably right.

PROFESSOR DORSANEO: -- did that.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I'll defer to Justice Bland.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I'm not rehashing, but the second sentence, if we're going to do the contemporaneous filing of the en banc motion, we have that "The majority of the court may with or without a motion order it en banc," reconsideration as long as we're within our plenary power, which to me is some saving grace, but you might not want to suggest that with or without a motion if -- because that might be giving back -- just for sake of clarity, does that imply that a motion can be filed at some point within the court's plenary power even if it would be untimely under that first sentence, because I think there is a lack of clarity among -- among -- in the rule or at least the way the practitioners see it now, and we probably want to take that out.

MR. GILSTRAP: Are we going to say the court

can consider the motion en banc or can't consider the case en banc even though it has plenary power?

PROFESSOR CARLSON: No.

MR. GILSTRAP: We're not going to take that out?

HONORABLE JANE BLAND: No. I -- no. I would like that the court -- I like the idea that the court can consider a case en banc at any time during the time it has plenary power. It's the "with or without a motion" language that's a little bit confusing, because it seems to imply then that you could file a motion at any point during the court's plenary power, and I think you-all are moving toward changing the rule to requiring that the en banc motion be filed at the same time as the motion for rehearing en banc.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: Well, it's an interesting point. This is a new point for me, but it seems like while it could be read that way. It's still valuable to say that the court can do it without a motion just to be clear.

HONORABLE JANE BLAND: That's fine. Without a motion is fine. It's the "with or without a motion."

HONORABLE BRETT BUSBY: So what would you propose that it say instead?

HONORABLE JANE BLAND: Well, presumably --

HONORABLE BRETT BUSBY: "The court may without a motion"?

HONORABLE JANE BLAND: Yeah, without a motion. Presumably we still -- if there's a motion filed then there's no question that we can rule on it during our plenary power.

HONORABLE BRETT BUSBY: Right.

HONORABLE JANE BLAND: It's the sua sponte consideration of the case en banc I think that we're trying to get at here. Is that right?

HONORABLE BRETT BUSBY: That seems like good clarification so that it would say, "A majority of the en banc court may, without a motion, order reconsideration."

MR. GILSTRAP: Well, they can with a motion. It's just untimely. It's like filing a motion for new trial, you know, too late, but the court still has plenary power. You can always file the motion. They just don't have to consider it because, you know, it's untimely, but you can file a motion and you do sometime with trial judges. They're sitting there. The motions for new trial have been overruled. You come up with something. They still have plenary power. You put a motion in front of it and say, "That's right, and I'm going to vacate the judgment." They have the power. You can move for it.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, that's going back the way that we had been interpreting the rule, and the problem is that if the motion is not timely, it -- you know, it might not get circulated to the en banc court. So to imply that an untimely motion will get the same consideration as a timely motion doesn't really reflect, I think, practices in large courts sometimes. I think it depends on the individual justice whether an untimely motion would get circulated beyond the panel to the en banc court.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, when I first got on the appellate bench I had a very odd situation, and no one knew exactly what to do with it. An en banc motion had been denied by the court four-four and then I got on the court because, you know, there was a vacancy when Justice Guzman moved up to Supreme Court and then I got on the court, and they filed another motion for rehearing and said, you know, basically "Make Judge Christopher break the tie," and so we had this big debate within the court as to whether or not, you know, the motion was timely. No, the motion wasn't timely, but we did see it, and then the question was should I rule on it or should I -- you know, should I just let it stand pat.

So weird things like that do happen. So it would be -- you know, it needs to be clear one way or the other.

CHAIRMAN BABCOCK: Where do you fall on the seriatim?

HONORABLE TRACY CHRISTOPHER: I like seriatim better.

CHAIRMAN BABCOCK: Okay. Justice Busby.

HONORABLE BRETT BUSBY: I guess on the -- the last thing I wanted to add was on the seriatim versus concurrent filings, and while as a former appellate practitioner myself I understand the value of the seriatim practice, I think maybe only once or twice in the four years I've been on the court have I actually seen an en banc motion that's substantively different from the panel motion for rehearing, because I haven't had Pam and Bill in my cases, and so most of the time what I have seen personally is that the en banc motion is the same as the panel motion, and so if that's consistent with others' experience it suggests that it would be more time efficient to have them filed together.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: But that -- but that violates the standard for filing motions for en banc reconsideration --

HONORABLE BRETT BUSBY: I agree.

PROFESSOR DORSANEO: -- which, of course, is not located where you could easily find it.

CHAIRMAN BABCOCK: Why did you do that?

HONORABLE BRETT BUSBY: People routinely do that in my experience.

PROFESSOR DORSANEO: Well, we can't say that's a good way to do things.

CHAIRMAN BABCOCK: Well, say --

PROFESSOR DORSANEO: You know, we'll have them filed early when they don't comply with the standards so it can be dealt with easily by being denied.

THE COURT: Well, let's stay focused on this seriatim versus concurrent.

PROFESSOR DORSANEO: That was part of it.

CHAIRMAN BABCOCK: Justice Boyce.

HONORABLE BILL BOYCE: I just make this observation. I would agree with Justice Busby that the vast majority of motions for rehearing en banc are invitations to read the panel motion for rehearing that should have been granted, not terribly elaborative of what's going on, but I would also make the observation that there are a subset of them that appreciate the differences and focus on new standards appropriate for en banc review as opposed to panel review. Occasionally the panel opinion -- panel motions will be granted, and the

opinion will be modified in a way that affects analysis, so I kind of -- I would support seriatim filing, and I would also make the observation that to some extent the efficiency concern looks like a solution in search of a problem in the sense that it is my perspective that it is not hugely disruptive to the court's handling of the motions and the overall dispositions of appeals to have the motions filed seriatim.

The ones that are relatively rote are dealt with, you know, pretty promptly. The ones that require more attention get some more attention, and I don't have the sense that the wheels of justice are being seriously gummed up by allowing the serial filing, and allowing that would protect the subset of the motions for rehearing en banc that really are en banc focused.

CHAIRMAN BABCOCK: All right. It's the recommendation of the subcommittee that we do it concurrent, correct?

HONORABLE BRETT BUSBY: I don't know if we had a recommendation. We're just putting it out there.

PROFESSOR DORSANEO: I don't know if we did. No recommendation.

CHAIRMAN BABCOCK: All right. Well, let's take a vote. Which do you want to have to be the positive, everybody in favor of concurrent raise your hand

and everybody in favor of seriatim raise your hand?

MR. GILSTRAP: Sure.

CHAIRMAN BABCOCK: That work? Everybody in favor of concurrent, raise your hand. I think I know where this vote is going.

Everybody in favor of seriatim, raise your hand.

MR. GILSTRAP: All purists.

CHAIRMAN BABCOCK: All right. The vote is for concurrent, one; for seriatim, 21.

CHIEF JUSTICE HECHT: A strong one.

CHAIRMAN BABCOCK: Yeah, but a strong one.

HONORABLE ANA ESTEVEZ: One and a half.

MS. BARON: Chip, can I make just one more observation, too? One of the reasons --

CHAIRMAN BABCOCK: Yeah, I mean, but look at what you've already done today.

MS. BARON: I know, I'm sorry. I should just pack up and go home and celebrate.

PROFESSOR DORSANEO: The usual advice is don't talk anymore.

MS. BARON: Thanks, we're good.

MR. MEADOWS: Followed by who?

MS. BARON: Another reason to file a motion for hearing en banc is to hopefully convince one of the

justices who is not on the panel to dissent, which gives the Texas Supreme Court jurisdiction over the case in certain circumstances, particularly in interlocutory appeals. So it does serve a valid function, and it's a different function than a panel rehearing. So I'd just add that.

CHAIRMAN BABCOCK: All right. Cool.

CHIEF JUSTICE HECHT: I've got two other things.

CHAIRMAN BABCOCK: The Chief has got a couple of things.

CHIEF JUSTICE HECHT: Tom Gray couldn't be here this morning, and he left two comments that I wish we could get your thoughts on. One is that the rule would provide that you cannot file a motion for rehearing en banc in a three-judge court, of which there are five.

MS. BARON: That makes sense.

CHIEF JUSTICE HECHT: And that when they're on such -- he's concerned about which judges can vote on a motion for rehearing en banc, so he thinks that when there is an assignment because a judge is recused, that judge should be able to vote on the motion in that case, but that it would not -- it couldn't sit on any other motion, but I guess that would go -- that would go without saying.

CHAIRMAN BABCOCK: Yeah.

CHIEF JUSTICE HECHT: He said "are limited to the judges who are elected to the court or who have been appointed to the position on the court to fill an unexpired term by the governor, expressly do not include those temporarily assigned to the court by the Chief Justice unless the judge assigned to the court to sit on the panel," but surely that's right.

MS. BARON: Well, isn't that the scope of the assignment that they have in your order? When you assign them you assign a judge to a particular case, right, not to the court? So I think that the order itself would limit their ability to sit on other cases to which -- outside their assignment, right?

CHIEF JUSTICE HECHT: Okay.

MS. HOBBS: Maybe Waco uses senior judges. Do they have some senior judges that sit more broadly? I wonder if that's what he's getting at.

MR. FULLER: They've got senior judges, but I'm not aware of them sitting. Let me take that back.

MS. HOBBS: I agree with what --

MR. FULLER: You're talking about retired?

MS. HOBBS: Yeah.

MR. FULLER: I mean, Bill Vance, but I don't know that he actually -- does he --

CHAIRMAN BABCOCK: Judge Yelenosky. I'm

sorry, Hayes. Hayes, were you done?

MR. FULLER: I was just going to say I'm not aware of any of the retired justices serving.

CHAIRMAN BABCOCK: Okay.

MS. HOBBS: We do -- I say, "we" do not. The Court, the Chief Justice, I think he does sometimes do -- and I don't know if you do it, but I know Jefferson did, where we would assign a visiting judge for a six-month period to help with backlog, and I think what he's trying to say is those blanket assignments, they shouldn't count as en banc, like you --

CHIEF JUSTICE HECHT: Oh, on the cases?

MS. HOBBS: Like you've -- unless you've actually heard the case. I think it goes without saying, but, I mean, I think that's what problem he's getting at, is that when somebody files a motion for en banc in Waco it doesn't bring in every visiting judge who might have a blanket assignment at that moment.

CHIEF JUSTICE HECHT: Okay.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: I may have misheard, and I just have a question because I don't know anything about this, but, Pam, did you say that if there's -- Pam, did you say if there's a denial of an en banc that's grounds for jurisdiction in the Supreme Court?

MS. BARON: No. There would have to be a dissent.

HONORABLE STEPHEN YELENOSKY: I mean, a dissent. Well, if you can't file an en banc in a three-court panel do you lose that basis?

MS. BARON: Well, if there's no en banc to go to, you've already had en banc because all three --

HONORABLE STEPHEN YELENOSKY: Well, is it considered en banc? Is it considered en banc without a motion? Okay. That's all I wanted.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: And also it's any dissent whether it's panel or en banc. So I think --

MS. BARON: Right, correct.

HONORABLE BRETT BUSBY: -- that would be taken care of, but it seems like there might be a problem with -- although on the surface it seems sensible to say a three-judge court shouldn't have any en bancs, if you have a senior judge who is sitting on the panel of a three-judge court then they could have an en banc because there would be four judges sitting on that. So I'm not sure it make sense just to have a blanket rule that no en bancs on three-judge courts because they could have a senior judge on the panel.

MS. HOBBS: Right, assuming the fourth judge

wasn't not sitting because he was recused but just for whatever reason wasn't sitting.

HONORABLE BRETT BUSBY: Right.

CHAIRMAN BABCOCK: Hadn't thought of that.

CHIEF JUSTICE HECHT: We will consult further with Chief Justice Gray.

CHAIRMAN BABCOCK: Okay. Anything else? All right. That only took us 35 minutes --

MR. GILSTRAP: We're still on the en banc rule, right?

CHAIRMAN BABCOCK: What's that?

MR. GILSTRAP: We're still on the en banc rule?

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: I mean, what about the "with or without a motion"? Are we going to talk about that or not?

CHAIRMAN BABCOCK: Let's talk about it.

MR. GILSTRAP: I mean, we could just take the language out, "with or without a motion," take it out. Then the rule would read, "While the court has plenary power a majority of the en banc court may order en banc reconsideration of the panel's decision." It would match the trial, 329b(d), which says, "The trial court regardless of whether or not an appeal has been perfected

has plenary power to grant a new trial or to vacate, modify or correct, or reform the judgment within 30 days after the judgment is signed." You know, it doesn't say you can file a motion, but you can. It's just untimely, and that might solve the problem, just take it out.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I defer to Justice Bland.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I think the rule is getting at that a court can consider a case en banc sua sponte, and so the "without a motion" is the signal that the court on its own motion or its own consideration can vote to grant en banc review sua sponte, which happens from time to time.

MR. GILSTRAP: But they always have that power as long as they have plenary power. You know, whether it says "with or without a motion," it doesn't make any difference, unless you just take the whole provision about plenary power out.

HONORABLE JANE BLAND: The idea is even if the time for having filed a motion for rehearing en banc has passed another member of the court might call for a vote without a pending motion and determine that, you know, they found a conflict or something, and they want

everybody to look at it.

MR. GILSTRAP: But you can do it with --

HONORABLE JANE BLAND: And then the court on its own motion would withdraw the panel opinion and consider the case en banc.

MR. GILSTRAP: But they can do it with a pending motion, even though the motion is untimely. They an say, "Hey, I didn't realize this. We're going to circulate it. It's an untimely motion, but we have the power to grant it."

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: I'm not sure an untimely motion would be considered pending, but it also seems like it's valuable to have the sua sponte concept in here expressly, especially if, you know, it might be troublesome for us to consider what signal is being sent if you take out "without a motion." Is that signaling that we don't have the power to do it without a motion? I agree that we should have that power inherently, but once you start having something express about when a court can do things and you take away the statement that we can do it without a motion, I think that may create an ambiguity about whether we have the power to do that, and so my suggestion is that we at least continue to say "without a motion," perhaps "with or without a motion," although I

understand Justice Bland's point on that, but I do think we need to make clear -- especially because the first two sentences of the rule are talking about a motion, that we're changing gears here and it's something that the court can do even without a motion.

MR. GILSTRAP: If it says, "While the court has plenary power a majority of the en banc court may order en banc reconsideration of the panel's decision," pretty clear you've got the power.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, you know, it might be redundant, but saying "on its own" or "on its own initiative" is no problem to add those words in there to make it clearer, and the "with," you know, "with or without" language is not as good as language that's frequently used in that circumstance, like "whether or not." Okay. We can make it clearer. There are a variety of different ways to make it clearer, and if you want we'll provide all of those alternatives to be dealt with or we could just do it now. You could just tell us to decide.

CHAIRMAN BABCOCK: Well, I think it would be better to do it now than to bring the rule back.

PROFESSOR DORSANEO: Yeah, so do I, because I was about to announce that we've finished two of our

assignments now it looks like.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: We're still not finished.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: There's one more thing. We have this language in here that says that -- in the comment "Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing." Well, I've always had the problem if you get down into current 48.9 and it says, "The court of appeals can extend the time for filing a motion for rehearing or en banc reconsideration if a party files a motion." Well, when I get the opinion from the court of appeals, I don't know if I want to move for reconsideration or panel rehearing or en banc rehearing, but I do know this, I need more time. So if I file a motion for rehearing en banc -- excuse me, a motion for rehearing and they gave me 30 extra days, and on the 29th day I file a motion for en banc reconsideration, does the extension of the motion for rehearing imply an extension of the time for filing a motion for en banc reconsideration? That's's always been an ambiguity in the rule and, you know, maybe others aren't bothered by it, but I am.

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN BABCOCK: Yes, Professor.

PROFESSOR DORSANEO: Well, in 2008 we tried to straighten this out, and one of the impediments is that we had a Supreme Court decision that said based upon the other rules with this rule that a motion for en banc reconsideration or en banc review was a type of motion for rehearing. We tried to undo that by making 53.7 -- that's what you're talking about, right, Frank?

MR. GILSTRAP: Yeah.

PROFESSOR DORSANEO: Talk about both motions for --

MR. GILSTRAP: No, I'm talking about 49.7, but 53.7 is the Supreme Court rule.

PROFESSOR DORSANEO: Is the Supreme Court rule. To say whether it's this one or that one, you get -- you get the longer timetable. We even changed the name of the motion for en banc reconsideration to motion for en banc reconsideration to make it have a different name than motion for rehearing; but in *City of San Antonio vs. Hartman,* or maybe the other way around, for whatever reason, the Supreme Court's opinion says that a motion for en banc reconsideration is a species of a motion for rehearing; and I thought we were trying to make that not be the common understanding; and I almost fell over when I read it in the comment to 2000(g) change, "Rule 49 is revised to treat a motion for en banc reconsideration as a

motion for rehearing." I was like "No, no, that's not a motion for rehearing." It's its own motion with its own standard and its own timing, okay, but it is in the -- it is in the comment, and that's -- you know, I don't know we could go back and retroactively change a comment. It's been done before, but I don't know whether we should do that, but maybe we need a comment.

MR. GILSTRAP: If it's not a species of motion for rehearing then a motion to extend the time for motion for rehearing does not extend the time for filing a motion for en banc reconsideration.

PROFESSOR DORSANEO: Yeah.

MR. GILSTRAP: Well, then we've got to file both? Do you just say, "And I move the court for a 30-day extension of my time for filing a motion for rehearing and my motion for en banc reconsideration"? Okay. Then they grant that. Then they file -- you file -- you file your motion for rehearing, and they overrule it, and then you say, "Now I want more time for my motion for en banc reconsideration." They say, "No, you've used it up." I don't know, it's a problem to me.

CHAIRMAN BABCOCK: Not to you, Bill?

PROFESSOR DORSANEO: Well, I don't know whether anybody thinks about that other than Frank, right? I haven't spent the time to think about it and don't think

it's a problem.

MR. GILSTRAP: Every time I move for an extension I think about it.

CHAIRMAN BABCOCK: Well, Orsinger is here, and he's undoubtedly thought about it.

MR. ORSINGER: I always file mine at the same time so I don't have all of these problems, but in light of what Pam said I'm going to quit doing that.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Just while we're on the comment, in light of what Bill was saying and what we've heard from other people that people aren't following the standard for motions for en banc reconsideration, maybe the comment could reference 41.2(c) --

PROFESSOR DORSANEO: Yes, it should.

MS. BARON: -- which says the standard so that people know how to draft these motions to fit within the box that they're supposed to fit into.

CHAIRMAN BABCOCK: Okay.

MS. GREER: You can also adopt the Fifth Circuit's IOP that says this is the most refused prerogative. The Fifth Circuit has an IOP, an internal operating procedure, that literally says that en banc is the most abused prerogative and please note that we grant them in less than one percent of the cases, so think about

that before you file.

MS. HOBBS: And it sets out sanctions in it, too, doesn't it?

MS. GREER: Yeah, it does.

MS. HOBBS: It references sanctions.

PROFESSOR DORSANEO: Are they still threatening sanctions if you file them?

MS. HOBBS: Yes.

MS. GREER: Yeah. But I haven't seen it done.

PROFESSOR DORSANEO: Disgraceful.

MS. HOBBS: I haven't either, but it scares you every time you do it.

CHAIRMAN BABCOCK: Which court of appeals was that?

PROFESSOR DORSANEO: Federal Fifth Circuit.

CHAIRMAN BABCOCK: Oh, the Fifth Circuit.

MS. GREER: Just trying to Federalize it.

CHAIRMAN BABCOCK: Yeah, Roger.

MR. HUGHES: Well, if the Court adopts the seriatim rule then we won't need to worry about whether you have to file your motion for extension of time. When you move to extend the motion for time for a motion for rehearing you need to include the petition for rehearing en banc. All I can say, from what I've observed about the

Fifth Circuit practice, treating the motion for rehearing as also a panel rehearing sometimes has the beneficial effect of solving the debate within the court as a whole. The panel just rewrites their opinion to solve the problem -- maybe to try to address the problem.

Now, that said, I have seen a couple of cases from the Fifth Circuit where the panel's attempt to rewrite the opinion had the effect of provoking en banc review rather than avoiding it, but I think that's probably the only beneficial effect of allowing a motion for rehearing en banc to have the same effect as a panel rehearing; that is, to maybe spur the panel to give a new opinion to avoid en banc review.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, if we had seriatim and then you file your motion for en banc reconsideration, the en banc court could deny it and the panel could still write a new opinion. You don't take that option off the table.

MR. HUGHES: No, it wouldn't.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I've never worked on a court of appeals or been on the court of appeals as a judge, but I always file them at the same time in hopes that by bringing other people on the court into the discussion

with the panel that you might influence the panel to change their opinion or to change their vote, and maybe that's unrealistic. I'm hearing people here that have connections to the courts of appeals, but if we only allow seriatim then does that mean we prohibit simultaneous filing if someone wanted to? Is that the --

PROFESSOR CARLSON: No.

MR. GILSTRAP: No.

CHAIRMAN BABCOCK: -- proposal here?

HONORABLE BRETT BUSBY: No, the version that allows for seriatim would also permit concurrent filing. You could do it either way. You could file the en banc and panel together, or you could file them one after the other, under one of these two versions.

MR. ORSINGER: Do you think there is -- is there any validity to the idea that if the entire court is discussing the two motions at the same time that someone that's not on the panel might influence someone that's on the panel? Is that --

HONORABLE BRETT BUSBY: Sure, that does happen from time to time, but you can get the same value by only filing an en banc motion. You don't need to file a panel motion in order for that happen because the en banc motion will go first to the panel before it goes to the en banc court.

MR. ORSINGER: Okay. Thank you for that.

CHAIRMAN BABCOCK: Okay. Anything else? Frank, you got anything else on this rule you want to talk about?

MR. GILSTRAP: No. Thank you. I appreciate you listening to me.

PROFESSOR DORSANEO: Should we write a comment?

CHAIRMAN BABCOCK: I don't know, what do you think?

HONORABLE BRETT BUSBY: Yes.

PROFESSOR DORSANEO: Justice Hecht is answering for you.

CHAIRMAN BABCOCK: Oh, okay. All right. Good. Anything else on Rule 49? Going once. Okay. Well, that wasn't too bad. 35 minutes, we said 15, but that's good. So back to discovery. And --

MR. MEADOWS: I think we were on the -- I believe we were at 191.3(d), effect of failure to sign.

CHAIRMAN BABCOCK: Right. That's what I --

MR. GILSTRAP: What page?

CHAIRMAN BABCOCK: Page 10.

MR. MEADOWS: Page 10. So this change is largely to conform to Federal Rule 26.

CHAIRMAN BABCOCK: Uh-huh.

MR. MEADOWS: And some effort to improve readability, but I don't think it's too substantial change from the existing rule.

CHAIRMAN BABCOCK: Anybody have any views on subsection (d) of Rule 191.3?

MS. BARON: Bobby, what page is that?

CHAIRMAN BABCOCK: Page 10.

MS. BARON: Thank you. Yeah.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: I've got a question on interrogatories. As I understand the current rule, a witness or a party who is required to sign the answers to interrogatories and swear to them under oath, it can't be done by the attorney. So does this rule apply to the absence of the attorney's signature or the party's signature or either or both in that context, if my understanding of the law is correct?

CHAIRMAN BABCOCK: Well, are you right, if they are just contentioned interrogatories?

MR. MUNZINGER: Well, a fact answer, to my understanding, the party has got to swear to a fact answer.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: As distinction -- I understand the distinction between contentioned

interrogatories, but this draws no distinction --

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: -- and that's kind of what I'm asking about. If my understanding of the law is correct. I may be wrong. It would be the first time, but --

PROFESSOR DORSANEO: Today.

CHAIRMAN BABCOCK: Yeah, Richard Orsinger.

MR. ORSINGER: The focus on interrogatories has caused me to wonder about this introductory clause that talks about a "discovery request, notice, response, or objection." Should we put "answer" in there? Because an interrogatory, you answer the interrogatory. You don't respond to it. You respond to a request for disclosure, and you respond to a request for production, but you answer an interrogatory, and I just wonder if we ought to drop the word "answer" in that clause.

MR. MUNZINGER: Well, the rule applies to discovery requests.

MR. ORSINGER: Well, I'm talking about the responsive side. So you have a -- you have an interrogatory answer that's signed by the lawyer, but there's no signature from the client.

HONORABLE ANA ESTEVEZ: We're trying to find where you are, Richard. I'm sorry.

MR. ORSINGER: I'm on page 10, subdivision (c), the introductory part of sub (c) appears to apply only to request notices, responses, or objections, but not to answers; and I'm just saying interrogatories uniquely have answers and not responses, so if we're intending to apply this to an irregularity in the answers to interrogatories, maybe we ought to drop the word "answer" into the introductory part of section (c).

HONORABLE TRACY CHRISTOPHER: Well, but -- okay.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I do understand that it seems like "answer" would fit there, but, okay, so it's an unsigned answer; and it says a part -- the other parties have no duty to act on an unsigned interrogatory. Well, I mean, you know, that's true, but not particularly useful. I mean, you usually file a motion to compel to get your answers because you want to be able to rely on an answer to an interrogatory, and if it's not signed you can't rely on it, so you file the motion to compel.

MR. ORSINGER: So then (c) and (d) don't apply to interrogatories answers.

HONORABLE TRACY CHRISTOPHER: It applies to sending an interrogatory without the attorney's signature

on it.

MR. ORSINGER: But not answering.

HONORABLE TRACY CHRISTOPHER: But it doesn't make sense to apply it to the answers to interrogatories.

MR. ORSINGER: Okay.

HONORABLE TRACY CHRISTOPHER: To me.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: So is there -- under (d) is there action that's contemplated on a disclosure or response or only on a request or objection? I mean, what action would be taken based on a disclosure or response?

HONORABLE TRACY CHRISTOPHER: Sure. Well, a disclosure is a request for disclosure.

HONORABLE BRETT BUSBY: Okay.

HONORABLE TRACY CHRISTOPHER: And when you answer --

MR. ORSINGER: What happens if your response to a request for disclosure is unsigned?

CHAIRMAN BABCOCK: Lisa.

MR. ORSINGER: No action is necessary, but it's really ineffective. Isn't that what we mean to say, is that it's not good enough, it doesn't operate as a response?

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Well, I was just going to

comment that I know we think about answering interrogatories, but when you look at the interrogatory rule it really talks about responding to request for interrogatories, so I think "response" would cover it without having to --

CHAIRMAN BABCOCK: Marcy.

MS. GREER: I was going to make the same point, that I think a response is covering answers to interrogatories because it's a broader if it were Venn diagrammed responses here and interrogatory answers here, and I think it might be confusing to put answer in because that implies a pleading --

MS. HOBBS: Right.

MS. GREER: -- in the other rules, but we do have to reconcile this because the same terminology is used in (c), and that's -- it's critical that (c) applies to interrogatory answers or responses, whatever you're going to call it, because that's the verification requirement. So we could clarify either way, but I believe the word -- or some word has to be in (c) and (d) that applies to interrogatories responses.

CHAIRMAN BABCOCK: Okay. Any more comments about subsection (c) or (d)?

MR. ORSINGER: Yeah.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I would like to suggest that instead of saying you have no duty to act, maybe we should just say that it's ineffective, because if there's a defective response you don't have a duty to respond or to act on a response at all, but that doesn't get to the problem. The problem is somebody is giving you a response that's ineffective, and so why shouldn't we say that it's ineffective rather than there's no duty to respond?

PROFESSOR CARLSON: It's the Federal rule.

MR. ORSINGER: Oh, that's right. I would be deviating from the Federal rule. Sorry.

MR. MEADOWS: Wow.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: May I point out to all of you complaining about it this is the exact same language that was in there before, the exact same words, just slightly rewritten. Exact same words. "If a request, notice, response, or objection is not signed." Exact same, and the complaint about (c), exact same. I mean, we did not go through to say, "Okay, we're going to completely change." There's a lot of duplication in our original rules, and that would require, you know, months more work to get rid of all of that to make it more perfect. We can.

MR. MEADOWS: We resist that, though.

HONORABLE TRACY CHRISTOPHER: And, you know, if you don't want to make these changes, it doesn't really matter. We just keep it as it is with all its flaws.

PROFESSOR DORSANEO: Keep it as it is.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I just want to make it clear this isn't intended to meet the verification requirements. Those are still included in the interrogatory rules and the other rules, so this is just something extra.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: Just to continue the dialogue --

CHAIRMAN BABCOCK: You're not going to slap yourself again, are you?

MR. ORSINGER: No. That hurt too much.

MR. MEADOWS: That was freaky.

MR. ORSINGER: It used to say that it must be stricken, which is like an instruction to the court. If somebody does it wrong, you can file a motion to strike it, and the court has to strike it. Now, saying "has no duty to act" means you don't have any kind of responsive duty. You can just let it sit, but it doesn't really say what effect it has if you let it sit. To me I think the purpose in both the previous language of you've got to

strike it on request or you have no duty to act really is that if it's noncompliant, it's ineffective. It seems to me that it's ineffective both from the standpoint of the one who is requesting or the one who is responding. What are you saying, Ana?

HONORABLE ANA ESTEVEZ: Just the last sentence that used to be there was "A party is not required to take any action with respect to a request or notice," so it is the same. It's just rewritten.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: Well, it's actually not the same because the previous rule just said no action on a request or notice. Now they're also -- the revision of the rule that's been proposed says there's also no action on a disclosure or response, so I think it is -- the issue that was being raised earlier is an issue with the new language and not with the former language, because it's difficult to understand what action is contemplated on a response, and so I think Richard's suggestion that just saying it's ineffective would be easier to understand.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I've got a problem with saying it's ineffective. Suppose my adversary doesn't sign for a specific reason. He still filed it. Is it an

admission? Is it a judicial admission? Does he -- can he violate it and avoid it if he's under oath? To say it's ineffective insulates a guy who is trying to play tricks with the record.

MR. GILSTRAP: Yeah, can you use it against him?

MR. MUNZINGER: Yeah. That's my point. To heck with that. If you filed it, you filed it. If he didn't sign it, I can raise Cain about it, but I don't have to do anything in response to it if you didn't sign it, but you filed it, stud, and you're the guy who lives with the words you chose.

CHAIRMAN BABCOCK: Now we're getting somewhere. The blood hasn't quite risen as much as it should, but keep after it, Richard.

PROFESSOR DORSANEO: Mindless compliance with Federal practice.

CHAIRMAN BABCOCK: Say that for the record.

PROFESSOR DORSANEO: Well, I said just let it be the way it was. This is just mindless compliance with Federal language.

CHAIRMAN BABCOCK: That's the phrase I was looking for. Hayes.

MR. FULLER: It does serve -- as it currently is and even as it's been proposed it does serve

a practical purpose, and that is if I file something and have failed in response to -- I'll return the favor to my good friend Jim's request, and I don't sign it or whatever, he at least owes me the courtesy of bringing it to my attention before he hits me with a motion to compel and sanctions.

MR. PERDUE: I would never sanction you.

MR. FULLER: So I can correct that. So, I mean, it does serve a very practical purpose. Sometimes you just do the best you can to get something on file. You may have a verification that has not been signed, but it's coming, and so it does serve some purpose to show good faith compliance with the rules, but before anybody can take hostile action against you they have to bring it to your attention so that you can correct that problem. So I think it's fine. I mean, I'm maybe the slowest person in the room here today, but I understand it.

CHAIRMAN BABCOCK: Now, we've now set the bar. We have a fuller bar now. All right. Kennon.

MS. WOOTEN: I think it's not entirely clear that this doesn't apply to a lack of verification, and I don't think the existing rules really address the lack of a verification, and I don't know if we need to, but this issue has come up before. I have it come up fairly frequently where a client will say, "I just can't get that

verification in time. What's the consequence?" And there's nothing that speaks directly to that in the rules. You instead have to look at rules and say, "You're not complying with discovery requirements" and then you look at the signature requirement, and you think, well, it kind of applies because it's -- a verification is a signature, so it's just a question of whether -- you know, because you do have the client signing, so it's just not squarely addressed.

HONORABLE JANE BLAND: Make sure you want to raise that that way.

MS. WOOTEN: So maybe just leave it alone?

HONORABLE TRACY CHRISTOPHER: Can I just say the Federal rules go through each type of discovery and talk about effect of failure to sign, et cetera. Every time. And they repeat, repeat, repeat under, you know, every section. Our rules had never done that. Instead we had sort of this global signing rule, and we had this global sanctions rule. Now, it might be a lot clearer to go through each particular type of discovery and talk about signing, effect of failure to sign, et cetera. So the answers to interrogatories, you know, what is the effect of an unsigned answer to interrogatory and how can a defendant use them and do you have to file a motion to compel the answers and, you know, what if you don't file a

motion to compel, you know, of verification.

So it is true that our old version of the rules were imprecise; and as I said, we could make them clearer; and I actually think the Federal rule of going through each type of disclosure and repeating over and over again, you know, the effect of not signing it, might be clearer; but that basically would mean, you know, we get rid of 191.3 and talk about it in every single type of discovery.

CHAIRMAN BABCOCK: Well, the requirements are different depending on what type of discovery it is.

HONORABLE TRACY CHRISTOPHER: Correct. Correct. And so this whole rule has been a little, you know, not problematic. I mean, we've been living with it for however many years, almost 20 years now; and we've been limping along on it; but it is not 100 percent clear with respect to each type of discovery. I mean, even when we were talking about, you know, revising (c) yesterday --

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: -- okay, well, you know, you look at that, and it's kind of like, well, what exactly does that mean? How does that score respond to CPRC Chapter 10. How does that correspond with Rule 13; and even that is not, you know, precisely clear; but, you know, it's what we've had for almost 20 years; and as

I said, we could get rid of all of that and make the rule clear; but I don't know if we have the time or inclination or we think what we had was good enough; and if it's good enough, let's not make any changes to it; and then it's just as imprecise as it was; and, you know, we just move on.

CHAIRMAN BABCOCK: Well, if Judge Peeples were here he would say, you know, if there's not a problem, don't try to fix it.

MS. HOBBS: Amen.

HONORABLE TRACY CHRISTOPHER: And, you know, on these two things that we've been complaining of -- people have been complaining about under Rule 191.3, let's just not make changes. I mean, we're okay with that.

MR. MEADOWS: Absolutely.

CHAIRMAN BABCOCK: On the other hand, the charge is to try to spot things that could be improved and --

HONORABLE ANA ESTEVEZ: We have bigger ones.

CHAIRMAN BABCOCK: Huh?

HONORABLE ANA ESTEVEZ: We have bigger ones.

HONORABLE TRACY CHRISTOPHER: Yeah, I mean, we're spending a lot of time on things that in my opinion are not that important.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TRACY CHRISTOPHER: That we could spend more time on like sort of the bigger issues, like should we have mandatory disclosures, should we change the timing of discovery, which we've recommended, so, you know --

CHAIRMAN BABCOCK: Well, the issue we spent time on yesterday about whether we should add this --

HONORABLE TRACY CHRISTOPHER: Oh, no, that was very good. I don't -- just some of these last few things that were -- and people just don't want to -- the rules have been imprecise. We thought we were making improvement. People think it's creating more problems. Let's just stay where we are on them.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: Which might be a way to think about how to spend our time this morning. We can continue, and, frankly, the next move into Rule 194 would be an important discussion, but if you think about it, what we accomplished yesterday was, as you indicated, Chip, a really big deal, because I think what we've done is we have reformulated the whole structure around the levels and categorization of cases and so forth, and I think, you know, it was a near unanimous vote that level two is going to become the big area of litigation, and level one and level three have got specialized purposes.

So that's great. We accomplished that.

The next big thing essentially coming out of our subcommittee work are should we have mandatory disclosures, initial and pretrial, and what should they be, the items themselves. This whole -- and we're going to come to it in Rule 194, that issue and proportionality. This whole proportionality analysis or function that we now see in the Federal rules, should that be part of our rules; and if so, how should it apply; and I indicated yesterday how we treated that, but I think that's a worthwhile discussion; and as I say, both of those issues come up next.

The other really two big issues, one is in our work before the committee; and that is the whole business around experts, you know, should there be this discovery around communications between lawyers and their experts and draft reports and so forth. That's in here. I guess depositions would be another place for some discussion because we don't recommend the ten depositions rule limit that's in the Federal rules, but it's there, and there are some other differences in how they control deposition discovery and how we do, and then finally, the whole Rule 215 set of changes, if any, and spoliation.

PROFESSOR HOFFMAN: Bobby, I agree with that, but you missed the big one that you and I haven't

talked about I overlooked this morning, scope of discovery, 192.3.

MR. MEADOWS: Well, that's in proportionality issue.

PROFESSOR HOFFMAN: Well, it's --

MR. MEADOWS: Well, yeah, I mean, it's relevant, so we're going to come to it right now.

PROFESSOR HOFFMAN: I just want to highlight that proportionality is a piece --

MR. MEADOWS: Right.

PROFESSOR HOFFMAN: -- but the subject matter and the reasonably calculated stand alone.

MR. MEADOWS: So I just offer that as if we could not leave here today until we've at least gotten some -- some reaction from the full committee about those big topics, that would be great; and as I say, we're going to come into what Lonny's talking about now, and in the scope of discovery discussion around 192.3, there's a lot there.

CHAIRMAN BABCOCK: Yeah. So your idea is we don't go through these seriatim, to borrow a phrase.

MS. BARON: Word of the day.

MR. MEADOWS: Actually, we can. We can for a short-term, and we can get through these general provisions.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: 190 to 194 and a couple of others, and that will be a big chunk of work.

CHAIRMAN BABCOCK: Well, scope of discovery is clearly in the --

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: -- big chunk pile.

MR. MEADOWS: And it's next.

CHAIRMAN BABCOCK: And it's next, so why don't we talk about that.

MR. ORSINGER: Are we basically skipping the rest of 190 --

MR. MEADOWS: Oh, whoa, whoa. Yeah, yeah, yeah. Yeah, I'm so sorry about that, because Rule 192.2, timing and sequence of discovery, Justice Christopher just pointed out to me is antecedent to that, and I think we should discuss it. So and I see Orsinger's hand up, so trouble is coming.

MR. ORSINGER: I don't want to skip 192.1.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Yeah, can I address that?

CHAIRMAN BABCOCK: Yes, go ahead, Richard.

MR. ORSINGER: There's another form of discovery that I use frequently --

CHAIRMAN BABCOCK: Buddy, I'm sorry.

MR. ORSINGER: -- that isn't listed here, and it's just subpoenas to third parties to produce records, and I don't believe that it's included in the request for production and inspection, and I think we ought to add it. It's -- some lawyers are not even aware that you can subpoena records from third parties to deliver them to your office, no deposition or anything. That's one of the real innovations in the discovery rules that I think is highly useful and that we ought to add it onto this list.

MR. MEADOWS: I think it's a great idea.

MS. HOBBS: And do we really mean to prohibit that before an answer? Like if you were investigating a claim, or what about how does Rule 202 come into this, too, a pre-suit deposition to investigate a claim?

CHAIRMAN BABCOCK: Yeah, if you have injunction proceedings.

MS. HOBBS: Yeah.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have a question on 192.2, on timing, "A party may not seek discovery from any source before the defendant's answer is due." If you have multiple defendants, how does that work?

HONORABLE TRACY CHRISTOPHER: What we were

trying to eliminate is the sending of discovery with mediation, and maybe that's just all we need to say.

MR. ORSINGER: What's wrong with that?

HONORABLE TRACY CHRISTOPHER: It has caused problem over the years; and first of all, when we're talking about sort of the idea of chatting with each other and deciding discovery, you get some mega case, with this, you know, humongous document request attached to the petition and then the defense, you know, oh, I've got 20 extra days to respond, but they haven't -- you know, they're so far behind the ball at that point, and you don't get the idea -- you don't get the ability to say, "Okay, here's how we're going to handle ESI, here's how we're going to do this, here's how we're going to do that." Plus we've seen it abused in like credit card debt cases. We've seen it not -- not served. There are tons of service problems with, you know, having discovery actually served with the petition. So anecdotally that's what we are trying to change.

MR. MEADOWS: And it also jumps ahead of the mandatory disclosures that are part of this new work. So you've got the mandatory disclosures that ought to come first and not have some pleading arrive with the petition.

MR. HAMILTON: Well, you mean you can't seek discovery from that defendant until that defendant's

answer is due?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. MEADOWS: Yes.

MR. HAMILTON: But not you can't seek discovery from any other source?

HONORABLE JANE BLAND: We can change that.

MR. MEADOWS: We can change that. That will get to Richard's point.

CHAIRMAN BABCOCK: And in injunction actions, you would do what you normally do, ask for expedited discovery?

HONORABLE TRACY CHRISTOPHER: Right.

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: So you would ask to not -- say, "Despite this rule, we know about this rule, but we have irreparable injury occurring" --

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: -- "and we need to do discovery right away."

MR. PERDUE: Well, how do exempt that, and how do you exempt a 202 position?

HONORABLE ANA ESTEVEZ: Maybe we just say you can't serve it with the petition.

HONORABLE TRACY CHRISTOPHER: Right. We can just say that.

MR. FULLER: I do like that. That makes a whole lot of sense.

HONORABLE TRACY CHRISTOPHER: Right. That's fine. No service of discovery with petition.

MR. GILSTRAP: That said, it's pretty broad. It says --

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: I don't know if that will fix it because somebody could read that and say, okay, "I won't put it with my petition, but tomorrow I'm going to pitch it to you."

HONORABLE TRACY CHRISTOPHER: True.

CHAIRMAN BABCOCK: Jim, did you have something? And then Professor Dorsaneo.

MR. PERDUE: No.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: Well, I'm not following. What do you mean "from any source"? What does that mean?

HONORABLE TRACY CHRISTOPHER: We will change that.

PROFESSOR DORSANEO: Huh?

HONORABLE TRACY CHRISTOPHER: What we are trying to prevent, if not artfully written, is the service of discovery with the petition.

MR. FULLER: "No dicovery request may be served on any party prior to that party's answer being filed," something along those lines.

HONORABLE KENT SULLIVAN: Right.

MR. GILSTRAP: Well, that's broader than what she said.

MS. HOBBS: Yeah.

PROFESSOR DORSANEO: I understand those two sentences, but I don't see how they fit together. I still don't understand.

HONORABLE TRACY CHRISTOPHER: You don't understand mine or his?

CHAIRMAN BABCOCK: Either.

PROFESSOR DORSANEO: I'm just confused by what does that "from any source" mean?

HONORABLE TRACY CHRISTOPHER: Right now --

PROFESSOR DORSANEO: It means no discovery --

HONORABLE TRACY CHRISTOPHER: -- people serve discovery with their petition, and we had put in the rules that you got a little extra time to answer, and we think that's a bad idea under the -- well, first of all, we've got mandatory disclosure. You should see what people give to you before you send discovery. We're trying to cut down on the costs of litigation, and this is

one way to cut down on the costs of litigation, is to eliminate the service of, you know, 50 requests for admissions, a hundred document requests, with the original petition.

CHAIRMAN BABCOCK: Justice Busby.

HONORABLE BRETT BUSBY: Does it clear it up for everybody just to say that "A party may not seek discovery from a defendant before that defendant's answer is due"?

MR. GILSTRAP: Same thing. I mean, it's implicit, "from any source." You can't seek discovery.

PROFESSOR DORSANEO: Well --

HONORABLE BRETT BUSBY: I don't think so.

PROFESSOR DORSANEO: Me either.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: I agree with Justice Busby's suggestion.

MR. DAWSON: I do, too.

HONORABLE JANE BLAND: That will clarify it. That would take care of the problem of investigating third parties or other codefendants that have already appeared. It will resolve that.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: As long as it's clear in the rule that if you were worried about, you know, just

evidence that was about to be destroyed or like that there would be some way around that, someone is about to die, you need their deposition, or I mean --

HONORABLE JANE BLAND: We can add "absent order of the court."

MS. HOBBS: Or something, right.

HONORABLE JANE BLAND: At the end.

MR. MEADOWS: Extraordinary.

MS. HOBBS: Something.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I just want to be sure that this doesn't stop somebody from issuing a subpoena to bring records to a temporary hearing.

MS. HOBBS: Uh-huh.

MR. ORSINGER: Because that's frequently argued that that's a form of discovery, and it's frequently objected to that if it's a subpoena to a party that they're supposed to have 30 days to respond to a request for production. In many, many family law cases we've requested a temporary hearing before answer day, and of course, if you're seeking support or you're seeking interim fees, you have to subpoena the other side's bank records, so if we file a divorce petition, get a temporary hearing, show cause order, and then get a subpoena to bring, have I just done discovery against that party

before they filed an answer or before their answer was due, because we can't rule that out or else it makes it very difficult for someone to make their case at the temporary hearing with no records.

HONORABLE TRACY CHRISTOPHER: Well, I mean, you have that problem under the current rules, and because, you know, a subpoena on a party you're supposed to give them -- they're supposed to get 30 days under the current rules. So, you know, to me you have to get leave of court if you want them to produce documents in less than 30 days. I mean, that's what our rule says.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: Is that what our rule should continue to say?

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, this is going to be a tension because under the Federal rules discovery doesn't start until the parties have had a conference to plan their discovery schedule and absent a court order, and we have opted for a plan that starts the discovery schedule without court intervention. My concern is that, you know, at a temporary injunction you may need to take a deposition or two in advance of the TI hearing on a hurry up basis, and I can understand then why maybe discovery might be necessary to pursue before the defendant's answer

is due.

On the other hand, what I'm worried about is -- are routine orders. You submit a petition with a stack of request for admission or request for production, and a pro forma order exempting you from the rule so that you can serve them with the petition, and I'm not sure exactly how we're going to draft to solve both simultaneously, but I just point it out. The other thing is what I often saw in order to serve discovery before the answer is due but not give them 50 days, is they served the -- they have a citation to serve you with a petition on Monday and then on Wednesday you get a citation with the discovery attached to it, so because it's not served with the petition, you don't get 50 days, but that's another abuse.

CHAIRMAN BABCOCK: Tricky. Justice Bland.

HONORABLE JANE BLAND: Well, in the temporary injunction case, typically the defendant has appeared and answered for TI, not for a TRO, and secondly, the party seeking expedited discovery moves for expedited discovery. Even under our current rule you couldn't get the discovery quickly enough for a TI hearing without getting court intervention.

MS. HOBBS: If you put the qualifier on the front of that I think it will work.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: I think the absence of the court or, excuse me, absent order of the court really addresses that.

MS. HOBBS: Yes.

MR. FULLER: Because the two problems we're really talking about here are centered around the consent of focus. In the discovery that is served with the petition your focus is not on responding to that discovery, i.e., the 300 requests for production surrounding the four requests for admissions or something like that. In the extraordinary proceedings, the things like that, the involvement of the court is focusing your attention on that discovery. It's not going to go by unnoticed. It's not going to take advantage of it.

CHAIRMAN BABCOCK: Okay. Anybody else? Richard.

MR. ORSINGER: Yeah, so if we rewrite 192.2(a) so that it says the party may not seek discovery from a defendant before the defendant's answer, we could still issue a subpoena to a CPA or to a bank, just not a subpoena to the other side. I'm not agreeing that that's good for family law, but that is the intention here, is that we're not prohibiting getting information from third parties. We're only prohibiting getting information from the defendant.

HONORABLE TRACY CHRISTOPHER: Without leave of court, right.

MR. ORSINGER: Well, can you get leave of court ex parte? I mean, when I go file my original petition and I get a show cause order or I get a setting for a temporary hearing, can I present an ex parte motion to the court to allow me to issue a subpoena for the hearing? Is that ethical and legal?

HONORABLE JANE BLAND: Not in front of me.

MR. ORSINGER: No? It's not? Okay. So basically let me just say that in a lot of family law cases we are prohibiting the party without control of the bank accounts from having any information at the hearing that they need to get support and to get interim fees, because typically they don't control the bank accounts enough to hire lawyers, hire a CPA, or even, you know, pay the bills. So when you have a spouse that's in that situation, the only way you can even find out what the evidence is of where the money is or what the income is, is to subpoena the other side to bring it; and if we prohibit that -- I mean, right now it's sometimes judges will do it, will let you -- you can subpoena; and if they bring the records then you get on with your hearing, but if somebody says you can't subpoena these records you can't know what you need to know in order to have your

hearing, then you're kind of in a situation where you have to take it on the fly and believe whatever they say on cross or you have to request a reset of the hearing for like a month. So this to me comes down on the side of you can't make them bring anything to the hearing, which I think is counterproductive.

HONORABLE TRACY CHRISTOPHER: But you have that same problem under the current rules, because the current rules say that if you subpoena a party, they -- for documents, they get 30 days to respond.

MR. ORSINGER: Well, you know, one of the e-mails I sent to this subcommittee was that I would like some clarification because the family law practice is irregular. Some judges say, "You were subpoenaed to bring the bank records and you didn't," and they'll be mad, and then other judges will listen to the argument that they have 30 days to do it. We can clear this up. It was an uncertainty left over from the original rules. It's been a problem for divorce practice ever since that time. I can get the Family Law Council to take a position on it, and I will do that, and I will bring that to you, and let you see what the general experience of family lawyers is, but it's just gaming the system when somebody refuses to give you information that's relevant because they're using this 30-day rule that's designed for a different purpose

to keep you from having a hearing within a month.

CHAIRMAN BABCOCK: Justice Bland.

MR. ORSINGER: That's my view.

HONORABLE JANE BLAND: Richard, does the change that we have included now that you may seek leave of court to subpoena the other party's documents within -- you know, does that rectify the problem that you're thinking about?

MR. ORSINGER: Yes, it does. Where do you say that?

PROFESSOR HOFFMAN: They're adding that.

HONORABLE JANE BLAND: So our new rule is "A party may not seek discovery from a defendant before the defendant's answer is due without leave of court."

MR. ORSINGER: Okay. So that gets back to my question of is it then ethical and going to be appropriate when you get your temporary hearing to have an ex parte motion or request to the court for leave to issue a subpoena to bring records to the hearing? If you say "yes," that's great. We can do that in every case we need it. If you say, "No, it's not ethical, it's ex parte or it's outside the rules," then we still have the same problem.

PROFESSOR HOFFMAN: I can't think that --

HONORABLE JANE BLAND: Well, the answer to

that, I mean, it's pretty atypical to grant ex parte relief, but if you're having somebody come for a temporary hearing for temporary orders and you're expecting to put on evidence and you're expecting them to put on evidence, they're going to get some notice of the hearing.

MR. ORSINGER: Well, they'll have notice of it after you get the relief from the judge.

HONORABLE JANE BLAND: Well, then you potentially have to lay the groundwork for getting that kind of ex parte relief, but I don't think you're going to get a rule that's going to permit that in every situation.

PROFESSOR HOFFMAN: Well, isn't the best solution here is that judges will often turn down that ex parte request if you don't make an adequate showing, but if you do, they'll give it to you, and then the other side can move to quash just as they always could.

MR. ORSINGER: That's perfectly workable. I just want somebody to tell me that the rule we're going to adopt allows you to go to the court before the hearing and get permission to issue a subpoena against the other side. If you'll tell me you can do that, I think it's workable. If you tell me you can't do that, it's not workable. It needs to be changed.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: I'm not going to say

whether it's ethical or not, but I think any time we have an ex parte hearing we want to know if you know who is on the other side and then we want the other side to be available and present. So if you know there's another attorney, then I guess if you came in, I would say let's put him on the phone, and I would make the ruling with him there. Because, you know, it would be -- I would feel like that's what we have to do ethically. So, I mean, is that going to create a problem? Do you usually know who's going to be --

MR. ORSINGER: The only problem -- and we have that problem a lot with all kinds of ex partes. The TRO practice varies from county to county, and some judges sign TROs just because they're put in front of them. Some judges won't sign any TROs because they have standing orders that they say substitute for the need of TROs, and others, according to Judge Yelenosky, he'll call these pro ses on the phone and say, "Your wife has filed a divorce" -- I think he described this practice. "She's asking for one, two, and three. What is your position on it?" Guy is not under oath, but he's being heard. The TRO practice varies, but the only time that I think that that warning of an ex parte order is difficult, if you have a family violence situation where there's a possibility of retribution or where someone might take that advance

notice and make assets disappear, because they've now been told --

HONORABLE TRACY CHRISTOPHER: But you subpoena them.

HONORABLE STEPHEN YELENOSKY: Or disappear with the child.

MR. ORSINGER: Or disappear with the child, which is even more of a --

HONORABLE ANA ESTEVEZ: I sign those ex parte without anybody. I do.

MR. ORSINGER: Well, all I'm telling you is that the idea that you're always going to give the other side notice in a family law case can be a problem if you have a law breaker out there that either the child disappears or the property disappears or some violent act occurs before there's a full scale protective order served.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Yeah, since you mentioned our practice, I think it's pretty uniform. We've really reached a consensus in Travis County --

MR. MUNZINGER: Judge, could you speak up?

HONORABLE STEPHEN YELENOSKY: I'm sorry?

MR. MUNZINGER: Would you mind speaking up?

HONORABLE STEPHEN YELENOSKY: I would be

happy to speak up.

MR. MUNZINGER: Thank you.

HONORABLE STEPHEN YELENOSKY: I think we've reached a consensus in Travis County that you have to give notice of a TRO to the other party if at all possible and almost always it is unless it's a life or death situation. It may be 9:00 o'clock in the morning you call them and say you're going to be there at 11:00, but at least there's an attempt. You have to explain why you didn't give an attempt, and usually the only explanations accepted are "If I tell him that I'm going to court to get an order to stop him from going to Mexico with the child he'll leave now" or assets will be dissipated, but otherwise there's no reason that -- especially in a family case, when somebody wants an order regarding a child and the other parent isn't there, I want to talk to that parent at least on the phone, even though they're not under oath.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: It seems like we're talking about two different things. We're talking about a TRO where we -- and I think, you know, very common practice. Sometimes you do it ex parte because it's dangerous if you don't. Sometimes you call the other person on the phone before you do any ruling. What

Richard was talking about is you have a hearing. You have a TI hearing or you have a temporary orders hearing; and you want to subpoena records for that hearing, okay; and the question is how much response time are we going to give a party who is subpoenaed to show up; and in the TI circumstance, which is a little different from what you're describing, Richard, you have the TRO. You've probably already talked to the other side, unless it's a true emergency where you can't, and then the lawyer says to you while the other person is on the phone or actually there, "We need some expedited discovery" and then they get an expedited discovery order.

You're describing something a little different where all you do is go down to the court and get a hearing date that's 10 days away, and how we handle that. So there's not an emergency where, you know, people have been contacted, but -- and this sometimes happens like in the TI situation where you don't get a TRO. You just get a show cause order for the TI, and so you don't have that ability to get the other person on the phone, but I think you could still do that in connection with your motion for expedited discovery. You're down there getting a date. You say to the judge, "Judge, we need expedited discovery. Can we get the other person on the phone," and you have a hearing so it's not ex parte. I

mean, to me that's how I think it should be handled.

CHAIRMAN BABCOCK: Should we -- should we move off timing and sequence of discovery onto scope of discovery under your -- Bobby, under your "Let's talk about broad topics."

MR. MEADOWS: I think so. I think we've got an understanding of the issue. Let us see if we can come up with something that makes sense to everybody.

CHAIRMAN BABCOCK: Why don't you tell us what you've done on scope of discovery?

MR. MEADOWS: Okay. Scope of discovery, recommends revising 192.3 to adopt some of the language in Federal Rule 26(b)(1) regarding proportionality, and we adopt the relevancy language from the Federal rules, so I don't know that I need to read it; but what you find now in scope of discovery is that "Parties may obtain discovery regarding any nonprivileged matter that is relevant to a party's claim or defense," which is a bit of a different -- is the Federal definition of relevance -- "and proportional to the needs of the case as set forth in Rule 192.4(b)"; and what you'll notice in this, if you're familiar with the Federal rule, is that we have removed from scope of discovery the considerations around determining proportionality which are now in -- in our 192.4, which it deals with limitations on scope of

discovery; and as I said yesterday, the reason for that is that we believe the burden on using proportionality for discovery should be on the party resisting it as opposed to the party justifying. So that's -- does anybody -- Jane or -- I think that sets up the set of issues.

CHAIRMAN BABCOCK: Yeah. Justice Bland.

HONORABLE JANE BLAND: The Federal rule does not take a firm position on whose burden it is to demonstrate that requested discovery is either within or without the scope of discovery and has a comment that says that, you know, the burden is on all of the parties and the court or something like that, and that's really not consistent with Texas practice, and it also I think could lead to a real lack of clarity in discovery disputes, because one party needs to make that demonstration that the discovery asked for is outside -- you know, is disproportionate to the relief that's being sought in the case.

CHAIRMAN BABCOCK: Yeah, but --

HONORABLE JANE BLAND: And typically in Texas that burden has fallen on the defendant who is resisting the discovery, and most of our case law has developed that places that burden on the defendant resisting discovery, so rather than kind of leaving it amorphous like the Federal rule does, we think for clarity

sake and also just consistent with our practice we think it's better to go ahead and set that burden on the party resisting discovery to demonstrate that what's requested is disproportionate to the needs of the case.

CHAIRMAN BABCOCK: Isn't -- isn't the practice in Federal court -- and, of course, all of our responses to this question are going to be anecdotal, I imagine; but if the party is resisting discovery, they resist it and they say, "It's not proportional and we're not going to give it to you"; and then the proponent of the discovery files a motion and says, "Judge, it is proportional and here's why"; and then the resister, the party that doesn't want to do discovery, says, "No, that's nonsense for this -- for these reasons." And I don't know where the burden falls there, but it's the party seeking the discovery that typically says, "This is why I need it. This is why it's material. This is why it's important. This is why it's not going to be all that expensive for them to get it."

PROFESSOR HOFFMAN: Chip?

CHAIRMAN BABCOCK: Yeah, Professor Hoffman.

PROFESSOR HOFFMAN: So I think the answer to your question first is your instinct, which is we don't know because it's too new. Right? All of this just happened as of December, and so we don't have enough

information. That's the first thing.

The second thing I think to say is think about the -- it's a structural question, and so I -- in general I applaud what the committee has done on this, though, I have one change on proportionality that I think is important; but structurally, what the feds did is they took proportionality, which was already in the rule, it was in 26.(b)(2)(c), and they moved it up to 26.(b)(1), and it's not just a question of like lifting it up. It's that they put it into the rule called "Scope of discovery," and the debate that the committee is hoping we don't have in Texas, but what is going on at the Federal level is whether or not by moving it into "Scope of discovery" the rule-makers intended to shift the burden to the party seeking discovery to prove that it comes within the scope of discovery, the kind of start -- right scope of discovery is the starting point, right, what are you allowed to have, as opposed to having a broad scope of discovery and then limitations, what for us are in 192.4; and so -- so I think whether it happens the way you described it or not in terms of who files the motion to quash, who files the motion to get it, that's a -- it's like a -- it's an organizational or almost like existential question that has been triggered by the structural move in the language, and that's what they are

trying to avoid, and that's the part at least I thought he meant.

CHAIRMAN BABCOCK: Yeah, but even -- others who have practiced in Federal court since December, you know, speak up, but whether it's Federal court or in our court, wouldn't it -- you know, if I say in response to request for production my response is, "No, this would" -- "This is not proportional, and for all the reasons of the proportionality rule, we ain't going to give it to you," and's that's what it says until the proponent of the discovery comes forward and says, "That's not right. Let's have a meet and confer," and that takes you a couple of months, and then when that is unsuccessful then they file a motion and they come forward, and can they say, "Hey, Judge, we asked for this. They ought to give it to us," or do they have to say more and say, you know, "The objection is lack of proportionality, and of course it's material, and it's important," and blah, blah, blah.

PROFESSOR HOFFMAN: So I guess I want to be clear that I actually think this is -- precisely for the reason you just said, this turns out to be less of an issue than it is, which is to say ultimately there's going to be a fight about whether it's proportional --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR HOFFMAN: -- and whether -- and so

in that sense I agree with you. Having said that, I want to underline. I think there are much bigger concerns here around the subject matter language and the reasonably calculated. That's where I think there's real danger and mischief going on here, and so in my view we ought to talk less about proportionality and more about those because that's where the concern is, but even if what -- but I'll just say to the extent that what you're saying is -- it's we're adding ambiguity into the law, into our rules, where we don't have to. Here's an example where the feds have made a change that's unsettled the law. We're having a fight now, and I think it really is too early to say whether we know what the effect of that is going to be, and we could avoid all of that. There's nothing pushing us to do this. It's already in our rule the way they've written it in Rule 192.4, and that's where I think it belongs.

CHAIRMAN BABCOCK: Lisa had her hand up and then Justice Bland.

MR. MEADOWS: As Justice Bland said, it's kind of the way our system works. I mean, but now if you are resisting discovery and you object, it's up to the proponent of the discovery to pursue it.

CHAIRMAN BABCOCK: That's what I was thinking.

MR. MEADOWS: And sometimes they don't.

CHAIRMAN BABCOCK: What?

MR. MEADOWS: A lot of times they don't. That ends it. They just say, "Well, I'm going to lose this," and so that's a reordering of the initiation of the fight, and I think it's worked pretty well in Texas.

CHAIRMAN BABCOCK: Okay. Lisa.

MS. HOBBS: So it can come up either way, right? You can move to -- like some -- when parties dispute whether it falls within the scope of discovery or not, either you go down and get a motion for protective order and you're arguing that "I shouldn't have to produce this," or someone files a motion to compel. It can be raised either way.

CHAIRMAN BABCOCK: Right.

MS. HOBBS: It shouldn't matter what vehicle it is raised in, what the standard is, which is why I like what y'all have done and kept it on the party who is resisting discovery, because it shouldn't matter whether you're filing a motion to compel or a motion for protective order who bears the burden to show whether they meet the scope of review -- the scope of discovery, shouldn't matter what the motion is that's filed. So I like what you've done, and I think you've done a good job.

CHAIRMAN BABCOCK: But, Lisa, typically

isn't it the movant that has the burden?

MS. HOBBS: It shouldn't be. I know there are people that get that confused, but it is the same burden.

PROFESSOR HOFFMAN: She's right.

MS. HOBBS: It should not matter. I know that people argue that it does, but it should not matter, and I appreciate that our rule is going to take a stand on it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Yeah, one of the things I worry about on proportionality is it's very expensive. There are going to be disputes as -- will that create more disputes, I mean, and then disputes call for briefing, and I've got one case that we are arguing over many things. We had one hearing, and the expense to my client has been over a million dollars, and so is that going to create more arguments and more disputes rather than what we have, you know, is pretty broad and defined because every time you have an argument the lawyers are going to brief, and they're going to -- and it's very expensive. I have no answer to it. I'm asking a question.

CHAIRMAN BABCOCK: You know, I think that one of the reasons things are getting more expensive is because there's more readily accessible data available

than ever before.

MR. LOW: Absolutely. Absolutely.

CHAIRMAN BABCOCK: Judge Orsinger.

MR. ORSINGER: I would like to raise the question of whether it's the best thing to -- for the scope of discovery to exclude privileged material and this proportionality. To me everything that is relevant or might reasonably be calculated to lead to admissible evidence ought to be discoverable, but there ought to be exceptions to discovery like privilege or proportionality, and the burden ought to be the party that's fighting to stop the discovery to prove that. An example, and this is in the old rule, not just the new rule. I'm not criticizing this language, but the scope of discovery only extends to nonprivileged matter, but there are lots of times when you can get privileged information. It might be -- there might be an exception that allows you to have it. They might be invoking the sword and the shield. There are a number of instances where privileged information is subject to discovery, and yet we define it, the scope of discovery, only being nonprivileged. I would suggest that the scope to discovery be everything that's relevant or might lead to admissible evidence, and then we ought to set up privilege and proportionality as someone's defensive effort to narrow the scope of discovery.

HONORABLE JANE BLAND: So, Chip --

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: -- if the burden on the party proponent that's propounding the discovery is to show that it's relevant, to demonstrate that it meets that definition and the scope, and all we're proposing is keeping Texas practice the same in connection with, you know, the burdensome aspect of the producing the discovery, so that if it is difficult to produce the discovery because there's so much electronic data or it calls for information that's really not proportional to the needs of the case, the party that's in a better position to demonstrate that is the party that has that information.

CHAIRMAN BABCOCK: So what you just said is --

HONORABLE JANE BLAND: So relevance is still a requirement by the -- that has to be met by the party propounding the discovery.

CHAIRMAN BABCOCK: Well, proportionality has a lot of stuff in it, right? It's not just relevance, and it's not just burdensome. It's -- where did you put it in these rules?

MR. MEADOWS: The next section, limitations on --

PROFESSOR DORSANEO: Page 16.

PROFESSOR HOFFMAN: 192.

MR. HAMILTON: Page 16.

CHAIRMAN BABCOCK: So on page 16 you say it's not proportional, needs the case considering -- the importance of the issues at stake, amount in controversy, relative access, resources, importance of discovery resolving the issues, and burden. So there are a whole bunch of things. Burden I agree is something that is peculiarly within the -- within the information and knowledge of the party resisting the discovery, and I think it's always been on them to show burdensomeness, but what about the other stuff?

HONORABLE JANE BLAND: Those arguments that you -- those categories, those are typically what we see in a party responding to a motion to compel. They'll say, you know, "The other party already has this information, or they can readily obtain it, you know, quicker and easier from someone else." They'll say, you know, "It's expensive for us. This is what it would" -- they'll say, "It's way beyond the contentions of the case," so we don't think that -- we think that this really fits well with what Texas lawyers are currently doing in the discovery process; and, you know, I guess bottom line is, you know, that piece of it seems to be working okay; and we agree

that the Federal language on proportionality is good language; but we're kind of already using that; and we just didn't want to disrupt a process that seems to be working well and for which we have a lot of available case law unlike the Federal courts where discovery disputes are not really -- you know, they don't have nearly the case law that we do about proportionality.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: I think deletion of the language, "likely to lead to the discovery of admissible evidence" is going to work a sea change in what people construe as what is a proper subject of discovery and what isn't. I don't think that it is -- that the words -- that this proportionality concept, as Lonny says, nobody knows what it means really. They're working out the meaning of it in the Federal courts, and I don't know that it is a proper issue to be considered in discovery. We've all done discovery for years believing that your discovery should be relevant to the issues of the case as qualified by the concept that it may not be leading to admissible evidence, but if it is reasonably likely to do so, that is an extension of relevance.

CHAIRMAN BABCOCK: Yeah.

MR. MUNZINGER: When you get to the point "It's going to cost me a million dollars to look at this,

Judge," that's an objection that the trial court can put the expense on the seeker without changing the subject matter of discovery. To me when you drop this language about what is -- the slight to controlling beyond what is relevant to the issues I think you're working a sea change in what the practitioners believe is or isn't the proper subject of discovery.

When you look at the definition of proportionality in this at the top of page 16, "The discovery sought is not proportional to the needs of the case considering the importance of the issues at stake in the action." That's kind of like saying beauty is in the eye of the beholder. To whom is it important? To Mr. Smith, the plaintiff, and to Mr. Jones, the defendant, it's life blood -- it may be the life blood of my business. It may be everything to me, but it doesn't really affect society as a whole. Are you going to have discovery determined by the judges determining what is or isn't a burning public issue? Is that what this means? The amount in controversy, surely everybody -- there has to be reason. Obviously there has to be a reason, and people complain about the cost of discovery, and well they should.

I had a case years ago involving a French oil company and the French general counsel laughed at me,

and he said, "You Americans, you spend millions of dollars on the question of competence," meaning jurisdiction and then he said, "Of course, you get to the truth." And that's the purpose of discovery, is to get to the truth. So the amount in controversy, these things can be adjusted by a trial court weighing the question of, "All right, Munzinger, you're insisting on getting it. Pay for it. Reimburse him. If it's that important to you, pay for it."

The party's relative access to relative information, the party's resources, you're supposed to be equal in the eyes of the law. Justice is blind. You're not supposed to make rules that the rich do this and the poor do that. On the other hand, in discovery clearly somebody can be beaten down and destroyed, and they shouldn't be, and a trial judge ought to have it within their discretion to do it. I'm just very concerned about putting all of these new words and this new concept into a rule of discovery and what it may mean to all of us. I'm sorry to speak for so long. I'm going to have to leave in a few minutes, but I did want to get that out of my system.

CHAIRMAN BABCOCK: How much time do you have before you go?

MR. MUNZINGER: 15 minutes.

CHAIRMAN BABCOCK: Well, then keep talking. Marcy.

MS. GREER: I agree with Lisa that it's important to know exactly where the burden of proof is because it comes up different ways, and it shouldn't be different, but I question whether we are introducing any ambiguity by using proportional in 192.3 in the definition of scope, because if our --

CHAIRMAN BABCOCK: Marcy speak up. Dee Dee's having trouble.

MS. GREER: Okay. If our goal is to make sure that proportionality is -- the burden of proof is on the person resisting, who has the facts within their knowledge, I think it would be clearer to delete the word "proportional to the needs of the case" from 192.3 and just say, "subject to the limitations of Rule 194" -- "2.4(b)" because otherwise there could be an argument that scope is always on the person seeking discovery and therefore --

MR. MEADOWS: That makes sense.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Yeah, here's the problem. By putting proportionality in 192.3 you're putting -- you're implying that the burden is on the party requesting discovery, okay, and, quite frankly, proportionality

logically has nothing to do with scope of discovery. Scope of discovery is as broad as the pleadings. Proportionality has to do with how much of otherwise -- how much information that is within the scope of discovery are you really entitled to go get.

MR. MEADOWS: I think it make sense.

MR. FULLER: So, yeah, you've got to decide there because you then put it on the defense to limit proportionality.

CHAIRMAN BABCOCK: Professor Hoffman.

PROFESSOR HOFFMAN: So that's very nicely put, Hayes. I agree with that. So I want to just -- since I finally get a chance to talk, four points. One, I don't think we should have proportionality in here at all. I want to make sure we're clear about that, and, Jane, to go to your point, it's working fine in 192.4, Jane, to talk about the burden outweighing the benefit. I'm not a fan of proportionality creeping in anywhere. We don't need -- what did you say, Bill -- mindless compliance with Federal language. I like that. Two, but if we're going to have proportionality, it shouldn't be in 192.3. Just put it in 4, and again, Hayes said it better than I did, so I won't repeat it.

Three, while we're talking about this and since Richard raised it, what the bigger concerns to me

are we shouldn't drop the "relevant to subject matter of the pending action" in exchange for the "relevant to any party's claim or defense." That's a big deal change that we haven't talked about yet. I think that's a mistake, and then, finally, four, we shouldn't drop the "reasonably calculated," and, again, Richard has already covered that, so those are the four.

PROFESSOR DORSANEO: Did you say shouldn't or should?

PROFESSOR HOFFMAN: Should not. We should keep that in there, so relevancy should be defined the way it was before, subject matter, not claim or defense, and reasonably calculated.

CHAIRMAN BABCOCK: Okay. Professor Dorsaneo.

PROFESSOR DORSANEO: Well, we've had a concept of proportionality for a long time before --

PROFESSOR CARLSON: Yeah.

PROFESSOR DORSANEO: -- it found its way into our rules, and it was within the confines of the reasonably calculated standard, so nothing new, but it is -- it is additional. Like, I would ask under the proportionality standard is it irrelevant that the information sought is reasonably calculated to lead to admissible evidence? Is it you still can't discover it?

Huh? Because this is a little tiny case you have here and it will cause a lot of trouble to allow somebody to get to that admissible evidence, and if you're arguing it you're not just going to end up arguing that it's -- you know, you argue that it's admissible, and if it's not admissible you'll argue that it's reasonably calculated to lead to admissible evidence that bears on the following pivotal issues in the case to explain to the trial judges what you're going to do and why you need to do it. Right? You know, and that's how it works, and I guess the last thing I want to say is, is this new standard going to change any of comment one, you know, well, "The scope of discovery is quite broad." Well, maybe that, you know, is broad, not "quite broad." Huh? Not as broad as it, you know, had been.

CHAIRMAN BABCOCK: Used to be.

PROFESSOR DORSANEO: "It is nevertheless confined to the subject matter of the case and the reasonable expectations of obtaining information." Then we have a -- we're sent, go read these cases. Okay. "Discovery needs to be tailored to the needs of the case." I mean, I would hate to think that adoption of this proposed change would make all of these cases in question. Huh?

CHAIRMAN BABCOCK: Roger has had his hand up

for a long time, and then Judge Wallace. And then Alistair.

MR. HUGHES: Well, picking up on what Professor Dorsaneo and what Mr. Munzinger said, if you take this language, I mean, this is enacted and then say but burdensome is going to be the responding party's problem and all the party seeking discovery has to show is relevance, the effect is to make pure relevance the king. That's going to be all the requesting party has to show, which then leads to the problem I think that Professor Dorsaneo just identified, and that is we have a series of cases. There's the Allstate case that condemns sending outs 200 requests for production just because you have it in your word processor. The party seeking discovery has some obligation at the outset not to ask every question and ask for every document in the universe, and if you -- and if all you do is take -- 192.3 says all the requesting party has to do is show its relevance and we remove the argument that it has to be reasonably calculated to lead to discoverable evidence, a lot of case law goes out the door, including the National Lloyd's opinion, which the way I read it is say pure relevancy is not -- just because you can think of a possibility. Does not make it exist in the real world as an actual avenue of -- that's going to lead anywhere. So I'm worried about that.

The other thing is, is if you put the entire -- what it is and what I see here is the discussion about defining proportionality, just treats it as a species of unduly burdensome, and while I can see the analogy, the problem is, is that I can explain why it's too expensive to my client to respond to it or what the cost to my client is and how it's going to disrupt their operations and their business. What I cannot explain to the court is how much -- is why this is crucial to my opponent's case or not crucial, and I certainly am not in a, shall we say, a reliable position to say, "Oh, come on, your Honor, the plaintiff's only" -- "his case on the best day with the wind on his back is only worth $10,000" because the plaintiff will stand and say, "Oh, no, no, my client's been damaged this and this. He has all of these damages. It could be a million-dollar case."

Well, how am I supposed to -- I mean, at this stage of discovery it's hard to build that up or knock that down, and I can begin to see why the feds say it's not easy to allocate the burden of proof. I'm just saying that some of the elements of proportionality are best answered by the person seeking discovery, and some of the elements might be best answered by the person who was trying to resist it, and I'm not sure one size fits all is going to be terribly workable, but at the very least, if

you're going to put the burden of proof on the defendant, I think we're going to have to leave in the language of "reasonably calculated to lead to discoverable evidence." Otherwise we will be pitch -- my humble opinion, we will be pitching a lot of the cases and a lot of the commentary that Professor Dorsaneo just identified.

CHAIRMAN BABCOCK: On the other hand, look at the bright side. He can rewrite his books and make a lot of money.

PROFESSOR DORSANEO: Rewriting these books at the age of 70 is getting a bit tiresome.

CHAIRMAN BABCOCK: You get people to help you. Alistair. And wait a minute, Alistair, sorry. Judge Wallace was ahead of you.

HONORABLE R. H. WALLACE: Okay. Well, with all due respect, I like the proportionality language, and I don't think it is a sea change in discovery, and here's why. The general scope of -- the rule on the general scope of discovery is sort of like the hearsay rule. The scope of discovery is what's relevant, period, and then there's all these limitations and exceptions that come along, and that's the way it always has been. The fact that it is not a grounds for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the

discovery of admissible evidence. That doesn't carve out a requirement of it still being relevant, and it never has. So but lawyers use that argument to come in and say, "Well, Judge, it may not be relevant, but, you know, if I could just get these multitude of documents I might find something in there that will lead to admissible evidence," but you've still got to show that it's relevant under the new rule or under the old one. So I don't think that -- I don't think it is a huge change, and I am very much -- I'm in favor of getting rid of that language about how it reasonably appears to -- calculated to lead to the discovery of admissible evidence because that's an art that doesn't change the requirement of relevance.

The one question I had is at the very beginning of Rule 192.3 it says "unless otherwise ordered by the court." How would the court ever change the scope of discovery? I'm not sure what y'all were thinking about or if that was --

HONORABLE JANE BLAND: That's a nod -- yeah, that's a nod to the Federal rule. The Federal rule almost throughout has "unless otherwise ordered by the court."

HONORABLE R. H. WALLACE: That's Federal judges.

HONORABLE JANE BLAND: Yeah, so we don't have a strong position about that.

MS. HOBBS: I do.

CHAIRMAN BABCOCK: Alistair, then Richard, then Lisa, then Judge Christopher, and then Hayes.

MR. DAWSON: So I think that the scope of discovery and the proportionality are probably among the most important changes that are recommended in these rule changes and the most necessary. I think we all recognize that the cost of discovery in many cases is just out of control, and in my judgment -- I don't have any evidence to support this, but in my judgment is one of the biggest contributors to the so-called vanishing jury trial, is how expensive it is to conduct discovery; and, you know, we tried in 1998 or the rules committee tried in 1998 to come up with ways to reduce the cost, and it hasn't worked; and two of the most important -- well, one of the most important contributors to the cause is this "reasonably calculated to lead to discovery," because that -- just about everything can be reasonably calculated. It's so broad that any time my opposition, you know, if they want to go on a fishing expedition, that's what they use as the language to come up. "Well, Judge, it might reasonably be calculated. It could. It's possible," you know; and a lot of judges, I think correctly with our case law, have a very expansive and broad view of the scope of discovery; and that's expensive.

So I think we -- I don't really care whether we keep it relevant to the subject matter of the proceedings or whatever the prior language was, but I do think we need to get rid of the "reasonably calculated" language because it broadens discovery much more than it needs, and as Judge Wallace points out, you just have to show relevance, and the way it is now, relevance and -- it includes in the eyes of many judges these "reasonably calculated" standards.

MR. MEADOWS: Extends it.

MR. DAWSON: It extends it. That's right. The two most expensive -- in my opinion, the two most expensive contributors to the cost of litigation are the collection and production of electronically stored information and depositions, and we ought to have in our rules a means to control that, and this is what Jim and I were talking about the other day, so if you've got a hundred thousand-dollar car wreck case and you issue document requests that are going to call for $3 million worth of time and effort to collect and review and produce ESI, the trial judge ought to have the discretion to say, "You know what, we don't need that. We don't need 3 million dollars worth of attorney time and effort on a hundred thousand-dollar car wreck case."

Conversely, if you've got the same hundred

thousand-dollar car wreck case and the defendants want to take 30 depositions just because they want to run up the cost for the plaintiff, the trial judge ought to have the discretion to say, "We don't need 30 depositions in this hundred thousand-dollar car wreck case." Now, it is true that our current rules have the ability, you know, to put these limitations. Much of the proportionality language is already in the rules in some other form or fashion, but the current system is not working, not working, not even close to working; and I think we need to send a message in the rulings to the trial judges that, look, you need to take into consideration the various factors that are laid out in the proportionality language when you're considering what discovery is appropriate for your case; and you trial judges really ought to do what you can to curtail the cost of litigation. That's my speech.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: Okay, so going back to the "unless otherwise ordered by the court" language that y'all took from the feds and that Judge Wallace doesn't know what that means, I think under Rule 26 before they amended it for proportionality you could have discovery that is relevant to a claim or defense or for good cause the court could order discovery relevant to the subject matter, and that was seen as a little bit broader than

relevance for a claim or defense, and so you had to show good cause to get this broader thing. So I think when they amended Rule 26 they've taken out that good cause thing, but they've added in this "unless ordered by the court," that allows you to get slightly broader.

So like maybe you haven't pled the claim or defense, but you -- I don't know, I'm not sure how you would show good cause, and I'm sure there is a whole wealth of Rule 26 case law under that old standard, but that's what I think it means.

HONORABLE JANE BLAND: They definitely intended to take out "subject matter," and I don't think they were putting it back in for the --

MS. HOBBS: What else -- I mean, what other order of the court would allow you nonrelevant information? I think it leans back to the slightly broader -- and we can talk about whether those two things mean something dramatically different or not, but they might in a certain situation, and that allows a court to possibly get to the subject matter.

MR. MEADOWS: So you would leave the language.

MS. HOBBS: I would leave the "unless," yes. I think it serves a purpose.

CHAIRMAN BABCOCK: I think it went Richard,

Judge Christopher, Hayes, and then Judge Estevez.

MR. ORSINGER: Okay. I wanted to make two points. I don't think proportionality should be in the scope of discovery because one solution to disproportionate is to disallow the discovery, but another solution to disproportionate is to shift the cost to the party seeking the discovery, and if you look back here you consider the party's resources and the burden of the expense, I think that a proportionality objection can be addressed by saying "If you want it, you pay for it, you can have it." Another one is just "This isn't worth it. I'm not going to let you have it at all." So for us to put proportionality in the definition of the scope of discovery basically means there's only one solution to a proportionality problem, and that's to disallow it.

The second point is that whole business about "reasonably calculated to lead to the discovery of admissible evidence," it has to do with someone making an objection to discovery on the grounds that the evidence is not admissible. Why don't we just eliminate that by saying, "It is not a ground for objection. Information sought will be inadmissible at trial." Period.

MR. DAWSON: It's in there.

MR. MEADOWS: It's in there.

MR. ORSINGER: No, no.

MR. MEADOWS: No.

MR. ORSINGER: You add on there if, if, you add on there or the rule -- the language that was in the original rule says an objection that is inadmissible is not grounds to deny discovery if it's reasonably calculated. Why don't we just eliminate the -- just say that the fact that it's not admissible at trial is not a valid discovery objection? I ought to be able to discover hearsay because somebody's hearsay may lead me to a witness that has personal knowledge.

MR. MEADOWS: Richard, the last sentence says exactly what you're saying.

HONORABLE STEPHEN YELENOSKY: He wants it to stop.

MR. MEADOWS: Of our proposal, the last sentence.

MR. ORSINGER: "Information within the scope of discovery need not be admissible in evidence to be discoverable." I get it. I like it. I think it's -- but doesn't that eliminate this debate over whether -- if it's not an objection at all then it's not an objection if it's reasonably calculated. We don't even have to have that argument anymore because you just can't even make the objection, and are we really debating something that's meaningful about getting rid of "reasonably calculated" if

you can't make an objection based on admissibility anyway? It's like a -- right? The debate is gone, right?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I wanted to tell Munzinger, who has left the room, that the points that he was complaining about are in our current rule. I mean, "The benefit or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." That is our current rule and has been for almost, you know, 30 years.

CHAIRMAN BABCOCK: So your point to Munzinger is read the rules, right?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. ORSINGER: The current rule is not necessarily good.

PROFESSOR DORSANEO: It's been pretty dormant.

HONORABLE TRACY CHRISTOPHER: It has been dormant, but it's been there.

CHAIRMAN BABCOCK: Well, now we're going to say, "Munzinger, read the transcript after you left." Hayes, I think you've had your hand up for a long, long

time.

MR. FULLER: Getting back to proportionality, it seems to me -- and I will be interested in y'all's comments on this -- that by introducing explicit proportionality in this draft that it really hinges on two other things, and one of those is mandatory disclosures, which are more extensive than previously allowed under our rules by the addition of documents; and secondly, the involvement of level three meet and confer discovery control conference sort of thing, Rule 26 conference, aspects of that. I was interested in Roger's comment about unduly burdensome and how that relates to proportionality, because I always found -- find you limit discovery on the basis that it was unduly burdensome, unduly burdensome, having to provide affidavits and basically the interworkings of my entire business persuades you, usually unsuccessfully, that this was too expensive to do.

It seems to me -- and I don't know if this is your intent or not, but that in order to have a meaningful distinction from which to determine an issue of proportionality, you've got to have a baseline; and I'm wondering if you were thinking -- or is it that baseline can't be centered around those mandatory disclosures with the addition of the documents? Because that would give

the court a way to say, "Look, you know, claims and defenses, scope of discovery, here's our mandatory disclosure. You're getting into your documents. We don't want the will supplement, will let you know later, stuff like real meaningful initial disclosures, and then come to us on the issue of proportionality and talk to us about what else you need." And unless you can show -- and the requesting party, the resisting party, you've got to have some standard to address that issue it seems to me. Anyway, that's -- I would be curious to know what your thoughts or comments are on that or if you even -- if that's something --

HONORABLE TRACY CHRISTOPHER: Well, I mean, that was part of our goal was no, you know, voluminous discovery requests, voluminous admissions served with the petition. Instead start out with production of documents and initial disclosures and then see where you are after that. I mean, that is what we were hoping to accomplish to try to limit the cost of discovery.

HONORABLE KENT SULLIVAN: Speaking for myself, just if I can jump in briefly, it turns these additional discovery requests into ones that are much more incremental as opposed -- to follow up on what Justice Christopher is talking about, as opposed to the need for extraordinarily broad requests, perhaps on both sides, to

get a baseline about what the entire lawsuit is about; and I think potentially it really can help the question of incremental costs.

CHAIRMAN BABCOCK: Judge Estevez. You've been very patient.

HONORABLE ANA ESTEVEZ: We were under the -- going back to "unless otherwise ordered by the court," that language I believe needs to be there because of the fact that they could require privileged matters to be produced, so I don't know that it goes to whether or not something was relevant, but I think it does go to the rest of the rule that says, "Parties may obtain discovery regarding a nonprivileged matter," but it would allow the discovery of privileged matters under those other circumstances, so I think that was the original intent, and we forgot about that.

CHAIRMAN BABCOCK: Can everybody over there hear her?

HONORABLE TRACY CHRISTOPHER: Good point.

HONORABLE ANA ESTEVEZ: I think we had talked about that, too, and we just all forgot.

CHAIRMAN BABCOCK: Roger, I think you were next.

MR. HUGHES: Well, I return to the -- return to praising the phrase "reasonably calculated." I think

it actually had substance, and it gave meaning. It is what -- that is the phrase that I think supported the court in Allstate in saying, "Look, just because you have a request for production with two or three hundred requests in it in your word processor, don't use it. Try to focus on what you think you're really going to need, not the conceivable universe"; and the second thing, once again, if all the party requesting discovery has to show is relevance, then a lot -- to my way of thinking a lot of case law is going to go out the window about having to show that it's going to actually produce something in the real world. All you have to do is say, well, it's some alternate universe. This request might turn up a dead fish, and so I get it. Now let the party resisting discovery show the opposite.

Also, I also point out that the placing the burden of proof is going to make -- I don't know whether it makes appellate review easier or not for the court. It may, because when you say the party resisting discovery has the burden of proof, once -- and you lose, that is, the judge says produce it, well, then all your evidence concerning proportionality and burden -- is just like making a burdensome argument. It disappears on appeal. It isn't there. You lost the credibility battle, and that makes it extraordinarily difficult then for the party

resisting discovery to make -- to raise proportionality. It becomes the analog of an undue burdensome. You lost that argument. The judge disbelieved all your evidence; therefore, it isn't there, and we have to sustain because in some parallel universe this could lead to admissible evidence, we are going to have to let -- the order will stand.

CHAIRMAN BABCOCK: Bobby, I was wondering just listening to all of this, we don't have near the full committee here, but it would be interesting to me to see who wants to abandon "reasonably calculated to lead to the discovery of admissible evidence" in favor of proportionality. Would that be of any benefit to anybody?

MR. DAWSON: I don't think they're tied together.

CHAIRMAN BABCOCK: Well, they sort of are.

MR. MEADOWS: I do think -- I was just conferring back here in terms of the advisability of some kind of, you know, nonbinding vote. There is a strong belief, and we've heard it here today from some, that this language about there's not an objection, that the information sought will be inadmissible at trial and so forth, has the effect of extending relevance beyond what it really is, which is the opposite of what Roger is saying. So, I mean, there is that belief, and maybe we

ought to get some indication of the committee in terms of where people land, because I share that view. I think the change is an improvement. I think lawyers argue this language we're talking about as a way to broaden the scope of discovery.

CHAIRMAN BABCOCK: I'm sorry. You said --

MR. MEADOWS: I think lawyers use that language --

CHAIRMAN BABCOCK: Right.

MR. MEADOWS: -- to broaden the permissible scope of discovery beyond relevance to the claims or defenses.

CHAIRMAN BABCOCK: Okay. And how would you frame the question in order to get guidance from the entire committee?

MR. MEADOWS: One way to do is just who is in favor of omitting that language and just leaving it as it's stated, which is it's not a ground for -- "Information within the scope of discovery need not be admissible in evidence to be discoverable."

CHAIRMAN BABCOCK: So all in favor of omitting or getting rid of that language.

MR. MEADOWS: Well, not that language. The --

MR. DAWSON: Omitting the "reasonably

calculated."

CHAIRMAN BABCOCK: The "reasonably calculated." Right. Okay. Bill.

PROFESSOR DORSANEO: You know, that language, when coupled originally with the relevance to the subject matter regarding the pending action, which is gone, was a limitation. Okay. Because relevance to the subject matter of the pending action really is pretty limitless. Huh?

PROFESSOR CARLSON: Yeah.

PROFESSOR DORSANEO: Once we take -- once we make it relevance to the issues in the pleadings, okay, like we're doing --

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: -- then it seems to work, you know, differently, but not -- not unfairly, except in the eyes of the beholder. I mean, if you're saying it makes it harder for me to win this case, okay, if the standard is this standard or that standard. Well, I can understand that, but I'm not sure --

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: -- if that's how we would look at that.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: You know, it's

really -- to me it's been very interesting listening to everyone's discussion on this "reasonably calculated." Like Judge Wallace, I always thought that language was used to broaden the scope of discovery, but it sounds like several of you think it's been used to narrow the scope of discovery, so I'm confused.

PROFESSOR DORSANEO: That's what they're doing now.

HONORABLE TRACY CHRISTOPHER: See, I don't agree. I think it's used to broaden.

CHAIRMAN BABCOCK: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, exactly. I was going to say whatever we do, the way it's proposed now doesn't resolve that ambiguity, and whatever we do should resolve it because I think you're exactly right. Some people think it broadens and some people think it narrows, so if we just take it out some people are going to think we've just broadened discovery, and some people are going to think we've narrowed it.

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: Well, once again, this is a problem that stems from evidence rules because we do have Rules of Evidence defining what's relevant evidence and then we have the argument -- some people would say everything that's not -- it can't be relevant until it's

admissible and then there are people that say, no, there is relevant evidence which nonetheless is not admissible. So if you take a very broad view of relevance as anything that might bear on these issues, then you -- then you have to have the reasonably calculated, otherwise you've got what I call a, well, it could be probative in an alternative universe. I think reasonably -- the reason why I say that is the moment you say "discoverable information need not be admissible to be relevant" then you need "reasonably calculated" to lead to it. Otherwise, we're going to be -- we have not helped -- we have basically done -- we have opened up the things quite a bit.

CHAIRMAN BABCOCK: Okay. Buddy, and then Richard.

MR. LOW: Bobby, what you're saying is they're not inconsistent. You could use both of them and then the trial judge could use their relative factors in deciding. Is that what you're saying? I mean, it doesn't -- that the two -- what did you mean when you said the two aren't particularly tied together?

MR. MEADOWS: Well, I think that was Alistair, but I agree with him that the proportionality discussion is not really linked to this.

MR. DAWSON: Reasonably can't come in.

They're separate.

MR. MEADOWS: I mean, we could take proportionality out of the scope of discovery as has been suggested, and I agree with that, and use it only in the limitation of discovery, but we would still be talking about this language around what's admissible and discoverable and relevant. So --

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Okay, I'd like to thank Judge Yelenosky for clarifying this for me, but Justice Christopher said that there's two categories of people here, those that look at this "reasonably calculated" as an expansion and those that look at it as a limitation. I think it's a question of whether you're going to follow the actual language of the sentence or whether you're going to follow the general drift. The general drift is to interpret this to mean that everything that's relevant is discoverable, plus everything that's calculated to lead to the discovery of relevant evidence, not admissible, but relevant. That's relevant plus something that might lead to relevant.

That class of people see it as an extension. If you read it literally it's relevant and you can't object to admissibility unless this inadmissible is likely to lead to admissible. That's a kind of an irrelevant

consideration in my opinion. Admissibility should not be the standard for discovery, so I think the confusion we're having is whether this "reasonably calculated to lead to the discovery of relevant evidence" ought to be tacked onto the scope of discovery or not, and to me that's what we ought to decide, should it be relevant evidence only or should it be relevant evidence plus evidence that may lead to relevant evidence. I hope I made myself clear.

CHAIRMAN BABCOCK: And Martha is now questioning her entire existence. "What did I get into," she says. Judge.

HONORABLE STEPHEN YELENOSKY: Well, part of what I think may be the problem, in addition to the disagreement, is a lot of the debate is at the level of jurisprudence that the normal attorney on the street and the normal trial judge on the street is not going to get into when he or she gets the change in the rules. They're going to look at it and say, "Well, what changed," and depending on what they thought it meant before, it's going to mean something different to them, so we can talk all day about judge -- or Professor Dorsaneo being correct on what it means or Roger being correct on what it means, but if we don't put it in a way either in the rule itself or in the comment that speaks to those people then we're going to have a problem.

CHAIRMAN BABCOCK: Yeah. Let's take a little vote just to -- and then a short morning break. Let's have the vote of who is in favor of getting rid of the "reasonably calculated" language. Raise your hands.

MR. DAWSON: Come on.

CHAIRMAN BABCOCK: And who is against? Well, the getting rid of it crowd has 13 votes. The keep it crowd has nine votes, Chair not voting, so --

MR. DAWSON: Overwhelming mandate.

CHAIRMAN BABCOCK: There you have it. Let's keep our break to like 10 minutes, can we? Then we'll be back and Justice Hecht, Chief Justice Hecht, will take you the rest of the way.

(Recess from 11:10 a.m. to 11:23 a.m.)

CHIEF JUSTICE HECHT: Bobby, what's next?

MR. MEADOWS: Did we run off the Chair?

CHIEF JUSTICE HECHT: Yeah.

MR. ORSINGER: We outlasted him.

MR. MEADOWS: Have we finished -- we finished the discussion around scope of discovery. Do we want to talk about any items?

CHIEF JUSTICE HECHT: Richard Orsinger.

MR. ORSINGER: Yes, sir. Bobby, I would like to suggest that the division -- pardon me, the section titled "Documents and tangible things" be

reconsidered to eliminate "tangible things" and say "information," because I think three quarters of the information we're getting now is not tangible; and I know that's not a change you made; but it's a change that needs to be made I think; and down when you're listing things we've got "electronic recordings, data, and data compilations," which in my opinion are not tangible things, so I think we ought to modernize.

MS. GREER: Well, are you saying eliminate "tangible things" altogether or just add "information"?

MR. ORSINGER: I think it should say "Information" or "Documents and information," but it shouldn't say "Documents and tangible things."

MR. FULLER: What about the product?

MS. GREER: Yeah. That is tangible.

MR. FULLER: That's tangible.

MS. GREER: I don't think the paper product means --

MR. FULLER: You would be better off saying "Information and tangible things."

MS. GREER: Right.

MR. ORSINGER: Okay. What's wrong with saying "Information"? Information is tangible and intangible.

HONORABLE STEPHEN YELENOSKY: Yeah, why do

we need to distinguish the two?

MS. GREER: I'm not sure -- I don't think of it as being tangible necessarily.

MR. ORSINGER: Information?

MS. GREER: I think of information as being something that's not tangible, and so I'm just saying add on both so that there's no question. So in other words, add "information," not delete "tangible things."

HONORABLE STEPHEN YELENOSKY: Well, information may be in the form of tangible things, but all we're talking about is information.

MR. ORSINGER: All I'm saying is let's not limit it -- I mean, the title limits it to tangible things, and the sentence limits it to tangible things, and then it defines "tangible" to include intangible. That's just not good anymore. We ought to just go ahead and accept the fact that this data is intangible.

CHIEF JUSTICE HECHT: Frank.

MR. GILSTRAP: When we were talking about Rule 9, which we're not going to get to today, we came up with the just broad definition of "document," which is "any compilation of information in written, electronic, or photographic or other form." I mean, you can define "document" and just say that includes everything, because that's what you mean. You want to include everything,

right?

MR. ORSINGER: Well, you know, if it's a video, it's not a document. I mean, aren't we using archaic --

MR. GILSTRAP: If you define a document to include video, it is.

MR. ORSINGER: Okay, but, see, why are we calling it a document when it's not a document?

MR. GILSTRAP: Because we want succinct language that we can use. We don't want to have to have, you know, 17 words to mean what one word can do.

PROFESSOR DORSANEO: Right.

MR. ORSINGER: That's fine. The word "information" is the most efficient word you can use because it's the word that all the information scientists use and the Nobel Prize committee and everybody else, but if that's not good enough for you --

PROFESSOR HOFFMAN: And Mother Teresa and --

MR. ORSINGER: It's St. Teresa.

MR. GILSTRAP: So you want to use "information"?

MR. ORSINGER: Yeah.

MR. MEADOWS: So "Information and tangible things" or just "Information"?

MR. FULLER: What you could do is just say

"Information" as your heading and then "The parties are entitled to discover information" and then just include "documents and tangible things" along with your list of "papers, electronic videotape recordings, data," et cetera.

HONORABLE STEPHEN YELENOSKY: Why do we even need it all? We defined the scope of discovery. Why do we need it?

PROFESSOR DORSANEO: It got in there when it was taken from the specific discovery rule context and put in general. Okay? That's why it says "Documents and tangible things," because that was lifted from the rule that was about documents and tangible things. Now, maybe that was a mistake years ago. I don't know who --

MR. ORSINGER: No, Bill, the rule --

THE REPORTER: Wait, wait.

MR. ORSINGER: Sorry.

CHIEF JUSTICE HECHT: Richard Orsinger.

MR. ORSINGER: The rule was written when there were only documents and tangible things. Now there are very few documents and tangible things, and almost everything is intangible, so let's modernize.

PROFESSOR DORSANEO: Well, I don't disagree with what you just said, but I was just explaining why that language is written the way it's written. Huh?

CHIEF JUSTICE HECHT: Bobby.

MR. MEADOWS: Okay, I think we've covered that.

CHIEF JUSTICE HECHT: Yeah.

MR. MEADOWS: Okay. Justice Christopher I think is looking for some clarity around the debate over what's relevant, "the claim or defense" or the prior language of "the subject matter of the pending action," so we recommended the change from dropping that language in favor of "relevant to a party's claim or defense."

PROFESSOR HOFFMAN: Justice Hecht.

CHIEF JUSTICE HECHT: Yes, Professor Hoffman.

PROFESSOR HOFFMAN: So just some quick -- so I favor keeping it as it was for all kinds of reasons, including if -- to quote David Peeples, if there's not a problem what are we trying to fix, because there are lots of other rules that manage the scope of relevancy as well as burden issues, so all of that. Having said that, real quickly, so the history is for 60 years the Federal rules had -- literally, from 1938 to 2000 the Federal rules had subject matter. Then in 2000, for reasons that remain both obscure and controversial, they changed the rule to say "relevant to claim or defense"; but you could also for good cause shown also get subject matter; and it was said

to be sort of a giving both sides a little of what they wanted; and then in the most recent round, the amendments that just went into effect in December of 2015, they eliminated subject matter entirely.

You'll note that in our current rule we stayed with subject matter. We never made the change that they made in 2000. We never even modified that to only for good cause shown could you get that, but you could get claim and defenses as the presumption, and so my point is here, this is a wonderful example of where state practice has been very consistent. It's not clear that anyone has pointed out a problem with this standard, and so all we're doing is creating, it seems to me, a problem by going to a standard that is totally not yet tested on the Federal side, which is relevant only to claim or defense, and so for all of those reasons I would recommend that we leave it as it is.

CHIEF JUSTICE HECHT: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Can you give me an example of what would be subject --

PROFESSOR HOFFMAN: Absolutely.

HONORABLE TRACY CHRISTOPHER: -- but not claim or defense?

PROFESSOR HOFFMAN: Yes, absolutely. So there are lots examples, but the best way to say it is you

assert a cause of action for whatever. You may have an additional cause of action against the same party, or you may have a cause of action against a -- another or related party, and if it's subject matter the way the case law has come down, especially on the Federal side, which I know better than the state cases, you're said to be given a little more kind of wiggle room to potentially look into those.

Now, obviously there's Alistair's point of the risk of kind of it being an open-ended fishing expedition, but the cases have been very -- overall we're not seeing big problems with that; and so, for example, if you're on the Federal side and you're bringing a Monell claim against a single officer for some section 1983 claim, subject matter always allowed you to investigate the possibility that you would have also have a Monell claim against the municipality, right, or there are lots of examples, but that's the basic concept.

The other thing is "relevant to subject matter" could also capture potential evidence on impeachment that isn't technically relevant to any claim or defense, but of course can come in and importantly does need to come in in course of trial. So those are some examples.

MS. HOBBS: And on remedies.

CHIEF JUSTICE HECHT: Lisa.

PROFESSOR HOFFMAN: On what?

MS. HOBBS: It can touch on a remedy --

PROFESSOR HOFFMAN: Remedies, yes.

MS. HOBBS: -- that may be a receivership in a way that it wouldn't touch on a claim or defense, so that's another example I can think of.

PROFESSOR HOFFMAN: And again, Tracy, if it was an example where we had case law that was just crashing against some rocks here, but that's not what's going on. All that's going on is there's some effort to think about ways to make our rules more efficient, all of which is a great thing, but there's just no evidence that either, A, we're having a problem with our existing rule or that the problems that we're having can be traced to this language, or, B, that if we make this change it won't cause collateral mischief or problems that we're not anticipating. What we know for sure is it's going to produce a whole mess of uncertainty in the case law as the courts try to figure out what's the difference between "relevant to subject matter" and "relevant to claim or defense," and that seems to me to be an unqualifiedly bad thing during whatever that transitionary period is.

CHIEF JUSTICE HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, it seems to me

that the structure under the general rule has been changed, in this draft at least, relevant to any party's claim or defense alone; and it doesn't make any sense to me not to make that same change everywhere that you're talking about the relevance, discovery relevance. I mean, under -- I understand what you're saying, Lonny, but under your thinking is if it's a document or tangible thing, well, I could get more of those because the scope of relevance to the subject matter in the pending action is and always has been broader than the trial relevance.

CHIEF JUSTICE HECHT: Professor Carlson, and then Frank.

MR. GILSTRAP: Why can't we --

CHIEF JUSTICE HECHT: Professor Carlson.

MR. GILSTRAP: I'm sorry. Oh, I'm sorry. Go ahead.

PROFESSOR CARLSON: Quite all right. Could this lead -- if we went to the change to "claim or defense" is that going to lead, do you think, to litigants pleading more claims and defenses so that they can come within the scope of discovery, or before you maybe just plead what you really thought you were going to go with, but you had some running room with the subject matter to determine whether you had other claims or defenses. I don't know.

CHIEF JUSTICE HECHT: Frank.

MR. GILSTRAP: The big story here is proportionality and yet we're changing a lot of other things, too. Why don't we just keep the existing rule and add a limitation based on proportionality, and we'll have that limitation, but we won't be changing all of this other stuff that's going to create uncertainty.

CHIEF JUSTICE HECHT: Jim Perdue.

MR. PERDUE: To answer Professor Carlson's question, I think necessarily that would absolutely be a byproduct. I'll give you an example of medical malpractice case pled as a vicarious liability case, seeking the personnel file to establish the training policies, procedures, and validation of the competence of the individual nurse. Resisted because it's a vicarious liability thing, and there is no claim of direct corporate negligence on the hospital for failure to properly train the nurse, necessitating a replead to make that discoverable. Current law, I get that as a subject matter of the litigation. We make a determination of whether there is evidence to satisfy that claim, but I would say that I've -- and there's a whole lot of pleading changes that are going on in the law as well from the plaintiff's perspective, but I think that if you go to claim or defense as defining the scope of what you can get, I can

think of then certainly a lot of my personal injury docket in a product liability case. The nature of the defect and the elements that you plead in the case have to be extended and broadened if you take out subject matter.

When Lonny was talking about I was thinking especially in the context -- and I don't do class action where you can really imagine, and, look, it is a tool for those types of lawyers to expand there, but to your specific point, I do think that you would be inviting necessarily a much more aggressive pleading to increase the scope of what you think you would be able and entitled to get.

CHIEF JUSTICE HECHT: Bobby.

MR. MEADOWS: I was just going to say without taking a vote I think the discovery subcommittee is largely agnostic on this. Maybe it would be worthwhile to get a vote from this committee in terms of just some directional information in terms of whether we ought to stick with the subject matter language or go to claims or defense, but I don't want to cut off the discussion.

CHAIRMAN BABCOCK: Yeah. Judge Estevez.

HONORABLE ANA ESTEVEZ: That was the same comment I think that we didn't think this was that important, and it appears to be more important than we thought, so we probably would withdraw our -- even our

recommendation, if it was going to cause such a big problem.

CHIEF JUSTICE HECHT: Kent Sullivan.

HONORABLE KENT SULLIVAN: Confession is good for the soul, so I want to confess. I did not anticipate all of this, and I want to say that the comments by Professor Hoffman, I think Professor Carlson, and Jim Perdue, I think they were all aligned, and I think they are correct. So I would not change subject matter.

CHIEF JUSTICE HECHT: Alistair.

MR. DAWSON: I agree. I think we ought to leave it as subject matter for a couple of reasons. One is I can imagine that there is evidence that is relevant to the claim but may not -- I mean, relevant to the case but not necessarily relevant to a claim or defense; and then, secondly, it invites unnecessary fights, so I think it would be better and cheaper to keep it with the way it is now and not change it.

PROFESSOR HOFFMAN: I'd like to retire from the committee now.

MS. HOBBS: I know, right. I was going to say.

MR. DAWSON: All in favor? We can take a vote on that.

HONORABLE STEPHEN YELENOSKY: You can only

go downhill.

CHIEF JUSTICE HECHT: It's the first time you've been ahead.

PROFESSOR CARLSON: This is the Hotel California. You can check out, but you can never leave.

MR. MEADOWS: Maybe we don't even need to vote.

CHIEF JUSTICE HECHT: Yeah, that's what I was thinking. Does anyone think we need to vote on this?

PROFESSOR DORSANEO: No.

CHIEF JUSTICE HECHT: Okay. What's next, Bobby?

MR. MEADOWS: All right. What would be next, perhaps we can skip over because we've largely discussed limitations on scope of discovery by virtue of the discussion on -- I mean, on scope of discovery and perhaps use what's left of our time to talk about the mandatory disclosures themselves.

CHIEF JUSTICE HECHT: That's good.

MR. MEADOWS: What people think about the items and so --

CHIEF JUSTICE HECHT: Good.

MR. MEADOWS: All right. Those are found in Rule 194.

MS. BARON: On page?

MR. MEADOWS: Page 25.
MS. BARON: Thank you.
MR. MEADOWS: Yes, well.
MR. ORSINGER: Are you going to have an intro, or you just want to take comments?
CHIEF JUSTICE HECHT: Richard, yeah, go ahead.
MR. ORSINGER: I'm curious to know what the advantage is to requiring this disclosure in cases where the parties are not seeking it, but let me go ahead and say that in a number of family law cases sometimes divorces are filed without clarity that there will ultimately be a trial, and sometimes parties attempt to reconcile even after a divorce is filed, and sometimes the parties ask the divorce lawyers not to do discovery while they try to talk through the problems that led to the filing, and I don't like the idea -- I guess maybe we can do a Rule 11 agreement to undo what the rules require, but really, what is the advantage to forcing people to start discovery before the parties want to start it? What do we gain?
HONORABLE TRACY CHRISTOPHER: Well, we discussed the idea that if people didn't want to do it they could just agree not to.
MR. ORSINGER: Okay.

HONORABLE TRACY CHRISTOPHER: But we thought that the requiring a request for disclosure was just an unnecessary expensive test, you know, that led to traps, and it especially led to traps for pro ses.

MR. ORSINGER: Okay.

HONORABLE TRACY CHRISTOPHER: Because they wouldn't know to ask the other side, and now, you know -- but that rule was always used against pro ses.

MR. ORSINGER: Okay.

HONORABLE TRACY CHRISTOPHER: Because the request for disclosure would come to them, and, well, you know, you didn't produce any documents, and you're out of luck, so that was the two reasons that we thought mandatory was better. Well, three, also, we felt that in the vast majority of cases it's just routine, so make it mandatory.

CHIEF JUSTICE HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: How does making it mandatory make them not out of luck?

HONORABLE TRACY CHRISTOPHER: Well, we discussed that. Okay. And, you know, that may or may not be something that we can cure somewhere, but if the one side at least is producing their documents, it might make them say, oh, I have this duty to produce these documents to you, too. It might. There might be a possibility

that, you know, it should be an order from the court and all -- you know, just a reminder, a reminder to everyone, all of my pro se litigants out here that you need to produce these documents, you've got to look at this rule and produce it. That is a problem. It's a problem either way.

PROFESSOR DORSANEO: So I read you to say that they're still going to be out of luck with going to mandatory.

HONORABLE TRACY CHRISTOPHER: Yes, if they don't produce them, you know, unless people give them a continuance and say, you know, you've got these documents, now the other side has them, I'll put the case off for 30 days, come back.

CHIEF JUSTICE HECHT: Lisa.

MS. HOBBS: And I've talked to Bobby a little bit about this offline, but in the big cases that I did at V&E this makes total sense that you would just -- you know, we could talk about whether 30 days is enough time to ship out your documents, but there's a lot of cases that would now be under the new rules level one and level two cases where the idea that you would, I mean, send all of this paper to the other side at any point in the discovery process is almost none. I mean, if you have a small breach of contract case, you're not -- there's not

going to be much paper flowing, and you're not going to need this kind of request for -- I mean, this kind of protective order production that's contemplated, especially because as it's written right now it sounds to me like not only do I need to produce it, but I may need to engage in e-discovery, and the vast majority of cases that get litigated in Travis County are not doing electronic discovery.

So I just -- I don't know if there's a way to carve out -- I worry that requiring a production of documents that's this broadly worded in every case is actually going to increase the cost of discovery to a big chunk of everyday cases in Texas.

MR. MEADOWS: So if I could just -- not to interrupt or even to quarrel with you, just to make sure we're --

MS. HOBBS: But --

MR. MEADOWS: No, I just want to make sure we're talking about the right thing, because if we're looking at paragraph (c), it says, you know, the documents you're talking about are only those that you may use to support your claim or defense. So it's intended to be somewhat focused.

HONORABLE TRACY CHRISTOPHER: Right, and I would not want any subject matter there.

MR. MEADOWS: Right.

CHIEF JUSTICE HECHT: Judge Estevez.

HONORABLE TRACY CHRISTOPHER: Top of page 27, the actual documents that you have to use.

MS. HOBBS: "You may use," so I have to go through in my little company, you know, I've got a million dollar company, and I've been sued for breach of contract, and I need at that point within 30 days of suit to be looking at what documents I think I may need to -- and no one has asked for them yet. I just have to -- I'm just saying there's a lot of cases that get tried with the contract. I mean --

MR. MEADOWS: As I told you when we talked, it's a very good point.

CHIEF JUSTICE HECHT: Judge Estevez.

HONORABLE ANA ESTEVEZ: Two points, the one having to do with the pro se litigant, we did address that, and one of our -- the way we were hoping to help the pro se litigant is that we were wanting to make a change also that in a petition you actually refer to this rule and make it clear when you file a lawsuit that that person will have to be answering those, and so it would refer straight to the rule in the petition as one of the requirements of the petition, so if you sue someone that's pro se, they would know that, and then it would be in all

of the little documents that they get from the court that says that they will have that obligation as well.

So there's a little bit of extra work that's going to be done besides just the mandatory disclosures, so that the pro se litigant or the pro se defendant will have some sort of notice that there is something that's being required. Now, how they produce it, I don't know. But the second point that Lisa was bringing up, I mean, I think a lot of this we're going to have to -- we're going to go back to that Rule 11. You know, you can agree to have more time. You can get out of this -- you know, you can say, "Here are these documents, and others will be produced as soon as we get them," if it's not enough time to get everything, so I think that most people that I spoke to or all the people I spoke to said that most of these initial disclosures -- and they did do litigation, both in Federal court and in state court. They thought this was a good rule and that they had those documents ready or can get them ready in a quick time. I mean, obviously these huge cases are going to be a different -- different matter, but for 99 percent of cases this is a good rule.

CHIEF JUSTICE HECHT: Justice Bland, then Kent, then Alistair, and Richard.

HONORABLE JANE BLAND: So with respect to

the small cases the idea is to get you to gather the documents that you're going to introduce at trial because sometimes somebody produces the contract but not the amendment to the contract; and they introduce it at trial; and the other side objects and says, "It wasn't produced to me"; and the responding party says, "Well, you didn't ask for it"; and that's just sort of -- you know, let everybody know that if you're going to use it, you should produce it; and obviously you can supplement that production as you go forward; and the rules provide for that; but the idea is to get everybody to put their documents across the transom if they plan to use them at trial.

CHIEF JUSTICE HECHT: Kent.

HONORABLE KENT SULLIVAN: I agree. Jane touches on I think all the right points. Lisa's point is a very important one. I think the language, though, is -- it is "may use." It is intended to do just what Justice Bland is suggesting, and my thought is on a practical level the question of what someone may use is something that you will deal with on an incremental basis. There will be obvious things that you'll produce right away, because if it's a breach of contract case, you're going to produce the contract. Over time you're going to supplement it, and the idea is exactly what Justice Bland

indicated. That is you want to avoid the last minute chaos and inefficiency associated with people not having produced things that, in fact, they are going to use and obviously intended to use as exhibits in the actual trial of the case. So hopefully on a practical level it could evolve to a process that was relatively economical and efficient.

CHIEF JUSTICE HECHT: Alistair.

MR. DAWSON: So all litigants currently have an obligation to preserve potentially responsive information, so when the lawsuit gets filed, you know, litigants on both sides need to go out and preserve their information. Presumably at some point they're going to collect it and they're going to review it and they're going to figure out what documents they're going to use in the case, and so I don't see this as adding any incremental cost because the process is going to be, you know, pretty much the same. What it's doing is it's requiring litigants to do that at the outset of the case as opposed to, you know, farther on down the line when maybe discovery is already underway, you know, or even been completed and it's right before trial, and I think it's an advantage to have it disclosed up front, and I don't see it as adding much in the way of legal costs.

CHIEF JUSTICE HECHT: Richard, and then

Judge Yelenosky, and then Judge Wallace.

MR. ORSINGER: I wanted to share with you the practice that has grown up in family law with these standing rules that operate as temporary restraining orders, effective immediately on all litigants the moment the divorce petition is signed; and in order to advise unknowing people that those rules are in effect the local rules require that you have a copy of them attached to your petition and that you recite in your petition that they are effective immediately, even though there's no TRO served; and I like Judge Estevez's suggestion. If we're going to make somebody file all of this discovery and they may be pro se or whatever, we better tell them because they may not have a copy of the Rules of Civil Procedure, and they may not know. So if we're going to do this, which I don't like, let's say that we have to attach some attachment telling them what their duties are or a copy of the rule or something like that.

Secondly, just evaluating this and what is feasible in my law practice, within 30 days of when I file an answer and I'm required to state all of my legal theories, that's premature. You're always going to get a statement from me that I don't know really what the nature of the plaintiff's claim is or what the nature of my defenses are. The next -- that's premature. The next one

is to list all of the persons with knowledge of relevant facts. That's difficult. That's the hardest things that my clients do, is to list every babysitter and every former teacher and every neighbor and the CPA's and everybody that's involved anywhere in their family life or their financial or their parent-child relationship or their children's activities. I cannot tell you how long and how I struggle to get names and telephone numbers and addresses of all the persons with knowledge of relevant facts of everything that a family has done for the last 10 years, but on number six -- but I have to within 30 days either produce or tell you where we have documents and other tangible things -- you know what I think about "tangible" -- that someone may use to support its claims or defenses.

Now, my marriage has lasted 20 years. They may use something that's 19 years old, or they may only say, "I'm only interested in the last five years. I'm going to request -- I'm going to send you a request for production to produce five years." And usually if they ask for 20 years, I try to work out a deal. "Let's give you five years first and then if you need 10, let's go to 10, and if you need 20, let's go to 20." All of these decisions are sort of taken away from us by saying that I have to decide what the other side may use to support

claims that I'm not sure that they even know that they have, and I don't know that they have. How can I do that? So in my world this mandatory disclosure at the beginning of the case is a problem.

One other thing that's a little bit different in family law cases is our discovery window does not close nine months after the first discovery event. As I understand it in general civil litigation, a deposition notice, the interrogatory or whatever starts the discovery period, and it closes after nine months. In family law it's back end loaded. You count back from the date of trial, and your supplementation deadline is 30 days before you go to trial, and your expert disclosure deadline is 90 or 120 days, depending on whether you're seeking relevant evidence.

So front end loading our discovery is giving us information that's less important to us than to back end discovery, and in a lot of family law cases we do back end discovery because people -- the clients always think they're going to work it out, and they don't want to spend a lot of money on the front end, and it's only when you start trying to negotiate the hard decisions about payment, child support payments or whatever, or what the visitation is going to be, that they realize there's a fight. This is forcing us to do a full press military

response on within 30 days of when we filed a response, which ramps up the litigation even when the parties don't want to. We may be able to Rule 11 around this all the time, and if so, then it's not going to be a problem, but if somebody refuses to Rule 11 around it then I either have to file a motion for protective order or I've got to get out there and start collecting five or 10 or 15 or 20 years worth of financial information.

HONORABLE TRACY CHRISTOPHER: But if they sent you the request for the production you would have that same problem, and the only thing that is different is the documents.

MR. ORSINGER: I do, and I let the judge do it. The only difference is that in most of my divorces nobody does that, that they require you to produce everything; and, of course, all I have to produce now under the current rule is what they ask for. I don't have to produce what they might need, so now all of the sudden I've got to figure out what they may use.

HONORABLE ANA ESTEVEZ: What you need. What you need.

MR. DAWSON: What you use.

HONORABLE ANA ESTEVEZ: What you need.

MR. ORSINGER: It's what I need and not what they need?

HONORABLE ANA ESTEVEZ: It's not what they need. It's not what you need.

MR. ORSINGER: Well, I misread that part.

CHIEF JUSTICE HECHT: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Any other problems you have I suggest we put in the line about "except in family cases."

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

HONORABLE STEPHEN YELENOSKY: I'm just trying to think, Justice Christopher, when you talked about pro ses, are you seeing or hearing about pro ses just being out of luck by -- they just lose because they can't present any evidence for failure to -- and so nobody brings up the point that they haven't done the disclosures until the time of trial?

HONORABLE TRACY CHRISTOPHER: That's correct.

HONORABLE STEPHEN YELENOSKY: And I can see that happening, but it's obviously a gotcha, and I don't know how many judges would tolerate that, but if they are tolerating that, should we put in something that requires at least, "Hey, I haven't gotten your disclosures," which would probably only need to be employed when you have a pro se on the other side so that -- because putting it in the initial thing with all that paper, it's enough for

them to get an answer in; and if you put the writing in there, they may not understand it. If you send them a reminder, I don't want to really say you have to set a hearing, but at least it's a stand alone.

CHIEF JUSTICE HECHT: Judge Wallace.

HONORABLE R. H. WALLACE: I was going to ask, in most personal injury cases, run of the mill, motor vehicle accidents, slip and falls, the plaintiffs produce their medical record through affidavit, and they file them, and they're admissible. Would this rule exempt them from having to produce medical records if they're going to do like that, or if it applies to those medical records, there's going to be kind of a rolling production as the person goes, but that's just a thought. I don't know that this is intended to -- I think they only have to file those like 30 days prior to trial.

CHIEF JUSTICE HECHT: Lisa, and then Roger, and Bill, and Judge Boyce.

MS. HOBBS: Okay, so assume it's a level two case that's a true level two case. Are these initial disclosures considered a response to written discovery that starts triggering the level two time frames? And let's not -- let's not leave it to doubt. Either it is or it isn't, but let's make sure that the rule is clear that what that means for tick-tock, tick-tock.

HONORABLE TRACY CHRISTOPHER: I'd get rid of that provision, personally, but --

MS. HOBBS: Well, I think if you consider it a written response, it does make the games less -- because we know when these are coming in, right, and so it might actually help us if they are considered a response, but the word "response" implies that someone sent you something and you responded to it, and these are automatic so it doesn't quite fit, but either way we should make sure we make it clear to everybody.

CHIEF JUSTICE HECHT: Roger.

MR. HUGHES: Two things. First, while I -- this comes from Federal practice on doing this. I'm just not real sure of its value because what I often see in Federal practice is you get a description like "Personnel records of relevant employees are located in Houston," "E-mails among potential witnesses located in Corpus Christi." I mean, that's the kind of descriptions that you're liable to get, and I'm not sure how helpful that's going to be.

The other thing is and I just brought up -- that's why I raised my hand -- medical expense affidavits. The problem is if you make -- and we're seeing this in some cases. The moment you receive the medical expense affidavit that triggers the 30-day deadline under the

statute to provide a counter-affidavit or you can't counter it, so I'm not sure because this may require a statutory adjustment. The point of it is if you tell the plaintiff, "You're going to have to hand them your medical expense affidavits right at the beginning of the case for the defendant," you're triggering an automatic 30-day deadline to produce a counter-affidavit from a qualified expent or you will not be able to contest those medical expense affidavits at trial, or you're going to have to go to the judge and get an extension of time, which you may or may not get.

And this is why some -- in some personal injury cases or cases involving damage to property or even -- I've seen expense affidavits used to prove up attorney's fees. They slap the affidavit down at the beginning of the suit, and all of the sudden you're scrambling to get an expert to counter the expense affidavit; or, of course, then they wait until 30 days before trial to put down the expense affidavit; but that could possibly be handled by setting the deadlines. All I'm saying is that's -- that's a risk that you create when you tell people you're going to have to produce these at the very beginning of the case.

CHIEF JUSTICE HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: I have two comments.

One is (b)(5). I'll do them in order, and the (b)(5) underlined language, you know, comes from 192.3(c), you know, more or less verbatim; and that language was meant to explain a bit of a puzzling case called *McIlhaney vs. Scott;* and in that case the court held that you couldn't be designated as a consulting only expert if you had -- if you had firsthand knowledge, okay, because then you were, you know, a dual capacity person; and also in that case it says but you can discover from consulting only people with factual information. In other words, you could take their deposition, okay, and that's controversial now; but you could take their deposition because, as the case says, well, the facts are the facts, and you're supposed to be able to discover the facts, which is not a very good analysis of the discovery issue; but the point is this language is problematic to me and probably still in this context.

The comment to 193 says, "The rule is intended to be consistent withing *Axelson vs. McIlhany*," but I don't know what part. You know, is it meant to be consistent with the part that says consulting -- you know, you can't be a consulting only person, or is it meant to be consistent with the part that says even if you're a consulting only person you're not immune from factual discovery? That's been puzzling me for sometime, and I

wish I would be not puzzled by it permanent. Okay. I think that that was something that didn't really get worked out on the last go around, to me.

Then the other thing is on -- which is really more serious, because I could live with being continually confused about things, but (b)(6), and I'm reading over there. Let's see, "A copy, description by category, or location of all documents," blah, blah, blah, and then it gets down there, and may be -- "and may use to support its claims or defenses." I'm saying, "What's that?" "The disclosing party has in its possession, custody, or control, and may use to support its claims or defenses." Well, why is that limitation in there? Okay. As distinguished from "and may use," you know, in a broader sense. I mean, am I -- am I mistaken here, Lonny, or is this importing into us a kind of Federal limitation on disclosure?

PROFESSOR HOFFMAN: So that is where this comes from. That said, if you go back and look at what in this draft would be (b)(3), again, I didn't talk to the committee about this, but I suspect their thinking was is that's meant to be quite similar to what we already have been asking people to produce, not the documents but the legal theories and the factual bases for a responding party's claims or defenses. Am I saying that right, that

y'all meant to sort of track that and just make it the documentary --

HONORABLE TRACY CHRISTOPHER: We just moved it from one spot to another.

PROFESSOR DORSANEO: Well, but that's -- "may use to support its claims or defenses" was not moved from one --

HONORABLE TRACY CHRISTOPHER: No, that one was not.

MS. HOBBS: No, that's new.

PROFESSOR DORSANEO: I think that should go, because I think that's a Federal limitation, okay, that we don't have. We don't have -- you know, you don't have to disclose if it hurts you.

PROFESSOR HOFFMAN: But, again, Bill, it tracks what I said before, the history I gave before, that in the year 2000 the Federal rule-makers amended 26(b)(1) to take out subject matter and to limit the scope of discovery to "relevant to a party's claims or defenses" and then they also then changed the provision about mandatory initial disclosures being limited to those you would use to support your side's claims or defenses.

PROFESSOR DORSANEO: But I'm not making my point clear enough. I mean, why should you not be required to disclose things that are harmful to you? You

are now under our, you know, request for disclosure practice. You're meant to disclose things that are helpful and things that are harmful.

PROFESSOR CARLSON: Right.

PROFESSOR HOFFMAN: I agree.

PROFESSOR DORSANEO: So I say cross -- "may use to support its claims or defenses" or at least evaluate whether we want to keep that. It seems to me that the rule was changed but without anybody really intending to change it.

CHIEF JUSTICE HECHT: Justice Boyce, then Frank, then Jim, and Roger.

HONORABLE BILL BOYCE: So if I'm understanding the rationale of the disclosures with respect to documents under subsection (6), that the notion is there's going to be some small universe of stuff that everybody knows is relevant and that are likely relevant and -- relevant and need to be addressed. There may well be some much larger universe of stuff that can be fought about. So to address the concern that Lisa had voiced, and this may be contrary to what Professor Dorsaneo is articulating, if there is concern that an initial disclosure is going to be particularly burdensome in level one/level two-type cases, is that addressed at all by limiting this "may use to support its claims or defenses"

language to "may use at trial to support claims or defenses," with the notion being if the goal is to get that universe, the small universe of stuff that everybody knows is going to be relevant, the contract that is being sued on, is that a way to narrow it? Now, I'm not sure that addresses Professor Dorsaneo's consideration, but that would be a way to narrow that language a little bit.

CHIEF JUSTICE HECHT: Frank.

MR. GILSTRAP: I want to go back to page 26, 194.2(a), "Time for initial disclosures."

"A party must make the initial disclosure at or within 30 days after the filing of the answer." I think that's what you mean. What you mean to say is that the defendant, a defendant, must make the disclosure 30 days after he files his answer. Not -- and that only applies to that defendant, and I think implicit in that is that the plaintiff must make his initial disclosure within 30 days after the defendant files his -- the first defendant files his initial answer. Is that what you mean?

HONORABLE TRACY CHRISTOPHER: Yes. Yeah, I mean, maybe we could reword it, but the defendant answers, and he has 30 days, and the plaintiff has 30 days to do their initial disclosure. If there's a new defendant he has 30 days from when he answers.

MR. GILSTRAP: That's the logical way, but you know, it maybe needs to say more than it does.

HONORABLE TRACY CHRISTOPHER: Okay.

MR. MEADOWS: Probably.

CHIEF JUSTICE HECHT: Jim.

MR. PERDUE: So I don't read this to change the reality. You can't produce what you don't have. So to Judge Wallace's point on from the plaintiff's perspective, medical records are a -- an order and, quite frankly, a fight as you get into a traditional tort case, you've got to get them from other priors. You've got to get them proved up, and the practice generally then is to give them to the other side as soon as you get them. I don't read this to say we've got to get them all and incur that expense in the first 30 days. You don't have them, and I can't give them to you if I don't have them.

I do think Federal practice has taught me that the reason why I'm comfortable with this is if you've got stuff that you know is directly relevant to the claim you're bringing as a plaintiff, the system is improved by getting that to the other side early so that they can evaluate the document; the tangible thing that you've got that is in support of that; and I think you have to recognize that this will -- this will create a level of burden on the average plaintiff; and the reason why I'm

still comfortable with it is because, contrary to what justice -- Professor Dorsaneo is saying, I think joining what you're saying, Judge Boyce, is that the narrow -- the narrowness of the scope of what it's requiring you to give is that which you know you're going to use. If you didn't have that limitation, as Dorsaneo was suggesting, I fear that you really would be increasing the expense and the burden in a 30-day window that would be a real problem for what Lisa was describing, because then you're getting into the concept of marshalling everything.

Whereas the way it's written and the way Federal practice works is, for example, in a product liability case, if you've got the thing that makes product ID and then you've got documents relevant to damages, get those to the other side in 30 days so that they can evaluate the case; and likewise on the backside, if there is a document for the defendant that is clearly key to saying there's no defect, get it to the other side, and get that on the table in the first 60 days. That helps the process, but I don't view this universe as something that is -- it is purposefully limited to that which the party knows they will use to support the claim, and therefore, the scope of it as a self-limiting allows it to not be expensive.

CHIEF JUSTICE HECHT: Lisa.

MS. HOBBS: Okay. I agree with what Mr. Perdue is saying, and to address your concern that you don't turn over things that are bad documents, you still have request for disclosure. I mean request for documents, like you get the bad stuff when you ask for the bad stuff. This is just the initial disclosure of what you're going to get, of what you're going to get.

CHIEF JUSTICE HECHT: Roger.

MR. HUGHES: No, she took my thunder. She said it all.

CHIEF JUSTICE HECHT: Bill, and then we'll give Judge Yelenosky one last point.

PROFESSOR DORSANEO: I just want to ask you one question, which I think it looks like a good improvement. Right now the timing of the request for disclosure is the plaintiff sends out the request for disclosure first, and that means the plaintiff gets the responses for the request for disclosure first. Under this new scheme -- and it's good to get the responses to the request for disclosure before you make your own, huh, but under this new scheme the responses would be the request for disclosure for plaintiffs and defendants would be simultaneous, right?

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR DORSANEO: I think that is a big

improvement. I got distracted talking about -- when we started talking about pro se people. I think it does make it better for it to be automatic for -- you know, on that basis. And I'll just say I simply -- I simply disagree that allowing somebody to keep something from being disclosed even though if the other side was smart enough,they might figure out a way to get it. It indicates they had to claim or defense. Okay. I mean, that's just nuts to me.

CHIEF JUSTICE HECHT: Judge Yelenosky.

MR. MEADOWS: We appreciate the support.

CHIEF JUSTICE HECHT: Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Jim, maybe I'm misunderstanding, but are you concerned about the word "control" in there? Am I looking at the wrong part, "possession, custody, or control"?

MR. PERDUE: I'm -- that seems to already be kind of a definition of what you could give.

HONORABLE STEPHEN YELENOSKY: Right, but medical records for -- or medical bills, are they within your control?

MR. PERDUE: I think the law would say that if you're going to use them, they are as of the point in time you get them.

HONORABLE STEPHEN YELENOSKY: That's my

question. Is it at the time you get them, because, of course, in discovery you can't respond by saying, "I don't have them" when you can get them.

MR. PERDUE: Gosh, I guess I would have to know what a case says on that.

HONORABLE STEPHEN YELENOSKY: Well, can you take out "control"? Since this is initial disclosure can it take out "control" and just leave it "possession or custody"?

MR. PERDUE: Yeah, I mean, smarter minds than me may have to address that, but --

HONORABLE STEPHEN YELENOSKY: No, you can't, Professor Hoffman says.

PROFESSOR HOFFMAN: You don't want to do that. I mean, that's a long history, and if Jim -- Jim can ask for them, but until he gets them they're not within his control. There are some things --

HONORABLE STEPHEN YELENOSKY: Well, that's the question.

PROFESSOR HOFFMAN: There are sometimes, like you could have a parent company that has control over its subsidiary, or you could have a company that has control over a distributor even if it's independently owned, and there's interesting case law about that and whether you need to reach out to preserve, but that's not

the situation that you guys are describing. If Jim doesn't have them from the doctor yet, nothing in this rule is requiring that in the front end of the case you have to go off and get it and that he's violated some obligation. That's not the case.

CHIEF JUSTICE HECHT: Hayes.

MR. FULLER: As a practical matter, aren't you more likely to get a description by category or location of these documents that you don't have or may have and just don't want to marshal? I mean, that's what the rule provides, and you may have them in your possession, custody, or control. I mean, you may -- your doctor may have those records, and that's certainly in your control, but I think that's helpful, the description, a reasonably accurate description by category or location. You're not necessarily -- I mean, if you've got the document sitting on your desk you may produce them, but if you don't I think you're at least alerting the other side what I've got or what you can go after and --

CHIEF JUSTICE HECHT: Bobby.

MR. MEADOWS: Yes, sir, so at this point I think we're about out of time.

CHIEF JUSTICE HECHT: Yeah.

MR. MEADOWS: The important question for the discovery subcommittee would be whether or not we should

continue our work on mandatory disclosures, initial and pretrial, and it would be useful to ask for a vote, unless we can hear from a higher source, that we should continue to work on this.

CHIEF JUSTICE HECHT: Well, let's do -- probably you're going to have to continue to work on it, but let's see -- let's see where everybody is. Phrase the question for us.

MR. MEADOWS: We would like a vote in favor of whether or not we should have mandatory disclosures in our discovery rules for both initial and pretrial.

PROFESSOR CARLSON: A tentative nonbinding vote.

MR. GILSTRAP: They're all tentative and nonbinding.

CHIEF JUSTICE HECHT: So all in favor, raise your hands. Three, five, seven, nine, 14. Opposed? So 14 to 3.

MR. MEADOWS: That's our answer.

CHIEF JUSTICE HECHT: All right. You've done remarkable work on this, and we thank you, Bobby and the subcommittee. We made a lot of progress. The November meeting is off. The December meeting is deep thoughts, and we'll reconvene on this probably in January.

(Adjourned)

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REPORTER'S CERTIFICATION
MEETING OF THE
SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17th day of September, 2016, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 983.25 .

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Given under my hand and seal of office on this the 30th day of October, 2016.

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