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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

September 16, 2016

(FRIDAY 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 16th day of September, 2016, between the hours of 9:00 a.m. and 5:00 p.m., at the Texas Association of Broadcasters, 502 East 11th Street, Suite 200, Austin, Texas 78701.

INDEX OF VOTES

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

Documents referenced in this session

16-28 ATJ proposed TRCP 183

16-29 ATJ Final Report TRCP 183

16-30 Proposed TRCP 183

16-31 TRCP/FRCP full-text comparison

16-32 TRCP/FRCP matched comparison

16-33 Discovery subcommittee proposed amendments

16-34 Discovery subcommittee future issues

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CHAIRMAN BABCOCK: All right. We're on the record. Welcome everybody, important meeting today, and we will be meeting tomorrow morning, Saturday morning. Sorry about that. So without further ado, Chief Justice Hecht will give his report, as is customary.

CHIEF JUSTICE HECHT: The Court issued decisions in all argued cases by the end of June again, and so has been in recess in July and August, although we met in late August to go over the petitions that have been filed during the summer and had oral arguments this week, so we're back in the swing of things.

In the summer all 10 of the deans of the law schools wrote to us to ask for the appointment of a task force that will look at the bar exam in Texas, what should be on it, how it's administered, whether we should go to the uniform bar exam about some close to 30 states have already gone to and the grading of it, just issues related to the bar exam. So we did that. Dean Sheppard at St. Mary's is the chair of that group, and members of the Board of Law Examiners, Chief Justice Rose of the Third Court of Appeals are on it, and several lawyers, so we'll be looking at those issues in the months ahead.

The Court's Commission to Expand Civil Legal Services, which we call in-house the Justice Gap

Commission has been studying ways to expand civil legal services to people of modest means. They'll issue a report we hope in November, and there are a number of projects that are ongoing. One is incubator law firms, which you may have heard something about. They're usually sponsored law firms, sometimes by a law school, sometimes by a bar association. Usually they employ younger lawyers, some of them right out of law school. They agreed to work on a reduced salary and represent people on a fixed fee basis for rates that are substantially below market rates in an effort to get experience but also to extend legal services to those people. So there are four of those that are starting in Texas, one by the State Bar. Frank Stevenson, the president, is starting one. The State Bar has committed $200,000 to it. Texas A&M is starting one in the Valley. I think Baylor has one scheduled, and somebody else I've forgotten, but we have several of those.

Then we're also looking at ways to improve referrals of people who turn up at the courthouse trying to represent themselves to lawyers who are willing to take those kinds of matters for fixed fees or reduced fees. We're even looking at creating an app to facilitate that, which we're calling the Uber for lawyers.

HONORABLE STEPHEN YELENOSKY: See if you get

past the city council.

CHIEF JUSTICE HECHT: Yeah. So there's -- all of that is ongoing. This is a very difficult problem. All of the country is working on it, and so we will expect some help from the commission in November. On the criminal side, we are working on ways to ensure that indigents are not incarcerated for an inability to pay traffic fines and parking tickets, those sorts of things. This, too, is a national problem, and the size of it is really extraordinary. We have 1,279 -- 1,272 municipal judges in Texas and 807 justices of the peace, so we have almost 2,100 judges working on these cases. They handle eight million cases a year, and the fees and fines and court costs that are collected are over a billion dollars. So it's quite a bit of money, and obviously the local governments have interest in all of this, but we're just trying to revamp the processes of those courts so that we'll ensure a higher level of fairness in the way those cases are handled.

Also on the criminal side, we are working on revamping the bail system to do away with bail in nonviolent cases. Again, this is something that is going on around the country. Several states are ahead of us, but we have a plan fairly far along in Harris County, and the Legislature has a great deal of interest in this, so

there will probably be some changes in all of those things next session.

E-filing, as you know, is mandatory in all civil cases in Texas. We finished that project ahead of time and on budget, and we're by far the largest state that has been able to achieve that. The Court of Criminal Appeals has ordered electronic filing in criminal cases starting next summer and a roll out, just as we did it, first in the big counties and then in the smaller counties, finishing up I think around 2020; but if our experience was any measure, it will be in effect as a practical matter probably a year or two before that. So we're very far along on that.

Now we return to e-access, and we will have to revisit rules that this committee looked at some years ago, but now have taken on new contours as we see what e-access is going to actually look like. This fall we hope to have the electronic filings in a case available to the lawyers in that case free of charge. Right now there's a charge for that. We have already all of the electronic filings in the state available to all of the judges in the state for free. Then the next step will be to make all of the electronic filings in the state available to all of the lawyers in the state, probably for some sort of fee kind of like a PACER charge; but we don't

know for sure, and then ultimately public access, probably again on some sort of registration PACER type system; but as we do that, we have concerns, again, about the public's interest in court records versus legitimate privacy concerns and expectations. So we'll have to balance all of those things, plus the clerks of the state are very concerned about how this is going to impact their operations and what's going to happen to the money, and so we'll be working through all of that.

Then we issued a final version of Rule 145 regarding indigence, and it's now in effect, and it's quite different, so we'll be seeing how it plays out in the months ahead, and the last thing is that we noted Tuesday in oral arguments that with some sadness that our former colleague, Justice Barbara Culver Clack, passed away in Midland on Sunday. She was admitted to the bar in 1951, when I was two, and she practiced law in Midland until 1962 when she was elected to the county judge of the Midland County county court, constitutional county court. She served there until 1978, and then she was on the district bench until 1988 when Governor Clements appointed her to replace Justice Campbell, who had retired. She was defeated that year, later that year, in the general election by Justice Hightower. Justice Culver was a great lady and a good friend and very dearly loved by her

community and by the state, and we'll miss her. She was 90 years old.

That's all I have. Oh, also, Justice Boyd is unable to be here this morning. He has a funeral service for a friend of his and then he's moving his daughter into a new apartment in Fort Worth later this weekend, so he would be here if he could.

CHAIRMAN BABCOCK: Great, thank you, Chief. We have two more meetings. One is in December, which I have informally called our deep thoughts meeting, and we'll have members of the Legislature here, and Lamont Jefferson's brother is going to be here to talk about the Justice Gap Commission, which he leads. That is what he's known as, your brother, right, Lamont?

MR. JEFFERSON: Absolutely.

CHAIRMAN BABCOCK: And if anybody else has any nominees of people that might be of interest to us or to the members of the Legislature who attend, let me know; and if not, then the Chief and I will just pick some people at random. We may pick one of you, so be careful -- be careful about that. I've had to adjust the schedule today. Bobby, I told you last time we would start with you, and I'm sorry we're not, because we have some people with travel commitments, and they have to get -- the Rule 183 thing has to get done this morning, so

without further ado, Carl and Roger, go ahead with 183. I don't know who is going to take the lead.

MR. HAMILTON: I think Roger is going to take the lead. He's been working on this mostly, and we have people here with the Access to Justice Commission also that joined in with us, and we're glad to have them, and we welcome their comments, too, but I think Roger is the one who has done most of the work on it.

CHAIRMAN BABCOCK: Yeah, Trish McAllister and Brianna Stone, who are over here on the right.

HONORABLE BRETT BUSBY: And Cathryn Ibarra as well.

CHAIRMAN BABCOCK: Sorry. So thank you for coming. We appreciate it. And, Roger, take it away.

MR. HUGHES: Yeah. Thank you. I want to thank all the committee members. Mr. Rodriguez couldn't be here today. I just want to point out that as it turned out most of the committee members on this project ended up being volunteers. I volunteered for it. Then Justice Busby called me, and he had a lot of ideas; and then he dragged in Ms. McAllister, Ms. Ibarra, and Ms. Stone; and a couple of things I want to point out before I first talk is if you haven't read, which was circulated just yesterday, the brand new Department of Justice guidelines for language access in civil courts, you need to do it,

because it reemphasizes the current administration's dedication to the proposition that the national origin -- ending national origin discrimination in civil courts means providing interpreters and translators; and so to a certain extent, yes, it's an unfunded mandate; but the point of it is that it's the -- at least DOJ says it's the trend; and they are willing to back it up with enforcement efforts.

Now, for those of you who might be a little concerned about the unfunded mandate impact of the rule, I ask you to talk to the Access to Justice people because they have -- there are already a lot of existing contracts the state has to provide low cost or free translation services to courts, and this may help ease the problem. So to get to the actual rule, what we are providing, if you have it, it's the one with a lot of footnotes, proposed Rule 183. The first section, section (a), talks about when a Court must appoint; and basically, the court has to make the appointment when there is a statute that requires it or when it's needed for effective communication with a person who doesn't speak English very well. That's limited English proficiency or has a communication disability. Now, we made it this either-or about "when required by law or effective communication" because we already have some statutes, and I didn't want

to accidentally overrule them under the Court Rules Enabling Act.

The second thing I point out is that it applies to translators and interpreters, and those are terms of art in the profession. An interpreter interprets oral speech. That's the person who stands in court, English to Spanish, Spanish to English. A translator translates the written word. They are the ones that take the document that's in one language and then provide it in another. Now, initially, I didn't think the rule ought to apply to translation, but Justice Busby pointed out that we already sort of have a rule. It's Rule of Evidence 109 about admitting translated documents, and tucked away in 1009 is a provision that allows the Court to appoint translators for documents, et cetera, when necessary and to tax their fees. So this may require a corollary change to Rule 1009 on that, but I thought whatever problems we're having over 183, we might as well cure it for 1009 as well.

Now, the second thing is that it applies to all Court proceedings. This gets now to the definition of the section, which is subsection (b). We borrowed the definition of "court proceedings" from the Government Code, Chapter 57. That statute requires the Court to appoint translators for all court proceedings which would

include mandatory mediation, court-ordered arbitration, and almost all hearings that a court is going to have. So, yes, all of the sudden now we're not talking about translators and interpreters just for hearings and trials and witnesses. We're talking about all the other allied court proceedings that go on around trials and hearings.

The definition of "communication disability" was -- we kind of put that together, borrowing that from various Federal and state disability regulations. "Limited English proficiency," that comes straight from the DOJ's guidance. Now, where we had some -- we had to sort of scratch our heads to figure out what would be a practical solution is -- is who -- what kind of translators and interpreters we're going to use, how do we find who's qualified; and we start off with we have already -- already have some statutes in place; and I first went to the Federal rules; and they were not exactly satisfactory because when you looked at Federal Rule of Procedure 604, the first thing it did is it said that in Federal court the translator has to qualify as an expert under Rule 702, and then there is an overlay with a separate Federal statute that basically gave the court some discretion when not to use certified translators. That was just not satisfactory.

Under Texas law, Chapter 57 of the

Government Code, starts off saying you have to use certified or licensed translators, and they have a procedure for license, and the Access to Justice people can explain that to you in more detail. Chapter 57 basically -- after it sets the default for using licensed or certified says, "but that doesn't apply," (a), in counties under 50,000 in population, or in (b), or when the certified translator isn't available within 75 miles, or (c), it doesn't apply under Chapter 21 of the Civil Practice and Remedies Code, which basically gives the counties along the river latitude to use noncertified translators. So what we did was either-or. A competent translator is a person who is licensed and is certified when required by law or available.

When the law allows the court to use uncertified or unlicensed people, number one, the person has to qualify under the Rules of Evidence. Well, that's already in the Government Code because the Government Code says when you can get away with using an unlicensed or uncertified translator, they have to qualify as an expert under Rule 702, then Chapter 7 further says they also have to be able to take the oath. Translators and interpreters have to be sworn, so they have to be under 18 years of age.

Then the last two ones came from anecdotal

information provided by the Access to Justice people, and if you read the new DOJ pamphlet that came out yesterday, there are other ones. These are cases where courts -- even in domestic cases. For example, a husband is hauled in on a domestic abuse case, and the wife doesn't speak English very well, so they let the husband translate for her, or they let parties translate for each other. I think you begin to see the problems, so first, we put a flag prohibition that your -- when you can use an unlicensed or certified translator you can't let a party do the translation or interpreting.

Second, and this was to give some flexibility, the translator cannot be the witness or a relative of the party or a witness or counsel unless the parties agree and it's approved by the court. I have seen this myself where a lawyer -- the party's lawyer will translate for the party or maybe the -- a party brings along a family member who were fluent in English. Again, we started off with the rule in that kind of situation, it should be prohibited unless the -- all the parties approve it and it's also approved by the Court.

Now, the next thing is compensation, and we start off with a rule that says the judge sets an appointed translator's fees, and they can be taxed like court costs, and generally speaking we all know court

costs are usually taxed against the loser and in favor of the winner. The first one is in subsection (2), is that fees for interpreting -- translation or interpretation services provided through the court or paid by public funds must not be taxed as costs. Let me give you an example. In Monday I was in court, and it was a domestic relations case; and the district judge didn't even ask. The bailiff did all of the translating, and in my opinion, humble as it is, did a fairly good job.

My opinion, my feeling is that when the court provides the translation services or interpreting because a staff member does it or you already have somebody under contract to the county or the state to provide the service, that should be free of charge to all parties. That's just overhead to the court, and I will also add my personal concern is I have seen this in some instances. It becomes a way for the judge to subsidize the salaries of their staff members, and it leads to problems over, okay, the bailiff provided the fees. We're going to tax a fee for the bailiff. How do you set the fee? Who gets it, the bailiff or the county? I mean, it just leads to problems.

Now, where we also had some difference of opinion, in subsection (3) we set out an explicit list of people who will never be taxed. You can't tax the costs

of -- for the interpreter or translator's fees against, number one, a person who has a communication disability when the services are needed for them to communicate. Second is a person who qualifies as indigent under the indigency rules. The third we borrowed from the ABA standard, which is you can't tax it against somebody who is of limited English proficiency unless the person finds -- unless the court finds that person can easily afford the costs and it won't impede their access to the judicial process.

Now, we can say this was some dispute because after reading the DOJ pamphlet yesterday, I think their attitude is you don't tax costs against anybody who has limited English proficiency, rich or not. They don't quite come out and say that, but there you have it, and then finally, this is the one that there was some dispute, "A party could not otherwise easily afford the costs and may impede the party's access to the judicial process." The ATJ people felt that this was more in line, may be required by the 2000 -- by the ABA standard and the 2002 justice department guidelines. My feeling is, is it basically is -- basically says if you -- if a person -- a person who doesn't qualify as indigent who is proficient in English and has no communication disability, nonetheless, we're not going to tax the cost of a

translator or interpreter against them. I fail to see myself why they should be treated different -- those sorts of people be treated different than other litigants, but like I said, that was a difference of opinion between the community.

Subsection (d), which simply re-emphasized that if you fit within the four categories of (3), under subsection (c)(3), you don't -- their fees for translation interpreting will not be taxed against them. Now, the last one also caused some difficulties about a practical way to phrase the problem. Subsection (e) dealt with the no delay of case problem. This came from anecdotal information from our ATJ members that from time to time the inability to pay for a translator would -- wouldn't -- and maybe I'm putting too hard an edge on this. It allowed the court to hold their trial hostage or hold their hearing hostage, basically just say, "Look, we'll hold that child custody hearing, that domestic violence order hearing, we're not going to hold that until you find a translator and you pay the translator to be here," and that combines a lot of problems, and it embodied the idea that the question of fees shouldn't become leverage for scheduling a hearing.

What was proposed was a rule that says unless the party who has the communication disability or

the English proficiency asked to have the hearing put off. The court could not delay or postpone the court proceeding until the party first pays the translator. There was a difference of opinion over how to deal with the practical problem, so we had an alternative proposal that basically the court would be -- could not delay a proceeding because a translator or interpreter could not be present, unless the person who has the disability or the difficulty speaking English requests the continuance and explains why the interpreter or translator can't attend. I think we solve the problem about holding the question of fees over the head of a party and then saying you can -- you can forfeit this, and we'll just go ahead and have the hearing, or we won't hold the hearing until you find a way to get the person here and pay for it. Maybe the question of taxing fees will solve that.

The flip problem is, is if you have a judge who wants to arrange it, and it just is proving more difficult than you might think, it puts -- it creates a situation where everybody wants a translator, nobody can get a translator there and we've got -- and what do we do? Are we just going to go ahead with the hearing anyway because the translator -- translator -- we can't -- the judge is forbidden from postponing the hearing until a translator is available, or do we push everybody to a

hearing. There is that problem.

So that's a -- I think it's more of a practical problem of how to devise a rule so that the question of fees doesn't -- and who is going to pay the translator to be there doesn't become a way of either putting the hearing off indefinitely, which could be devastating in family law, or let's say landlord-tenant disputes, or the judge just said, "Look, I can't do anything. You can't get the translator here. I can't find one. We're just going to have to hold a hearing." We don't want that result either. So I think we're all open to practical solutions on that, and at this point I'll turn it over to Justice Busby to add any of his thoughts or comments.

HONORABLE BRETT BUSBY: Thank you, Roger. I don't have a lot to add because we're interested in hearing everybody's feedback, so I won't take much time, but I do want to thank Carl and Roger and the subcommittee for allowing us to have a dialogue with them, and I think it's been very productive. As I mentioned last time, the Access to Justice Commission has a rules and legislation committee, which I chair; and we had had a language access subcommittee that was looking at this issue already, so we had some thoughts and ideas to bring; and I want to thank the members of that subcommittee and in particular I want

to thank Trish McAllister, who is the executive director of the Access to Justice Commission and her colleagues, Brianna Stone and Cathryn Ibarra. Trish and Brianna have expertise handling these issues in cases in their prior practices as well, and so we've been able to draw on that expertise and also on information that they're gathering from the subcommittee members and lawyers who are dealing with these issues. So I think Roger has outlined it well, and we're mainly interested in getting your feedback, so I'll ask Trish if you have anything else to add before we get started in hearing response.

MS. McALLISTER: No, I thought we should just hear what people have to say.

MR. HUGHES: One thing before we throw it out, I don't know if I mentioned this, but Justice Busby did bring this up. We may need a corollary amendment to the justice court rules. Currently the justice court rules say the JP can pick and choose how to apply or whether to apply the general Rules of Civil Procedure. If we're to avoid scrutiny from DOJ, that's going to have to change. Giving the judge discretion about whether to appoint a translator, et cetera, et cetera, may cause some problems, so we're going to have -- I'm not sure that it's going to be any difficulty with that, but it probably is going to have to be done. Thank you.

HONORABLE BRETT BUSBY: Just one other item to add, I think there are a lot of moving parts on this, but one of the things that we were trying to do was bring together rules and mandates from a lot of different sources and have them all in one place, because if you don't know this area of law it's hard to find all these statutes and requirements that are already out there, but they are not pulled together. So that's why we've added all the footnotes that explains where everything comes from to try to get this in one place for everybody to look at.

CHAIRMAN BABCOCK: Thank you, Judge. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Well, I'm just going to signpost some areas rather than going into them in detail, unless you're ready. First is whether appointment is always necessary as opposed to a party -- appointment by order is always necessary as opposed to a party bringing in a qualified interpreter without an order, which happens now, and that relates also to the new reporting requirements for judges with respect to appointments pretty much of anyone, which is -- we had a big meeting on, the judges, just a couple of days ago, and I won't go into detail on that. I'll signpost it.

Second is the categories that I see

different ways in which interpreters might come into a case are confusing to me as a judge, as a trial judge. There are places -- there are paragraphs that say you can tax and you can't and then there are other paragraphs saying you can't, but you can, and so I would do a different organization of it, which I won't go into now. The third, and I think I know the answer to this, is can you award fees to an LEP person by taxing the costs against an opposing party when the obligation to provide an interpreter in a court proceeding is the governmental's obligation. Maybe you can because other court costs you do, but that's a question; and fourth is with respect to delay, is that even a problem because I don't think -- since there's even a question about whether we can ever deny an interpreter, whether the person can afford it or not, it seems to me we would have to agree, at least with respect to expense, that we can never hold up a case because somebody can't afford an interpreter. The court would then have to provide it, whether or not later on tries to tax it as costs.

With respect to getting interpreters nobody can find, ultimately the question is, is the payment of an interpreter an absolute requirement of the government, in which case you've got to figure out how to do it, even if it's by Skype or otherwise, or does the DOJ guidance leave

some room to say it would be an unreasonable burden on the government to do that? There is some comment in DOJ. I think the 2010 one where there's some opening to the idea of financial impact on a governmental entity. The idea of unreasonableness in a financial sense is embedded in the Americans With Disabilities Act as well, although I think the standard is extremely high on governments for that. So those are my points, and if you want to go into detail on any of them I'll do it.

CHAIRMAN BABCOCK: No, I'll call on some other people, but before we leave you, Judge, you said that there are reporting requirements for judges. Whom do you report to, and what do you report?

HONORABLE STEPHEN YELENOSKY: Big answer. The Legislature has required as of September 1 that every month every judge report every appointment made by that judge, to whom, in what case, whether there's any relationship between the person appointed and anybody involved essentially, upload that to the -- to some kind of site. This is all hearsay because I haven't studied it myself, so this comes from a meeting. I've looked at the statute and that then becomes, I assume, public. So given that, and obviously the spirit of it is that if there are judges out there who are sort of self-dealing or helping out people they -- by appointments, that should stop.

The other part of it is you have to use a rotating wheel for appointments unless you can establish good cause and explain it. The result of that, at least for the judges I've talked to, is we are not going to appoint anybody we don't have to appoint, because right now I already do that, because I don't want to get into the question of whether I chose somebody for the wrong reasons. So if somebody -- if they agree, they can agree, and unless it has to be in an order, it's not in an order. It does have to be in an order if you have an unrepresented minor, you have a notice by publication, but you don't have to put in order the person agreed to for mediation, for example.

Do you have to put in an order the agreement as to an interpreter? If you don't, we're not going to do it because we've satisfied the spirit of the statute, which is we're not involved, and so -- and there's no order appointing the person, and so our staff does not have this incredible requirement for the reporting, which is -- which is onerous, but the Legislature is entitled to do that.

CHAIRMAN BABCOCK: So the statute you're talking about is broader than just interpreters and translators.

HONORABLE STEPHEN YELENOSKY: Oh, yes. It's

mediators, competency evaluators in family cases, guardian ad litems in family cases, attorney ad litems in friendly suits, it's almost comprehensive.

CHAIRMAN BABCOCK: Gotcha. Professor Hoffman.

PROFESSOR HOFFMAN: So I had some comments that are different from Stephen. Do you want to let others comment on his stuff first?

CHAIRMAN BABCOCK: No, go for it.

PROFESSOR HOFFMAN: So I want to go back to --

CHAIRMAN BABCOCK: By the way, you guys are out of place. You should be there, and you should be over here. What's going on today?

HONORABLE STEPHEN YELENOSKY: Well, at least you didn't put me in the other room.

CHAIRMAN BABCOCK: We have a satellite feed.

MR. HAMILTON: They're coming over to the good side finally.

CHAIRMAN BABCOCK: I see.

HONORABLE R. H. WALLACE: I think it's Chapter 27 of the Government Code. I think.

HONORABLE STEPHEN YELENOSKY: Oh, the new --

HONORABLE R. H. WALLACE: What you're talking about.

HONORABLE STEPHEN YELENOSKY: Yeah, I wouldn't spend a lot of time looking at it because we're all still trying to figure it out, as is David Slayton from the Office of Court Administration.

CHAIRMAN BABCOCK: Great.

PROFESSOR HOFFMAN: I want to talk about (a), and, Roger, maybe you can help guide me here, so first I just have questions. So if we have a party who either has a communication disability or is limited English proficiency, the court must also determine that it's necessary for effective communication to have -- before the mandatory interpreter or translator kicks in?

MR. HUGHES: Yep.

PROFESSOR HOFFMAN: Okay. So I guess from that --

MR. HUGHES: Well, the other kicker is there may be a statute. There may be a statute that imposes or takes away discretion altogether, but that's what I'm saying, there are statutes, but if there's no statute and that they can be invoked, then it's when needed for effective communication.

PROFESSOR HOFFMAN: Okay. I'm fine.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: I have a question and then a comment. So my question is are we expanding

this to include translators because we were called to? Is that part of the assignment, because I don't believe we should include translators, and the reason is I think it would be clear that every Spanish speaking person who had a lease issue with an English speaking person who didn't have their lease in Spanish would need -- under this would probably have a reason to need it translated because they would meet all of those qualifications, and I think it's extremely expensive, and I don't know. I think that's something that the Legislature has been working with, whether all documents have to be in different languages, in the language that someone natively speaks.

So I would keep this to interpreters because an interpreter can interpret all of those lease agreements to their person they're interpreting or to whoever they're assisting. They can let them know what everything says in Spanish or English or whatever language you're speaking. I'm just using Spanish since that's the one that's usually the problem, but I would be concerned about the amount of translating that would be required under the statute if you are requiring translators for the written documents, because people enter into those documents in English, whether -- it could just be a car loan. I mean, there's just so many documents that the whole entire proceeding is based on those -- I mean, the only reason they're in court

is because there's a written document, and if you're going to need to get that translated into whatever language that is because the statute requires you to because it would be needed for effective communication, and they would be limited in English proficiency. Am I wrong? I mean --

MR. HUGHES: No. No. That's --

HONORABLE ANA ESTEVEZ: I just don't think you should include the translators. I think you stick to interpreters. They can do the same thing.

HONORABLE STEPHEN YELENOSKY: We don't have a choice.

MR. HUGHES: Again, that was my initial thought, and the only thing that persuaded me otherwise is that we already have a rule of evidence that says the court can appoint a translator for documents and tax their fees, and if we already have that, that's going to cause the same eyebrows to be raised as our current Rule 183. That's all.

HONORABLE BRETT BUSBY: Also, I think to answer the other part of your question, there is some discussion of that in the DOJ guidelines. I believe, Brianna, can you provide some additional background on that?

MS. STONE: Yeah, so the DOJ does require translation of what they call vital documents, and so

there's sort of evaluation that needs to take place what a vital document would be, but, for example, they give -- one example that applies to court are court orders they've said are probably vital documents; but the other thing I would say about your question is that I think that's where effective communication comes in, because like you said, what you're talking about where the interpreter interprets a document just right there in front of you, that's called sight translation; and so you're right that in a lot of situations you would just use the interpreter that you have to do sight interpretation. You wouldn't need an additional translator.

HONORABLE ANA ESTEVEZ: Can I ask her a question?

CHAIRMAN BABCOCK: Yeah, sure.

HONORABLE ANA ESTEVEZ: You said that court orders, so are you saying that if I granted a divorce between two Spanish speaking people and by jurisdiction, and now one of them is filing for contempt because the other side didn't pay their child support, that that's a court order and that that would be required under the DOJ to be translated?

MS. STONE: I am saying that the DOJ requires translation of vital documents, and they have given guidance to courts about how to determine what a

vital document is, and, yes, one of the examples they have given are court orders, but you know, they also give a lot of guidance about how you decide what a vital document is, and it may be that a court would determine that not every court order would be a vital document, so it's a detailed kind of guidance.

HONORABLE ANA ESTEVEZ: I'm not going to -- I just want to say for the committee that I don't believe translators should be included in the statute. I think that needs to be --

CHAIRMAN BABCOCK: Justice Gray.

HONORABLE TOM GRAY: Bear with me if you will. I read the comments from the last meeting, and I noticed that at least the topic was touched on as to whether or not we needed to do anything with regard to the rule and whether or not we were the appropriate part of state government to do it, and I kind of wanted to elaborate on that, but I do know that the committee -- even if we voted unanimously to not do anything, as in the referrals that we got today, the Court tends to say, okay, but if we do do something what would it look like, and so part of my comments are directed to what I hope may be a coalition of five judges that decide that we don't need to do anything with regard to this rule when it comes up, and I'd like to touch on a few of the reasons why.

We, the legal profession, I think are going down the same road that the medical profession did toward a complete Federal regulation of the state judicial system, and while I expect to be thrown under the bus ultimately I didn't expect to be asked to drive the bus, and so I, you know, have some reservations.

In the first instance as to this what I consider a small part of the problem, I don't think we're even on the bus, and I could be wrong. I don't know exactly how much Federal support we get of the judicial system; but having just submitted our LAR, I know that there's none in it for our court; and the DOJ guidelines are there -- I do note that the Federal funding is still my money, but I digress in that part; but if there is Federal funding for the judicial branch, it is the Legislature and, respectfully, not the Supreme Court of Texas that needs to make the decision of whether or not we are going to continue to accept that funding and be subject to their restrictions as opposed to reject the funding and approach the problem, you know, on our own.

I note that when the -- you know, this letter is six years old; and what I hope happened six years ago when we got the letter is that it was sent to all the legislators and the Governor and the Lieutenant Governor and the attorney general, and they said, okay,

you know, pink building, we have a problem. We've gotten this letter from the DOJ, and if there's a violation we're going to have to write a check, and let them deal with it from that perspective. If it's -- if that's not what we did, I hope that's what we do with it now, is we put the Legislature on notice that there's a potential problem, and we're going to deal with the aspects of it that we can, but we're not -- we shouldn't be goaded by the cattle prod of the DOJ to address the rule at this level. We're in a Federal system. It's a hierarchy system. It also has three branches at both the Federal and the state level, and we rely on that in the way that our government functions.

Second, I note that we are about to undergo a change in administrations, and while I say it somewhat tongue in cheek, the current administration seems more interested in school bathrooms than state courtrooms, and so we may not have to take this up under an immediate problem. Third, I was a municipal judge before I was an appellate judge, and I noted the concern about the application of these in JP court. As Justice Hecht mentioned, there were -- I was one of those 1,272 municipal judges; and while this may be an issue in the district court, it was a daily thing in the municipal courts. I was -- my experience was in a small town, with

a very active police force, otherwise known as a speed trap, and we had a lot of activity; and when the -- for court days when a litigant was coming to court, they knew whether or not there was going to be a language barrier; and they brought witnesses that couldn't speak English. They had themselves who couldn't speak English, and so they would bring their own interpreter with them. Sometimes it was a friend, sometimes it was a relative, sometimes it was their children, and they may be minors or not, but we dealt with it. It slowed things down and I will get back to that, but we dealt with it.

It was a -- I could tell by looking at the defendant and the interpreter whether or not they were effectively interpreting and communicating both between me and the state and themselves, were we making a connection, and as a judge I am convinced that you can do that. You can make sure that someone's due process rights are not being violated, and you don't have to have a paid interpreter to do it.

The first thing I did every morning as a municipal judge is I called the jail to see if anybody needed to be arraigned that had been arrested the night before. Frequently there was. I go to the jail. I don't know when I get there if I'm going to have an interpretation language problem or not. I never had to

leave the facility to hire an interpreter or find an interpreter. We were always able to find someone that could interpret. Actually, the best interpreter I ever had was a long-term inmate in the county facility. He was incredible. He was a great artist, too, but I, again, digress on that.

My point is that these are interactions of people in daily life, and the more we try to write the precision of the rule that has been done here, great effort, may be clearer than what we've got, you can't cover everything, and we have a general rule that is sort of working. I think it just needs to be -- it's an educational issue, and again, I will get to the fix on this in a minute.

Fourth, I come full circle back to the comparison to the medical field with the emphasis on universal health care and for everyone that needs it. I will not get into the quality issue because I think I know the direction; and it's not particularly good; but on the pure distribution of the basic services we're in the same path; and this is a step in that path; and at the end of that path I hope everyone in here is willing to provide services at state rates to civil litigants because that's where we're headed; and, I mean, because the fundamental problem in the legal profession is that we -- lawyers are

interpreters for LLPPs, limited legal proficient persons. I mean, that's what we do.

CHAIRMAN BABCOCK: Is that your term?

HONORABLE TOM GRAY: That is my term, but it is -- but, I mean, it is what we do. It is why we appoint lawyers for criminals that can't afford them, because the legal system is so complex that they need assistance.

HONORABLE ANA ESTEVEZ: Amen to needing assistance.

HONORABLE TOM GRAY: She just went through a two-day pro se trial.

HONORABLE ANA ESTEVEZ: Pro se criminal trial.

HONORABLE TOM GRAY: Fifth and finally, I note that my access and use of the system is, to use a DOJ term, chilled by the cost of using it. In fact, the very reason that contingent fee representation -- something that Jim Perdue knows a lot about, something that I cut my teeth on as a trial lawyer. The reason that contingent fee representation was created was the recognition that unless parties prevailed and won a recovery, they could not afford to pay for the use of the system. I know that I never could afford -- could have afforded myself as a lawyer, so to use the legal system, I must engage in a cost benefit analysis, and so I must ask why should any

part of the cost portion of that analysis be taken out of the system for some but not all and why should it be taken out in a capitalistic economy, but I don't want to raise a problem or a complaint or an objection without a solution.

This is a communication and understanding issue. Most of our problems that we address today, with the exception of one, are that type problem; but since the time that Jethro counseled his son-in-law, who was the world's eminent authority on the law because he had received it directly from God, the problem has been and remains the number of judges. Any time you try to force more product through the same size pipeline you get tension, and that's the way I view this. This is a tension between speed of processing cases and getting them done. I mean, you've got to get something done. This is a problem that is created by trying to force that increasing level of activity through the same pipeline.

All the problems we're addressing today, like I said, with the exception of one, is the problem of not having enough judges to deal with this and the other issues, and I think we need a bigger pipeline, and I think our efforts would be better served if -- and I noticed one of Justice Busby's comments is that the Access to Justice had a legislative committee or subcommittee. That's where we need to be focusing our efforts and leave this rule

alone, because if judges are educated on the problem, there's a whole office over there called the -- oh, code of -- enforcing the Code of Judicial Conduct. If there are judges out here that are depriving people of their effective courts because they're not dealing with the translation or interpreter issues, they need to be called on the carpet for that, but I don't think the problem is systemic in the cost function, and I do note that with the amendment to Rule 145 that Justice Hecht referred to, that cost assessment issue may have been fundamentally dealt with.

It has, if we don't have to be under the DOJ's thumb on it can't be assessed against anyone, but I don't understand why if there is a witness that's in a case that needs an interpreter and that interpreter is paid for and the other side of the case is more than affluent to pay for it, has the financial resources, why that interpreter cost cannot be assessed as court costs against the losing party, and then assuming that's the more affluent party, they have to pay it. That is a cost of the system, and so I think we leave this alone, although as a rules committee I understand we have to go forward, and I will gladly participate in that, but I think it can be left alone and then us focus resources on fixing the pipeline, because I notice when we turn back to

Robert Meadows' problem, the discovery issue, you get a judge involved in those cases earlier and things just start happening. You don't have the level of discovery problems that you do, so --

CHAIRMAN BABCOCK: Justice Gray, when you say fixing the pipeline, I'm --

HONORABLE TOM GRAY: Bigger pipeline.

CHAIRMAN BABCOCK: More judges.

HONORABLE TOM GRAY: More judges, the ability to process -- because Ana gave a -- before we started gave me an insight. She spent two days with a pro se inmate. It was a criminal case.

HONORABLE ANA ESTEVEZ: Jury trial.

HONORABLE TOM GRAY: A jury trial and --

HONORABLE ANA ESTEVEZ: Minimum is 20 years.

HONORABLE TOM GRAY: -- they extended the time periods for the trial because she knew it was going to take more time. Probably a case like that would have been tried in a day on a normal basis. It took two days, two extended days. It takes more time. Our problem with pro se litigants -- and this I speak of both from the time when I was municipal judge, now as an appellate judge. I've heard it -- I read about it last time in the record of this proceeding. Pro se litigants take more time. We're trying to figure out how to deal with pro se

litigants and get forms and all of the stuff that this committee has done.

CHAIRMAN BABCOCK: Yeah.

HONORABLE TOM GRAY: If the trial judge has more time to deal with that pro se litigant, frequently an indigent pro se litigant, they can deal with it, but not if there are still 999 cases lined up at the door.

CHAIRMAN BABCOCK: I get that, but how does -- how does the interpreter/translator issue impact a judge's time? I mean, it may -- if you have to have a -- if have you to have an interpreter, that may -- may take a longer trial because you're -- you know, you have more time for testimony, but --

HONORABLE TOM GRAY: Finding and organizing, getting them there, working with a party to get them there. I mean, any of that is going to take time of the judge and the coordinator and the staff, and I -- I believe that if you give that judge more time, again, we're talking about the due process, the ability to make sure that they get a fair trial, the judge's personal involvement in that will facilitate it, and it may or may not be through the appointment of an interpreter. It may be nothing more than, although it delays the trial, putting it off a week until the witness' uncle can be there or the party's uncle can be there or the mother of

the defendant.

CHAIRMAN BABCOCK: Okay. So you're saying the administrative burdens of administering a rule like this is a bad thing?

HONORABLE TOM GRAY: Yes.

CHAIRMAN BABCOCK: But somebody has got to -- I mean, if you're going to have an interpreter, somehow it's got to happen. How's it going to happen?

HONORABLE TOM GRAY: I'm saying the judge. I mean, the judge is ultimately the one that's going to have to make sure that it happens. The flexibility to do that is given with the current rule.

CHAIRMAN BABCOCK: Ah, okay.

HONORABLE TOM GRAY: And the -- but it takes time, and if the judge doesn't have the time, that's when they feel the pressure to do something.

CHAIRMAN BABCOCK: Okay, I'm with you. Judge Peeples and then Justice Christopher.

HONORABLE DAVID PEEPLES: Two things. I want to just follow-up on what Tom said there about time. One thing that lengthens it, I mean, when you're translating or interpreting, it doubles the length of whatever that segment of the trial is. Okay. That's one kind of thing, but having to wait for the interpreter is another, and I think that depends in this diverse state on

where you are. For example, at one pole is Laredo, heavily Hispanic, and they've got several interpreters who just work right there in the courts; and if you're holding court and you've got a case that needs an interpreter, you just ask them; and within minutes somebody is out there, they'll interpret, and then they're gone; and so that doesn't take much time.

Somewhere in the middle is San Antonio, a big city where there's lots of Spanish speakers, and we've got two courthouses and -- civil and criminal; and I don't know how many interpreters are on the payroll; but just because they are there in the city and in the courthouse doesn't mean you get them with the snap of a finger. They might be in another court. It takes time to walk across the street and so forth, so if you need them for part of a trial and it's going to take 15 minutes, well, that's 15 minutes that you wait until they get there because of travel time or they're doing something, and that kind of thing adds up, and then at the other pole from Laredo would be small towns where even a common language like Spanish there's nobody who qualifies here anywhere close, and so if you need somebody for a little 15-minute hearing or maybe a five-minute hearing, you can't just get them -- you've got to reschedule. And if it's a language other than Spanish, of course, it's a lot harder. I know there

are places where you can get people remotely and so forth, but just to pursue what Tom was raising, there are those costs.

I want to ask a question of the committee and the advisors about when this applies, and I'm looking at "Court proceedings," the first paragraph, (a), when needed and so forth, "The court must appoint a qualified interpreter for a court proceeding involving a party or witness." Now, that can't possibly mean that in a one-week trial that's going to have one 10-minute witness you've got to have somebody for the whole trial. I know it doesn't mean that. It needs to be tweaked, but my question is -- there are two. What court proceedings, and I've looked at the Government Code, and it talks about arbitration and mediation and things like arraignment, that's where somebody has been arrested and gets his rights, so that's very important. It doesn't take long either, but in a trial, it might be a jury trial, it might be a nonjury trial, a trial can be a five-minute hearing on a family law case where they agreed on every single thing except the amount of child support or when it starts or about -- or an arrearage that might be a couple thousand dollars. That's a trial. It's not a big trial, but it's a trial, and so my question is how much discretion judges will have to not go through the whole

process on something very, very small like that. Admittedly it can be very important.

And then a related part, this is in the same sentence, "court proceedings involving a party or witness." It's one thing when the party is on the witness stand and needs interpreter, an interpreter, or when a witness is on the witness stand. What about the rest of the trial when the plaintiff or the defendant, the husband or the wife, is sitting there listening? Does this mandate an interpreter to interpret everything that's happening while other people testify. Those are different things. And I just -- really this is a question about what you-all -- where you see this going.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: We've got all kinds of proceedings, summary judgment, discovery, temporary orders, the minor nonjury trial, those kinds of things, and then for the party or the witness on the witness stand, does it apply to the party who is sitting there listening while other people testify?

CHAIRMAN BABCOCK: Do you have a view on who should be driving the bus, us or the Legislature?

HONORABLE DAVID PEEPLES: I think there needs to be a lot of discretion, and there may be in that first sentence, "when needed for effective communication."

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE DAVID PEEPLES: I'd like to hear what Roger and the advisors have to say. This goes to the heart of this. When does it apply? I'd kind of like to know that as we talk about the details.

CHAIRMAN BABCOCK: Justice Christopher, will you yield to --

HONORABLE TRACY CHRISTOPHER: Sure.

CHAIRMAN BABCOCK: -- get the answer to that question? Okay.

MR. HUGHES: Well, to a certain extent it's already here, folks. Chapter 57 says when you appoint a -- when you -- if you're going to appoint an interpreter, it's for all court proceedings. Now, that brings up a couple of interesting points. I mean, obviously when you have a witness on the stand you want to translate for them. When the judge is giving orders orally in court to a person, you probably would want them to do that, but the third thing you mentioned is the person with limited English proficiency has left the witness stand, they're a party, they're listening to testimony. Now what you're talking about is do they need to have a translator there in order to go turn to counsel and go, "The witness is lying about this, that, or the other thing," because -- and that's the problem. The

answer is I'm not sure how that would work out because, number one, it might require two translators, one for the person on the stand and then a separate one to advise the party so they can talk to their attorney.

Well, usually, in my neck of the woods, that's handled because if the -- if the party has a problem speaking in English, usually they've gone to an attorney that shares their common language so they can communicate with their counsel. They don't understand the witness. Well, all I can say at this point is what happens in criminal cases? Because the Code of Criminal Procedure has another statute altogether. What happens in criminal cases when you have a defendant who can't speak English? Do they provide -- and I ask because I don't know. Do they provide a translator to sit next to the --

HONORABLE STEPHEN YELENOSKY: Interpreter.

MR. HUGHES: Interpret so the defendant will understand what that police officer is saying about the arrest?

HONORABLE STEPHEN YELENOSKY: Yes.

CHAIRMAN BABCOCK: Okay. Trish.

MS. McALLISTER: Well, again, Brianna and I can answer some of those questions, which is that, you know, what Roger is saying is true, that 57.002 already applies, so you have the legislative piece and that is of

the Government Code, and they have looked at this issue repeatedly, but that 57.002 applies to Rule 183. So the standards that are already there should be being utilized currently, and the Legislature regularly looks at this issue so that those standards may change.

In terms of when an interpreter is required, especially underneath the DOJ, basically, you know, what the DOJ is wanting us to do is that they're going to be needed for the party if there's a limited English, LEP party, and if they -- if they -- during that case there's a witness that needs an interpreter, the witness is going to need an interpreter, so you at that point now have two interpreters. Once that witness is off the witness stand, though, and they are no longer needed, there is not a need for a second interpreter.

HONORABLE STEPHEN YELENOSKY: But there is the first interpreter through the whole case.

MS. McALLISTER: Right. Yeah, but the party -- if there's a party that is in need of an interpreter for the exact reason that Roger stated, they are -- it is, you know, against Title IV or Title VI. They consider it discrimination if they're not going to have a meaningful participation in the court proceeding, and meaningful participation is that they need to know exactly what's being said and commenting on exactly that,

whether or not somebody is lying or being able to communicate with their lawyer effectively. So that's -- I think that's pretty settled, at least with the DOJ, and the other thing that I just wanted to state is -- oh, gosh, now I've completely forgotten, but I know I'll think about it again. I know, Brianna, you had some things you wanted to say as well.

MS. STONE: Yeah. Sorry, I'm a little under the weather. I would just echo what Trish said about Chapter 57 and how it already requires appointment, and this also goes to part of what you were asking about, Judge. It already requires appointment in certain situations like when someone requests an interpreter; and you're right, there are, you know, shorter hearings, you know, where as an attorney to you they may seem very perfunctory; but if you were someone who, you know, was not able to follow the proceedings, it might not seem as perfunctory; and so, you know, as you mentioned, you know, if you're talking about child support orders, for example, that can be something really important; and an LEP person would really want to be able to participate in that discussion; and I would just also add that the DOJ would say that all proceedings, you know, I mean, not just in court, but court mandated and court annexed proceedings is the language that they use; and they also talk about

contact that you have with the court outside of -- outside of the judicial process. So they talk about clerks, and they talk about all of these things, and they really look at the judicial branch, you know, as a whole and where an LEP person would have contact with that and where their rights would be implicated.

So this rule, of course, is only about civil procedure, but there is case law right now about presence, you know, an LEP person in order to be present has to be able to comprehend the proceedings according to these cases. Those things happen mostly on the criminal side because you see these things appealed on the criminal side, almost never on the civil side, which you can understand why, but on the criminal side, you know, in order to be present, you have to -- there's cases -- lots of cases around the country about the importance of interpretation, to be present and competent and all of those kinds of things, so that's what I have to say about that.

MS. McALLISTER: And the one thing I did want to say --

CHAIRMAN BABCOCK: You remembered.

MS. McALLISTER: -- that I knew I would remember, yes, is that I think one of the things that everybody needs to be aware of is what Roger was

referencing earlier; that is, the DOJ is very actively looking at states and the progress that they've made, because this isn't actually just from 2010 or 2002. I mean, it's been an over a 30-year mandate that the Federal government has had on this issue; but it has been ramped up since 2002 basically and then again in 2010 and then this latest, it's clear that with this latest thing that they just, you know, distributed yesterday, that they're still monitoring it very heavily; and the thing to be aware of is that the DOJ has intervened in several states; and in the states that they intervene in, all of those states result in rules that say everybody gets an interpreter, no one pays.

Up until I guess -- I can't remember when North Carolina came in, but North Carolina was the first time that the DOJ took a look at the landscape of court rules. I mean, before they were just suing states because they didn't feel like the process in the states was adequate for protecting the interest of people, LEP individuals, but North Carolina was looking at their -- was looking at their rule and had drafted a rule that the DOJ did not feel was adequate, and that is when they then intervened. So I do think that they're looking at legislative efforts and court rules, so I just want to make sure that people understand there's -- you know,

they're looking at everything.

CHAIRMAN BABCOCK: Okay. Justice Christopher, do you even remember what you were going to say?

HONORABLE TRACY CHRISTOPHER: Yes, I do. Expanding interpreters to civil cases will be very expensive. All right. Right now we do it in the criminal cases. We do it in parental termination cases, but expanding it to all civil cases will be very expensive. In my opinion the rule does not make clear who is paying and when, and I'll give you an example in Harris County. So in Harris County, similar to other counties, we have a pool of Spanish-speaking interpreters that are county employees and paid for by the county. Now, if I appoint one of those people and they come over and they translate, under this rule they could not possibly be charged as court costs even if I had two extremely wealthy Spanish-speaking people in front of me in this court -- in this case. I think that's wrong.

So I think -- because I think that, you know, if you're wealthy enough in the civil system, you should pay for the cost of your interpreter. So to me -- and then secondly, if I am a judge and someone says, "I need an interpreter" and I appoint an interpreter, I want that interpreter to be paid. Okay. So I either do it

through the county people or if it's not Spanish speaking, the county has a contract with another language service that will, again, you know, send over somebody that speaks Vietnamese or Chinese or whatever, and the county then pays that interpreter. Otherwise, how am I going to make sure that the interpreter is going to get paid? All right. So you can't put in there this blanket prohibition that if the county pays for it, you know, you can never tax it as court costs. Again, I give the example of two wealthy individuals who are able to afford the cost, should be -- should in my opinion pay the cost for an interpreter. So the way it's written, it doesn't allow that to be done.

So what I would say, okay, you file a motion for the interpreter or the court on its own motion if they see. Then the court has to make the determination are they indigent. Okay. If they're indigent, they get a free one. All right. Can they not afford, if they cannot afford or it will impede, they get a free one. Then the court knows how to handle it. The court knows they're going to go through this system to get, you know, the free interpreter. If it's someone who can afford it, in my opinion I say, "Hey, come back with an interpreter, and you pay for it." But the way the rule is written it doesn't allow for that, and so I think it needs to be

rewritten to allow for that.

Now, I understand that you think the Department of Justice is going to require that we appoint no matter what, regardless of ability to pay. Well, I really think that's a legislative matter, and, you know, I don't think we should go that far, and I don't think this rule is clear at all on who pays what, and you can't just hide it by a bad -- sorry, an inaccurate drafting. I also don't like that we refer to other things in the rule itself, because that always is confusing to trial judges and, you know, to lawyers. So I've got to look at this, I've got to look at that, I've got to look at this to see whether I can file this motion or who gets taxed as costs. It should all be spelled out in the rule. We shouldn't have "or when required by law." We shouldn't have "the proceedings listed in section," you know, whatever, "of the Government Code." It all needs to be in there.

CHAIRMAN BABCOCK: Elaine, and then, sorry, Judge Wallace, and then you. Elaine Carlson, Professor Carlson.

PROFESSOR CARLSON: I think that Justice Christopher just answered one of my questions, but this applies to all languages?

HONORABLE STEPHEN YELENOSKY: Yes.

PROFESSOR CARLSON: So in Harris County

where I think we have 180 different language speaking. Okay. Secondly, Roger, did you find -- and I'm sorry, I just don't know this area of the law -- on the civil side are there judicial decisions dealing with the due process implications of the necessity of having the translator or the interpreter, or are we responding to the DOJ?

MR. HUGHES: I don't know that there's any Texas cases. I think the impetus came from the DOJ. What about -- what do the ATJ people happen to know?

HONORABLE BRETT BUSBY: Well, and it's also in the -- I mean, to answer part of that question and part of what was said earlier, we already have it in civil cases by virtue of Chapter 57 of the Government Code, which says that they have to be appointed in civil cases. So we were responding not only to the DOJ but also to what's already in the statute but wasn't reflected in the current version of the rule.

PROFESSOR CARLSON: So our Legislature might be affording more due process than the law would require.

HONORABLE BRETT BUSBY: Could be.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: Another question I have to kind of follow up with what Justice Peeples was inquiring about, is this all pretrial proceedings or just trial, because I notice that --

HONORABLE STEPHEN YELENOSKY: All proceedings.

PROFESSOR CARLSON: All proceedings. So summary judgments.

HONORABLE STEPHEN YELENOSKY: Yes.

PROFESSOR CARLSON: I notice that the qualification under (b)(4), when you're not using a licensed or certified interpreter or translator qualified under the Rules of Evidence, and, Roger, I think you said that's Rule 702.

MR. HUGHES: Yes.

PROFESSOR CARLSON: So is that both the knowledge, skill, experience, training and education, as well as must be helpful to the trier of fact? So if the jury all speaks Spanish, you don't need it, or the jury all speaks English and you have an English witness, you don't need it, or how does that work together?

MR. HUGHES: Well, I was thinking mostly of the qualified by experience, et cetera, and that's part of what is in the statute itself -- pardon me, somebody has it here. Yeah, scroll down for a second. Yes. 57.002(e) says that a person appointed who was -- when they allow you to use uncertified, "must be qualified by the court as an expert under the Texas Rules of Evidence." So that's already baked into Chapter 57; and I expect that the part

about being helpful to the trier of fact, that's sort of a given, I mean, that the trier of fact needs to have it translated. I mean, a translation is necessary, so I think that solves that part of the problem. I think it's the -- when you're talking about qualified as an expert then I think what you're really talking about is their training, skill, and experience.

HONORABLE BRETT BUSBY: And also just to add to that, it's the way that -- it's already that way in the rules. Under Rule 604 they say, "An interpreter is subject to the provisions of rules relating to qualification as an expert." So this is not a change from what we're doing currently.

PROFESSOR CARLSON: I just worried -- was wondering how that second part of 702, if that was a factor at all.

HONORABLE BRETT BUSBY: I'm not sure what courts' experience has been, but they've -- I mean, it's something they should already be doing under the way the evidence rules are currently written, so I haven't -- but I don't think we've heard about any problems with that part of it.

CHAIRMAN BABCOCK: Just a -- Judge Wallace has been waiting. Go ahead.

HONORABLE R. H. WALLACE: I'm trying to find

out how court proceedings are defined in section 57.0017 of the Texas Government Code, because I had the question that sort of combined what Judge Peeples and Judge Estevez raised; and that is, number one, translators, could it be argued that a translator is required to translate pleadings, discovery, things of those nature? Is that part of a court proceeding?

PROFESSOR DORSANEO: Sure is.

HONORABLE R. H. WALLACE: If it is, it won't take somebody down at TDC long to figure that out and want a translator. I don't know, that --

MR. HUGHES: Well, the statutory definition is arraignment, deposition, mediation, court-ordered arbitration or other form of alternative dispute resolution, or it includes those.

HONORABLE R. H. WALLACE: Okay, so --

MR. HUGHES: I don't think it necessarily requires that all the pleadings, et cetera, would have to be translated. We can have fun with --

HONORABLE R. H. WALLACE: Okay.

MR. HUGHES: -- what exhibits that's already been brought up, and I'm sure --

HONORABLE R. H. WALLACE: Okay. That answered my question, but how -- yeah, okay, Harris County has their own I guess pool of interpreters. Tarrant

County does not, to my knowledge. How are we going to pay these people?

CHAIRMAN BABCOCK: Judge Yelenosky, then Judge Peeples.

HONORABLE STEPHEN YELENOSKY: When this -- when I first read the 2010 opinion we met with some people that brought it to our attention, and actually it wasn't Spanish speakers. I forget what it was, but in any event, it was surprising to me how extensive this was and how expensive it would be, and we put together a plan because we reviewed DOJ information and that we interpreted it to mean as expansive as it is. Now, we're spending a lot of time resisting that. I think that's a waste of time. If higher courts want to adjudicate this, fine, but as far as DOJ is concerned this is a settled matter, a lot of this is a settled matter. You have to think of it in terms of somebody is in the courtroom, they're supposed to be able to understand everything that a person who speaks English would understand, and so they have got to understand what the witnesses are saying if they're a party. Is that incredibly expensive and troublesome? Yes, but that's not our decision.

I think that we need to focus on drafting the rule from the understanding of the DOJ guidance, and there's a lot of discussion about what that means, but we

need to look at what DOJ has already said. We may not like it; but the rule, if we're going to write one, needs to be consistent. Otherwise, DOJ is going to look at the rule and say, well, that clearly and facially is contrary to Title VI, because it says if you can afford, for example, but I don't know if that is; but I agree with you, somebody who can afford it should pay for it, but I don't get to decide that.

As far as exiting from Federal funding, I just quickly looked up one program. National Institute of Justice gives about $48 million to the state. That's not including the other forms of Federal financial assistance that go to the justice system in Texas. Most of that is criminal, but they look at the whole justice system. They're not going to break it out civil and criminal in my understanding. That doesn't include any Federal assistance to counties, and I think a county is a county. If you give money to a county I think it's all the programs in the county, although I'm not certain of that.

In any event, that's a legislative decision, whether to opt out of Federal assistance for all judicial things, and if that's possible and they want to do that, then we don't need a rule. It's possible that we could do it by an LEP plan, and by that, I think the Supreme Court's plan is in there, right? It doesn't have to

necessarily be a Rule of Civil Procedure, and maybe that's our recommendation. I can see the merit in not doing a rule and writing and having an LEP plan for all the judiciary which allows for flexibility and understanding -- or flexibility and accommodation for the different needs of different places; but it's still going to be subject to scrutiny, not only how it's written but how it's implemented; and so I understand, because I did the same thing when this was brought to our attention in 2010, that this is somewhat chalking and sweeping, but it is. It's not in question. It is.

CHAIRMAN BABCOCK: While Judge Peeples is talking, can you think about what the interplay is between the DOJ standard and the Chapter 57 standard?

HONORABLE STEPHEN YELENOSKY: Okay.

CHAIRMAN BABCOCK: Judge Peeples. Then Lamont, then Judge Estevez.

HONORABLE DAVID PEEPLES: I don't see anything in here that requires that there be a request for an interpreter. Am I right about that, Roger?

MR. HUGHES: No.

HONORABLE DAVID PEEPLES: You don't do this sua sponte?

MR. HUGHES: Yes.

HONORABLE DAVID PEEPLES: Could we add the

words "upon request" somewhere in the heart? Or is that forbidden by other law?

MS. STONE: I think the DOJ would say that you can't require them to make a request.

HONORABLE DAVID PEEPLES: The way you word it, they can't require them, I'm just saying do I have to do it even if nobody is asking for it, they're willing to waive it, or they just don't even bring it up?

MS. STONE: There's guidance about that. I mean, it's complicated, but if -- if an LEP party -- technically, yes, an LEP party can waive it, although there's a lot of case law, mostly on the criminal side again, about how things go terribly wrong when that happens; but, you know, as a judge, I would think there would be concerns about the lack of interpretation for someone who you know cannot communicate in English, so that's complicated. DOJ advises against it. There's a lot of guidance about that, and we could, you know, supplement with a report if you want to hear more about that, but --

HONORABLE DAVID PEEPLES: Well, there's time later on this, but this applies not just to people who can't speak a word of English. It applies to bilingual people whose first language is Spanish.

MS. STONE: That's right, if they can't

communicate.

HONORABLE DAVID PEEPLES: But, no, no, if they're good in both languages but English is not their primary language, sub (b)(3) says this applies.

MS. STONE: And that's right, and in the DOJ guidance they talk about how although a person may know enough English to speak English in a lot of situations, what you see a lot in courts is that under the stress of that kind of proceeding, it's often that their language ability isn't quite to that level when you get into legalese and a lot of these things; and so, whereas, somebody might not need an interpreter to go to the grocery store, for example, they still would need an interpreter in a court.

HONORABLE DAVID PEEPLES: You know, it was said a few minutes ago this applies to pretrial. Okay. When I look at the introductory clause there "when needed for effective communication," I like that, because in a summary judgment case, there's nothing -- or hearing there's nothing but lawyers or the pleadings are being disputed or discovery and it's only lawyers there, which usually it is, I mean, pretty rare for parties to show up for those. I could say I don't need to appoint an interpreter because there is nobody here who needs one. They're parties, of course, but then it says "or when

required by law," and I think you-all are saying that DOJ misses -- or maybe it was Chapter 57 require it, even if it's not requested. I think I hear you saying that.

CHAIRMAN BABCOCK: Yeah, that was --

HONORABLE DAVID PEEPLES: I hope I don't, but --

MS. STONE: I don't --

CHAIRMAN BABCOCK: -- the question I was getting to.

MS. STONE: Not if there's just lawyers. I mean, if there's not an LEP person in the court you wouldn't need to appoint an interpreter, but if there's a party who you know is LEP, then the responsibility to provide language access is on in this case the judicial branch or the judge. So whether they request it or not, you know, your responsibility wouldn't be met if you don't provide the interpretation.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Pretty quickly here, and I think I'm in -- I agree with those who say putting all of this in a rule is going to be very hard and maybe impossible, and including all of the cross-references to all of the other regulatory authorities, but in particular, the rule applies both to those with limited English proficiency and with a communication disability,

where we're basically talking about deaf and hard of hearing people, I think, or people who would require some kind of sign language interpreting, which is foreign, totally foreign, to most people; but it is a community that's very close with each other; and they've got a whole kind of communication system among themselves; and I would really urge that we not talk about deaf and hard of hearing in a rule as if it's the same as not understanding English, which is totally different.

And just as a quick story, I had a hearing in Travis County just a month ago, six weeks ago, that involved my client who was deaf, the other side who was hearing, and a lot of deaf communication involved. Travis County, because a school of the deaf is here, is very familiar with the deaf community and with the handling issues involving those who require sign language. We had three interpreters in the courtroom for the hearing, one that was interpreting the record, one that was interpreting for the witness, and one that was interpreting for my table; and all I had to do was call the clerk and say, "You know, we've got this hearing coming up. We're going to need interpreters," and they magically showed up. This is the only place in the state, maybe in the country, where that would happen, and it was incredibly -- I'm sure, incredibly expensive to someone,

but, you know --

HONORABLE STEPHEN YELENOSKY: The county.

MR. JEFFERSON: -- my client wasn't charged for it, and I don't know how the payment ends up getting paid.

HONORABLE STEPHEN YELENOSKY: Well, it's through an entity that's funded by Travis County, and it's cheaper than it would be to hire interpreters individually, but, yes, it's been done for years.

MR. JEFFERSON: And so I was told after the fact that had I called earlier I could have had the interpreter at my pre -- my prehearing conference with my client to help me interpret with my client in advance of the hearing. So, I mean, there is a whole other level of procedure and communication assistance and complexity required with the deaf as opposed to those with those who don't speak English.

HONORABLE STEPHEN YELENOSKY: Yeah, and that's the ADA, and the guidance on that is very specific and very helpful and puts a burden even on the attorneys to provide effective communication in your office.

HONORABLE BRETT BUSBY: And just to add to that, in response to your question, Lamont, about why they're together in the rule, the reason that both of those are in this rule together is because that's the way

the Legislature set it up, also in Chapter 57 of the Government Code. They treat both of those subjects together as far as whether you can speak English and also whether you would have some other disability.

MR. JEFFERSON: I understand, but it's not the same thing to not be able to speak Spanish and to not be able to communicate in voice, not be able to voice communicate.

HONORABLE BRETT BUSBY: Well, that's certainly true, but both of them require some sort of person to be appointed in a sense.

MR. JEFFERSON: But the fix is different for one who is not English proficient versus one who can't speak.

CHAIRMAN BABCOCK: Judge Estevez, and then Judge Sullivan.

HONORABLE ANA ESTEVEZ: I'm not going to make my other comment. I'm just going to respond to his because I don't think it --

CHAIRMAN BABCOCK: No, make your other comment.

HONORABLE ANA ESTEVEZ: No, I mean, because I need to do a little more research because someone else said something, and I want to make sure I'm right before I say it, but as far as --

CHAIRMAN BABCOCK: That's not the standard here.

HONORABLE ANA ESTEVEZ: You know, all these appellate judges, that's what all I ever get to think about, what are they going to do with what I just did, right? But as far as there is a provision that we pay, and we do everything for the deaf, because I think it is -- it is totally different because they're speaking -- that is their only language, they can't learn English. I mean, they're speaking in their language, which is English. They don't have another language to learn, to ever become proficient in the written, so I know the Civil Practice and Remedies Code requires us to get them. We have to get ours from Texas Tech, so ours come from Lubbock, and we have to always pay for at least two, sometimes three, because they can only go for three hours at a time, I think; and then when you have a deaf and a deaf, then you have two, the party -- we had a really complicated case that we had to deal with that, but that is a different remedy because the court does pay for that. I don't think that goes to court costs to anybody. I think that goes to the county, and it never gets charged to anyone. There's a special provision in the Texas Civil Practice and Remedies Code for that, but I don't know what it is.

MR. JEFFERSON: Then should it be included in the rule? I mean, if there is a different fix and I'm not -- again, Travis County where it's sophisticated, where you see -- where they see the issue all the time, it's handled great, I've got to say, but if you're in Laredo or you're, you know, I don't know, in West Texas or wherever, even in San Antonio, really anywhere else but Travis County in the state of Texas, you're going to have -- anybody would have a very difficult time.

HONORABLE ANA ESTEVEZ: It's delayed. We call, and we have the actual professors that are teaching it I suppose in college are the ones that have to come up, and it is -- this is going to be extremely expensive. I mean, we have had to fly people in, pay for their hotels from different -- we've been lucky that we've never had to do them from out of state, but in our criminal trials we've given our interpreters more money than our court-appointed attorneys got because of the hotel stay, the flights, every hour they interpret; and there are over 180, as they said, languages, and that's in the criminal context. So this is going to create a huge burden, and again, if it's required, it's required, and that's where we are, but I don't think we should expand it to something beyond what is required under the DOJ, so I don't believe we should go on and do full translations of every type of

document unless, you know, they're required, and I think this is broader than what's -- anyone has stated was required.

CHAIRMAN BABCOCK: Kent Sullivan.

HONORABLE KENT SULLIVAN: Listening to this, I think we really owe a debt of thanks to the subcommittee for making a run at this because this is tough. As I was thinking about it, looking at it, it occurs to me there are sort of four overarching analytical considerations. One is determining the scope of the right, you know, when it's going to apply; two is trying to ensure the technical competence of the interpreter; three, trying to ensure that the interpreter is conflict free; and, four, trying to ensure that this is somehow paid for.

There have been a number of comments about most of these areas, but I was going to circle back to one that I don't know has gotten much attention and maybe ask Roger about what is currently contemplated because my thought is if I was going to construct a rule I would be concerned about conflicts, and I know there's some language in the current rule, but it appears to be limited. Candidly, I would want prior to a proceeding for it to be on the record a disclosure by the proposed interpreter the extent to which he or she has any financial, professional, or personal relationship or

involvement with the parties or their lawyers, and I'm not sure we're there, and I just at least wanted to raise it for consideration. I think an interpreter can have a profound impact on a legal proceeding.

CHAIRMAN BABCOCK: Okay. Yeah, Richard Munzinger.

MR. MUNZINGER: I may be wrong, but having listened to all of this, I've got this question to the committee. Brief preface, last night I had dinner with a friend of mine and his wife, who is from Cambodia. She's been in this country a few years, and she clearly is an LEP person, very bright. Our conversation covered a number of subjects, but there's no doubt but that she would be an LEP in this rule. Let's assume she is my client. I want to take her -- I am her attorney, plaintiff or -- I'm her attorney as plaintiff. A deposition is taken of a witness. She wants to attend, has the right to do so. Must the court appoint a translator for her in this deposition, and if so, would it be a court cost that I could have taxed against my adversary in the event I win the case, and does that apply to every witness?

Most times clients don't go to summary judgment hearings, but let's pretend she does. Let's pretend she comes to a motion for continuance hearing.

Again, I as her counsel am fully capable of explaining to her. It may take me a long time, but I think I can explain to her the rules, the pitfalls, this, that, and so forth, but my question stands, to a deposition must a Cambodian translator be provided to her? If so, can it be taxed as court costs the way this rule is written?

MR. HUGHES: I'll venture. Two things. First, under the Government Code, the deposition is a court proceeding. I'm not -- I can't say that there is a case that says you -- you could appoint a translator under Rule -- under Chapter 57 so that the LEP -- in other words, for the benefit of a party so that they can understand the witness, not so that the witness can testify in English, but assuming that is the case, that it could be done, the answer on the fees is pretty simple. It could be taxed as fees. Then in other words, if the appointed translator's fees can be taxed and then they're taxed as per the rules, which usually means loser pays, winner collects.

MR. MUNZINGER: So for a deposition for a Cambodian client, a defendant can be required if the defendant loses the case to pay for the translation for the depositions that are taken in the case and theoretically every court hearing the way this rule is written?

MR. HUGHES: Well, I --

MR. MUNZINGER: And if that is the case, the in terrorem effect on an adequately advised client who might lose a case is pretty serious.

MR. HUGHES: And again, all I can say is I'm not sure it would go that far into deposition decision, maybe the judge has some leeway at the hearing, but the answer is to some extent you've got a point, but under the rules if the judge appoints the translator then those fees get taxed, and, yeah, that can be pretty substantial in some cases.

MR. MUNZINGER: Well, but the point is the Government Code defines a court proceeding as it includes a deposition.

MR. HUGHES: Yes.

MR. MUNZINGER: And it makes no distinction between a witness and a party insofar as I can see, which prompted my question. It seems to me the DOJ is driving this but not paying for it and is driving it without support in case law or -- there may be statutory law, I'm not that versed in it, but, man, that's a pretty troubling situation we just outlined.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: We recognized on the committee that the main issue in this case is one of who

is going to pay, and I was interested in Judge Christopher's statement about that Harris County does hire interpreters for the courts, and if they do, why would you tax --

HONORABLE TRACY CHRISTOPHER: Well, right now --

MR. HAMILTON: -- the interpreter's fees to anybody, and if so, how much would you tax?

HONORABLE TRACY CHRISTOPHER: My understanding, because I asked before I got here, with respect to criminal cases they're not charged. Parental termination cases, no charge; contempt, no charge; but in family, just a regular family matter or a civil matter where you use the Harris County people, a fee bill gets taxed, you know, to -- and put in the file.

MR. HAMILTON: How much do you charge?

HONORABLE TRACY CHRISTOPHER: I don't know how much they charge. And then like the -- the outside service, you know, just bills the county; and the county paYS it and then we have a dollar amount from the outside service. I'm not sure how much they charge, if they do, for the people that are on the payroll.

MR. HAMILTON: And you said if you have an LEP person who can afford it, you tax it against them, but what if you have an LEP plaintiff who cannot afford to pay

the fees, you provide the service, but the defendant wins the case? Do you tax those costs against the defendant who won?

HONORABLE TRACY CHRISTOPHER: No.

MR. HAMILTON: See, I think that's what the DOJ wants, isn't it? You don't ever tax any costs against the LEP, but you could.

MS. McALLISTER: Right.

MR. HAMILTON: You could tax the cost against the winning party even though they win the case.

MS. McALLISTER: Well, I think -- here's -- there's a couple of things -- the DOJ I think would say I can't tax anybody. You know, nobody has to pay. I think that's just the DOJ's standard; but the ABA has a different standard; and I think the DOJ -- you know, frankly speaking, I think the DOJ at this point is looking for progress; and so I think that they would be, you know, willing to accept something less than nobody pays; and the ABA standard is that people who are well-resourced litigants can pay. So companies can pay, but in no situation should any party or witness or -- any party who is LEP be required to pay or any non-English speaking -- or if you're an English speaking party that you have a limited English witness that is, you know, kind of like critical to your case. I mean, you know, we have these

cases all the time in Legal Aid cases, and you're maybe -- you know, anyway, in those situations that person can't be required to pay either. I mean, there are certain things, but I think that if there is a none LEP party that is well-resourced you could tax it against them.

MR. HAMILTON: Even if they win the case.

MS. McALLISTER: Even if they win the case.

CHAIRMAN BABCOCK: Yeah, Justice Busby.

HONORABLE BRETT BUSBY: And that's certainly a discussion we had through drafting this rule because one version we drafted was if you're not indigent under 145 or these other categories then it can be taxed against you even if you're an LEP party, and the reason we came to this version was because of some of the anecdotes that Roger mentioned where court personnel were being appointed to translate and then the judge was charging their costs, and it was unclear where the money was going and that sort of thing. So, but I think we could write it either way, depending on, you know, what the view of the committee is; and the other thing that I would say in response to Richard's question is I think you're accurate in the way that you're thinking about that; and I also think that that's current law under Chapter 57 of the Government Code. So we were trying -- as I mentioned earlier, what we viewed as our task here, at least as far as the

comments that we made from the Access to Justice side, was to draw in what we're already doing and put it down here for everybody to look at, and some of it is quite broad, but this draws together what we're getting from the DOJ and what the Legislature has already done in Chapter 57.

CHAIRMAN BABCOCK: Yeah, that raises a question that to me is pretty fundamental. What is -- and I asked Judge Yelenosky to think about this a minute ago, but what is the interplay between Chapter 57, which is law that we ought to be following if we can, and DOJ, which as best I can tell are guidelines, aspirationals with the stick that if you don't do what we say we're going to come make life miserable for you, but that's not law. That's just an agency of the Federal government saying, "Here's our view on things." But are they -- is the DOJ standards broader than Chapter 57? How do they relate? Justice Christopher, you got a thought on that?

HONORABLE TRACY CHRISTOPHER: Well, I've got 57 right here.

CHAIRMAN BABCOCK: I do, too.

HONORABLE TRACY CHRISTOPHER: 57 says there's supposed to be a motion for an appointment of an interpreter or a request by a witness, and I didn't see anything in there about who pays for this interpreter. So maybe I missed it. I didn't see it, you know, should be a

court cost, it should be taxed as a court cost, it should be taxed against the winner, the loser. I didn't see anything. Am I missing it?

HONORABLE BRETT BUSBY: 57 doesn't talk about taxation. It just goes under the ordinary court cost rules now.

HONORABLE TRACY CHRISTOPHER: But why? Why is it even a court cost? I'm pretty sure it's not in the current list of court costs that the indigent rule that was just passed was in there. At least I don't remember it, because that was something I was a little worried about as to what court costs were under the indigency rule.

HONORABLE STEPHEN YELENOSKY: And, Chip, the --

CHAIRMAN BABCOCK: Yeah.

HONORABLE STEPHEN YELENOSKY: I don't think -- they may -- you asked me, but they know better than I. I don't think it conflicts necessarily with anything that DOJ is saying. It can be interpreted in a way that, if you want to, that's consistent with DOJ. It doesn't include everything that would be required by DOJ.

CHAIRMAN BABCOCK: So it's not inconsistent. It's just underinclusive.

HONORABLE STEPHEN YELENOSKY: Well, that's

my opinion quickly, but --

CHAIRMAN BABCOCK: Yeah. Trish.

MS. McALLISTER: Yes, and I wanted to answer another question, but I think Brianna can answer some of these questions that you guys have.

CHAIRMAN BABCOCK: Well, let's stick on what -- let's stick on --

MS. McALLISTER: Yeah, right.

CHAIRMAN BABCOCK: -- Chapter 57 for now. What is DOJ suggesting in their guidelines that 57 doesn't address or is contrary to 57, Chapter 57?

MS. STONE: Well, if the justice is right that Chapter 57 addresses when a court needs to appoint an interpreter and when that interpreter must be certified or licensed and when you can use one that's not certified or licensed and if you're using one that's not certified or licensed what other requirements that interpreter needs to fill, but that chapter doesn't address the real question that we're really worried about, who pays, and that's part of what the DOJ is worried about.

The DOJ cares about Chapter 57, when you get interpreter, what kind of competence that interpreter has; but they're also saying it has to be provided by the court; and in their guidance the word "provided" means paid for. It doesn't mean just appointed. It means -- in

fact, they say specifically, you know, appointing an interpreter without paying for it is not providing it.

CHAIRMAN BABCOCK: Okay. 57.002(a) says, "A court shall appoint" and that's not --

MS. STONE: I'm sorry, can I just add one more thing?

CHAIRMAN BABCOCK: Yeah.

MS. STONE: I just want to be clear for folks who haven't had a chance to look over all the documents. When we say guidance we're not talking about, you know, only the letter that they sent in 2010 or this document that just came out yesterday morning where they, you know, talk about how they -- you know, all of their guidance on Title VI. We're not talking about just their letters. What we're talking about is the guidance that was published in the *Federal Register* in 2002, which is based in Title VI and also in the implementing regulations under Title VI, so it's not --

MS. McALLISTER: They just call it their guidance.

MS. STONE: They call it the guidance, but it is actually --

MS. McALLISTER: Clarify what that is.

MS. STONE: -- the authority. It's not just -- not just their letter.

HONORABLE ANA ESTEVEZ: One at a time.

MS. McALLISTER: The case law -- Brianna can probably speak to this better than I can, but the case law around it is not -- there's not a whole lot in the civil side for courts, but there is a lot of -- there's a lot of cases -- there is other cases that have gone up on other -- you know, other areas like, you know, providing interpreters if you're going to go get, you know, Social Security disability or something like that, whatever, those kinds of other governmental agencies.

CHAIRMAN BABCOCK: Well, is the legal basis of the DOJ guidance, is it --

MS. McALLISTER: Title VI.

CHAIRMAN BABCOCK: -- statutory, Title VI, or is it constitutional --

MS. McALLISTER: It's Title VI.

CHAIRMAN BABCOCK: -- or both? Just Title VI.

MS. STONE: Well, it's both.

MR. SCHENKKAN: It's in between.

CHAIRMAN BABCOCK: In between. Richard Munzinger, and then Pete, and then somebody else had their hand up, but Richard. He passes. Pete, to you.

MR. SCHENKKAN: Yeah, one of the items in our packet is under (3)(i), 28 CFR 42, 104. That is a

Federal rule adopted pursuant to a statute, and as I read it -- and this is the first time I've ever read it, so I'm prepared to be told I'm reading it wrong. It pretty flatly says you can't deny an individual an opportunity to participate in the program, including provision of services or otherwise afford him an opportunity to do so, which is different from others afforded to the program, treat an individual differently. I am hard-pressed to find out how we would defend the proposition that we are not in violation of Federal law under this.

CHAIRMAN BABCOCK: Read that again a little louder --

MR. SCHENKKAN: A separate question for --

CHAIRMAN BABCOCK: -- for the hearing impaired down here.

MR. SCHENKKAN: Well, I doubt that -- it was a long list of them. "Provide any disposition, service, financial aid, or benefit to an individual, which is different" --

MR. HAMILTON: Can't hear you.

MR. SCHENKKAN: -- "from the manner provided to others under the program. Subject an individual to separate treatment at any matter related to his receipt of any disposition, service, financial aid, or benefit under a program. Restrict an individual in any way of the

enjoyment of any advantage, privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program. Treat an individual differently from others in determining whether he satisfies" -- and a long list of nouns -- "this individual must need in order to be provided any disposition, service, financial aid, function, or benefit provided under the program. Deny an individual an opportunity to participate in a program through the provision of services or otherwise" --

CHAIRMAN BABCOCK: Okay. We got it.

MR. SCHENKKAN: Yeah, I mean, it's pretty clear.

MS. STONE: That is the regulation.

MR. SCHENKKAN: It may be ill-advised. It might be that no one would be prosecuted on it. It might be that some would be, but nobody as big as the State of Texas, but I don't think we should base what we decide we're going to do or recommend to the Court or not recommend on the proposition that this isn't the law. It probably is.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Well, I didn't hear anything about translation in that rule. It said, "Treat everybody the same," so I guess if we get somebody a translator,

maybe we're treating them differently, but aside from that, we've got tension here between the need to spend money to provide translation services and the need to pay for it, and we've got a problem with slowing court proceedings down. Those are the problems that I'm hearing about. The -- it may be -- and we've kind of got to draw a practical balance between the two. Providing translation services in Harris County is different from providing translation services to an Urdu speaker in Runnels County. It seems to me that maybe one way you deal with the tension between all of this is to kind of start slowly and go incrementally.

One way to do it may be to loosen the qualifications. I think these qualifications work real fine in Harris County, but they don't work in Runnels County. It may be that in a lot of situations the best available speaker, translator, is the 16-year-old daughter who has been in U.S. schools and who speaks better English better than anyone else in the family. That's how it works. Maybe you loosen up the qualifications. Maybe you say anybody can be a translator as long as the parties agree, including a party, including a minor. That maybe alleviates some of the tension that we're talking about and allows to proceed forward.

CHAIRMAN BABCOCK: In practice doesn't that

happen today?

MR. GILSTRAP: It may be, but it can't under this rule.

MS. McALLISTER: One of the things that I want to just point out also is that the interpretation services, that interpretation needs to provide meaningful access, but that does not necessarily mean that there has to be an individual in the room translating, you know, if it's a witness or something like that. In immigration courts, like Chief Justice Jefferson, former Chief Justice Jefferson, asked me to look at the Federal system back in 2012, and those folks actually use almost all -- it's a different kind of hearing obviously, but they use all language line type stuff. So, I mean, I think there are times when you could -- in certain situations where you would not necessarily need a live interpreter. In a lot of situations you're going to, but that's also an option, and I can tell you that, you know, the state already has a negotiated contract with language line because the state of Texas or the State Bar of Texas, we have a language access fund, and we use that to help Legal Aid lawyers and pro bono lawyers translate with their -- and with clients in their offices all the time, and there's 278 languages.

They're all certified, or they're all licensed. There's a difference obviously between licenses

for interpreters, certifications for a translator. So there's -- there's options, and you can -- you know, it's significantly reduced. The prices are significantly reduced under that contract than they would be for, you know, somebody -- a private attorney or any other organization, by lots -- by significant. I mean, for Spanish it's 78 or 68 cents per minute for a private individual. For some of the Legal Aid organizations they were paying $3.74 per minute, so, you know, there are those kinds of options.

MS. STONE: Can I just --

CHAIRMAN BABCOCK: Justice Boyce.

MS. STONE: I'm sorry.

CHAIRMAN BABCOCK: Hang on. Justice Boyce.

HONORABLE BILL BOYCE: I wanted to follow up on a point Judge Peeples raised earlier because I'm still unclear after looking at 57.002 and the cheat sheet about why predicating it on a request is not a permissible consideration. Because if we're talking about flexibility in implementing some of these considerations, 57.002 is predicated on a request -- a motion by a party, request by a witness. The current draft of the proposed rule does not involve a request, and I think you had referenced in earlier comments that there may be guidance from the DOJ that points against a request, but I'm not seeing it in

57.002 or the cheat sheet where a -- where including a mechanism for a request for translation is going to be impermissible.

MS. STONE: Well, I can definitely -- it will take me a minute to get to it, but I can get that. I mean, the requirement to provide language access is on the Court, and it's not incumbent upon the LEP individual to request it, and the reason that the DOJ -- you know, their explanation of that has to do a lot with the way things -- you know how they work in court. A lot of people that go into court, they don't know what they're rights are, so if we require them to request something, like their ability to participate, to have an interpreter, they're never going to have it because they're not even going to know that they should be making that request. So many of our -- of the folks that we're talking about, they're not represented, and that was one of the concerns that we talked about in our committee, but it's also in the guidance that -- I mean, like any of -- any of the other rights under Title VI, which is about racial discrimination and whatnot, you know, it's not incumbent upon a person to request that they not be discriminated against. It's incumbent upon the government agency to provide -- to provide that, you know, equality, but I will definitely -- I will find the specific --

HONORABLE BILL BOYCE: I guess under that approach 57.002 is --

MS. STONE: Well, you'll see that --

HONORABLE BILL BOYCE: -- out of --

HONORABLE STEPHEN YELENOSKY: You can't --

MS. STONE: -- 57.002 actually has two situations. A person may request it, but also the judge may do it on their own.

HONORABLE STEPHEN YELENOSKY: Sua sponte.

HONORABLE BILL BOYCE: So why would that mechanism not be translatable here, as opposed to a 183 draft right now that doesn't go there?

MS. STONE: I would say that the -- that the 57.002 was not necessarily drafted with all of these issues in mind. So and that's -- or maybe it was, and that's why they allowed the judge to provide it without a request, but that's why those two options are both in 57.002.

HONORABLE BRETT BUSBY: And if we wanted to lay it out, we could certainly say, you know, "When a motion is filed or when the court thinks it's necessary for effective communication."

CHAIRMAN BABCOCK: Judge Wallace, and then Hayes.

HONORABLE R. H. WALLACE: I don't know how

the judge would know unless somebody asks. If they show up for a hearing, I don't chitchat with them. I don't know whether they speak English or not. If they go to a mediation or whatever, so it seems to me the request ought to be required. As a practical matter, what usually happens in a small car wreck with soft tissue is on the morning of trial one of the parties shows up with an interpreter, and I ask them if they're certified, and I swear them in, and we go, but, now, if somebody shows up at a hearing or trial and says, "Judge we need an interpreter appointed," that's going to delay the hearing or the trial because we don't have one sitting there waiting around. So it seems to me like it ought to be -- I don't see -- it certainly would help the trial judge, let me put it this way, to have some requirement that the party request it and request it early on in the proceeding. They ought to know pretty soon if their client is language deficiency or --

HONORABLE STEPHEN YELENOSKY: You're assuming they have an attorney.

CHAIRMAN BABCOCK: Hayes.

MR. FULLER: Shifting gears a little bit, I probably as a member of the subcommittee should have asked this question of ourselves sooner, but is there a procedure or process for DOJ preapproval or approval of

any proposed rule we may come up with? Because it seems to me that would be a very good way for us to get their answers to a lot of the questions we're raising before we get in trouble for not doing something they ultimately decide that we ought to have done.

MS. STONE: I have been told that they cannot get involved with the rule-making process at all, but they can provide technical assistance when requested, and that's through the compliance and coordination division, the one that put out that booklet that came out yesterday.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: You know, what Judge Wallace said just stimulated this thought. You're talking about if people have a lawyer that's a very different thing than a pro se person, and most of the pro se things that you see in district court are family law, and whatever this is going to cost, if you would take some of that money and hire a pro se helper -- we've got one in Bexar County, and I don't know about other counties -- who just helps pro se people, walk them through the system, you would do so much more good for poor people by taking this money and hiring somebody who when somebody comes in there pro se, English speaking pro se, to walk them through the system. "You need to do this," "you need to

do that," "let's get your husband served" and so forth, and they would probably use family members, the 16-year-old who is, you know, going to school, to find out what's going on. Most of those cases are going to settle, and everybody is glad they settled. More done -- more good would be done that way than by this.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE DAVID PEEPLES: That's not a rule-making thing, but it's a thought.

HONORABLE ANA ESTEVEZ: I just want to put on the record for the smaller jurisdictions, we pay $270 each time we have any type of Spanish speaking plea because they charge $90 an hour with a minimum of $270 for a certified court interpreter for Spanish, and there's only three of them, and so it is -- I just want to put that on the record so that when we're looking at the numbers that we know what we're really looking at in the smaller counties, where we do have the high percentage per capita of refugees in the state of Texas in Amarillo with -- I don't know how many languages, but we have a lot of language issues within our civil cases and our criminal cases, and it is a huge expense for us.

CHAIRMAN BABCOCK: Okay. Judge Yelenosky.

HONORABLE STEPHEN YELENOSKY: Justice Gray is going to hate this, but Travis County services for the

deaf -- I just looked it up to see. It's a program created by the county, and, granted, this isn't going to work in smaller counties necessarily, but they employ certified interpreters for the deaf. I see this going probably in Travis County the same way on translation with respect to Spanish, because that's the most common. It's a cheaper and, as Lamont says, pretty seamless way of handling things. I suspect Travis County will create a department like services for the deaf that's pretty seamless. They come in. They interpret when required. Nobody pays anything except essentially the taxpayers of Travis County, because it is cheaper than one offs for us. I don't know about a smaller county if that would work.

The other thing about 57, when I said it could be interpreted consistent with DOJ, that's because it would allow a sua sponte, and I think the interpretation would be you've got to do it sua sponte if it's evident to you that effective communication is necessary. Now, if somebody comes before you, Judge, and hasn't spoken a word and there's good reason they haven't and you don't know, I don't know how you can be faulted for that; but my experience with pro ses is they come in, I will have some interaction with them; and if they can't speak English at all, that's apparent quickly. I speak Spanish well enough to, you know, ask them in Spanish,

"Are you going to be able to do this in English"; and then if they say "yes," then I speak to them in English and see if they really can.

The other reason you don't want to do a request is not only do they not know to ask for it, pro ses are intimidated and particularly if they don't speak English. They're intimidated about asking a judge to do something like that.

CHAIRMAN BABCOCK: Okay. We're going to take our morning break, which is a little overdue, but one thing that occurs to me as we're talking about all of this is there's -- this is going to cost money, and does the Supreme Court have the authority under its rule-making authority to pass a rule that requires somebody to pay money, whether it's the county or somebody else? I guess we can -- I guess the Court has the authority under its rule-making to charge the parties as court costs, I guess, but beyond that, what's our authority to pass a rule like the one we're contemplating? Just a question. So let's take a 15-minute break.

(Recess from 11:10 a.m. to 11:36 a.m.)

CHAIRMAN BABCOCK: All right. Everybody, here we go. Justice Hecht, Chief Justice Hecht, and I were talking over the break, and we can maybe save a little bit of time if the Chief gives us some perspective

from the Court, which goes back a few years and was something that I didn't know about, and maybe some of you did, maybe some of you didn't, but anyway, Chief, want to let us know?

CHIEF JUSTICE HECHT: Just to give you something of the genesis of issues that we're talking about, when the Obama administration first came in, this was one of their immediate priorities to ensure access to the courts across the country, and that ended up in being the paper that came out in 2010. The chief justices' immediate reaction to it was that it was impossible, it just simply could not be done in any significant jurisdiction, and I think it's fair to say that the department was fairly insistent that it be done and believed that their view of the U.S. Constitution and Federal law was as stated in the paper.

So that kind of left everybody at loggerheads, and the department went to the ABA to try to get a supporting resolution. The chief justices asked the ABA not to do that. The ABA delayed it a little while, came out with the resolution that you have, which was somewhat changed from the original one, and there the problem has kind of sat because of the difficulty -- difficulties that it presents in so many different kinds of jurisdictions with so many different kinds of language

access problems across the country. So I think the -- one idea is that it just can't be fixed. I mean, there's not -- it's too complicated for a comprehensive fix, but that doesn't mean we shouldn't work at it and do our very best to make sure that the access problems are as low as we can reasonably get them.

Chapter 57, in my judgment, is an effort by the Legislature to say the right thing and walk out of the room before the bill comes, and this is not the first time that that's happened, but you can imagine if when Chapter 57 was passed the Legislature had said the counties have to pay for this, there would have been a hue and cry from the counties, and then maybe there wouldn't be a statute at all, and we would sort of be in limbo. So I don't know this, but my sense of things is that the Legislature passed Chapter 57 and hoped we would just all kind of do better, and some counties have taken that incentive and done a lot better and shouldered the expense of it. Some counties have not, and that's kind of where we sit.

Obviously, the elephant in the room is who is going to pay for it, so the question was does the Supreme Court have the authority to write a rule that says that, and I don't know the answer to that. I think the judiciary has some authority to require the government to pay for a justice system that meets the requirements of

the Constitution and Federal law, but since we don't exactly know what those are then it's not clear exactly what the judiciary's authority is, but the discussion is helpful, I think, from the Court's point of view because it's useful to remember that family cases have their problems, the 8 million misdemeanor cases, no jail cases, have problems, and it's -- we could make progress here by trying to get a rule that points us in a better direction than we have been. So that's -- I mean, I think that's the way the Court sees the work that the commission has done and the work that we're looking for from the committee.

CHAIRMAN BABCOCK: Let me just ask the district judges in the room or any of the judges, really, but if a -- if the Supreme Court were to promulgate a rule like what's been proposed, how would -- how would you go about funding the -- or trying to fund interpreters?

HONORABLE STEPHEN YELENOSKY: You mean personally, with our money?

CHAIRMAN BABCOCK: Yeah, take it away from you.

HONORABLE STEPHEN YELENOSKY: I mean, that's another fund I guess.

CHAIRMAN BABCOCK: Since you raised your head above the foxhole, why don't we shoot at you first?

HONORABLE STEPHEN YELENOSKY: Well, I think I've already answered -- I think I've already answered that, which is it's not my decision. It's the commissioners' decision in the county, and what they've done before --

CHAIRMAN BABCOCK: But you say to the county, "The Supreme Court has passed" --

HONORABLE STEPHEN YELENOSKY: Yeah.

CHAIRMAN BABCOCK: -- "a rule that says I've got to do this."

HONORABLE STEPHEN YELENOSKY: Right. And we would do the same thing we've done with parental representation where we have an office of parental representation for termination cases, actually provide rather than hiring private lawyers ad hoc every time we appoint. There's actually a group of people salaried who do that. We have salary people who do interpretation for the deaf, and I imagine for Spanish anyway we would move to that, if we're going to be using the interpreters significantly enough that it's cost effective, which I suspect it would be, and then you would have other languages that aren't used as much, and there would have to be a calculation as to whether it's useful or cost effective to have a salaried employee or two on that or they're one offs where we just have to pay on a contract.

CHAIRMAN BABCOCK: Okay. Judge Estevez.

HONORABLE ANA ESTEVEZ: I would --

CHAIRMAN BABCOCK: Speak up.

HONORABLE ANA ESTEVEZ: I guess, just court costs is probably the best way we can go, and if they're indigent then they don't end up paying their court costs anyways.

CHAIRMAN BABCOCK: Yeah, but who -- if they're indigent and doesn't pay the court costs then who does?

HONORABLE ANA ESTEVEZ: The county absorbs it.

CHAIRMAN BABCOCK: The county.

HONORABLE ANA ESTEVEZ: That's what they do now.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: The rule as written as implemented by the Court?

CHAIRMAN BABCOCK: No.

HONORABLE DAVID PEEPLES: I'd try to change the rule, first of all --

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: -- to give a little bit more discretion in small hearings and that kind of thing. Right now courts order counties to pay for

appointed lawyers in criminal cases and termination of rights, and so there is that practice, but I'm not aware of any contempt cases where they haven't done it, you know, but that's the only thing the courts can do when push comes to shove, and of course, you've got to -- you can't make people work for free, do interpretation for free; and if they know that there's going to be a long time getting paid, they might not ever get paid, are they going to show up for work? Real problem. I'd sure try to get this tweaked in some of the ways we've been talking about, and if the DOJ wants to go to court and force somebody then maybe that will happen, but I just think there are things that can be done to make this a lot more workable, and that's what I would do on the front end.

CHAIRMAN BABCOCK: Yeah. Okay. Kent, you used to be a district judge, so you can weigh in on this. How would you handle this?

HONORABLE KENT SULLIVAN: I would echo what Judge Peeples said. I'm not sure I really have a lot to add on this.

CHAIRMAN BABCOCK: Okay. Justice Christopher, you used to be a district judge.

HONORABLE TRACY CHRISTOPHER: Well, I actually asked if I could get the number before I came to the meeting today on how much the county spends right now

to do the criminal, parental termination, and contempt hearings where it's, you know, provided without costs. I haven't gotten that number yet, but I assume it would be double that number. We would have to go to commissioners court to get extra funding obviously for that. The way it works in Harris County is the commissioners court gives us -- gives the judiciary a budget; and out of that budget we have to pay for all of our court-appointed attorneys, all of our, you know, things like the interpreters; and, you know, some years we have to quit including sort of the discretionary spending that's in our budget because we don't have enough money because of an increase in court-appointed fees.

CHAIRMAN BABCOCK: Okay. Justice Bland, anything to add?

HONORABLE JANE BLAND: Same county. I mean, right now I think civil judges borrow from the criminal courts, and those people sometimes come over and do it as a favor for something short, but for trials and stuff, you've got to get somebody, but I would say if you could make the rule -- when I think about discretion, I think about discretion of the parties and the attorneys, and if the waiver rule could be a little bit broader so that you could have the requirements of a certified interpreter or waiver and not sort of say you've got to meet all of these

requirements with the interpreter that you bring, I think you would see probably parties themselves get to a lot of the -- to resolving a lot of the quick hearings where, you know, having a certified interpreter is not as critical as long as everybody agrees on who -- you know, agrees to it.

CHAIRMAN BABCOCK: Yeah. Judge Wallace.

HONORABLE R. H. WALLACE: Yeah, I don't know how it could be done other than what Judge Christopher says. We don't have a line item in our budget right now for interpreter or something like that, so it's either going to have to be the county commissioners are going to have to fund it or have the judge -- have it part of the court's budget, but whatever it is, it's going to be significant, and I think from the trial judge's standpoint, the important thing is to know that there's a fund somewhere so that when you call that interpreter you can tell them "You're going to be paid and it's not going to be two or three years from now, but we can pay you." So there has to be a fund there somewhere, or you can't make them work for free.

CHAIRMAN BABCOCK: How do you do it now? Don't you use interpreters now?

HONORABLE R. H. WALLACE: Yeah, but I don't recall ever having to appoint one. We're only a civil court, don't do family, criminal.

CHAIRMAN BABCOCK: Right.

HONORABLE R. H. WALLACE: So it doesn't come up very -- I have not had -- I can't recall having had to appoint an interpreter for someone who said they couldn't afford it.

CHAIRMAN BABCOCK: Okay. Justice Boyce, do you have any thoughts about this? No. Justice Busby.

HONORABLE BRETT BUSBY: Well, I would point out a couple of things. One is that the Office of Court Administration has already done some helpful work in this area in terms of providing language lines for translation over the phone, so that -- that availability of that could possibly be expanded as one option other than just putting it on the counties. There is an interpreter fee in section 21.051 of the Civil Practice and Remedies Code. "The clerk of the court shall collect an interpreter fee." It's only $3 dollars, as a court cost in each civil case in which an interpreter is used, so that could be adjusted. Obviously $3 is not going to go very far, but I was surprised to learn that it was even in there.

HONORABLE STEPHEN YELENOSKY: That would charge -- that potentially charges the person who is LEP, though.

HONORABLE BRETT BUSBY: Right.

MS. McALLISTER: Right. Yeah, you can't --

HONORABLE BRETT BUSBY: So we get into that issue as well of who is being charged that fee, and then, Trish, you had some other thoughts --

MS. STONE: You could charge everybody.

MS. McALLISTER: Yeah, I think that's where we -- when we were looking at that one, we were thinking about more of adjusting the legislation itself to make it -- because right now that's just on its face a problem.

HONORABLE STEPHEN YELENOSKY: But she's right. If you did everybody, it would be perfectly --

MS. McALLISTER: If you did everybody then you could -- I mean, you know, it would be a little bit more, but I would still think you're going to run into the issue that it's just not going to be enough. And then the DOJ does -- if people are inclined to take Federal money, they do have several grants where interpretational costs are part of their grant-making process, so that's also an option.

HONORABLE BRETT BUSBY: But I think what we were trying to do in this draft is do what the Legislature did and not -- you know, not put the Court in a position of saying, "This is how it has to be paid for," because I think that really is something more for the Legislature and the counties to say where the money is going to come from.

CHAIRMAN BABCOCK: But if the Court imposes a duty on the trial judges or all the judges then somebody is going to come screaming out of their boots about how much it's going to cost, so you can't be -- you can't ignore that elephant, because it's in the room.

HONORABLE BRETT BUSBY: And it's a problem now because I think even under the rule as it currently exists if somebody qualifies under Rule 145 you can't charge them already for an interpreter, so, I mean, the problem is already here regardless of what we do.

MS. McALLISTER: Actually, people are being charged for interpreters.

CHAIRMAN BABCOCK: Sorry, Trish, you've got to speak up.

MS. McALLISTER: I said actually they are being charged for interpreters. I mean, like Legal Aid programs pay for interpreters, so even though all of their clients are indigent.

CHAIRMAN BABCOCK: Yeah. All right. Well, we're not going to solve this today, I don't think, are we? Somebody want to?

MR. HAMILTON: Richard wants to talk.

CHAIRMAN BABCOCK: Oh, Orsinger has got the solution.

MR. ORSINGER: I don't have the solution. I

have been listening and everybody wonders why I haven't said anything.

CHAIRMAN BABCOCK: Very unusual for you.

MR. ORSINGER: Okay. Any time you look at the particular situation of unfortunate people, it's easy to want to help them and particularly with the government to want to use government resources to help them, but there are -- there are multitudes of people who have needs that our government needs to fulfill, and we can't fulfill all of them, so when we put money in one place, we have to take it from another place. So I think that our hyper focus on this one issue makes us miss the issue the Legislature didn't miss, which is you can't pay for everything you want, so you're either going to cut some things out and include others or pay everything else or raise taxes, which is not realistic in Texas. So I think that we need to be careful when we realize that we -- when we put resources into this particular issue, we may be taking them away from, you know, children who are in need of protection from abuse or understaffed jails or whatever.

Number two, this rule makes me want to think about two things. What -- when does the duty arise for the appointment of interpreter or translator and what escape clauses do we give the Court to make practical

compromises so that they can do business with the resources that they have, and I look here and I see the -- first of all, Rule 183 as written, it's only two sentences long. It's very elegant. It's not constitutional probably, but with a few changes it could be made constitutional. It's a very simple short rule that with a few changes might work just fine, but when I look at this proposed rule I see an effort basically to comply with every possible applicable statute, Federal or state, as well as every reg, as well as every DOJ publication; and to me the rule does too much; but looking for the when does the duty arise, "when needed for effective communication," the first few words there. Well, my goodness, virtually, I mean, that could apply in almost any case you could think of, a need for effective communication. I would prefer we institute something like "when required for the proper administration of justice." That's what we're trying to get here. We're not trying to help people communicate effectively. We're trying to be sure that we give people due process of law.

HONORABLE STEPHEN YELENOSKY: Not according to DOJ.

MR. ORSINGER: I know that. Well, that's fine, and I've got a -- in a minute I have a comment about doing everything that DOJ says that you should do. Under

definitions, under "communication disability" it talks about "a need to communicate with others." Well, I recently had a one-day hearing with a client that couldn't speak English, and there was a -- the Bexar County has seamless transportation -- translation or interpretation services for Spanish, and that worked. We had a Mexican lawyer that was testifying in Spanish. My client couldn't speak any English. That worked flawlessly. What didn't work flawlessly was she was trying to communicate with me and I was trying to communicate with her in the middle of the hearing, and we didn't have any help doing that. So I was able to do an effective job. The result turned out all right, but when you say "communicate with others," does that mean that you have to help the client communicate with the lawyer and the lawyer communicate with the client, and maybe that does, in which means we've got to have two interpreters, one that's handling the witnesses and the other one that's handling the private conversations at the counsel table.

The next thing that concerns me about when the duty arises or the scope of it is the person does not speak English as a primary language. Well, the statute, the Civil Practice and Remedies Code 57.002, says "can hear, but does not comprehend or communicate in English." There's a big difference between being able to comprehend

and communicate in English and not speaking English as your primary language. My client that I had in this hearing, she spoke four different languages fluently. It's just one of them wasn't English. The fact that someone doesn't have English as a primary language to me is irrelevant. What's relevant is whether they understand what's going on and can help their lawyer and can testify and understand --

HONORABLE STEPHEN YELENOSKY: But that's covered by "when needed for effective communication."

MR. ORSINGER: Well, it's not covered when you put a rule in here that says it applies to someone where English is not their primary language, that language is going to be used to restrict the scope of your out, your escape clause. It gives the judge judgment to say when needed for effective communication, but my client doesn't have English as a primary language, and it says right here that that's one of the communication needs. So in my view that standard has nothing to do with the administration of justice and ought to come out.

There is an escape clause under qualified about "certified or qualified where available." There's a lot of situations where they're just not available. I was in Corpus Christi a month ago, and they were -- a Vietnamese family was having a divorce case in a courtroom

where the only person that could translate was a friend, and the friend did an effective job of translating. The hearing got reset. You know, I just don't know what you do in Houston where you've got a hundred and something languages, so the "or available" is very important.

And then I guess my last point is I feel like we've tried to do too much in this amended rule, and as far as including Federal regs and Federal statute and especially what the DOJ says, those guys are advocates. They're lawyers. They're not judges. They're not ruling on the 14th Amendment, and so rather than look at DOJ circulars or even regs issued by the administrative department I would rather see what the consent decrees are in the lawsuits where the Department of Justice has actually sued somebody and made them do something against their will, and let's look at those consent decrees and see what does the DOJ really require.

HONORABLE STEPHEN YELENOSKY: We have, what was it, Alabama, was -- the Supreme Court of -- it was one of the first ones.

MR. ORSINGER: Seems to me that a better standard for us to follow in terms of voluntary compliance with the spirit behind all of this is not to read what the DOJ says they think it means, but to look and see what happened when a Federal lawsuit was filed and a Federal

district judge ruled or a state cut a deal in order to get a consent ruling, and let's see what the DOJ is really requiring of states before we do that. So I think this rule is an excellent tool to focus our attention and to get us debating all of these issues, but I think it does too much, and I think 183 as it exists, two sentences long, with a few changes would be a better than trying to incorporate all of these standards and rules and statutes and DOJ opinions.

MR. LOW: Chip, can I ask a question?

CHAIRMAN BABCOCK: Buddy, yeah.

MR. LOW: Traditionally the interpreters were used when a witness or a foreign language is speaking so that it came out in English. Are we now talking about interpreters to translate English to another language? I mean, that to me is a basic question, and then does it apply in depositions? Does it apply in others? So we first have to decide the scope and what -- and is an interpreter like it traditionally used to be or is it something else?

CHAIRMAN BABCOCK: Yeah. Judge Estevez, and then Judge Yelenosky.

HONORABLE ANA ESTEVEZ: Just one of the questions that Mr. Orsinger had brought up is whether or not you would need more than one interpreter.

CHAIRMAN BABCOCK: Can everybody hear over there?

HONORABLE ANA ESTEVEZ: And the answer, I mean, at least in the criminal proceeding, the answer was always yes, so we would have -- we had a separate interpreter that would do -- interpret everything between the attorney and the client so we could preserve the attorney-client privileges and then there would be a different one for a court proceeding. So I think the answer would be "yes" to that, yes, you would definitely need more than one interpreter in that type of proceeding if your client doesn't speak English, and then the second thing I wanted to just bring up that I thought Judge Bland's comment was actually probably the most beneficial for the trial courts. Part (d), that waiver, if we could make that waiver very, very broad and take out that they can't be relatives. I think they should be able to be relatives in a proceeding. I think that that's probably the most helpful people. I don't know why you wouldn't be able to do that unless it's a domestic dispute in which they would be a witness, but I think most people feel very intimidated by the process anyway, and so when they bring in a relative they feel like the relative is going to be the most trustworthy person there and would be giving them the most accurate translation or interpretation depending

on whether it's by the written word or --

CHAIRMAN BABCOCK: Roger.

MR. HUGHES: One caveat about trying to analogize from criminal proceedings, in criminal proceedings not only do we have the criminal code, but there's a constitutional overlay about confronting witnesses and effective assistance of counsel. We don't have those restrictions in civil cases. While the court when they select or appoint counsel in civil cases might want to think about does counsel speak the language of their client or the person for whom they're to be appointed, I think that's one consideration, but I'm just not sure that the DOJ standard or language access goes all the way to simply say I need -- you need to provide a separate attorney -- interpreter to interpret between client and counsel in civil cases. I mean, I may be wrong about that, but I have my reservations. That's it.

CHAIRMAN BABCOCK: Okay. Yeah, Pete.

MR. SCHENKKAN: I want to encourage us to come at this from an entirely different angle.

THE REPORTER: Speak up, please.

MR. SCHENKKAN: I want to encourage us to come at this from an entirely different angle. The Supreme Court case that is the basis of the law in this area required a San Francisco school district that had a

significant number of non-English speaking students of Chinese origin to take reasonable steps to provide them with a meaningful opportunity to participate in Federal education programs. The guidance that's *Federal Register* guidance, not the executive order and DOJ staff thing that we've seen more recently, was -- that's in effect, was proposed in the waning days of the Clinton administration and adopted in 2002 in the Bush administration. It says that there is a four factor test for whether you are making reasonable efforts to do what you're supposed to do here, and I have somehow got the pages out of order and -- there we go. And the four are -- the question is how is a recipient, a government entity that's receiving the Federal funds, in this case our judicial system --

MS. BARON: Pete, can you talk a little louder? I'm sorry. We're having trouble.

MR. SCHENKKAN: I apologize. The question is that the justice department -- that the justice department provided in the guidance that we're operating under asked the question heading "How does a recipient" -- which would be the Texas judicial system or Harris County or judicial system -- "How does a recipient determine the extent of its obligation to provide LEP services," and it says, "The recipient is required to take reasonable steps to ensure meaningful access to their programs," and that

this is designed to be a flexible and fact dependent standard and then it gives four criteria. One is how many people are we talking about in the eligible service program for the language, a question I don't think we presently had the answer to for the State of Texas or for major cities like Harris County or Dallas County or Bexar County, and if they say why don't we start with that fact, and then the frequency with which LEP individuals come into contact with the program.

Third, "The nature and importance of the program, activity, or service provided by the program," which suggests what might be more important to have such people provided for child custody than for traffic tickets; and then, finally, the thing that seems to have bothered us the most this morning, "The resources available to the recipient and the cost," making the point, among others, that reasonable steps may cease to be reasonable when the costs imposed may substantially exceed the benefits. It seems to me that this suggests not that we may not need a rule. Perhaps we will need a rule that is binding on judges and that can be invoked by parties, but I think what we need is a Rule of Judicial Administration and a commission to the Office of Court Administration to go work with the principal counties to see what the needs are, how they're being addressed now,

and for the ones that look substantial and are not being addressed, to basically be a clearinghouse and resource base for possible ways to more cost effectively handle them. I'll only give two examples, pardon me, and hope --

CHAIRMAN BABCOCK: Keep your voice up.

MR. SCHENKKAN: The Office of Court Administration is here in Austin, where one of the two great educational systems of higher education in Texas --

CHAIRMAN BABCOCK: One of two.

MR. SCHENKKAN: One of the two, has -- what is it in Austin? 60,000 students attending the University of Texas at Austin, to say nothing of the others in the system, and I suspect large numbers of those students come from families whose -- whose parents are limited English proficiency in one or more of these many languages. Would many of those students perhaps be receptive to being paid a modest amount to be part-time court resources for the speakers of some language? I would guess so.

Second, the communities themselves of these individual language groups have vital interest in the members of their community being able to have these services. I suspect that if -- and I may be butchering the name of this community, someone help me, spelled H-m-o-n-g. I think they're the people we used to call Hmongtoniards, who were in the mountains of Vietnam and

staffed our special forces and then when we got on the helicopters and left the Vietnamese massacred most of them because of the boats. Many of them are in Houston, the ones who made it out. I would think if you ask the Hmong, or whatever you call it, community, "Can you help us arrange speakers in your language to be available should one of the members of your community find himself or herself in the Harris County court system in need of that," I think the answer would be "yes," and I think that's the kind of thing that the Office of Court Administration -- obviously they've got to prioritize, too, but start with the biggest groups in the biggest cities, find out the ones that are not already being met. Harris County may have Spanish speakers well under -- you know, that may be solved and think creatively and invite ideas about what are some free or at least cost effective ways of getting these resources, and I believe that doing so satisfies the letter and the spirit, and I would predict the intent of the current justice department, what they want to see is we are trying to make reasonable efforts to meet this problem.

CHAIRMAN BABCOCK: Uh-huh. Good, thanks, Pete. Justice Busby.

HONORABLE BRETT BUSBY: And I think that's an interesting idea that's worth us all thinking about.

Further, I wanted to respond to some of the points about flex -- allowing for flexibility in terms of who is doing the translating. We -- this current rule was trying to stick with what we have in Chapter 57, which requires certified or licensed personnel. If a motion is filed, they have to be certified or licensed, and there's no flexibility in the statute. Now, the Court could preempt that statute by rule and write in these exceptions, but I think, you know, everybody would need to feel comfortable changing what the -- what's in the Government Code.

CHAIRMAN BABCOCK: Good point. Okay. Yeah. Anybody else? Buddy.

MR. LOW: You're not asking -- you're not saying look at the frequency, so if it happens a lot in Travis County but not in Chambers County, they would treat -- an individual would have more rights in Travis County than Chambers?

MR. SCHENKKAN: No. They're saying that in terms of the program --

MR. LOW: Okay. Okay. I follow what.

MR. SCHENKKAN: -- you have to set up to enable you to have the resources, and they are recognizing if --

MR. LOW: I understand. I just wanted to be sure I had that distinction.

MR. SCHENKKAN: -- there is a someone who is limited English proficient and is -- the language he's fluent in is in Armenian and you're in Tyler --

MR. LOW: Right.

MR. SCHENKKAN: -- the odds are against your being able to do anything about it in Tyler, but the odds are not against your being able to call the Office of Court Administration should there be enough primary speakers of Armenian in the whole state of Texas, and I don't know whether there are or not, if that's enough of a population where we ought to be trying to do it, and they reach it in their priority list, and they find somebody who is willing to be on call to do that, we've done what we can, and the justice department would say, "Great, that's a big improvement."

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, OCA already does have that. They have a list of certified interpreters, so a judge could call OCA and get a list of certified interpreters in Armenian or Hmong or whatever language, but -- if that's the correct language for either one. I don't know. It's probably something different, but you know, it's just a question of who is going to pay for it and we're just kicking that can down the road.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: Quick question. Did the committee talk about where CART might play a role in the interpreting services?

CHAIRMAN BABCOCK: I was going to ask Jackson about CART.

MR. JACKSON: I've been sitting here quietly trying to --

MR. JEFFERSON: Well, I'm sorry. I didn't mean to jump the gun.

CHAIRMAN BABCOCK: No, that's all right.

MR. JACKSON: I was told whatever you adopted for the interpreter you would just kick CART in that same bucket.

CHAIRMAN BABCOCK: Can you tell us what CART is?

MR. JACKSON: CART is probably more expensive and more complicated than some of the interpretation problems. You have five levels of CART, and the only level that's authorized to do court hearings is Level V, and there aren't very many Level V CART providers in Texas, but there are -- they do it, and it happens a lot, and it kicks in -- we've had a juror that demanded to be a participant in a trial, so they had to hire a CART prior to sit with the juror and write realtime for that juror to participate in the trial.

CHAIRMAN BABCOCK: Could you tell everybody what a CART provider is? It's in the statute.

MR. JACKSON: A CART provider is a court reporter or like a court reporter who writes realtime, you know, verbatim almost. It's not totally verbatim because there are some little nuances in CART. Where you have a name that comes up that's not in your dictionary, you finger spell it so that the reader can at least see what the spelling of the name is, so you don't have time to write verbatim everything, but you try to convey to the recipient as close as possible exactly what's said. It's like sign language. Sign language can't relate exactly what was said.

CHAIRMAN BABCOCK: So it's a court reporter doing realtime in English?

MR. JACKSON: In English.

CHAIRMAN BABCOCK: For somebody.

MR. ORSINGER: It's not in English. It's --

CHAIRMAN BABCOCK: It's not in English?

MR. ORSINGER: If you give it to them in English it wouldn't help because speaking --

MS. McALLISTER: No, these are hearing-impaired people.

MR. ORSINGER: Oh, hearing, only hearing.

CHAIRMAN BABCOCK: Yeah. That's what CART

is designed to help, right?

MS. McALLISTER: Yeah.

MR. JACKSON: Hearing impaired.

CHAIRMAN BABCOCK: So a court reporter realtimes in English for somebody that is hearing impaired, and they need it.

MR. JACKSON: Right.

CHAIRMAN BABCOCK: And that's in Chapter 57.

MR. JACKSON: Yes.

CHAIRMAN BABCOCK: And you've got to get to Level V to do that, and there are how many Level V court reporters in the state?

MR. JACKSON: It's growing. I mean, those CART tests are given a couple of times a year by the Texas Court Reporters Association.

CHAIRMAN BABCOCK: You're not under oath. How many?

MR. JACKSON: I have no idea.

CHAIRMAN BABCOCK: Okay. Yeah, Judge Estevez.

HONORABLE ANA ESTEVEZ: I wanted to respond to Justice Busby. When I'm looking at 57.002 there's nothing in there that says a relative could not be a -- an interpreter.

HONORABLE BRETT BUSBY: If they're

certified, that's true.

MS. McALLISTER: Well, I think the proposed rule doesn't say that either. The proposed rule just says the parties have to agree to it.

HONORABLE ANA ESTEVEZ: I'm concerned that you have a provision that is being more restrictive than what is allowed now under our law.

MS. STONE: That part --

MS. McALLISTER: Well, I have a question, though. Would judges require a family member to interpret if the family members didn't agree?

HONORABLE ANA ESTEVEZ: Are you talking about in a family law case or in any type of case?

MS. McALLISTER: No, just in any case. Would a judge ask a family member to interpret when the parties themselves didn't agree to it?

HONORABLE ANA ESTEVEZ: Not necessarily, but I have a lot of uncontested divorces, and so all the parties have signed off on it, and I have someone that is a refugee family, and their daughter comes in, and I don't need to have a certified one there, but even if it's a Spanish, someone that's just a relative, might be her sister, and she -- I can prove up that whole divorce with her, and there wasn't any reason for the expense. And then under this, I can't -- the parties can't waive it if

she's a relative of a party, even though she has nothing to do with the divorce, according to what your -- how I'm reading your (b)(4)(d).

MS. McALLISTER: (b)(4)(d) says --

THE REPORTER: Just a minute. One at a time, please.

HONORABLE ANA ESTEVEZ: Are you suggesting -- I guess the problem is you're saying that's only if someone has filed a motion for interpreter, but a lot of people do that but don't necessarily follow through.

MS. McALLISTER: What the rule says, though, and what the proposed rule would say is that if the parties agree that a family member can interpret and the judge finds that that's acceptable. In other words, they don't think there's a conflict of interest. I mean, because a lot of times what will happen is exactly what you're saying, which is the parties want their family members to translate or interpret because they trust them, but there are certain circumstances obviously where that's totally inappropriate, like in a family law situation where they're going to maybe have some bias, but --

HONORABLE ANA ESTEVEZ: I think I'm misreading what you're trying to say.

MS. McALLISTER: I think so, because the intent of the proposed rule was to -- that was the part

where judges can, you know, do what they need to do to address the issues where -- where, you know, for us in the Access to Justice community, I mean, this was a high topic of discussion in the committee; and, you know, there are certain members of the committee who felt like, you know, under no circumstances should somebody who is not certified be used. There were other members of the committee, myself included, that felt like there were certain circumstances where somebody who is not licensed or certified could be used; and for those it -- my example was exactly that, a prove up where the people already know what's in the document and they're just there to do the prove-up. So that allows the parties to agree to --

HONORABLE ANA ESTEVEZ: I think I was misreading it, so I'm just going to withdraw my last comment.

MS. McALLISTER: Okay.

CHAIRMAN BABCOCK: Justice Busby, and then Justice Bland.

HONORABLE BRETT BUSBY: And just to follow up on the 57.002(a) what it says is that "A court shall appoint a licensed court interpreter for an individual who does not comprehend or communicate in English if a motion is filed by a party or requested by a witness in a civil or criminal proceeding." So they have to be -- they have

to be licensed according to the statute and then there are various exceptions written into the statute for when they don't have to be. So, you know, we can debate the wisdom of whether those should be broader or not, but I'm just letting you know that that's what the current statute says. And also, I did find an answer earlier to a question that Justice Christopher had about the source of the authority to tax fees as costs, and it's the current Rule of Civil Procedure 183 that provides the ability to tax it as cost.

HONORABLE TRACY CHRISTOPHER: But no one does.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, I guess what I'm looking at now is just the rule and separate from the statute, and the rule contemplates appointment with or without a motion or a request, and the waiver provision is constrained in that there's an "and," so you can only waive in these specific instances, a witness, a relative of a party witness, or counsel in a proceeding, but the other requirements are still in place, like that the person be a certified interpreter; and what I'm saying is, you know, have (a), (b), and (c) be requirements and (d) have -- be (d), the parties, you know, knowingly waive their -- relinquish their right to a certified interpreter

who is 18 years of age, and that would go a long way in uncontested hearings and in other times when you're really looking at, you know, there's a level of trustworthiness, and we allow lawyers to waive rules all the time. You know, when lawyers testify, "Do you waive the oath?" "Yes, I waive the oath."

Well, I'm sure there's a requirement that, you know, witnesses testify under oath, but, you know, as a matter of courtesy lawyers often waive the oath when a lawyer testifies; and, you know, I don't advise it, but there's a statute that says a court reporter should record all proceedings in court; but we say, you know, that you can waive that by not, you know, requiring the court reporter to be in there or affirmatively saying that you want the court reporter to take down the proceedings. So all I'm saying is if you build in some ability or if you don't circumscribe the ability without maybe dictating the parameters of what might be required in a waiver, if you just, you know, let there be the possibility of the lawyers in a case waiving -- waiving some of these requirements, I think that it would go a long way to making this a more workable rule.

CHAIRMAN BABCOCK: Levi, did you have your hand up back there?

HONORABLE LEVI BENTON: Yeah. I came in

late, Chip, but just on the issue of funding, why can't we just ask the Legislature to ask -- to add it to filing fees across the state?

CHAIRMAN BABCOCK: I guess we could do that, although, maybe not in a rule, but I guess the Court could do that. Yeah, Roger.

MR. HUGHES: Well, I'm always for courts getting more money, and if raising filing fees will do it, fine. The thing about it is, if -- and we sort of discussed this briefly. If you say -- if the Legislature says, "County commissioners, you can raise court costs another $25 or 30 or a hundred for translators," that doesn't necessarily mean they'll spend the money on translators. It all goes into general revenues, and it could go to pay for the brand new AC -- air-conditioning system for the courthouse instead of hiring translators.

Now, this was -- the alternative was earmarked. That is, you tack on an extra fee for translators; that is, every lawsuit you have to pay an extra $30 earmarked to pay for translation services generally at the courthouse. There's already something like that in Chapter 21 of the Civil Practice and Remedies Code for counties along the river. What one person suggested is, well, then aren't you taxing people who are not English proficient or disabled to provide them the

services, which is precisely the same sort of thing that the DOJ says you can't do. It's sort of doing on the front end what you can't do or may not be able to do on the back end. If you can't tax it to them as court costs at the end of the case, why are you taxing it to them at the beginning of the case, and I don't mean to say I have an answer and I know the answer to that. I'm simply saying those are the objections.

CHAIRMAN BABCOCK: Buddy Low.

MR. LOW: I have a question of Roger. Just like I asked about the interpreter, does translation mean translating many, many documents that are in English introduced into Spanish for Spanish speaking person? I mean, translators usually were -- they were referred to in 1009 as foreign documents, but now under this rule, would you have to appoint for communication a translator to translate 2,000 documents that are in English into Spanish?

MR. HUGHES: It may be.

MR. LOW: Good lord. Okay.

CHAIRMAN BABCOCK: All right.

MR. ORSINGER: Can I ask Roger a question?

CHAIRMAN BABCOCK: Okay. Richard Orsinger.

MR. ORSINGER: Yeah, I meant to say earlier and Buddy prompted my memory on this. It would -- we

haven't discussed translators today, and they're just as big a policy problem as the interpreters, but I'm involved in a dispute right now between two Iranian heritage citizens -- people that have come to live in the United States and are now getting divorced, and we have a number of recorded phone conversations, and we've both hired expert witnesses from out of state to do the translations. The language was in Farsi, and it was hard to hear the tape in the first place, and the difference between the translations is stark. It's starkly different, our interpretation of these conversations and the others. If we have a court-appointed translator, I'm worried that the court-appointed translator is going to be making a bunch of subjective decisions about how to translate a foreign language or concepts of the foreign culture into American law and that they'll have an official or maybe a binding translation.

So if we are going to do anything about translators here, I think we need to preserve the right of people to disagree or to somehow discount or not give that translator some greater weight than any other witness because whole cases could turn on the interpretation of a contract, and -- or a statute out of Mexico, whole cases can turn on the interpretation of one word in a Mexican statute, and to have a court-appointed translator and all

of the sudden their translation is official, there are many ramifications there.

MR. LOW: Well, many German words we translate them to English, and they have a stronger meaning in German, and we can't really translate to our language, and it's going to be that way I'm sure in other languages.

CHAIRMAN BABCOCK: Yeah. Roger, your committee has done fabulous work. I don't think your work is done, it doesn't sound like.

MR. HUGHES: Well, you know, seeing how it's lunch and I hate to keep lawyers from their lunches, you know, we -- the big bridge we had to cross or face is do we have a rule, do we just alter this rule to deal with the question of protecting LEP persons and communication impaired persons from having to pay the costs and leave for another day who provides them and who pays for it before the end of the case, or do we do the rule this way in which we try to solve some of those questions now?

You know, originally I thought, no, let's leave it for another day, you know, and the weight of the committee was, no, we need to do the best we can now rather -- for the reasons the Chief Justice outlined earlier. That's the only thing I can say if you have to make a decision today which way are we going to go. Are

we going to try to solve as many of these problems as we can agree on today -- I mean, not today but over the next sessions or so, or do we go back to an original what I call kind of a tunnel vision rule or rule where all we're going to deal with is who pays for this at the end of the case and leave the rest of it for another day.

CHAIRMAN BABCOCK: I don't know if the Chief has any views, but I have some. I don't know that this rule can solve the funding problem. I think it's going to have to -- it's going to have to direct the district judges or the trial court judges on how to handle things, hopefully in compliance with state law and whatever Federal statutes and the Constitution of both the United States and Texas dictate as best we can; and we've had a lot of suggestions about how to tweak that and maybe minimize the financial impact on the counties; and if those are good ideas then I think we ought to pursue them; but at least for discussion next time, we will put this back on the agenda for November 18th, when our next meeting is, 18th and 19th, a two-day meeting next time, and see what we can do. Chief, do you have any other thoughts? Okay. Well, let's have lunch.

(Recess from 12:28 to 1:31 p.m.)

CHAIRMAN BABCOCK: Okay. We're back on the record. This Rule 183 thing took a little longer than I

anticipated, so we're going to hop over Texas Rule of Appellate Procedure 49 for the moment and go right to discovery because Justice Christopher can't wait to weight into this little battle. So, Bobby, I know you guys have been working your rear ends off on this thing, so take us through it.

MR. MEADOWS: All right. So before we actually dig into it let me just say a couple of things about what you just said, and that is the effort that's been applied to this. I mean, it's not just our subcommittee that weighed in with thoughts or comments. A number of members of this committee gave us the benefit of their thinking. Lonny Hoffman gave us a 14-page memo with his thoughts on it, and all of it has been helpful. I mean, we heard from Buddy Low, Alistair, Lonny, Roger Hughes, and of course, we have the State Bar committee's recommendation.

The discovery committee, I think everybody knows, is Justice Christopher, Justice Bland, Justice Brown, David Jackson, Alex Albright, Kent Sullivan, and Ana Estevez, Judge Estevez, and so -- and Cristina Rodriguez, who couldn't be here; and what I was going to say about that is even though Harvey and Cristina and Alex are absent today, they were fully engaged along with the rest of the committee in putting together what we have

submitted; and on that, let me just say that we -- this assignment was made in one of the few meetings that I missed, and I'm not making any connection, but we went to work in June right away when we got the assignment, and we had a -- what we really got going with the benefit of Kayla Carrick, who is with me right beside me. She is a new King & Spalding lawyer who joined us in May of this year. She's from Austin. She clerked on the Supreme Court with Justice Brown, a UT Law graduate, and she's been an instrumental help in this. I mean, she's been side-by-side with the subcommittee in this work, taking the results of meetings. As I said, we got started, we put out for everyone to consider a comparison of the Federal rules and the state rules on discovery, circulated to this committee. We made assignments on our committee. Each member of our subcommittee took an area of the rules, a number of the rules, went off and worked on it.

We had a telephone conference in August, on August the 17th. That was after Justice Christopher did a study of all of the Supreme Court Advisory Committee meetings that have dealt with discovery issues since the 1998 rewrite, and with all of that, we started our meetings on August the 17th, and then we all met in Houston in person on August the 24th, and the result of that was work product that has been refined and is now

recirculated to this committee on Tuesday.

CHAIRMAN BABCOCK: Great.

MR. MEADOWS: So with that --

CHAIRMAN BABCOCK: The main thing I'm impressed about what you just said is that Kayla was here all morning, and she's still here. We didn't run her off with our nonsense.

MR. MEADOWS: It's no small accomplishment.

CHAIRMAN BABCOCK: Yeah, well, Kayla, thank you for your work. We appreciate it.

MR. MEADOWS: And because I don't think it will be necessary to draw Kayla into this all that much, but she has done a big role, served a big role in integrating the work, and there were just places where we had to move things around. There were thoughts about adding clarity and better language, not so much substantive changes, and she's been a big -- played a big role in that, and she may need to speak to it.

So with that, I guess we just get started and with Rule 190, discovery limitations, and you'll see from the materials that the first recommendation is with regard to Rule 190.2, dealing with level one. The recommendation was made that we increase the amount in controversy there to a hundred thousand dollars, and the committee is in agreement on that and makes that

recommendation. The -- Justice Christopher recognized that perhaps if we did that we ought to allow parties to have additional -- some additional discovery, and so if you add an expert, you get an additional two hours for each expert that becomes a part of that.

CHAIRMAN BABCOCK: Okay. We should be looking at your redlined version, right?

MR. MEADOWS: You should be looking at the redlined version. So the redlined version was, as I say, circulated on Tuesday.

CHAIRMAN BABCOCK: It should be (Q).

HONORABLE TRACY CHRISTOPHER: I have (S).

HONORABLE TOM GRAY: If you have the most updated agenda, it's (S).

MS. BARON: No, it's (Q).

MR. MEADOWS: What we did to make this more adjustable and user-friendly is that you'll see alongside the rule with the recommended change that will be underlined some commentary in the column next to it that --

THE REPORTER: I can't hear you, Mr. Meadows. I'm sorry.

MR. MEADOWS: Cannot hear me?

THE REPORTER: I cannot hear you.

MR. MEADOWS: That's a first.

HONORABLE ANA ESTEVEZ: That's because everybody's talking back there. They're trying to find it.

CHAIRMAN BABCOCK: All right. Hang on for a second. Let's everybody find it. It's Tab (Q). Tab (Q).

MR. HAMILTON: Called the proposed --

CHAIRMAN BABCOCK: Yeah, the draft he's talking about.

MR. LEVY: It was updated with the revised agenda, so the latest agenda had it as Tab (S), but it's the same document.

MS. WALKER: The latest agenda is (Q).

MR. LEVY: Oh, it is (Q)? I'm sorry.

PROFESSOR CARLSON: Says Roman numeral (I) through (VIII).

HONORABLE ANA ESTEVEZ: Do you want me to pass them out?

MS. WALKER: Do you want me to pass them out?

CHAIRMAN BABCOCK: Yeah. Marti will pass it out so we're all on the same page.

MR. PERDUE: Should this give us concern about the ability of the committee to process this?

CHAIRMAN BABCOCK: Yeah, I was thinking IQ is probably not the appropriate number for this draft.

MR. LOW: Chip, just in the event some people wonder why certain things weren't covered, Bobby has given us a list of future things they will consider so they won't say, "Why didn't you do this?"

CHAIRMAN BABCOCK: Everybody should be aware --

HONORABLE ANA ESTEVEZ: Can she go off the record?

CHAIRMAN BABCOCK: No, we're on the record, but maybe we could quit muttering. Richard's still muttering about the Yankee government that's trying to jam down 183 changes.

MR. ORSINGER: I don't identify with the Yankee cause or the Southern cause.

CHAIRMAN BABCOCK: Somebody pointed out back here that Bobby provided us with a list of coming attractions, things that are not in these rules that still need to be talked about.

MR. MEADOWS: Well, you'll find this -- yes, we have a list of issues that were identified by our subcommittee that were not the result of opinion or recommendation, just flagged them, and they're in a separate list. So you'll also see some of that in the notes that run parallel to the recommendations, not in every instance, but there are times when we took up a

matter, recognized that some change should be considered and perhaps it should be and just flagged it, but, yeah, we have identified a number of places.

What we did is not just take the Federal rules, I mean the amendments to the Federal rules, and try to overlay them on what we have. We took our assignment to be I think as it was articulated by Justice Hecht to be we were to be informed by the amendments to the Federal rules, but we were to look at our rules with the idea of how to make them more efficient and effective in reducing the cost of litigation. So, for example, there's nothing in the Federal rules about reduce -- about increasing the amount in controversy of a level one case, but Kent Sullivan thought -- not to identify him as responsible for it because we all agreed -- that this might be something that was timely, that this is a point where perhaps it would be consistent with what we've done in Rule 169 and perhaps a level one case ought to be a hundred thousand dollars, so if everybody is with us now, that's the first recommendation, is at Rule 190.2.

CHAIRMAN BABCOCK: Okay. Any discussion about that? Yeah. Professor Hoffman.

PROFESSOR HOFFMAN: So I have a general comment that is -- while I'm not opposed -- I have no negative reaction to this in particular. I just want to

make -- because it fits here as well as any place else. We're looking at -- in my view, we're looking at this backwards, which is to say, as I tried to lay out in the memo, in the very few cases where we have extensive discovery and that discovery is a problem, they almost always are high dollar cases. So in my view both the Legislature and now this change would be misguided in that we would be trying to control discovery for the very smallest cases when the problem is in the very largest cases. So I'll leave it at that.

CHAIRMAN BABCOCK: Okay. Who else? Yeah, Richard.

MR. ORSINGER: The provision under 190.2(a)(2), which relates to family law, says, "Any suit for divorce not involving children" and that "not involving children" was put in there originally because we didn't want this track available for custody cases; and it says "more than zero" because we didn't want this to apply to estates that might have significant amounts of negative debt, which would be very complex. So we're talking now about estates that are positive, but not worth more than a hundred, and since this rule was adopted I don't know if inflation has raised 50 to a hundred, but I don't think a hundred is too high at all. One thing that does occur to me, though, is when we say "any suit for divorce not

involving children" is probably not very good. We probably should say "proceeding under the Family Code." Many custody provisions are not incident to a divorce or custody related matters, so at any rate, I like this. I think this is fine.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I don't know if this is out of order, but where we're talking about the hundred thousand-dollar change from $50,000.

CHAIRMAN BABCOCK: Uh-huh.

PROFESSOR DORSANEO: And all of these number changes tend to be behind schedule. Like 169 is not high enough in my experience to be an adequate number to use and expect people to litigate those cases by trial.

CHAIRMAN BABCOCK: Uh-huh. Yeah. Okay. Anybody else?

MR. MEADOWS: Well, this is going to be easy.

CHAIRMAN BABCOCK: Yeah, you're smoking. All right. Let's go to the next -- yeah, Peter, sorry.

MR. KELLY: The raising the limit from fifty to a hundred thousand is not simply a matter of inflation or, you know, the time value of money. There is a difference between the smaller cases, and I don't know precisely where the line is, and cases that are getting up

to a hundred thousand. I mean, if you look at an award of damages in, say, a motor vehicle accident case would be say two to three times what the medical damages are. So at that point you're looking at roughly, say, $30,000 in medical damages multiplied by what juries normally award in that situation. If you're talking $30,000 in medical damages, you're talking multiple treaters and multiple providers, what you're not talking about if you're talking about say 10 or 15,000. Because you have an increased number of medical experts you're going to have to do increased medical discovery on it. So lifting it from fifty to a hundred will make it harder to prosecute personal injury, in particular motor vehicle cases. So it's not just an "Oh, it's been a few years, let's raise it." It actually is an order of magnitude that will affect discovery.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: All right. The next change is on the following page, request for disclosure. We are recommending the removal of that language because we are recommending mandatory disclosures for all levels, one, two, and three.

CHAIRMAN BABCOCK: Okay. Who has got a view on that?

MR. ORSINGER: Are you on subdivision (6)

now?

MR. MEADOWS: Yeah.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: I was trying to cross-reference this so that I could see what the mandatory disclosure would be. Is this carried over into (6) or are you just saying --

MR. MEADOWS: Carried over, right.

MR. ORSINGER: It is?

MR. MEADOWS: Well, what we did is Rule 194, is we lay out the items of the mandatory disclosure.

MR. ORSINGER: And is this one laid out over there because I didn't see it?

MR. MEADOWS: Yes, it is.

MR. ORSINGER: Okay. I missed it. What page is it on?

HONORABLE TRACY CHRISTOPHER: 25.

HONORABLE BRETT BUSBY: 25.

MR. ORSINGER: 25, okay.

MR. LOW: Chip?

CHAIRMAN BABCOCK: Yeah, Carl.

MR. LOW: In reference to mandatory disclosure, you also increased disclosure to include some of the things like documents that the Federal rules include when you increased it, didn't you?

MR. MEADOWS: I think what we did is we left everything in the request for disclosures and added the --

MR. LOW: You added, so it's mandatory more than what people used to think of as disclosure in Texas to meet what the Federals --

MR. MEADOWS: Right.

MR. LOW: Right.

MR. MEADOWS: And so I don't know, Chip, that this is -- this would cause us to jump to 194 and start talking about mandatory disclosures or we just kind of press on through the --

CHAIRMAN BABCOCK: Well, what do you think? I think the disclosure issue is a pretty big one, but you have lots of language between here and there.

MR. MEADOWS: Right.

CHAIRMAN BABCOCK: So --

MR. MEADOWS: What do you think?

CHAIRMAN BABCOCK: Justice Bland, what do you think?

MR. MEADOWS: My colleagues think we should keep going.

CHAIRMAN BABCOCK: Yeah, I think so, too.

HONORABLE TRACY CHRISTOPHER: I mean, either, you know, if people don't want mandatory disclosure, we just put it -- you know, we don't make that

change in 190, so --

CHAIRMAN BABCOCK: Right. Yeah.

MR. MEADOWS: Where are we -- this would be after 190.4 of the discovery control plan?

PROFESSOR DORSANEO: The record does not support their own interpretation of the change.

CHAIRMAN BABCOCK: Professor Dorsaneo has got a comment.

PROFESSOR DORSANEO: I have an ally.

CHAIRMAN BABCOCK: Might even be a criticism.

PROFESSOR DORSANEO: I'm having trouble finding the fact that the mandatory disclosure provision is a -- is a substitute, a factual and legal substitute, for the (6) that's removed on page three. I don't see that in 194. I thought that 194 had more disclosure that -- I mean, pardon me, that 190.1 had more disclosure in level -- .2 had more disclosure than 194 because it was otherwise much more limited.

MR. MEADOWS: Professor, look at 194.1(b).

PROFESSOR DORSANEO: Okay.

MR. MEADOWS: See if that doesn't satisfy you that we've captured what was previously --

CHAIRMAN BABCOCK: Would you say that rule again, Bobby?

MR. MEADOWS: Yeah, 194.1(b) on page 25 of the --

MR. ORSINGER: Well, I think it's at the top of page 27.

HONORABLE TRACY CHRISTOPHER: Right. At the top of page 27, sub (6).

MR. ORSINGER: At the top of page 27 that is their effort to reduplicate this language. I finally found it. Very top of page 27.

PROFESSOR DORSANEO: Yes.

MR. MEADOWS: Paragraph (6).

PROFESSOR DORSANEO: That's where it is.

MR. ORSINGER: I couldn't find it at first.

PROFESSOR DORSANEO: You're quicker than I am, Richard, although younger.

MR. MEADOWS: But, also, the language in paragraph (b), between those two paragraphs it captures everything that was in request for disclosure.

CHAIRMAN BABCOCK: Got it. Okay. Justice Bland.

HONORABLE JANE BLAND: The only thing that -- Professor Dorsaneo, the only thing that's not left from that is the actual making of the request because we're no longer going to require somebody to make a request for disclosure, and I think we'll talk about that

when we get to Rule 194.

CHAIRMAN BABCOCK: You got that, Bill?

PROFESSOR DORSANEO: I'll be ready.

CHAIRMAN BABCOCK: Uh-oh. Carl.

PROFESSOR DORSANEO: Maybe.

MR. HAMILTON: I thought we had this covered somewhere, but what if the case doesn't involve a monitory amount at all, injunction case or something, and then according to this it would be covered under level one, which I don't think should be.

CHAIRMAN BABCOCK: Yeah. Bobby, did you hear that? What if the case doesn't involve any claim, monetary damage, but rather is for equitable relief like an injunction?

MR. MEADOWS: How is that handled now because we didn't make any change to the scope of level one, two, or three other than to increase the amount in controversy in level one?

PROFESSOR CARLSON: Has to be level three.

MS. WOOTEN: Wouldn't it be defaulted to level two?

MR. MEADOWS: And we made note -- so, Carl, it was default to level two, and we're not making any recommended change to level two.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: I have a question.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. ORSINGER: Yeah, Bobby, the original concept is that the level one cases are so small that we don't want to force them to go do a bunch of discovery. In fact, we want to limit the discovery if somebody is going to try to abuse it. If we move the level one cases into the mandatory disclosure then we're saying that the mandatory disclosure applies to level twos and level ones.

MR. MEADOWS: Right.

MR. ORSINGER: So all of the sudden we're forcing a lot more discovery on level one. The whole reason we carved out level one was to avoid all of that forced discovery. So is this a smart thing to do to level one?

MR. MEADOWS: Well --

HONORABLE ANA ESTEVEZ: Do you want me to respond?

MR. MEADOWS: Please.

HONORABLE ANA ESTEVEZ: Okay. The subcommittee -- Richard, we think alike, because I was the dissenting vote on that, and I did not want --

CHAIRMAN BABCOCK: Oh, man, don't put that on the record.

HONORABLE ANA ESTEVEZ: I did not want this

to apply to level one, and I went back, and I said, "There's nothing you're going to say that's going to change my mind. I'm going to do my own independent research." I called lawyer after lawyer after lawyer about raising to a hundred thousand on the plaintiff side, you know, because it's their case, raising to a hundred thousand and also doing these mandatory disclosures. Every one of them thought it was a good idea, and so I had to -- I humbly, humbly sent an e-mail to my subcommittee to tell them that as they predicted I was wrong. I'm not saying you're wrong. I challenge you to ask the same thing to your people, and you can change your mind or not change your mind, but the people I asked, I had one person that suggested we could exempt anything under 25,000 if we wanted to, but everyone was okay with saying we can make it clear that if you choose no one has to do the mandatory disclosures at all, and by agreement you can exempt out of it.

MR. ORSINGER: Not according to this rule. On page 25 there's no right to opt out.

HONORABLE ANA ESTEVEZ: Well, I think that's part of the stuff that we're going to be talking about, whether or not there is one. So we all -- at that point I had done what I promised to do, and I was wrong. So I can't speak for the litigator, so when I talked to them --

and I went from the ones that do the small cases that are 2 or $3,000 to the ones that do the personal injury that are, you know, 100 or 200,000, or a million.

CHAIRMAN BABCOCK: Richard, on a break will you talk to your people?

MR. ORSINGER: I probably can't reach my people that quickly, but I can send some e-mails around and have it by November.

CHAIRMAN BABCOCK: Oh, no. We don't need that. You haven't been around his people I imagine. Okay. What else, Bobby?

MR. MEADOWS: I mentioned there was no recommended change to level two. I will say that there was -- there was some interest by one or more of our number in the question of whether or not we should have limits on request for production along with the limits that are imposed under level two for discovery. We didn't -- we discussed it somewhat. I'm just identifying it as a -- if it's something that we should -- if this committee wants us to examine further or whether or not there's strong views on it. We did not reach a recommendation on that, but it was raised in terms of whether a request for production or an item of discovery that should have limits. The next change --

CHAIRMAN BABCOCK: Well, let me -- let me

pull you back to what you -- you said that you discussed whether request for production should have a limit in terms of the number?

MR. MEADOWS: A limited number.

CHAIRMAN BABCOCK: And what was the result of that discussion?

MR. MEADOWS: It was -- there was no consensus on our committee, and it was not -- it didn't carry the day in terms of having a subcommittee's stamp of approval, but --

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: There are just several things even if they were -- because either Alex had a view -- this is not something that she sponsored, but because a well-reasoned position was articulated about an idea, even though it didn't become a recommendation, it struck me as being useful to raise it in terms of, you know, direction for future work or whether or not there just -- we don't need to worry about it because it's a bad idea.

CHAIRMAN BABCOCK: Okay. Well, Jim Perdue and I had a discussion about this this morning before our meeting. I think it's worthy of a little bit of a discussion right now. You know, I've found that our profession, if you have unlimited --

MR. MEADOWS: Anything.

CHAIRMAN BABCOCK: -- rights to do something, particularly in a big case, we're going to keep sending requests for production if they're unlimited, even though we might not send more than 25 interrogatories. The problem with limiting request for production is that it could hurt the party with the burden of proof because if they have limited numbers then they may not be able to get to -- may not be able to find out what it is that they need to ask for and therefore never get it and the other side hides it from them; but -- but if these disclosures are expanded in the way that you suggest, perhaps, you know, having a limited number of request for production might help; and I'll give you an example in another area.

I've got a case right now in Federal court, and this judge requires -- limits motions in limine to only 10; and this is a fairly significant case, complicated facts, but what that -- what that limit does, is it forces the lawyers to agree on some things that they should agree on anyway, and then each side has 10 things that are really important to them; and without that rule there would be 50, in this case, because there are millions of lawyers working on it; and they would be throwing stuff in, so defined limits to me have some merit. But, Jim, you want to -- I probably haven't represented your side of our conversation this morning

well.

MR. PERDUE: I think what I said to you in the car, which I've said to Alistair and to others, but I think from the perspective of somebody who is carrying the burden of proof, the concern with just a hard limit on request for production is the idea, to quote Secretary Rumsfeld, "You don't know what you don't know." And so when I get the concept of a mandatory disclosure of documents that defendant are relying upon, that puts me from my perspective, I would say two steps further down the road than I am when I'm absent and my first request for production go out. So I was -- what I actually did say, as a pariah in the plaintiff's bar, was I kind of was getting my arm around it, but with the idea that if you do go to a mandatory disclosure, I can reach across the aisle to you with the idea of limiting request for production because I have a base of knowledge now for a first round of request for production based on what you've gotten.

The challenge, and as to Lonny's point, which is very well taken, is in a large case the first answers to a focused request for production inevitably inform you about knowledge that other people have that you now should be entitled to get in a second, and oftentimes that then leads to a third. Now, you can't do that forever. I acknowledge that, but Alistair and I were

having a conversation about a limited number of custodial -- in an ESI situation, custodial file requests. The problem is if you say, well, you only get 10 custodial file requests but then two of them identify three players that you never ever heard about that are key to the case, a hard limit you can see will have some substantial problems.

So my -- my thought in the abstract without in fairness breaking down all of this as it follows was at least recognize the concept of staging it. So you would have the initial disclosure. You would be entitled to an initial round of request for production to some number. Then you would be entitled to a second stage and then you could perhaps call a terminal point a third stage, but not so much the absolute number of request for production, but I know that smarter people than me have already looked at all of that, and it's all in here. That was our taxicab conversation on the way to the meeting.

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: I think what we didn't know here is it sounds like what Jim is describing is not a level two case. It sounds like what he is describing is a level three case, where we're going to have a mandatory meet and confer -- reading ahead, we're going to have mandatory meet and confer, and there's

going to be more hands-on working on the discovery, and I think what we didn't know as a subcommittee is in the -- in cases that are truly level two, I think a lot of people used to do, okay, we're level two, so that they weren't limited by that 50,000-dollar amount. Okay. So now we've upped it to a hundred thousand, and we think based upon our experience of seeing those kind of cases that the number of hours of discovery and request for productions were adequate for the hundred thousand-dollar case. Increasing -- as Peter noted, increasing more hours if there were more experts. So but what we didn't know is from a true level two case where parties intended to want to keep this, you know, 50-hour total time limit, we weren't a hundred percent sure whether those cases could handle limited request for production. So that's why we were -- we just needed more work on it. We needed to talk to more people that, you know, said, "Yes, I like being in level two. You know, I want to stay in level two with this 50 hours" and then talk to them about the request for production.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Well, in the -- in the long history of Federal style discovery, the original idea was if you wanted to get production you had to file a motion for production of documents and show a need and

materiality, and it was always a pain to go -- to prepare that motion and to go argue about need and materiality, and often not to get -- not to get an order that provided you with much production.

That's not surprising because the thing that you really want the most are these documents, okay, in order to figure out what the hell else you need to do; and, you know, I don't know whether it's 15 or 25 or whatever; but I do know that's probably still so. Okay. And I would be inclined to err on the side of having not too many more, but more.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I wanted to make two points. One is Justice Christopher referenced to the typical level two case versus level three. In the many cases that I've handled since these new rules went into effect, many, many times I have had to move from level two to level three, but it was never, not one single time, to increase the deposition hours or anything like that. It was to change the deadlines under level two, and it's been my experience in the family law practice that a hundred to one, if not a thousand to one, the reason we move from level two to level three has nothing to do with these limits on discovery. It has to do with how close you are to trial before you have to produce your expert reports or reveal

your witnesses, so there's no problem in my opinion in the family law practice with too much discovery. It's just a question of the timetable.

Secondly, the policies behind family law cases are different, and particularly in divorce, because in a typical divorce both the petitioner and the respondent own the information that is being exchanged in the discovery process. This is not some victim of an automobile accident that's suing a corporation that's headquartered in New Jersey. This is somebody that has a one-half interest in assets, but they're all under the control of the other spouse. They can't access any of the information through the bank. They don't get it in the mail. They're living in separate homes so they can't get it out of anybody's drawer, so what you're doing is you're requesting copies of information about your assets. So the policy there is entirely different.

Now, as a practical matter, the family law section of the State Bar publishes a form book that is -- they author a form book that's published by the State Bar of Texas, and it's widely disseminated, several thousand copies, and who knows how many people are doing the document assembly, and they have a standardized request for production in that form book, and it's very broad. It could cover -- it covers everything that you could

possibly imagine, and you wouldn't use it all in one case; but the typical request for production that I send or receive is about 75 separate items; and we don't globalize them like produce everything you've got that relates to the community estate because that's so general it doesn't help to order the data, so we ask, you know, all of your life insurance policies, all of the medical insurance policies, all of the vehicles, all of the real estate, all of this, all of that, all of the other; and it comes out to be about 75 categories that we routinely use.

Now, in any particular divorce it may be that 20 of those don't even apply, but you don't necessarily know that before you make the request, so if you were to arbitrarily say you're only allowed to request 10 things or 15 things in a family law case, you would be saying that we're not entitled to find out about a whole area of the community estate that we actually own but we don't know the details of it. I don't think it's a problem in family law, and to the extent I see other civil law, I don't think it's a problem either. I remember, Bill, practicing in the Seventies when you had to file a motion to get the court's permission to get the court --

CHAIRMAN BABCOCK: That's what he just talked about.

PROFESSOR DORSANEO: That's what I just

said.

MR. ORSINGER: You were saying it was under the Federal law. I remember it under the state law as well.

PROFESSOR DORSANEO: No, that was Rule 167.

MR. ORSINGER: Yeah, and it required us to go to court all the time to do essential discovery, and we have gotten away from that. I much prefer the paradigm that if you think you have a claim and you think it's out in this area that you can request what you think you need, and if the request is abusive or if it's too expensive or would take too many people too many weeks to set it aside, you can file a motion and ask the court to narrow it down or to stage it so that you can do the broad level first and then a lower level and then another level, but I will tell you this, and I didn't know about this today. I'm going to have to share this with my family law friends as much as some people may not want me to, but we just couldn't conduct a good family law practice with an artificial limit of 10 or 15 or even 25 requests for production.

CHAIRMAN BABCOCK: Well, how many could you live with, 300?

MR. ORSINGER: Sure, that's excessive because that might encourage people to include the whole

form book, and we're not -- I -- look, in a divorce case if you're finding out about your own property, why should the government come in and say you're only allowed to ask 25 questions about your vehicles or your real estate or your retirement plan or your businesses? What's the public policy there? I just -- you know, I don't think it works in my area.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Should we just exclude your -- the family law proceedings?

CHAIRMAN BABCOCK: That's usually their answer.

MR. ORSINGER: Yes, and when we don't get excluded sometimes we have to go to the Legislature and get it excluded, but we only do that when it's really important, and there's an important policy I think to keep family law under the rules of procedure as much as possible, which is why I try to listen and report what they say.

CHAIRMAN BABCOCK: Professor Dorsaneo.

PROFESSOR DORSANEO: I think you say family law has its own particular characteristics. Well, I think a lot of commercial litigation have, you know, similar complicated documentary characteristics in comparison to car wrecks and conventional tort litigation.

CHAIRMAN BABCOCK: Yeah, so there. Professor -- Justice Christopher.

HONORABLE TRACY CHRISTOPHER: So now we've heard, so probably not a limit on a request for production on level two. I mean, family law is a big section of level two, and, you know, so putting an artificial, you know, 30 down would not be a good idea and perhaps not in your, you know, mid-level corporate.

CHAIRMAN BABCOCK: Okay. Well, I wanted to -- I wanted to raise the issue, and I don't know if that's the end of it, but let's keep going.

MR. MEADOWS: Well, you're not the only one who sees it as an area of concern, and, you know, I don't know whether some denomination is the right answer or some sequence, but I suspect if we all ask around we would find that there are lawyers who suffer under it and feel like that they're subjected to too many.

CHAIRMAN BABCOCK: But the problem is certainly in the commercial litigation area there is now so much data. I mean, there's just an explosion of data. You could -- I don't know what the answer is, but --

MR. MEADOWS: We're going to come to it.

CHAIRMAN BABCOCK: Yeah. And probably even with individuals who are getting a divorce, Richard. I mean, they have computers, too.

MR. ORSINGER: I know. That's the real problem we ought to be talking about, is when you get a cease and -- or a nondestruct letter saying, "Don't delete any of your e-mails" and I have to bring my client and say, "You can't delete any texts or e-mails for the next year and a half," they look at me like I'm crazy. As somebody said somewhere, "If that's the law, then the law is an ass." It's really --

CHAIRMAN BABCOCK: Easy now.

MR. ORSINGER: -- hard to imagine telling average people that they can't delete junk mail. They can't delete -- I mean, what do we tell them? I don't know what to do.

CHAIRMAN BABCOCK: Yeah.

MR. ORSINGER: There's too much data, and we just really -- the electronic part is out of control. I think that's really more what we ought to talk about than how many pieces of paper you have to do.

CHAIRMAN BABCOCK: Okay. All right. Sorry to digress. Go ahead, Bobby.

MR. MEADOWS: The next point is in Rule 190.4, level three cases where we're recommending that there be a mandatory meet and confer. We're not recommending it for level two or level one cases.

MR. MUNZINGER: What rule number?

MR. MEADOWS: I'm sorry?

MR. MUNZINGER: What is the rule number?

MR. MEADOWS: 190.4.

CHAIRMAN BABCOCK: (a). Judge Wallace.

HONORABLE R. H. WALLACE: Comment on that, and this looks to me like it kind of follows the Federal rule concerning conferences and whatnot. When somebody files a lawsuit they're either -- they're going to go to level one scheduling order if it's less than whatever, or if they don't -- or they're going to be pushed into level two, and what I think a lot of the times lawyers do is they -- it's not a big case, they don't need to hold a lot of conference and things, but they would like to have the flexibility of deciding when the discovery deadline is, when they designate experts, all of that kind of stuff, so what they normally do is submit an agreed level three scheduling order, setting out all of those things. I would like to see a way that people can continue to do that without having to do the meet and confer and file the discovery control plan and all of that, but there's a lot of cases that don't really need that. Some do, but some don't. At least if they had the right under level two to somehow do their own discovery control plan or whatever. That's just my thought on that, is that it may be forcing some people to do more work than they really need to do.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, so this represents a -- a sort of compromise from what the Federal rule has with certain limited exceptions. The Federal rules now have meet and confer in every case, and we understand that a lot of cases in state court that would be an expensive exercise to go down to the courthouse for, you know, a level one case and even a level two case. Because level three cases are you're basically asking for specialized management, you're asking for relief from the deposition guidelines, that you're asking for more depositions, more discovery, it was our view that that was really what the Federal rule meet and confer -- where the Federal rule would work best for us in Texas; and that's really because we want to encourage the parties to meet and to confer so they can make these agreements about the motion in limine that Chip just described and they can make these agreements about discovery; and so if they do have an agreed scheduling order, great; but, you know, they can meet about all of these other things, too; and we also want the judge to be paying attention to the case; and we understand -- so it was sort of we know that judges' dockets are so busy that they can't do this for every case; but for these cases where there could be out of control costs associated with discovery, at least let

everybody get together in the same room and say, "How are we going to manage this"; and so this was the compromise that our committee came up with.

CHAIRMAN BABCOCK: Jim.

MR. PERDUE: Did the committee look at the idea of an ability of the parties who agree to the limitations of deposition time and interrogatories and discovery as laid out in section (2) to have their ability to -- the problem with level two for litigants is the way the deadlines are set. It's exactly what Orsinger is talking about. You've got this deadline tied to a trial date that dates back. It's very hard for staff to calendar it properly. It's very hard for lawyers to concrete what the deadlines are for designation of persons with knowledge and especially experts. So let's say you've got a one doc med mal case. It's a 300,000-dollar case, it's got a 250,000-dollar policy, and I probably won't get that either, but so you're looking at two experts and probably 10 fact witnesses. It's got a damage model. It would take you out of the other.

The problem with making that a pure under this idea of level three, which is a -- I can pick up the phone to the other side, just like Richard can pick up the phone to the other side, and we can agree these will be the expert designation deadlines, and this will be the

concept of the closing of discovery. Level two sets those deadlines right now and doesn't provide the ability of the parties to do that other than to move you to level three.

HONORABLE JANE BLAND: No, you can.

MR. PERDUE: You can?

HONORABLE JANE BLAND: Well, not --

MR. PERDUE: Well, I've never seen it because every time we've had to do it the court has said you have to call it level three. Because I don't have a problem -- look, I'm a big fan of 50 hours or less of depositions, and I don't have a problem with 25 interrogatory limits. That's not the problem in a 250,000-dollar case. It is the deadlines.

CHAIRMAN BABCOCK: Yeah. Justice Bland.

HONORABLE JANE BLAND: Rule 191.1 allows people to modify discovery procedures by agreement, and we're proposing that you don't even have to show good cause. I think the problem, though, is it's not in -- it's not in the same rule where all the plans are. So people don't go and read to the next -- you know, read further down in the rules to figure out, well, can I modify this. Now, the reality is people go ahead and modify it, and it doesn't really get tested in court as long as they -- you know, if they comply with Rule 11, they can file it, and it's an agreement that's

enforceable, but you can modify it.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I agree. That's exactly what I was talking about is giving the ability to modify it. Maybe if you put that in Rule 190.3, where they say, okay, here's the deadlines, but you can modify it by agreement, that solves the problem.

HONORABLE JANE BLAND: Okay.

HONORABLE R. H. WALLACE: Because, I don't know, I always thought in Federal cases all of these meet and confer meetings was kind of busy work. I don't know whether you were yawning or opening your mouth, Chip. You may have some --

CHAIRMAN BABCOCK: I've got some definite views about meet and confers.

HONORABLE R. H. WALLACE: Good or bad?

CHAIRMAN BABCOCK: And since you asked, there is -- there has developed an absolute art form to meet and confers by people who are resisting discovery.

HONORABLE R. H. WALLACE: There you go.

CHAIRMAN BABCOCK: What happens is they haven't given you what you think you're entitled to, so you call and you say, "Hey, I'm meeting and conferring with you because you haven't adequately answered this interrogatory, haven't produced documents under this

category," et cetera, et cetera; and you have this long, hour-long conversation; and they fight with you and talk about it and everything; and then finally they say, "Okay, fine, we'll amend our responses." So you say, "Cool." So, now, you know, a week or two has passed, and they give you amended responses, and now they're worse than the first. They're more -- they're more vague and ambiguous than before, so you call them up, and you can't get them. You know, they won't return your calls, so it takes you a week to get them. Then you get them on a meet and confer, and they argue with you for a couple of hours.

At the end of the day they haven't agreed to anything, so now you're a month down the road and then you finally file your motion, and there are many variations on that, but the meet and confers, while a great idea, are in practice are being terribly abused I think.

MR. MEADOWS: So you would resist the suggestion that we received that meet and confers be conducted only in person and by lead trial counsel.

CHAIRMAN BABCOCK: Well, that's the rule in the Eastern District, which has just been modified, by the way. It used to be that, and that delays even more because lead counsel are real busy. You know, you're out in L.A. trying a case for five years, and so you can't get back to Houston to have an in-person meet and confer.

HONORABLE JANE BLAND: Hey, he made it back here to do your work.

CHAIRMAN BABCOCK: That's true. Alistair.

MR. DAWSON: So the meet and confer that you're talking about is on discovery issues.

CHAIRMAN BABCOCK: Yeah.

MR. DAWSON: That is a whole separate problem and but what they're talking about here is a meet and confer on discovery, you know, issues at the beginning of the case, scheduling issues at the beginning of the case; and one of the beauties of the Federal system is that, for example, if you have a dispute about the scope of electronic -- electronically stored information or how you're going to produce it or, you know, who you're going to search from, if you get that involved at the beginning of the case as opposed to midway through, it's a whole lot better for all the parties.

CHAIRMAN BABCOCK: No, that's absolutely true, but I did not mean to limit my meet and confer objections to discovery only. I've got a case in Federal court, not in Texas. Our 26(f) conference is now going on three months. We've met -- on the phone we've met three times and haven't resolved it, and so it's still going. Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Back to the

level two timing question, I think that has always been a problem since these rules were first enacted. People hated the, you know, 90-day after the discovery of the first response, and it was so difficult to calendar. So when I was a trial judge I just sent out scheduling orders in everything that, you know, clearly set out the deadlines so people didn't have to sit around and worry about, you know, what the 90th day came out to, but if we want to keep the -- and it sounds like Richard was saying that they, you know, like a big bulk of the higher dollar family law cases like the level two, but they also have trouble, just like Jim was saying, with this timing. So I think we should either say you can modify it by agreement or specifically provide for a level two discovery control plan by agreement, and then there won't be this, oh, no, you can't do it as a level two, you have to do it by level three. So we could make that change there to help people, I think.

CHAIRMAN BABCOCK: Okay. Buddy.

MR. LOW: Lee Rosenthal was telling me that what she does, she makes them meet and confer with her.

CHAIRMAN BABCOCK: That's effective.

MR. LOW: And that she really has no trouble with that. So, I mean, because she says that when they meet and confer they either agree on a lot more than --

you know, I'll give you all of this and all of that, or they don't cut. So she has her meet and confer with her, and she has little trouble after that.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: We shouldn't require meeting. There's a lot of litigation in this state that goes on between lawyers that are in different cities and where the forum is even in a place where neither of the lawyers are, and particularly when it's a family's money that you're spending, why should we force people to get in a car, get on an airplane, and have a meeting with something they can do over the phone.

My -- the principal point I wanted to make was on the topic here about the conference. It says that under the proposed rule with the change, "The parties must submit an agreed discovery control order." Okay. That's not ever -- I mean, that is not going to work. I can name you the names of lawyers in every city that won't agree to anything, and so this idea that we have to agree to everything and then submit that to the court, maybe that works in Federal practice. That doesn't work in state practice.

As a practical matter, you can agree on some things, but there may be other things that you don't agree on, and so you go to the court to rule on the things that

you don't agree on. Now, I don't mind being asked to consult with the opposing lawyer before I have a hearing. I have to do that in the appellate practice. I even have to call the other side and ask them if they'll agree to my motion for rehearing after I lost in the court of appeals, but I do it because they make me do it.

MR. MEADOWS: It may not survive discussion, but -- and we haven't gotten to it, but we have a provision to deal with the behavior you're talking about where someone refuses to participate in good faith and they can be held accountable for --

MR. ORSINGER: You know what, when you get down there into that argument about whether they were operating in good faith or not, you're going to get a lot of bad faith arguments and a judge that's not going to make a tough decision. I think when you tell me that I have to in every case have an agreed scheduling order with the opposing lawyer, no matter what it is, whoever it is, no matter what's involved, you're telling me something I can't do, and I think that's not just me. I think that's really true probably all over the state, so I ask you why do you -- why are you asking? Why do you say we must submit an agreed scheduling order when the courthouse is down there to resolve disagreements?

CHAIRMAN BABCOCK: Marcy.

MS. GREER: Well, we typically don't submit an agreed on everything order in Federal court. I mean, in most of my agreed scheduling orders there will be pieces of it where you'll say, you know, plaintiff's position on whether we should bifurcate class discovery is X, defendant's is Y. So it's like a joint pretrial order where you're basically putting all of the parties' positions in one place and agreeing to as much as possible, but typically there's room for disagreement without having to get into any kind of bad faith discussion where you can say, "Plaintiff feels that the expert disclosure deadline ought to be X, Defendant thinks it should be Y, it should be staggered because" -- I mean, there's flexibility, and I would imagine that if we can agree that it's built into this system, that will accomplish a lot more. Because the idea is to figure out where the parties can come together, and, you know, it would be great to have Judge Rosenthal arbitrate all of these, but most judges don't have that kind of capacity to do, and so I think that's a way to get closer to it.

That said, I am very much in favor of making it absolutely clear in the rule that under level two the parties have flexibility, because what happens is judges will say, "You can't change my rules." You know, I mean, "I can't change the rule," and it's better to say, "Here

it is right here. We have flexibility in level two," because it doesn't really make sense to have to kick up to level three if that's the only thing you're getting out of it.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, I think that -- I think it would be good if the parties can agree on a discovery control plan and scheduling order, a trial date, and all of that. If they can agree on that and submit an agreed order, and I would say 90 percent of the cases that I see, which are just civil, not family, that's what they do. They submit an agreed order. If they can do that, I don't think they should need to go through these other procedures of meeting and discussing all of that stuff. If they can agree upon that, it's probably not a big complicated case, and they don't need to spend that time and effort on it. As a practical matter that's what a lot of judges do. They say, "If you can submit an agreed scheduling order, do it. If not we're going to have to schedule a hearing."

MR. MEADOWS: Okay. So I don't really -- I don't necessarily think that what's recommended by the discovery subcommittee is out of alignment with what you're saying or even what Richard is saying; and we're taking it piece by piece, step by step; but perhaps it

would be helpful to the discussion if we examined what this is all about and the critical pieces of it. So and this may get rejected, but the general belief in operating in what's happening in the Federal rules and understanding our assignment, there was a view or there is a view in the subcommittee that having lawyers talk to each other, try to work things out, is a good thing, that that can avoid problems that end up in motions and complicated discovery disputes. So that's principal one, is that getting lawyers to talk to each other and making them talk to each other about how to proceed in the case, what's at issue, how are you going to handle discovery, what kind of limits you want, that that's a good thing.

So then we say you have to do that. You've got to do it as soon as practicable. These are the things you've got to talk about. Then to Richard's point, then you've got to submit a discovery control plan, but it doesn't have to be agreed. I mean, that would be the preference, but the rule that we're recommending says, "The discovery control plan must state the parties' views and proposals on," and then we list a whole bunch of things from the Federal rules and our rules. So that's the architecture of the thing, is to get people talking. This is what you've got to talk about. You've got to do it as soon as practical, and you need to submit a control

plan, and preferably it would be agreed, but if it's not, "What is your view on this, plaintiff? What is your view on that, defendant?" And then if it ends up in something that's controversial like a trial date or some other issue, then the court hears it.

HONORABLE TRACY CHRISTOPHER: I think if we just take out "and agreed" there in 190.4(a) and then you look over at, you know, (d), what the actual plan would be, it can state "the parties' views and proposals on," so that way it could have, you know, alternate views just as was described in the Federal court. Okay. "We've agreed to this. Here's where we're not agreeing."

CHAIRMAN BABCOCK: Yeah. Levi.

HONORABLE LEVI BENTON: I wonder if the committee would support a change in the language from "as soon as practical" to "at any time before intervention of the court is sought for any reason other than emergency relief, but in no event later than 60 days or 90 days following the filing of an answer." Because as soon as practical, it's like if I'm not bothering the judge why do I need to do this as soon as practical?

CHAIRMAN BABCOCK: Right. Justice Bland.

HONORABLE JANE BLAND: We talked about that. We talked about whether or not to establish a time deadline, and what we decided is that the carrot is that

you cannot conduct discovery until after you've had the conflicts, so no discovery. You may not seek discovery until you've had the conference, so we think that is enough of an incentive to get people to arrange their schedules such that they can meet.

HONORABLE LEVI BENTON: Yeah, I still -- you know, Jane has always been right, but I'm not persuaded. But if I'm not --

MR. DAWSON: But now she's not.

HONORABLE LEVI BENTON: I'm not calling -- if I'm not calling a trial court's clerk saying, "I need a hearing on such and such" and I'm not utilizing the court's time, you know, and we can otherwise agree on it in the depositions without completely agreeing on the schedule, I can live with that.

HONORABLE TRACY CHRISTOPHER: Then you just stay in level two and don't bother us. I mean, if we make that change with respect to the discovery control plan, you can just stay in level two until you feel the need to get up to level three where there's -- we're anticipating, level two is, you know, a hundred to maybe 350, and then above that is level three.

CHAIRMAN BABCOCK: Yeah. Lisa, then Levi.

MS. HOBBS: I wasn't sure in the proposed rules the timing of all of this, so right now in order to

be in level three you need a court order to get into level three, and I don't think y'all changed that, right?

MR. MEADOWS: Right.

HONORABLE JANE BLAND: Right.

MS. HOBBS: So what if someone pleads level three but never goes down and gets a order on it? What's the timing of the meet and confer? And they're still -- I mean, I just -- I wasn't really sure how it -- it seems like there's like some chicken and egg things coming in here with whether they're really level three once they --

MR. MEADOWS: Well, there could be. I mean, there could be a little -- but we do have the requirement, though, that the discovery control order be entered and there are time limits around that in the discovery control order language.

MS. HOBBS: They're not level three yet because they didn't go down and get their level three order yet.

MR. MEADOWS: Well, if they submit a discovery control plan the court has to enter an order within a certain period of time.

MS. HOBBS: So they have to do the meet -- you're going to kind of assume that they're big boys and they know they're moving towards level three, even though the comment to the rule says unless you actually have an

order you're not level three.

MR. MEADOWS: Yeah, but if you want to be in level three you need to do these things. You need to do meet and confer, you need to submit a discovery control plan, and the court has to enter an order.

MS. HOBBS: Yeah. I think the timing -- I mean, I think we may just need to tweak the timing of it.

MR. MEADOWS: Yeah, there could be a lot of tweaking associated with this, but I guess the guidance we're looking for is not absolute acceptance of each and every one of these recommendations. I mean, are we pursuing the right things? A lot of what we did is influenced by the Federal rules and just sort of we've now had experience with these rules since 1998 --

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: -- and how are they working.

CHAIRMAN BABCOCK: Kennon, did you have your hand up?

MS. WOOTEN: I just have a question about how it works because in the rule as it's proposed it provides that there will be no discovery prior to this conference, right? But then you have initial disclosure rules that are mandatory.

MR. MEADOWS: Right.

MS. WOOTEN: And the way that you have the

definitions crafted it still defines written discovery to include request for disclosure, but it's not clear whether that includes the required initial disclosure.

MR. MEADOWS: So that may be just, I don't know, a remnant because there are no request for disclosure. They're all mandatory disclosures at this point.

MS. WOOTEN: Okay. So the idea that you might have some information come from those required disclosures that's not going to be defined as discovery before --

MR. MEADOWS: Well, the point of this language you're looking at in paragraph (3) was "No discovery before conference" was intended to remove the practice of serving discovery with your petition.

MS. WOOTEN: The RFD. I guess it's good to put some teeth in there that you can't do discovery before then, but I do think having some information in hand can make conversations about what needs to be done more efficient.

MR. MEADOWS: But won't you have that through the initial --

MS. WOOTEN: Well, and that's kind of what I'm trying to figure out, if you would have that by default under the way it all works out.

MR. MEADOWS: Yeah. We just need to make that clear because our intention is that the initial disclosures are mandatory, and they occur.

MR. PERDUE: Regardless of level three. You don't have to wait on your order.

MR. MEADOWS: Right.

MR. PERDUE: Okay.

CHAIRMAN BABCOCK: Peter.

MR. PERDUE: That's not clear.

MR. KELLY: We were just having a sidebar over here. There's one -- I have a couple of cases where this was an issue, and we're limiting discovery before a conference. You know, having a commercial case it's all documents or it's preserved by computers. If you have a car wreck case, cars are hauled off and put into storage; but if you have an industrial plant, to limit the ability to get discovery and have inspections, particularly have expert inspections, the defendant will want that to happen relatively quickly so they can get back online and not have to preserve an accident scene. The plaintiff will want to do it to make sure the defendant isn't hiding stuff. There should be more of an explicit way to conduct -- either carve out inspections or something in subsection (3) or have an expedited hearing with the court even before an answer is due. Otherwise it's all done ex

parte, but some way to speed that up would benefit both plaintiffs and defendants.

CHAIRMAN BABCOCK: Okay. Carl, then Professor Hoffman, and then Justice Bland.

MR. HAMILTON: Well, I sympathize with what Peter says, but in addition I have a problem with the discovery starting based on when the parties have conferred, because that may be a matter of agreement or disagreement as to whether they've conferred. I think we need a more objective standard like submission of the order.

CHAIRMAN BABCOCK: Okay. Professor Hoffman.

PROFESSOR HOFFMAN: So I agree with that, and I remember a conversation years ago I had with Liz Cabraser, who has served for many years on the Federal rule committee and who is a really wonderful lawyer who said this is the problem, is that she often would get delayed the time when discovery could start; and, of course, it feeds into your point, Chip, you know, that you end up with these like months-long conferences. So having said that, if I could make a -- I want to make, if I could, just a bigger point and I'll stop, which is this seems to me, Bobby, to answer your question, like we're moving in the right direction. Of course, in my memo I supported this. I think this is a good idea, but my

bigger point is that we can be informed by the Federal experience here, because there's been a lot of it at this point. We know, for instance, from studies that have been done that 26(f) is rarely taken seriously by the lawyers. Chip, more often the problem isn't that they're going on and on. It's that they never go on, so it's something like 10 to 30 minutes is like how long they spend on these, and that's fairly typical.

So we can learn from what we already know about Federal practice about what works well. I mean, Alistair's point is an excellent one, which is if we can get lawyers talking to each other early about the things that we know if they try to talk about there's a chance that -- like, for example, anticipating ESI difficulties -- we can go a long way toward reducing costs. So I'm a big believer of this, and I just think the question is how do we write it with enough detail kind of having learned what we've learned from the Federal rule.

CHAIRMAN BABCOCK: Good point. Jane had her hand up. Justice Bland. Then you, Richard.

HONORABLE JANE BLAND: So I think Kennon raised a good point that we need to clarify that the "No discovery before conference" we need to add "Other than the mandatory disclosures required by our mandatory disclosure Rule 194." That should address, Carl, your

concern about not having anything to start out with; and then as far as sort of the one off, you know, critical timing issues like a plant inspection, you can modify this, and you can -- by agreement, and you can go to the court and get a court order. So this is sort of the default, and if there is some sort of need for emergent discovery, you can go ask for that or try to get it by agreement.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'd like to respond to Bobby's 10,000-foot view perspective on the whole process, and my perspective obviously is different from that of many around the table, but I have had cases in Federal court. 99 percent of my work is in state court, and there's a huge difference between the way Federal court is run and state court is run, and I believe that 99 percent of the people, 98 percent of the people in America, cannot afford to litigate in Federal court.

MR. HAMILTON: Amen.

MR. ORSINGER: There's too much pretrial that's required before you get around to trying your case. Most state cases are tried without a lot of pretrial. If you Federalize our procedure, you're pricing out a lot of people from being able to litigate the way you expect them to litigate, and what you're going to find is they're

going to ignore the rules, and you're going to create this problem for people where they're not complying and their witnesses may be struck or their exhibits may be excluded when it wasn't possible for them to have all these meetings and pay for all this stuff that you're asking them to do. Federal court is all about pre-try, pre-try.

Now, perfect example. You can't get a trial in Federal court without sitting down with the district judge and working out how the trial is going to go, what the issues are going to be, what you're going to submit to the jury, and what you're not going to submit to the jury. Well, in San Antonio, Bexar County, or Travis County, if you file something within 30 days that the judge has to rule on in 30 days, nothing is going to happen because we don't have a judge in Bexar County or Travis County. It's all random assignment on the day you show up for trial. So whatever you file in the Bexar County clerk's office is going to sit in the Bexar County clerk's office unnoticed by anyone, and all of your deadlines that you're debating here are not going to be applied because there's no judge to give it to, and there's no judge to rule on it. Now, that's --

HONORABLE STEPHEN YELENOSKY: We do have judges there.

MR. ORSINGER: Right, but it's random

assignment to trial on the morning that you show up to the docket.

CHAIRMAN BABCOCK: There was a lurking cure to that problem in these rules.

MR. ORSINGER: Now, you know, Travis County and Bexar County don't represent maybe as much as Harris County combined, but they do represent a lot of cases that go on, and these rules don't work at all in that situation. So I just want to be a -- I just want to sound a note here that not everyone thinks that increasing Federalization of state procedure is a good thing. It may be a good thing for most of the people who try cases around this table because their clients have unlimited amounts of money to pay on litigation; but, you know, most state court litigants that are individuals have very limited amounts of money to spend; and the more you make them spend to pre-try a case that may get settled anyway, because 9 out of 10 cases settle anyway before you even get to trial, you've spent all of this money preparing a case that isn't going to be tried anyway; and the clients can't afford to pay it; and I don't know what's going to happen to the practice.

HONORABLE TRACY CHRISTOPHER: But you're not going to be in level three where we're putting these requirements in.

MR. ORSINGER: Okay. Then why don't we just move the whole family law cases over into level three then, because level two isn't going to work at this rate.

HONORABLE TRACY CHRISTOPHER: Why is level two not going to work if you can change the timing?

MR. ORSINGER: Well, because I've got to have all of these pretrial hearings.

HONORABLE TRACY CHRISTOPHER: No, two is just the same.

PROFESSOR HOFFMAN: There's no pretrial hearing for level two.

MR. ORSINGER: I don't mean -- I mean pretrial preparation. Nine out of ten of my cases, 98 out of a hundred of my cases settle without a trial. All the money you make me spend preparing for a trial is probably wasted in almost all of my cases.

HONORABLE TRACY CHRISTOPHER: Are you talking about the disclosures down the road?

MR. ORSINGER: No, no, no. I'm talking about the idea that we're all going to get together on the schedule, we've got deadlines on what we agree on, and when we don't agree we've got to file something with the judge, which we don't even have a judge in Bexar County and Travis County, and then the judge has to rule within a certain period of time.

CHAIRMAN BABCOCK: I think the judge's point is that these conference requirements --

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: -- are just for level three.

MR. MEADOWS: Yeah, there's no mandatory meet and confer, Richard, in a level one or two case.

MR. ORSINGER: Well, then I'm sorry.

HONORABLE STEPHEN YELENOSKY: That would be never mind.

CHAIRMAN BABCOCK: As Emily Litella used to say, "Never mind."

MR. MEADOWS: By the way, it was well said.

MR. ORSINGER: Well, if it applied to level two I would be right.

CHAIRMAN BABCOCK: Judge Estevez.

HONORABLE ANA ESTEVEZ: Can I just respond?

MR. ORSINGER: Sure it is, because we're in level three because we don't agree with the scheduling, so then that puts it in level three and then we're in the soup.

HONORABLE ANA ESTEVEZ: Your concern about the judge, too, was something else that the committee discussed, and they discussed having a judge on these level three that it would stay with instead of it being --

and I don't know how -- I don't know --

MR. ORSINGER: Yeah.

HONORABLE ANA ESTEVEZ: -- how that works. That could be a political issue.

HONORABLE JANE BLAND: That went on the list as beyond the scope of our subcommittee.

HONORABLE ANA ESTEVEZ: I just wanted you to know we discussed it.

MR. ORSINGER: Try to bring that to those two counties.

HONORABLE ANA ESTEVEZ: We were concerned about that happening in Bexar County or other counties that did that, and so how they get put off.

CHAIRMAN BABCOCK: I thought you put on the if you go level three, one judge has got to have the case all the way through.

MR. MEADOWS: That was a suggestion. We noted it.

HONORABLE TRACY CHRISTOPHER: That's a talking point.

MR. DAWSON: Very good suggestion.

HONORABLE TRACY CHRISTOPHER: That's a talking point.

CHAIRMAN BABCOCK: You okay with that, Pete?

MR. SCHENKKAN: Sure.

CHAIRMAN BABCOCK: With level three, one judge per case?

MR. SCHENKKAN: Sure.

CHAIRMAN BABCOCK: Okay. There we go. Travis County has bought in.

MR. SCHENKKAN: We operate under the special local rule for administrative cases. They're especially assigned at the beginning. I don't have this problem.

HONORABLE STEPHEN YELENOSKY: Well, not every level three case, though.

MR. SCHENKKAN: No, no, I know. We move it. It would now incorporate more, but I'm saying I personally have not had the problem.

HONORABLE STEPHEN YELENOSKY: Well, and if it incorporated every level three, there's no more central docket.

MR. SCHENKKAN: Exactly.

HONORABLE TRACY CHRISTOPHER: I anticipate that level three will be very small. I don't know why -- I mean, that's the whole idea of these rules.

MR. DAWSON: No. Because everyone opts out of level two because of the --

HONORABLE TRACY CHRISTOPHER: But they're not going to because we're going to fix that.

MR. DAWSON: No, because of the deadlines

that are all set by the first discovery response that nobody knows about.

HONORABLE TRACY CHRISTOPHER: I know. We're going to fix that so everybody stays in level two --

MR. MEADOWS: Make their adjustment.

HONORABLE TRACY CHRISTOPHER: -- except for a small minority of cases that really need the hands-on work.

MR. DAWSON: How are you going to fix the scheduling issues in level two?

HONORABLE TRACY CHRISTOPHER: Right here, level two discovery control plan by agreement. Added.

CHAIRMAN BABCOCK: Professor Dorsaneo is itching to say something.

PROFESSOR DORSANEO: I'm sitting here listening, and you're making me afraid of level three.

CHAIRMAN BABCOCK: Whoa.

PROFESSOR DORSANEO: And I'm reading, well, do I have to do this level three if the judge wants to do it? And I'm thinking like, well, it's not absolutely clear to me that I don't have to do it. Okay. It seems like I have to do it, and I'm worried about judges who think all of this Federalization is a good idea, because I think it's a stupid idea, like Richard, and for a lot of the same reasons, but I'm old, you know, and I'm hostile

to the changes.

CHAIRMAN BABCOCK: You're old school, but here's a new school guy, Kent.

HONORABLE KENT SULLIVAN: I was just going to at least comment briefly on, you know, the issue that was raised. First, I agree with Justice Christopher that I think if we fix the couple of problems, and really when you boil it down there are only a few problems, although they have a significant ripple effect in terms of level two, that it can be the broad category that catches most cases. It can be made much more user-friendly.

With respect to level three, I really think it is critical that you have a single judge appointed. Justice Bland I think said that level three was, in effect, asking for -- I think the phrase she used was specialized management, and I -- I like that, because I think that's exactly what you're asking for in level three; and candidly, if you get passed off to a different judge for every hearing on every issue, you cannot have specialized management. You cannot have a coordinated pretrial game plan that will be in any way efficient or coherent, and I think it's just critical that you have one judge that is responsible and accountable for the case if you have a complex case that's designated level three.

CHAIRMAN BABCOCK: And you're a member of

the Travis County bar, right?

HONORABLE KENT SULLIVAN: I think.

MS. HOBBS: No, he's not.

CHAIRMAN BABCOCK: Not after that speech. Carl.

MR. HAMILTON: I'm trying to understand what is trying to be accomplished by going more to the Federal rules, because I agree with what Bill says and Richard says. It's more expensive. Right now, we're in level three, lawyers call each other up on the phone, and in 10 minutes we put together a control plan. We don't have to meet, sit down, confer, talk about issues, and all of that. That can all be done under Rule 166, if that's a necessary deal, but I don't see the point in going through all of this that's more expensive.

CHAIRMAN BABCOCK: Yeah. Jim, what do you think? I'm looking for a younger lawyer. You're it. What do you think about this discovery? It looks like some of the people that have been practicing for a long time aren't very enthusiastic about it.

MR. PERDUE: Well --

CHAIRMAN BABCOCK: Not that you haven't been practicing for a long time, but less time than the 60 years that Professor Dorsaneo has been doing it.

PROFESSOR DORSANEO: There's a long time and

then there's a long time.

MR. PERDUE: So having practiced in both Federal and state, you do have to recognize that there is a different constituency for those respective systems, and I do agree with Orsinger that there is a level of expense built into the Federal rules because of the expectation of the level of litigation for a case that qualifies for the Federal rules; and so when you take the construct of the Federal rules and put them onto, what I think Lonny's point is, the vast majority of the cases that are in the state court system, you're applying a construct that will create more expense rather than less, because the reality is, is that a 200,000-dollar tort case, you pick up the phone to the other side and say, "The judge has issued a trial date, let's work back, go 60 days back for defendant's designation of expert witnesses, 90 days back for me. We'll have a discovery cut-off 45 days before trial. Let's go fight it out. Let's figure it out," and avoid the idea of building a ton of expense in the first six months of litigation or in the 30 days prior to a cut-off for a case that is going to get resolved without trying it; and the Federal rules do build in a lot of that.

So I get the idea of meeting is good. You know, ABOTA and professionalism and all of that ought to

apply and all that, and lawyers ought to get on the phone and work things out a lot more than they do, but when you -- when you take the Federal construct as a whole and try to say that's going to apply to every case over just in -- just in concept I heard somebody say $500,000 plus. That's still kind of reaching down I think a little far to the level of a case in controversy to apply that level of expense that isn't necessary. I mean, I could have a 5 million-dollar truck wreck case that can end up getting litigated successfully with $50,000 in expenses. Now, my time, I don't keep my time, so, you know, I don't know; but if you want to handle it efficiently, I've never thought of the idea of changing level two to being the catch-all, because we've been practicing for 12 years with the idea of level three being the catch-all; and so that's -- that's just a change in mindset of you're going to create something that looks more like Federal rules for IN cases that need more management; and you're going to have a lawyer be able to work it out on what Lonny would tell you is the majority of cases and just continuing with what we all know works essentially at a reasonable expense in a level two construct. That's devil in detail stuff that certainly could look at. It sounds like we're kind of coming around on that, but anything that you take out of the Federal rules that looks like it's going to reduce

costs is probably going to raise costs when it comes to state court litigation.

CHAIRMAN BABCOCK: Bobby.

MR. MEADOWS: So just -- I feel like we're cloaking what we're trying to do in the state rules with an unnecessary view about the Federal rules. In the Federal system there's only one kind of case. I mean, there are not three levels. You just have a lawsuit in Federal court and all the Federal rules apply to it. We're trying to create something in our state system that recognizes the complexity of certain kinds of litigation, which level three; a different kind which could be in level one, where you have very limited discovery, should have very limited expense; and then we've got this -- you're right, this new attitude about level two where you can make adjustments, and that's where most of the stuff ought to go; but what we're doing is not trying to make the Federal -- I mean, the state practice look like the Federal practice. I think we're trying to accomplish the opposite. Again, it's built around an idea that is -- you know, that has become kind of the new talk around the Federal rules; and that is getting lawyers to do things themselves is better than having everything resolved in a disputed manner in court.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: I'm going to disagree with that a little bit, and that is, there's a -- there are conference requirements in a lot of rules, Federal system and state system. I don't think that a requirement to confer and that the lawyers talk to each other means anything gets done. I mean, lawyers talk to each other now and, to R. H.'s point, submit agreed scheduling orders. If all we want to do is get a scheduling order in place, I don't think we need help in the rule to get that done. That's going to happen. The reason why it's more effective in the Federal system is because there is judicial involvement, is because there is real meaningful judicial involvement with either the judges or their briefing attorneys.

So, I mean, I think the premise that it's good for lawyers to talk to each other when they're adversaries and that helps advance the ball, I think that's wrong. I don't think that does anything. If you've got to check that box, you're going to find a way to check the box and move on, but you're not going to agree with your opponent, or your clients aren't going to agree, and I don't think you accomplish much by making the lawyers talk to each other.

MR. MEADOWS: My experience is just different really. I mean, I hate to use the California

example, but everything that occurs in California has to be -- has to have an antecedent meet and confer. You've got to -- you can't do anything, and what happens is there's some of the posturing that Chip is talking about, but a lot of it results in the positions of the parties gets reflected in whatever motion gets filed or whatever relief is sought, that, you know, we asked for this, reasonable request, we were met with that. It affects the outcome. So I think there are two purposes in it. One is to kind of distill the dispute down to something that's really -- people are happy to go to court over, and the other is to see if you can't find some way to resolve the matter without having, you know, then and there. So --

MR. JEFFERSON: Just quick reaction, I'm just reacting really to R. H.'s point that why make the lawyers talk. There ought to be an ability to me -- I think the cost is much less to submit an agreed something because you're not going to -- I don't think you advance the ball, and I think you increase costs.

MR. MEADOWS: That's the same thing, Lamont, really. I mean, if you've got an agreed something, you've got the result of a meet and confer.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Our rule --

MR. MEADOWS: You don't have to actually sit down at a table with somebody.

MR. JEFFERSON: I think that's what R. H. was --

MR. MEADOWS: That's not our recommendation.

HONORABLE R. H. WALLACE: That's only the John McBryde rule.

MR. MEADOWS: But we rejected that. That was suggested to us that the lawyers have to actually meet and maybe even certain of the lawyers, and we rejected that. Yeah. So a meet and confer can be a phone call or it can just be a meeting of the minds. You know, you just know you've done it so many times with your opposition it's standard procedure.

HONORABLE JANE BLAND: Look, the rule provides for agreement of the parties at any time, at any level, so what we're trying to do is set a framework for the beginning of the discussion, and if it turns out you don't need to have a long discussion because you're in agreement, great. Then, you know, file your agreement with the court, and you're done. If you need more judicial intervention, if you need -- if you're going to be going to court over disagreements about discovery, about the timing of discovery, then it makes sense to have talked about it beforehand in a level three case, which

year not anticipating is going to be every case. It's only going to be those cases where the lawyers or at least one of the lawyers has asked or the judge has decided should be a level three case, so you've opted into it, or someone has opted into it.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: Well, let me ask you this. I don't mean to jump ahead, but Rule 191.1 allows you to modify the procedure. Would you contemplate that the parties would be allowed to file the Rule 11 agreement saying, "We have agreed that we don't need to confer on these various matters, and we're just going to submit an agreed scheduling order, and we're done"?

MR. MEADOWS: Yeah.

HONORABLE R. H. WALLACE: I mean, if that --

MR. MEADOWS: If the parties are in agreement.

HONORABLE R. H. WALLACE: And we don't have to submit that discovery control order or plan? Plan. See, that's where they've got to -- somebody has got to sit down, if they're going to meet them, they've got to sit down and go one, two, three, four, submit that to the judge. Can they opt out of that by saying "With the approval of the court, we're not going to do that. We're just going to submit our agreed scheduling"?

MR. MEADOWS: I think that's the same thing, isn't it?

HONORABLE R. H. WALLACE: Well, I don't know. There's some "must" language in there. I don't know what that means. I know in my court what it means.

CHAIRMAN BABCOCK: Okay. Richard.

HONORABLE R. H. WALLACE: I say, "No, you can't do that."

MR. ORSINGER: I'd like to say that I'm very confused. I thought that -- pardon me. Are you saying now that any changes in scheduling -- first of all, are the deadlines for doing discovery, do they apply to both scheduled -- both level two and level three, or do they only apply to level three, the scheduling deadlines? Like you have to supplement so many days, you have to disclose your experts so many days, what level are they under?

HONORABLE TRACY CHRISTOPHER: Are you talking about the automatic disclosures?

MR. ORSINGER: No. I'm just talking about -- I don't understand the mechanics well enough, but I'm going to ask a very general question. Are there still going to be deadlines that so many days before the end of the discovery period or so many days before trial you have to supplement and list your witnesses and you have to disclose your experts? Do they apply to both two and

three equally or have the same deadlines?

HONORABLE TRACY CHRISTOPHER: Yes.

MR. ORSINGER: Okay. So if you move to change the deadlines, are you saying that you are -- you can stay in level two and do that, or does that automatically put you to level three, which I think it does under the current rules, if you change the deadlines.

MR. MEADOWS: I'll speak to it first, but I'm going to invite Tracy and Jane and anybody else that may need to correct me. As I appreciate it, level two has these dates that you can change. Level three calls for a specialized plan that requires you and your opposition to agree or to submit competing plans to the court for a discovery control order, but they don't have any specified dates. It is to be crafted in level three.

MR. ORSINGER: Okay. And can one party request it and then it doesn't happen unless the judge agrees? You can't force yourself from level two to three, one party can't, can they?

MR. HAMILTON: Yes.

MR. ORSINGER: They can? So just one party acting alone can move you out of schedule two to schedule three?

MR. MEADOWS: I think so, yeah.

PROFESSOR DORSANEO: Or the judge.

MR. ORSINGER: Well, sure, I understand the judge is the right one to decide that, but it frightens me to think --

MR. MEADOWS: That's the way it is now.

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. MEADOWS: That's the way it is now.

HONORABLE TRACY CHRISTOPHER: That's the current system.

MR. ORSINGER: Well, I know, and that's why I had misunderstood that all of these meeting requirements were going to apply to level two because there are hardly any level two cases in my experience, but you're not going to move to level three -- pardon me. Anybody can move you to level three and then level two is over. It requires the unanimous consent of all litigants and the judge to stay in level two basically, right?

HONORABLE JANE BLAND: That's not right.

MR. ORSINGER: That's not right?

HONORABLE JANE BLAND: No. A party can move for a level three discovery control plan, or the judge can order, sua sponte order, a level three discovery control plan. If the party moves for it, it's either agreed into, in which case you're in level three --

MR. ORSINGER: Okay.

HONORABLE JANE BLAND: -- or it's opposed,

in which case the trial judge makes a determination --

MR. ORSINGER: Okay.

HONORABLE JANE BLAND: -- about being level three. Does that help?

MR. ORSINGER: Yes. I feel much better about that.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: So I don't get why imposing this meet and confer for a discovery control plan is going to add significant expense. For Jim's case, you know, if he's got a whatever, two or three hundred thousand --

MR. PERDUE: No, make it bigger.

MR. DAWSON: 500,000, I don't care.

MR. PERDUE: Keep going.

MR. DAWSON: He's got that case, and he calls his opposing lawyer up, and they don't have any -- they don't need to change any of the, you know, discovery obligations. They don't have any problems about how discovery is going to be produced. They just agree on a schedule, and then you submit that, and that's your agreed discovery control plan. I don't see how that adds significant expense, but in those cases that are more either complicated or challenging or if they have a disagreement about electronically stored information or who -- what custodians are going to be searched or, you

know, things of that nature or this talks about privilege issues. I don't really know how that would come up at the beginning of the case, but if there are those issues then they ought to be resolved at the beginning of the case, and if you're going to have those issues you're going to have them somewhere along the line, so I don't get how this adds any real expense to the vast majority of cases, and it could help solve a lot of problems that are -- that would otherwise be created later in the case. So I think it's a good change.

CHAIRMAN BABCOCK: Jim, did you have your hand up a minute ago?

MR. PERDUE: I did because it dovetails to something that Richard was just observing, and I do want to kind of put out there, is so current practice is I think widely that a -- you know, a non-kind of traditional small car wreck case will plead into level three and say, "We will give the court an agreed scheduling order." Probably the vast majority of the family law cases, certainly the vast majority of kind of my tort docket, but let's say in this construct now you've got this definition of the meet and confer and the issues that it is laying out, which are new and, quite frankly, an opportunity for one party or the other, I think, Alistair, to raise issues that are somewhat -- they are -- they're crystallized as

far as addressing issues of scope of discovery, privilege, and things like that.

So I have a 200,000-dollar, you know, single op car wreck case, and I say level two on the pleading. So I opt in as the plaintiff of a 200,000-dollar, shouldn't require a bunch of judicial intervention and time lawsuit, and then the defendant says, "Nope, I want my big old conflict, and I want the court to have to take me down there and go through all of this," on a case that in concept shouldn't require that level of judicial intervention. In concept that might exist in a family law example of you say you can live in level two, but the husband says, "No, you know what, I don't think so. I think we need to have a lot more intervention."

MR. ORSINGER: It will be the wife's lawyer that says that.

MR. PERDUE: I'm so sorry.

MR. ORSINGER: It will.

CHAIRMAN BABCOCK: Now, why would you say that? That's sexist.

MR. ORSINGER: Because it's usually --

MR. PERDUE: I am not supposed to even laugh at that. That is not funny, by the way. But the question is the opt-in, and you're right in concept, that it shouldn't be that different, but Lamont's touching on it I

think a little bit as well, which is if -- I like to think I can do a lot of things by handshake and everybody agrees, but if you did have a case that shouldn't involve a ton of judicial intervention on all of these new criteria and categories, which are in concept, again, designed to address complicated cases, aren't you imposing an extra layer of cost, time, intervention in a case that shouldn't require that?

CHAIRMAN BABCOCK: Justice Christopher.

HONORABLE TRACY CHRISTOPHER: Well, all right, you plead level two. So then we're going to fix the level two problem about, you know, timing; and we're going to allow you to put in, you know, your agreed level two discovery control plan. So we're going to fix that, and so we're anticipating that most cases will be level two now. Having fixed that troublesome timing problem that has existed in level two for forever, it is possible for someone that -- the defense to say, "Oh, we really need a level three case," and it's always been possible for a defendant to do that, and it's been possible under the current version of the rules. It's been possible under Rule 166, asking for a pretrial conference. The defendant can go down there and say, "Judge, you know, I want more hands-on management of this case." So I don't think we're really changing that to raise some hoary

specter of defendants wanting to ratchet it up to a level three. The concept is --

MR. PERDUE: I wasn't describing it that way.

HONORABLE TRACY CHRISTOPHER: The concept -- I mean, it's kind of funny to me because I have been to so many conferences where lawyers have gotten up and said, "You state court judges are not managing your cases well, and, you know, you need to do a meet and confer, you need to get involved, you need to be helping us with this discovery because things" -- "you need to be more like the Federal courts, because things have run amok in the state court," and now I'm hearing this. So we wrote a rule to address that, and now everyone here is like "Oh, we don't want to do that."

PROFESSOR DORSANEO: You're talking to the wrong people.

HONORABLE TRACY CHRISTOPHER: So I'm feeling very conflicted.

CHAIRMAN BABCOCK: Bill, then Pete.

PROFESSOR DORSANEO: Well, you know, in terms of level three was always thought of as this is what Steve Susman talked about where you would make an agreement about stuff, and that's a whole lot better than establishing a requirement for a discovery control plan

like the Federal model. Now, this is -- this level, new level three is the Federal model, is really what it is. Okay. And that's very different from, okay, level three is available if we want to customize things and if that's possible to do given the nature of the case, the nature of the adversary, et cetera, et cetera. Fine with that, but, you know, one of the things that happens, if you have to do all of this stuff it might be a waste of time, especially -- frequently would be a waste of time, and it will be pretty -- it will be early. It will be the Federal timing. "The judge must issue the order as soon as practicable but in any event within the earlier of 120 days after any defendant has been served with a petition or 90 days after any defendant has appeared."

HONORABLE TRACY CHRISTOPHER: That's optional. The subcommittee didn't actually recommend that timing, right?

PROFESSOR DORSANEO: Well, that's -- that may not be too soon everywhere, but a lot of places that's going to be too soon to do all of this stuff, and I thought a lot of the Federal management stuff was in Justice Burger's idea that lawyers don't know how to handle their cases so we need to give them -- we need to have them paint by the numbers. Okay. And I don't think that's -- I think there's some truth to that, but I never

thought there was as much truth as Justice Burger, Chief Justice Burger, apparently thought.

I'm not afraid of current level three. I don't like the idea of being forced into level three. I'm an appellate lawyer, so nobody will ever force me into level three. It's not going to happen, but --

CHAIRMAN BABCOCK: We're thinking about doing that for appeals.

PROFESSOR DORSANEO: I don't like the idea of anybody being forced into doing a lot of work early that may turn out to be unnecessary and that will only benefit, you know -- I guess I'm not as afraid of defense lawyers as I am afraid of the system as a whole providing this as an acceptable option.

CHAIRMAN BABCOCK: Scary. Pete.

MR. SCHENKKAN: I want to -- a reality check here. It seems to me, am I right -- I need to make it a question. Is it the case that the principal difference between existing Rule 190.4, discovery control plan by order of level three, and the one we're looking at is that the one we're looking at says you've got to deliver the plan within 14 days of the conference, and the plan does not have to be agreed in the sense that most of us when we first saw the word thought it meant, but has to be agreed to the following extent: You either agree on the items

that are supposed to be addressed or for each item on which you do not agree you state each party's position, and then you go to a scheduling conference, and the judge tells you what the schedule is. Is that all we're talking about?

It seems to me that's a good idea. If you have a case where the lawyers on both sides are getting it worked out already, that will not change, but if you have a case where that is not happening, this will not -- is not a silver bullet. It won't solve all the problems, but it has these advantages. You're going to have to have -- for the cases that don't apply to either Richard or me, but you're going to have to have an assigned judge, and the assigned judge is going to be presented early on with the opposing side's views not only of what they agreed to about how this case is going to be handled but what they don't, and the judge is going to have a chance to say at that point how she wants to run her case, and it won't cover everything, and some of it may change later, but she will start out knowing more about where we were the first time somebody comes in with a motion to compel or to quash or something, and, you know, I just do not see how that can add to the cost of the system. I think the odds are it will contribute modestly to the reduction of the costs of the system and modestly to the reduction in the

gamesmanship that we were talking about in the Federal model.

MR. MEADOWS: By the way, our ambitions were fairly modest.

CHAIRMAN BABCOCK: Judge Estevez, and then Robert.

MR. SCHENKKAN: I'm not complaining when I say that.

HONORABLE ANA ESTEVEZ: I suppose I'm feeling a little defensive just because I guess working on the subcommittee and trying to figure out what we thought we should recommend; and for anyone that doesn't know where it is, on page two of the matched comparison, which is now the current (O) tab, it will show you what the Federal Rule 26(f) states. So that will give you an idea of why we were even talking about it, because we were -- we felt we were mandated to look at everything that's different from the Federal rules to what's different from Texas and Federal rules and then decide is this going to be cost effective, is this going to be hurtful for litigants, helpful for litigants, or cost neutral, and what recommendations we should give; and when we voted on this we thought that it would be cost prohibitive for level one, cost prohibitive for level two; and the way we were looking at what level three would be as we've changed

it, it would become a reason why people would want level three, so it would be cost saving for level three because the people that are going into level three want more discovery, want more court intervention, and are actually asking for expense.

I mean, if you want to -- if you want to save money and you want to go to the place with the sale rack then you're going to go level two or level one. If you want to pay wholesale then you're going to level three, and the way everything has been set you can do everything you need to do in level two. You really can. There's nothing you can't do in level two that you can't do in level three.

CHAIRMAN BABCOCK: Okay. Robert.

MR. LEVY: I just wanted to say I agree with Pete. I think that these types of efforts will help us improve cooperation, collaboration, trying to resolve disputes, to avoid a situation where the gamesmanship can take place, and then the option is you have to kind of drag the court in in an exception case, which can be more problematic, so I think it does make sense.

CHAIRMAN BABCOCK: I'm sorry, you trailed off. You think what?

MR. LEVY: It does make sense. I'm sorry.

CHAIRMAN BABCOCK: That's okay. Professor

Hoffman.

PROFESSOR HOFFMAN: And so I just wanted to add just a little more perspective that I think that this is -- it should be seen for it's a very good effort that's also very progressive. In fact, I'm not aware of any state -- and it's not true in the Federal system where this would happen, and to be precise, what's happening is for the vast majority of cases we're letting them self-control, which they do. There's very little discovery that happens in the vast majority of cases, and so those will be level one or level two cases. What we're doing is we're creating a special category for the cases, as Judge Estevez says, that needs the extra help, that as Robert's talking about the cases -- and Pete's talking about, the cases where we need more intervention.

The judges -- the lawyers have been telling judges to get more involved, and so this is really -- Texas would be way out ahead of any other jurisdiction that I'm aware of and absolutely out ahead of the Federal system where that giant five-dollar word, trans-substantivety applies. They have a one size fits all for everything, and that turns out to be a big problem. So this is -- this is a remarkable change if we do it well in terms of making these transitions.

CHAIRMAN BABCOCK: What does

trans-substantivety mean?

HONORABLE STEPHEN YELENOSKY: It's a religious term.

MR. ORSINGER: It actually becomes the flesh of living god.

CHAIRMAN BABCOCK: She can't take this down. Somebody knows what that means.

PROFESSOR HOFFMAN: It's like *Cat on a Hot Tin Roof* where mendacity is one of those five-dollar words.

MR. LEVY: The challenge in the Federal rules has been the thing that they did not want to make rules different for the different types of cases.

PROFESSOR HOFFMAN: Right.

MR. LEVY: So what we're doing and what has been done for many years is that we do split up the case depending on the size, so we have made that decision already, and this is further drawing on it.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I want to further support that. There's one other rule change we haven't gotten to yet, I think, that I think goes with this discovery control plan or scheduling order requirement that together make it promising to be an appreciable step in the right direction, and that is the requirement of proportionality

in the discovery. There are two different kinds of parties to these lawsuits who can be abused without the judge managing this issue effectively. I will indulge in a few clichés here just to save us time. The giant corporation is stonewalling the plaintiffs.

MR. LEVY: Never happens.

MR. SCHENKKAN: Never happens. The plaintiff, let's say class action plaintiff, is burying the defendants in extraordinarily expensive discovery to force a settlement. Does that ever happen? Don't answer that question. A person in either -- thinks he's in either category, if you combine the proportionality rule, which judges will have to get themselves acquainted with and get in the practice of enforcing, and this early plan, "We agree on these things and here are the ones we don't agree on," the judge gets a proportionality ruling chance early on. That doesn't guarantee that the thing won't go wildly off the tracks and lots of money will be wasted, but it improves the odds.

MR. MEADOWS: So we've jumped ahead, but maybe this discussion is probably happening at the right time and in an important way as opposed to just going piecemeal, but obviously Pete has introduced on top of mandatory disclosures, meet and confers, one of the more topics that will call for a lively discussion. That's the

proportionality question in the Federal rules, and I just want to say because I think we on our subcommittee agree that it could be a meaningful change, we did something different in our rules. I think in -- and Kayla can correct me, but in the Federal rules the whole concept of proportionality is introduced in terms of scope of discovery. We had proportionality there, but we do not discuss the factors, the considerations that are necessary to apply it until we get to limitations of discovery; and our belief is that it's more appropriate there because it more aptly places the burden on the person -- demonstrating proportionality on the party resisting discovery; and in our view that was where the burden should go as opposed to the party claiming discovery, requesting discovery, relying on a proportionality analysis to get it. We thought it was better in the limitations on discovery. So, again, we can talk about the particulars around it, but I just wanted to enter it because proportionality had gotten on the table. I wanted this committee to know that we did not accept the application of it that's in the Federal rules.

CHAIRMAN BABCOCK: Okay. Jim.

MR. PERDUE: Without getting to proportionality, but the fact that -- but the fact that it got put in in this conversation on level three, and the

last conversation we had about level three recognized that a single party has the ability to essentially invoke it, regardless of the amount in controversy under the way this is defined. With all due respect to my friend Hayes Fuller, I'd be curious how the defense bar views the opportunity to enforce a -- a control plan in kind of a traditional divorce case, contract case with $300,000 in controversy, construction case, where there is a -- there is an unavoidable incentive in the way these rules are written for one party or the other to invoke that unilaterally regardless of the amount in controversy so that they can get the issues of discovery and all of these other things that are now defined in here tapered.

The concept, Lonny, I don't think is self-regulating. I don't think the way this is written does provide for what you recognize, which is everybody is going to be a level two, because that's not the way it's written right now. It provides very easily access -- and the last point, and I can't comment on this, we've got former trial judges who are responsible for the committee, one and then one here, but this will be a lot of district court involvement early, and I think a vast more -- a vast majority more cases are going to see that now. We're going to have a lot more trial judges called upon to get involved. Maybe that's the goal, but I fear the way

you've written it you've incentivized the idea of one side invoking it more easily than you may realize regardless of the amount in controversy.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: We -- because it's been said a couple of times I think there might be some confusion about how one gets into level three. First of all, we haven't made any changes from the existing discovery rules about how one gets into level three. They are the same as they were -- they're the same as they are right now, which is that a party can move to have a case be considered a level three case, but they cannot unilaterally invoke it.

HONORABLE STEPHEN YELENOSKY: That's not the current rule.

HONORABLE JANE BLAND: They actually have to get a court order, and then the second thing is the judge can order it.

HONORABLE STEPHEN YELENOSKY: But the rule requires the judge to issue a level three.

HONORABLE JANE BLAND: Right.

HONORABLE STEPHEN YELENOSKY: And your rule without the judge's involvement requires the conferencing, and how can the judge stop it based on how this is written?

HONORABLE JANE BLAND: If someone has pled level three and requested that the case be considered a level three case, just that part of the rule didn't change. That part of the rule says -- so, yeah, I mean, maybe there's some fault on our language because we're not trying to allow any unilateral --

HONORABLE STEPHEN YELENOSKY: Conference is not within the judge's purview. It just says they must.

HONORABLE JANE BLAND: Right. Right, but if you start at the very beginning of the rule, "Discovery control plan by order of level three."

HONORABLE STEPHEN YELENOSKY: Yeah.

HONORABLE BRETT BUSBY: "The court must."

HONORABLE STEPHEN YELENOSKY: "The court must."

MR. ORSINGER: There's no discretion.

HONORABLE STEPHEN YELENOSKY: So if it becomes a level three, therefore, it's conferencing --

HONORABLE JANE BLAND: I see what you're saying.

MR. ORSINGER: Absolutely.

HONORABLE STEPHEN YELENOSKY: -- and if it -- the judge can always make a level three under the current rule look exactly like a level two because there's no definition for a level three, and if a car wreck case

comes in and they say, "I want a level three," and it's a small car wreck case, "Here's your level three. It looks exactly like a level two," and I can do that under the current rule. Under this rule I could still do that, but you would have to do all of the conferencing.

HONORABLE JANE BLAND: Right, because I think the idea is that -- and I'm wrong, I'm sorry.

MR. ORSINGER: You're never wrong.

HONORABLE JANE BLAND: No, I'm always wrong, and -- not always wrong, but sometimes wrong. I'm wrong in this case, but I think the idea is the judge has to issue the order, so it's not going to be a unilateral -- even if the party invokes level three then the judge issues the order. So this idea that the one party is going to drive what the -- and I guess your concern is that you don't want the judge to have to --

HONORABLE STEPHEN YELENOSKY: Well, it's not written that way. (C) is conference, and it's directed to the parties, right? And it says what the parties are to do, and they're supposed to do it without a court order or when the court orders it. So (c) is sort of self-actualizing, and all it needs is a level three label, and it gets a level three label by unilateral request. You want a level three, it's a level three, whatever the contents are. Therefore, you are directed under (c) to do

your conferencing.

HONORABLE TRACY CHRISTOPHER: The plaintiff pleads a level three. If the plaintiff doesn't -- so the plaintiff is the one who wants it to begin with. If the plaintiff doesn't plead a level three, somebody has to move to make it a level three.

HONORABLE STEPHEN YELENOSKY: Right. So he can, and the judge has --

HONORABLE TRACY CHRISTOPHER: So when the plaintiff pleads it, you go straight into the meet and confer. Do people object to that?

PROFESSOR CARLSON: Yeah.

HONORABLE STEPHEN YELENOSKY: Well, what they object to is that it may not merit the conferencing, and one party, if you're saying the plaintiff, can require the conferencing, and the judge can't stop it.

HONORABLE TRACY CHRISTOPHER: You know, it seemed to me that people are worried about the defendant trying to make it something --

HONORABLE STEPHEN YELENOSKY: Well, whatever. One party can unilaterally force conferencing in any case.

HONORABLE TRACY CHRISTOPHER: No, if the plaintiff pleads three, it goes to level three. If the plaintiff doesn't plead three, there has to be a motion to

make it three.

HONORABLE STEPHEN YELENOSKY: Yeah, but the motion, it says I must enter a level three if there's a motion. I must.

MR. DAWSON: The judge decides --

HONORABLE STEPHEN YELENOSKY: No.

MR. DAWSON: -- whether it's three or not.

HONORABLE STEPHEN YELENOSKY: No, I don't decide. It says "must."

HONORABLE KENT SULLIVAN: Can this be solved --

MR. MEADOWS: That is the --

THE REPORTER: Wait. I can't get all of this.

CHAIRMAN BABCOCK: One at a time, guys. One at a time.

MR. MEADOWS: We're going to identify things like this. I mean, that's the current rule. We didn't touch it. We didn't think about how the current language read. Maybe we want to have the judge make a determination.

HONORABLE STEPHEN YELENOSKY: Well, then it needs to read differently. Right now the current rule works this way. Judges sometimes don't like -- don't think a case needs a tailored scheduling order, but we

have to give them a level three. It doesn't say what a level three's contents are. I can make a level three exactly a level two. I just cross out "level two" and I put "level three" at the top, but under your rule that doesn't get rid of the conferencing.

CHAIRMAN BABCOCK: Bobby, do you feel under attack?

MR. MEADOWS: No.

CHAIRMAN BABCOCK: Okay, good.

MR. MEADOWS: I feel this is a normal day for me, but --

CHAIRMAN BABCOCK: We've got Kennon and then Lisa and then Martha. This will be our rules attorney segment of our program.

MS. WOOTEN: Well, I think under the existing structure just because you plead level three doesn't mean you're in level three. You have to go get the order from the court. The order comes -- the judge has no discretion --

HONORABLE STEPHEN YELENOSKY: Well, I --

MS. WOOTEN: -- about if there's been a request to level three then the judge has to put it in level three, but you don't get level three just because it's in your pleading.

HONORABLE STEPHEN YELENOSKY: Yeah, but the

important point is you get level three for the asking and neither the judge nor the opposing party can deny you a level three the way this is written, and once you're a level three, whatever the other content of level three, it invokes section (c).

MS. WOOTEN: Right. But I think the way it would work --

CHAIRMAN BABCOCK: Quiet, quiet, quiet.

MS. WOOTEN: -- under the proposed rule would be the same as the existing rule, right, that just because you plead it doesn't mean you get it. Now, I understand if you're going to go to court you're going to get it, but you can't just have it because you said you wanted it. So you're not going to be in this level three procedure simply because you pled for level three, right?

MR. MEADOWS: Well, the way I understood Tracy to discuss it is the way I see it. The plaintiff gets to pick the level he wants to be in. I suppose we could create the opportunity to object to that and leave it to the judge, but typically if the plaintiff wants to be in level three, the case is going to be in level three.

CHAIRMAN BABCOCK: We're still on our law clerk segment. Lisa.

MS. HOBBS: Well, I mean, this is the issue I raised at the very beginning because the way I see it is

plaintiff pleads level three, and immediately the meet and confer starts, even though you haven't gotten a judge to give you an order that says you're actually level three under the -- and I don't know if that's your intent or not your intent, but that's how I'm reading the rule right now, which is different than today's, the way we get into level three today. So it is a change in level three as it's currently written, whether that's what y'all intended or not.

CHAIRMAN BABCOCK: Okay. Martha.

MS. NEWTON: I think we should take our afternoon break.

(Recess from 3:29 p.m. to 3:51 p.m.)

CHAIRMAN BABCOCK: All right. When Martha summarily dismissed us for our afternoon break there was some hands up. Justice Busby you had one of them.

HONORABLE BRETT BUSBY: No, that's okay. Pass.

CHAIRMAN BABCOCK: You pass, but Orsinger.

MR. ORSINGER: Yeah, I think over the break we've worked out a compromise on this corner that we're satisfied with.

HONORABLE STEPHEN YELENOSKY: He's just going to write it up.

CHAIRMAN BABCOCK: What about the west

corner over there? Are they satisfied with it?

MR. ORSINGER: And I won't change mine on the fly either. The suggestion is that instead of allowing either party to force the case into level three, that it should require a motion, and the court must order it or it doesn't happen, and then that means that it won't happen unless the judge, first of all, knows it's going to happen and buys into the close control. If the parties agree, that's fine, they'll cooperate; and if one side is uncooperative, the court can order it and then they'll be under level three and then you can put all of the meet and greets and everything under level three if you want to because at that point they've either agreed to operate by those rules or the judge has said you will operate by those rules; and if that's possible, then I'm much less concerned about level three, because nobody can put me there over my objection except the judge; and I have a chance to avoid going into level three; but as long as the plaintiff can plead you into level three or the defendant can file a motion that the court must grant, then all of the sudden we all have a stake in level three, even if we shouldn't; and so I think that greatly simplifies it.

HONORABLE STEPHEN YELENOSKY: Well, I have a dissenting opinion since talking to Tracy.

MR. ORSINGER: Oh, we are going to change

this on the fly.

HONORABLE STEPHEN YELENOSKY: Tracy's concerned about the trial judges not doing what they should do and that they would be required to do it, so the order -- I mean, you could break it out to it doesn't happen unless you move for it and get an order and leave in "but the judge must order it," which is how it reads now.

HONORABLE TRACY CHRISTOPHER: Actually, what I thought we had agreed to was --

CHAIRMAN BABCOCK: Whoops.

HONORABLE STEPHEN YELENOSKY: I haven't agreed to anything.

MR. ORSINGER: This is why Rule 11 requires the agreements to be in writing.

HONORABLE TRACY CHRISTOPHER: That the plaintiff could plead to level three, but the defendant could object; and if there was no objection then you go straight into the meet and confer; and if there's an objection then you get an order from the judge one way or the other, should this be a level three or should it go back to level two as a compromise.

MS. GREER: And then if the defendant wanted it to go to level three but the plaintiff didn't plead it wouldn't that also --

HONORABLE TRACY CHRISTOPHER: Same thing, they could file a motion to put it in level three.

CHAIRMAN BABCOCK: Okay. Judge Estevez, then Carl.

HONORABLE ANA ESTEVEZ: I just wanted to know why it's so bad to be forced into level three. You know, if there's one party that really wants to talk and confer, then that's -- we're halfway there, so --

CHAIRMAN BABCOCK: This is true.

HONORABLE ANA ESTEVEZ: Which is a lot farther -- you know, if neither of them want to be there then there's never an issue. I mean, don't talk to them, but if one side really wants to confer, why is that an unnecessary expense? I mean, usually if someone requests mediation, one side, I order the mediation, period, and then there's going to be an objection and then I'll have a hearing why it would be absolutely a waste under the Texas Civil Practice and Remedies Code. I don't see this as so burdensome and so expensive. This conference could take less than an hour, or it could take months if you're on it, apparently.

CHAIRMAN BABCOCK: Yeah, if I'm involved it's several months.

HONORABLE ANA ESTEVEZ: If you're involved, but I would just like to know from the ones that are

really objecting to this why is it? Is it just the concept of having to talk to someone about this, or is it really that you're concerned that you won't get a work -- you won't get an end result? You won't get the product after talking, because you can say that, too.

MR. ORSINGER: Well, I thought if you went under schedule three that you have to make up your own deadlines, none of the schedule two deadlines apply by default and you've got to go from scratch.

MR. HAMILTON: That's right.

HONORABLE ANA ESTEVEZ: Well, you do, but the judge can put them all in, too.

CHAIRMAN BABCOCK: Carl, then Elaine.

MR. HAMILTON: We had the same discussion when we enacted these rules, and the concept then was that most lawyers don't want limits on discovery. Sometimes it's okay; and so that's why the level two was by default, which in effect means that both lawyers are agreeing to do level two; but if any lawyer wanted level three, the judge had to grant that, because many lawyers thought they shouldn't be restricted in the discovery. So we had this same discussion before, and it was decided that that was the best way to go rather than force lawyers into a level two where some of them didn't want to be.

CHAIRMAN BABCOCK: Yep. Elaine.

PROFESSOR CARLSON: Yeah, I agree with Carl. Sometimes it's because you want more discovery than you can get in level one and level two, but you're really not wanting as much judicial involvement. If you can work out an agreed discovery control plan, then why do you have to go through all the conference things? To me there should be different types of level three, one where you have all of the conferencing if you need it, one if you don't. We want more, we recognize there are two good lawyers, it's a really complicated case, and they can agree. So let them have their agreed discovery control plan and not have the stopping of the discovery and the conferencing and everything else and have another track for those lawyers who can't agree, and you would confer and go to the trial judge and get the customized plan.

MR. MEADOWS: I thought that -- Elaine, I thought we had agreed that was now going to be something that could be accomplished in level two. We're going to make level two where the parties can agree to change those limits from 50 hours to 60 hours or whatever and essentially modify level two around a set of agreements.

PROFESSOR CARLSON: I did not understand that was the deal. I thought it was level two you could change the deadlines, but now you're saying you can change the limits.

MR. MEADOWS: You're right. We were talking about the deadlines, and I guess --

HONORABLE TRACY CHRISTOPHER: Just deadlines.

MR. MEADOWS: Just deadlines? All right. You're right. You're right.

CHAIRMAN BABCOCK: Lisa.

MS. HOBBS: So under the new level three the burden isn't just on the parties to meet and confer and whether we agree or disagree whether that's an onerous thing or not. The burden is actually on the system because the whole point of level three is to have far more judicial involvement, and so we need level three to work. Level three has to be a narrow level of cases; and so, I mean, I think Judge Christopher has come up with a great solution that if the plaintiff pleads it somebody can object to it; but any idea that if anybody pleads into level three and it's automatic that a judge has to be that involved, that's probably a problem for the system. Whether it's also a problem for the litigants or not, I mean, that's up for debate, but we've got to make sure whatever we do we somehow control what cases are really level three cases and not just let that be a default position if it's going to work.

MR. MEADOWS: So the fix that I heard at

your corner was something that was discussed at the break in this corner, and that is if you --

HONORABLE STEPHEN YELENOSKY: We shall meet and confer with you outside.

MR. MEADOWS: By the way, we didn't overhear any of your conversation.

HONORABLE STEPHEN YELENOSKY: I was talking directly to Jane and Tracy.

MR. MEADOWS: So anyone, either the plaintiff or the defendant, could object to being in level three and the court decides. That's the way it happens. That's your point, too, right? So I think that takes care of at least that fundamental issue with how level three works. If you plead it, the defendant can object, say, "I want to be in level two," the judge decides. You can go the other way as well.

HONORABLE STEPHEN YELENOSKY: And, Justice Bland, you said, I think, you were concerned about judges -- I talked to both of you, so I may have switched up who said what, but didn't you say you were concerned about judges? One of you said you were concerned about trial judges.

HONORABLE JANE BLAND: That wasn't me. I was the other. I was what you said --

MR. DAWSON: Justice Bland is never --

MR. MEADOWS: But your point is, and I think this is your point, Lisa --

HONORABLE STEPHEN YELENOSKY: Well, it's also her point.

MR. MEADOWS: -- if the judge puts you in level three, the judge must enter a discovery control plan.

MR. ORSINGER: But they're worried about the judge that refuses to do it --

HONORABLE STEPHEN YELENOSKY: That won't.

MR. ORSINGER: -- because they just don't want to be troubled by it.

HONORABLE JANE BLAND: That.

MR. ORSINGER: We're forcing bad judges --

HONORABLE ANA ESTEVEZ: I'm going to protect Dee Dee.

MS. GREER: Well, that's what mandamus is for.

MR. ORSINGER: I wish mandamus was that easy.

MR. DAWSON: It is now.

HONORABLE JANE BLAND: Well --

HONORABLE STEPHEN YELENOSKY: Justice Bland.

HONORABLE JANE BLAND: It's the Goldilocks thing. We don't want it to be too burdensome on judges,

because that's too much of a burden on the system. On the other hand, we want to encourage judges to pay attention to a case that might need a little bit more active management, right? And so this idea that the objection seems to work well for those that are concerned that this is too much work for the parties, because this does not in and of itself create more work for the judge, because the judge may choose to hold these conferences in the judge's presence, but the rule does not require that. In fact, it doesn't require lead counsel. It doesn't require a face-to-face meeting. We left it to be as expedient as the parties can make it if they chose to make it.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: If you're going to give a judge discretion to decide whether a case should be in level two or level three, what will the judge consider? What makes it appropriate for it to be in level three versus two? Because I wonder if that needs to be addressed in the rules. Right now the way it's structured you're in two by default and then you go into three by choice essentially, but if a judge is on the bench trying to make the decision because the parties can't agree, is it the cost, is it the amount of money in controversy, is it the number of parties? I mean, I just wonder if we need to spell that out in the rule.

HONORABLE STEPHEN YELENOSKY: Well --

MR. MEADOWS: Isn't it that you need more discovery than is allowed in level two?

HONORABLE TRACY CHRISTOPHER: Right.

MR. MEADOWS: Simple as that?

HONORABLE TRACY CHRISTOPHER: Simple as that.

MS. WOOTEN: Wouldn't you have to explain why you need the discovery because the judge --

HONORABLE TRACY CHRISTOPHER: Right. Right.

MS. WOOTEN: Would it be factors similar to what you have in 169 with the expedited action, like trying to decide whether it's appropriate?

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: The way this is currently drafted I don't see anything in here that covers one of the situations that Richard spoke about, which is the obstreperous lawyer who refuses to agree even though he's agreed that it's a level three case. He now either won't meet with me or meet with me meaningfully or I won't meet with him meaningfully to determine the parameters of the scheduling order, yet the rule permits discovery to begin after our conference, notwithstanding the absence of a discovery order, as I read it. I may be wrong about that.

HONORABLE TRACY CHRISTOPHER: I think we're

going to change that.

MR. MUNZINGER: Pardon me?

HONORABLE TRACY CHRISTOPHER: Someone suggested we should change that, and I think that was a good idea.

MR. MUNZINGER: The point is somehow or another people ought not to be doing discovery until you know what the parameters of the level three order are, and parties ought to be required to come to a prompt agreement that allows that, and if you don't have that in the rule, I think you've got a problem.

CHAIRMAN BABCOCK: Okay. Any other comments? We all commented out so far? All right. Bobby, is there something else we should be going to talk about?

MR. MEADOWS: What level do you want to stay at, Chip? I mean, for example, we could have a discussion around the things that you need to talk about, the things that need to be in the order; or maybe what we ought to do with our time is to go to these bigger issues of such as, you know, proportionality; but if we're just going to press on, I guess we need to know whether or not there's any objection to conference timing, if there's any objection to this -- you know, the consequences for failure to participate, what's in the discovery control

order. I mean, a lot of this stuff was in the existing rule, but some of it we've migrated from the Federal rule. I mean, we've been essentially talking about whether or not we ought to do something like this as opposed to how we propose doing it.

CHAIRMAN BABCOCK: Yeah. I think that's right, Bobby. There have been a lot of comments, and some have suggested that the Federalization of the discovery process is not a good idea, and I'm not sure how deep that sentiment runs, so probably a good thing to find out.

MR. MEADOWS: Well --

MR. HAMILTON: Take a vote.

MR. MEADOWS: Let's do it within the framework of our assignment, which was can we make our rules more efficient, more effective to reduce litigation costs and be informed by the recent amendments to the Federal rules; and so that's -- we didn't accept all of the Federal rules; and those that we did like, if we didn't like all of it, we didn't apply it. So I guess maybe it's just a fundamental question. I mean, based on what we've talked about so far are we feeling that the introduction of the Federal rules is helpful or not?

MR. LOW: Chip, one thing we need to remember, the Federal rules were done after much research, discovery, and many people put many hours in it, so it's

not bad, quote, just because it's a Federal rule, but they did spend time. I mean, it wasn't something they just drew out of the air. Now, whether they're right or wrong, it depends on which side I'm on, but we do need to remember that there's been some research put in this, much research.

CHAIRMAN BABCOCK: They're making us do interpreters, and now we're going to do our Federal discovery rules. What's the world coming to, Richard?

MR. LOW: Too much for me in one day.

MR. ORSINGER: I don't doubt that the Federal rules are extremely well thought out; but the kinds of cases that they litigate in Federal courts are different from the cases that we litigate in state court; and ever since I have been on this committee and even before I was on this committee there was a recognized difference between the way we handled procedure in Texas courts and the way the feds handled procedure in Federal court; and that's still a valid distinction; and I don't think that it's easy for us to say let's just do it the way the Federal courts do it; but those of us who don't litigate in Federal courts, if you went out there and did some research and stopped lawyers at the courthouse and said, "Do you want to stay under the rules of procedure, Texas rules, or do you want to adopt the Federal rules,"

and you just count that vote.

MR. LOW: Well, I'm not saying the cases aren't different. I'm saying for their purposes, and you can have your opinion on how different they are, and maybe I don't agree with all that, but they did do a lot of research on trying to save time and be more efficient. That was one of their goals. Now, whether they knew what they were doing, I wasn't on the committee.

MR. ORSINGER: Yeah, but, Buddy, what I'll say, my assessment of the Federal Rules of Procedure is that they're saving court time. They're not saving litigants' time, and they're not saving attorney's fees. I feel like what the Federal system has done is that they have moved off and increased the cost of pretrial preparation so that the trial time itself is -- shrinks. That's the opposite of what we do in state court. In state court we don't force lawyers to be prepared. They can come in and they can mark exhibits that they've never numbered and they can call witnesses that they haven't disclosed.

HONORABLE STEPHEN YELENOSKY: And they do.

CHAIRMAN BABCOCK: The good old days.

MR. ORSINGER: I mean, there's -- not everybody can afford to prepare a state court case to try as well as a Federal court case. Furthermore, most state

court cases are settled without trial, so the more money that we make litigants spend on getting their case ready for trial is money wasted if they settle, and so --

MR. LOW: Why do you think --

MR. ORSINGER: -- I disagree with the principle.

MR. LOW: Why do you think they settle if they don't know what they're doing? They settle because they now know where they are from discovery.

MR. ORSINGER: You know, I don't agree, Buddy --

MR. MEADOWS: But Richard --

MR. ORSINGER: -- and you know I respect everything you say.

MR. MEADOWS: Your argument is not an argument against these rules. Level one and level two do not look anything like what happens in Federal court.

MR. LOW: Yeah. That's right.

MR. MEADOWS: Nothing.

MR. ORSINGER: And that's great, and if you keep me out of level three because we can make all the amendments we want to level two and stay in level two, then I'm happy. If you guys want to go practice Federal law in state court, that's okay with me, just don't make us come with you. That's all I'm asking, and the way this

is written I have to go to -- I mean, I know you're going to change that, I think, that the judge isn't required to move it to level three if somebody objects and the judge doesn't believe it's appropriate.

CHAIRMAN BABCOCK: We're thinking about a subsection that says all of your cases go to level three. Marcy.

MS. GREER: Well, I actually -- I litigate in both Federal and state court and other state courts, and there are a lot worse options out there. I think the Federal rules, especially when you're talking about discovery, there is an advantage to doing the work up front, kind of Alistair's point. If you agree on the ground rules in advance, ESI in a case that's level three is probably coming, and to go ahead and start talking about search terms and not have that come in a reactive mode where it's always a bad situation, but to do it up front and try to put some ground rules in place does cut down on the number of discovery motions, which is really the big issue in discovery. That's where the big expense is because, one, if you can get them and have hearings you lose time focusing on that instead of just getting it done and coming together, and I think that if you have the ground rules in advance -- I've done it both ways, and it makes an enormous difference if you have agreed upon

protocols as to ESI and other forms of discovery in advance, and that's the advantage of what they're proposing with the conference here, whether the parties get together in a room with or without the judge, however it's done, coming together and having that conversation up front makes an enormous difference in the number of disputes going forward.

One other thing and, Chip, I think you had mentioned this at a prior meeting, that the Northern District of New York does this, and I think it's a great practice to consider. You can't file a discovery motion until you have a prehearing conference with the judge, and the way it works is you send a letter that's limited to, you know, a couple of pages and outline what the issue is that you're having a problem with, and the other side gets to respond. The judge gets the parties on the phone and has a conversation about it; and no ruling is made; and the judge decides do I need briefing on this, do we really need to turn it into a full blown discovery dispute, or can I give you some tentative leanings of where I'm going, and the parties work it out; and it's extremely effective. I've had that in a couple of cases now in that jurisdiction, and it's very effective.

So there -- it's not that I'm a proponent of Federal court. I like state court, too. I really do, but

there are some advantages to doing this up front in a complex case so that you can be thinking about it because what happens is people don't think about it at the beginning. Then they get halfway down the road to discovery deadline, or usually it's up on the date of the discovery deadline, and they figure out that there's a problem, and now we're in to motion practice that could have been avoided. So that's my perspective, and again, it's level three only that we're talking about, so not -- it wouldn't be appropriate for some of the smaller, less complex cases.

CHAIRMAN BABCOCK: Thanks, Marcy. Pete, you had your hand up.

MR. SCHENKKAN: Yeah, I wanted to address Richard's point again, Orsinger, that this is not an effort to say "Let's adopt the Federal rules because they're the Federal rules." This is an effort -- and ignore the differences between the systems, ignore the differences between the judges, lifetime appointments and elected terms; between the staffing, lots of briefing attorneys, most state courts none. You know, we're not saying let's do it just because the Federal rules and regardless of whether it fits.

What we're doing, and the subcommittee worked pretty hard on it, is to go line by line and say,

"Is this a good idea for our system?" To which the answer may not be "yes" or "no." It may be, "Well, if you made these three modifications it would be," and that's what we're actually looking at; and on this one, on this particular one about the conference, the only thing I see that has changed, once we're in the level three box, is you've got to deliver the agreed plan to the court within 14 days after the conference, not a terribly onerous thing justified, you know, only by the fact that the feds do it; and in what you submit you have to -- assuming you haven't actually agreed on these points, you have to have the parties' views and positions on a list of things, which the judge is free to disregard, the judge is free to pick one side or the other, the judge is free to take some from column A and some from column B, or the judge is free to say, "I need to hear more about the difference on item six, electronically stored information. It looks to me like in this case this is where this case may wind up costing three times the amount in controversy, and I think I better hear more about that before I rule on that," and I just don't see what our problem is with that.

To me, that is not going to make a lot of stuff go away, but it is going to improve the odds that some of it will get decided or agreed sooner before lots of money has been wasted doing it what turns out to be in

the wrong way in the eyes of the only neutral party, the judge.

CHAIRMAN BABCOCK: Richard, did you have your hand up? No? Justice Bland.

MR. MUNZINGER: Others have spoken to what I was going to say.

MR. MEADOWS: So there's one issue around this question around level three --

CHAIRMAN BABCOCK: Your mouth is not even moving.

MR. MEADOWS: I didn't hear it.

HONORABLE JANE BLAND: I said call the question.

MR. MEADOWS: I defer.

HONORABLE JANE BLAND: I was going to ask the Chair to call the question to see, you know, the sense of the committee in terms of this first -- this is the first place where we've had lack of consensus on a substantive point, and the question is whether or not the committee believes that we should have a meet and confer requirement in level three cases.

CHAIRMAN BABCOCK: Yeah. I think that's good. Lisa is like desperate to say something.

MS. HOBBS: Well, before we call the question I do want somebody like Richard to understand

that level two is not -- what they're proposing, I believe, is that you can modify the timing of discovery, but not the limits of discovery. So when you tell me that for your client's own property you need as many interrogatories as you need to get to the facts of those cases, level two is not going to work for you as they're proposing it right now, because they are just saying that we can agree to different deadlines, not that we can agree to different --

MR. ORSINGER: What about the request for production? The 25 interrogatories, we're doing just fine in family law practice, but a limitation on the request for production would be devastating.

MR. MEADOWS: It's not in there. We don't have one.

HONORABLE ANA ESTEVEZ: We don't have one in level two.

CHAIRMAN BABCOCK: Although some people think there should be one. Okay. Jane, you want to call the question? You want to frame the question?

HONORABLE JANE BLAND: I did.

CHAIRMAN BABCOCK: Well, do it again.

MR. ORSINGER: Would you frame it more simply so Chip can --

CHAIRMAN BABCOCK: So Richard can understand

it.

HONORABLE JANE BLAND: All of those in favor of adopting a meet and confer requirement in level three cases only, raise your hand.

CHAIRMAN BABCOCK: There we go.

MR. ORSINGER: Wait, wait, wait. Does it have to say -- I thought you said you weren't going to require a meeting. Why did you say "meet and confer"?

MR. DAWSON: That's what it's called.

MR. SCHENKKAN: Meeting, including by telephone. And y'all are going to fix that.

PROFESSOR DORSANEO: Let's not call it what it is.

HONORABLE ANA ESTEVEZ: Call it a conference.

CHAIRMAN BABCOCK: Call it a conference.

HONORABLE JANE BLAND: I told you I would screw it up. I'm not firing well today.

CHAIRMAN BABCOCK: All right. You're terrible at this. Everybody that thinks we should have a conference requirement for level three cases only, raise your hand.

MR. DAWSON: All of that, and it's overwhelming.

CHAIRMAN BABCOCK: All of those who think we

should not have a meet and confer for level three only, raise your hand.

So a near unanimous 29 to 1, Chair not voting, and what about having -- what about the issue of having a conference requirement for any case -- for any level?

MR. MEADOWS: We didn't recommend that, level two and level one.

MR. ORSINGER: No one has moved that. Why do we have to vote on it?

CHAIRMAN BABCOCK: Well, because --

HONORABLE ANA ESTEVEZ: It didn't get out of subcommittee.

CHAIRMAN BABCOCK: Because you spent an hour railing against this --

MR. DAWSON: And then voting in favor of it.

CHAIRMAN BABCOCK: -- and then voted in favor of it.

MR. ORSINGER: I'm okay if you want to do it in level three as long as you don't force people into level three.

CHAIRMAN BABCOCK: Well, fulfill your responsibility to the bar by being a voting member of this -- do you think it's a good idea for level three?

MR. ORSINGER: Yeah. I voted in favor of

it.

CHAIRMAN BABCOCK: Okay.

MR. ORSINGER: But not level two. I'm going to vote against that if we have a vote.

CHAIRMAN BABCOCK: Anybody else feel that it shouldn't be -- other than Carl, that we shouldn't have it for level three? Okay. So there you go. A resounding endorsement of the subcommittee's work.

PROFESSOR DORSANEO: As long as we don't have to be in level three.

CHAIRMAN BABCOCK: Right. All the level two people here. Judge Estevez.

HONORABLE ANA ESTEVEZ: I was going to ask if we could have a vote on mandatory disclosures, too, just whether or not we should have one, because we spent a lot of time on it, and I'm not really sure if you guys even want to do that.

MR. ORSINGER: I think we ought to discuss it.

HONORABLE ANA ESTEVEZ: Oh, we didn't really discuss it. Okay. Well, I thought we had.

CHAIRMAN BABCOCK: Yeah, we're into discussion. We're into the talking among ourselves.

MS. GREER: And to clarify, mandatory disclosures for level three only.

PROFESSOR CARLSON: No. We're skipping way ahead to page 27.

MR. MEADOWS: We are recommending mandatory disclosures, initial and pretrial, in all cases.

MR. SCHENKKAN: And what I wanted to ask is we have very little time left this afternoon, and some of us are not going to be able to be here, much as I would like to be, and just the question whether -- the subcommittee would know more about this I expect than anybody. Is that the best use of our remaining, let's say, hour today. Maybe it is, but is that the hottest, hardest issue left?

MR. MEADOWS: I think proportionality is the hotter issue.

MR. SCHENKKAN: That would be my vote.

CHAIRMAN BABCOCK: Yeah. Here's my plan, Pete. I thought we would spend some more time on discovery tomorrow, and I know that not only you but maybe some others won't be here, but I was planning on bringing this back in November, too.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: I have a question about the discovery control order where time to issue, the judge must issue it within the earlier of --

HONORABLE TRACY CHRISTOPHER: That was just a suggestion. It's not the committee's recommendation.

HONORABLE R. H. WALLACE: All right. Because the judge doesn't know when those things happen for the most part.

HONORABLE TRACY CHRISTOPHER: Right.

HONORABLE R. H. WALLACE: So I would say peg it to when they file their discovery control plan.

HONORABLE TRACY CHRISTOPHER: I think that snuck in somehow.

HONORABLE TRACY CHRISTOPHER: That was Harvey. Harvey snuck that in. We didn't like it.

CHAIRMAN BABCOCK: We good?

MR. PERDUE: So the bracket around (e) represents that that's not the recommendation of the subcommittee, it's just language. Because I'm really confused by this last sentence in (e)(3).

HONORABLE TRACY CHRISTOPHER: Just forget about (e).

MR. MEADOWS: Consider it a thought piece.

MR. PERDUE: All right.

HONORABLE JANE BLAND: So --

HONORABLE TRACY CHRISTOPHER: We were still making changes at the last minute.

CHAIRMAN BABCOCK: Justice Bland.

HONORABLE JANE BLAND: Well, that piece is a suggestion by Judge Brown, who couldn't be here today.

MR. MEADOWS: And no one else is going to defend it.

HONORABLE JANE BLAND: No one else had taken a look at that, but there was a little bit of the battle of the forms going on toward the end.

CHAIRMAN BABCOCK: Okay. Well, we've gotten through the conference. Do we need to talk about the discovery control plan? Is that the next logical thing, subparagraph (d), (d) as in dog?

MR. MEADOWS: The items? Yeah.

CHAIRMAN BABCOCK: Yeah.

MR. MEADOWS: We haven't talked about the items themselves. We certainly can.

CHAIRMAN BABCOCK: I mean just chronologically that's the next thing.

MR. MEADOWS: Well, we would recommend them all.

CHAIRMAN BABCOCK: Okay. You're one for one so far, but Orsinger is lurking.

MR. ORSINGER: Why did you strike subdivision (3)? Is it subsumed in one of the new ones you wrote, or do you not want limits on discovery? If I'm reading the right page of discovery control plan,

paragraph (3) was stricken.

HONORABLE ANA ESTEVEZ: If you look at page six.

CHAIRMAN BABCOCK: You're on the right page.

MR. MEADOWS: Look at (d)(8).

MR. ORSINGER: It's folded into one of the new ones?

MR. MEADOWS: We believe so.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Duplicative of 190.4(d)(8).

MR. ORSINGER: Okay. Thank you.

CHAIRMAN BABCOCK: Okay. Any other comments about this, the discovery control plan, (1) through (9)?

MS. WOOTEN: Just a question.

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: Just a question. On (7) it refers to "issues about claims of privilege or protection of trial preparation materials." It seems a little premature. I know it's coming over from the Federal rules, but I'm wondering whether that's a topic that should be required for the plan.

MR. MEADOWS: So is it your --

HONORABLE TRACY CHRISTOPHER: If it's premature can't you just say, "None known at this time."

HONORABLE ANA ESTEVEZ: Yeah, and supplement it.

MS. WOOTEN: You could. I just don't --

MR. MEADOWS: Do you think it would never be useful to talk about it?

MS. WOOTEN: Well, I guess there may be some times when it is useful. I'm just thinking trying to make it to reduce the cumbersome nature of it, because if it's here you have to at least cover it, right, and so it just struck me as an item that probably isn't going to be one you're talking about at that juncture, although I guess if you have required disclosure of documents it could come up.

MR. DAWSON: What was the thinking behind --

CHAIRMAN BABCOCK: Judge Wallace.

HONORABLE R. H. WALLACE: You know, I'm looking at this quickly. If you look ahead to the discovery control order, it says that "The order must include the date set out in Rule 190.4" whatever, and "may address" issues concerning the rest of the stuff. So I'm wondering would you want -- in your discovery control plan would you want to say the discovery control plan "must" state the parties' views and proposals on, say, (1) through (3) and then the parties "may" address in their discovery control plan the following items? See what I'm

saying? Because these are the things that --

MR. MEADOWS: Yeah.

HONORABLE R. H. WALLACE: -- might be hard for them to sit down and agree on, whatever, but that -- that way at the minimum they've got to come up with dates.

MR. MEADOWS: Right.

HONORABLE R. H. WALLACE: Okay. That's the thought to making it --

MR. MEADOWS: Okay. I think that's a good suggestion. I mean, I haven't --

CHAIRMAN BABCOCK: Richard Munzinger, and then Kennon.

MR. MUNZINGER: Most discovery control orders that I've seen address -- and that I have been involved with address the question of designation of experts, service of expert reports, completion of expert discovery, timing of expert discovery, dispositive motions, et cetera. None of that is in the committee's work, and I was just curious why? I know that it's subsumed within some of the general subject matters, but why would these items, which are generally such matters of importance to the trial lawyers involved in the case in getting ready for trial, not included in this rule?

MR. MEADOWS: I guess that's a good question.

MR. ORSINGER: I think they're in the mandatory disclosure section. If you look at the mandatory disclosure section, which has its own deadlines and applies to (2) and (3), I think your expert discovery is over there in the mandatory disclosure, so you don't need to have all of this chitchat.

MR. MUNZINGER: What page are you on?

MR. ORSINGER: I can't remember. I'm sorry.

PROFESSOR CARLSON: 27.

MR. ORSINGER: If you can find the mandatory disclosure, that's where -- look at the bottom of page 26.

PROFESSOR CARLSON: 26, 27 under (b).

CHAIRMAN BABCOCK: Kennon.

MS. WOOTEN: My suggestion to take or leave would be to not let the parties get out of the mandatory -- existing mandatory disclosures under the RFP procedure, because I think that's handy to not have to get into a dispute about whether 194.2 disclosures are required, and under the way this rule is written it suggests that you can change the form for requirement for disclosure, and it strikes me that there might be some aspects of disclosure under Rule 194.2 or now 194 that you don't want the parties to have to talk about and have an out on.

MR. MEADOWS: I'm not quite sure I'm

following you, Kennon.

MS. WOOTEN: So in (d)(4) on page six --

MR. MEADOWS: (d)(4), page six.

MS. WOOTEN: Discovery control plan has to address changes that should be made in the timing, form, or requirement for disclosures under Rule 194.

MR. MEADOWS: Yeah.

MS. WOOTEN: So on its face that suggests --

MR. MEADOWS: Right.

MS. WOOTEN: -- that the parties can modify the mandatory disclosure positions, and it seems like that would be good for some things definitely, but for other things, not so much.

MR. MEADOWS: How about just we change it to just timing? You could just -- we don't think -- I don't think they should be modifying what's compelled for mandatory disclosure, but maybe the timing could be discussed.

MS. HOBBS: Well, the form is okay to change, too. It's the requirement --

MS. WOOTEN: Right.

MS. HOBBS: -- that's the problem.

MR. MEADOWS: Okay. So just leave timing and form?

MS. WOOTEN: Uh-huh.

HONORABLE TRACY CHRISTOPHER: And add dispositive motion to this.

MR. MEADOWS: This is very early in the work here.

CHAIRMAN BABCOCK: Richard. Throw some bombs on this.

MR. ORSINGER: No, I'm liking -- I mean, I'm trying to help here, looking for -- I was looking for where the expert disclosure is, and it's on page 29. It says that "A party must disclose expert information as provided in Rule 195," but I don't have a Rule 195. I go from Rule 194 to Rule 205.

MR. MEADOWS: Keep going.

MR. ORSINGER: So it's behind Rule 205?

MR. MEADOWS: Yes. It's after that in the materials.

HONORABLE TRACY CHRISTOPHER: Page 33.

MR. ORSINGER: Okay. I'll go study that. Thank you.

MR. MEADOWS: So you haven't read the complete materials I see.

MR. ORSINGER: It was very confusing, Bobby. It really was.

MR. MEADOWS: Well, the pages are numbered.

MR. ORSINGER: Well, except Rule 195 is

after Rule 201, so I didn't look for it back there.

MR. MEADOWS: They were actually -- these rules were sort of compartmentalized among the committee members who had responsibility for them.

MR. ORSINGER: Oh, that's a good organizing principle.

MR. SCHENKKAN: There is a table of contents on the beginning that has as item number two, Rule 195, page 33.

MR. MEADOWS: I tell you one thing that might be useful to discuss, and I think -- I mean, I don't know, are we still going item by item here?

CHAIRMAN BABCOCK: Yeah. Go ahead.

MR. MEADOWS: I'm just waiting for comments.

CHAIRMAN BABCOCK: Oh, okay. So what are they commenting on?

MR. PERDUE: (d), whether the list looks okay.

CHAIRMAN BABCOCK: Okay. (d) as in dog. There are nine items. Anybody have any other comments? Judge Wallace.

HONORABLE R. H. WALLACE: Well, you've got number (9) is almost a catch-all, but you could make a real catch-all of any other matters the parties wish the court to consider or rule on. That would include

deadlines, any designations, you can always go in.

MR. MEADOWS: Okay.

HONORABLE R. H. WALLACE: That way they can put in all their deadlines they want.

CHAIRMAN BABCOCK: Okay. Nothing more on (d)? Alistair, were you pointing at me or --

MR. DAWSON: No, no, no.

CHAIRMAN BABCOCK: Okay. Nothing more on (d). (e) is an alternative that somebody wanted us to talk about --

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: -- or we scratched that?

HONORABLE TRACY CHRISTOPHER: Scratch.

HONORABLE JANE BLAND: Scratch it.

CHAIRMAN BABCOCK: Scratch it. You know, in the Federal system there are discovery control orders.

MR. MEADOWS: Yeah, and that was the thought behind I think the person who suggested this one, this --

HONORABLE TRACY CHRISTOPHER: I think we need to work a little on this, but I don't like (e). We've asked -- we say in 190.4(a) that the parties must submit an agreed discovery control order and then we turned it into a discovery control plan, so we need to just kind of work on that --

CHAIRMAN BABCOCK: Okay.

HONORABLE TRACY CHRISTOPHER: -- in terms of timing and whether there should be something different in the order from the plan.

CHAIRMAN BABCOCK: Okay. Gotcha.

HONORABLE TRACY CHRISTOPHER: It still needs a little more work.

CHAIRMAN BABCOCK: And I see that (f) is bracketed, too. Is that something that we should defer to a later discussion or not?

MR. MEADOWS: I think it's worth getting a reaction to. I don't think necessarily it's -- you know, should there be consequences for failure to participate. If we're going -- maybe not, if we're just going to allow parties to submit where they stand and offer their views on things, but --

CHAIRMAN BABCOCK: Well, this is something that would normally provoke Richard Munzinger's ire, so --

MR. MEADOWS: This is definitely modeled after Federal Rule 37.

MR. MUNZINGER: Well, my experience is the same as Richard Orsinger. There are a lot of people that don't respond.

CHAIRMAN BABCOCK: Right.

MR. MUNZINGER: They get away with not responding because the judges are busy or they're elected

judges or what have you, and I don't think that you can have a rule that lets people say you're supposed to meet, but if you don't there's no sanction for it, because it's far too frequent that there are people who simply tell you to go fly a kite.

CHAIRMAN BABCOCK: Yeah. Yeah, Justice Bland.

HONORABLE JANE BLAND: The reason this was bracketed and we shouldn't consider it now is because we have our catch-all Rule 215 for violation of the discovery rules.

CHAIRMAN BABCOCK: All right.

HONORABLE JANE BLAND: And our view is that rather than having seriatim sanction provisions that we just discuss those in connection with Rule 215.

HONORABLE TRACY CHRISTOPHER: Yeah, the Federal rules kept repeating sanctions, and we have them all in one spot.

CHAIRMAN BABCOCK: Got it. Yeah, Richard.

MR. ORSINGER: I like the use of the word "proposed discovery control plan" because that's sensible to me, and I would suggest that you use it back on (d), because I got confused. I thought the discovery control plan was what the judge signed, but now I see that it's just a proposal that the parties are making and the judge

is going to sign something different called an order.

HONORABLE TRACY CHRISTOPHER: Right, I think we need to fix that.

MR. ORSINGER: This is like the Federal practice where you have to sit down basically and have an agreed order and then you have scheduled out what your disputes are, and the plaintiff's position is on Exhibit A and defendant's position on Exhibit B, and then you just like submit it all in writing. Is that what you're driving at here? Okay. Well, I'm not going to repeat what I've said before, and I know you're grateful for that, but trying to get state court litigants and lawyers to put their entire case and their thoughts about their case down on paper in an organized way so that you can just look at Schedule A and Schedule B in chambers and rule, that's not the way state courts work.

That's the way Federal courts work, and they can compare Schedule A and B and say, well, you know, they agree here on this and this and this, and they don't agree on that, and they just issue a ruling, and then it gets mailed out; but in state court we show up and we have a free for all, and we walk out of there with a ruling and then we fight over how we type it up into the order; and it is pandemonium, and it is disorganized, and it's messy; but you know what, it doesn't require a lot of effort to

sit down with somebody for hours and send drafts back and forth of what the agreed proposed scheduling order is going to be like if you disagree on a lot; but as long as the only people that are having to do it are the people that want to do it, you know, they have my blessing.

HONORABLE TRACY CHRISTOPHER: I agree with you we need a little work on that, because if they're going to submit something that is not agreed the judge isn't going to sign it generally in state court, so generally it would have to be brought to the judge's attention via motion that something needs to be ruled upon, so --

MR. ORSINGER: You know --

HONORABLE TRACY CHRISTOPHER: -- I think it needs some work.

MR. ORSINGER: It's way too late in the game to make a suggestion like this, but what's wrong with just saying, look, level two is the pattern that everybody should go by unless you're exceptional. If you're exceptional, you can go to the court and say, "I need an exemption to level two deadlines or limits and this is the reason why. I want more interrogatories," or somebody else wants more request for production or somebody else wants less or more deposition time. Instead of just saying we're going to have this category of litigants that

have no rules, go work it out, and what you can't work out submit something in writing and then have a hearing in front of the judge. What if we just -- the whole approach is level two deadlines and limits are what everybody has got unless you can get an exception and the judge gives it to you. That's a different paradigm, but that's more realistic I think for the state practice.

CHAIRMAN BABCOCK: Okay. Bobby, the next redline I see is on 191.1.

MR. MEADOWS: Right. There is a suggestion on 190.5, modification of discovery control plan. The language that you see on the page is what we have. One of our committee members suggested that once you actually get a discovery control order maybe it should be more difficult to alter or modify and recommended that we consider -- and rather than use the language "interest of justice" we change it to "for good cause shown." Again, I don't think it's anything that we felt compelled to change in the existing rule, but some of our committee members who offered these suggestions are absent, and I just --

HONORABLE TRACY CHRISTOPHER: Kent, weren't you the big one on this?

HONORABLE KENT SULLIVAN: No.

CHAIRMAN BABCOCK: Okay. Well, let's go to 191.1. You took "for good cause" out.

MR. MEADOWS: Right, and what we did there is because we -- why did we take "good cause" out? The Federal -- the Federal -- I guess it's just that simple. In this example the Federal rule does not require good cause.

CHAIRMAN BABCOCK: Okay. Any discussion on that? Peter.

MR. KELLY: So once it's issued the parties can't agree to extensions or to expand the numbers? I mean, it seems sort of --

MS. GREER: Yeah, they can.

MR. KELLY: I'm looking at the commentary, and it says, "The discovery control order may be modified only for good cause and with the judge's consent."

MR. MEADOWS: That was what was discussed.

MR. KELLY: Okay.

MR. MEADOWS: That was just what was -- the comment -- the one thing to note here is this modification procedure, Rule 191.1, we had "for good cause" and we took it out. In Texas Rule of Civil Procedure 90.5 we say that we can modify discovery control plan any time in the interest of justice, so there seems to be a different standard.

CHAIRMAN BABCOCK: Okay.

MR. MEADOWS: So I don't know if we want to

impose consistency. In this instance we just took out "good cause" because it's not in the companion Federal rule.

MR. PERDUE: And it's also consistent with what seems to be the sense of the subcommittee on the idea of level two.

HONORABLE TRACY CHRISTOPHER: Right.

CHAIRMAN BABCOCK: Makes sense to me. Anybody have any comments? All right. Why don't we go --

MR. ORSINGER: Can I ask a question, Chip?

CHAIRMAN BABCOCK: Yeah, sure.

MR. ORSINGER: I would assume that the reason that we would have a standard is to give some guidance to the -- to the judges about when to grant the request, but I'm looking at it from an appellate perspective. If a party has a program that they've been following and then it gets altered to their detriment and something adverse happens in the case, they're going to be appealing the fact that the judge changed the rules of the game, maybe after they had already made decisions about what depositions to take or what deposition not to take or whatever. If you take "good cause" out of there, is the judge free to do anything they want, or are they still held to some standard? I would assume that it's abuse of discretion standard. Actually, no matter what rules you

set it's probably an abuse of discretion standard, whether it says "good cause," doesn't say "good cause," or says "in the interest of justice" I think it's an abuse of discretion standard, don't you think?

PROFESSOR DORSANEO: Uh-huh.

MR. ORSINGER: Okay. Then it really doesn't matter what we say or don't say.

MR. MEADOWS: Right, my only reason for mentioning it at all is that we could omit it, we could leave it, or we could conform it to the language used in Rule 190.5, which is "interest of justice," so we just took it out.

MR. ORSINGER: Yeah, in my view, these kind of things are addressed to the sound discretion of the trial court, and so it doesn't matter what you say, that's the rule.

MR. MEADOWS: Gotcha. So 191.3?

CHAIRMAN BABCOCK: Yeah. No, 191.3, unless Kennon had a comment.

MS. WOOTEN: I just -- I just thought that maybe consistency is better. I don't know why you would have two different standards because you're kind of speaking to the same thing, aren't you?

MR. MEADOWS: Well, the way we dealt with that was to just take it out, so it's not -- we just took

out "good cause" as opposed to inserted the different language.

CHAIRMAN BABCOCK: Carl has got a comment, too.

MR. HAMILTON: I think we ought to have some standard in there. Otherwise we may have judges that just think, well, it says I can do it so I'm going to do it without any good cause or without any interest of justice or anything else.

CHAIRMAN BABCOCK: The way I read this, Carl, was that there would be an agreement of the parties or by the court.

MR. HAMILTON: Or by court order.

CHAIRMAN BABCOCK: Well, who is going to -- if the judge says there's good cause, who is going to challenge that? And if the parties do it --

MR. HAMILTON: Parties do it, it's okay, but if the parties don't do it and the judge just decides "I'm going to do this" and does it --

CHAIRMAN BABCOCK: What do you do about it?

MR. HAMILTON: -- without good cause or anything else.

CHAIRMAN BABCOCK: No, I know what you're saying.

MR. HAMILTON: I'm just saying that rule

might cause some judges to think about it before they do it.

CHAIRMAN BABCOCK: Yeah. Elaine.

PROFESSOR CARLSON: Well, Kennon, I think 190.5 is when the trial judge "must" modify the discovery control plan when the interest of justice requires. 191.1 is when the judge "may." I don't know why -- I would just take out that whole thing about the court and just leave that about the parties --

MS. WOOTEN: It has about the parties now.

PROFESSOR CARLSON: There's no standard for "may."

HONORABLE TRACY CHRISTOPHER: 190.5 already talks about "may."

MS. WOOTEN: But you're talking about removing it in 191.1, right?

MR. MEADOWS: Right.

PROFESSOR CARLSON: Well, it says, "The court may modify" and "must in the interest of justice," so do you think that modifies both of those? And if so, why do you have anything about the court in 191.1?

MS. WOOTEN: Right.

MS. GREER: The reason I think we should leave in "the court" there is just to make it clear that that alternative still applies and that you're not

overriding the court's ability to affect the order and limiting it to only where the parties agree.

MR. ORSINGER: Elaine, my concern is, is that 190.5 only applies to level three, and so we don't have anything that applies to level two, do we?

PROFESSOR CARLSON: No. No.

MR. ORSINGER: So shouldn't we take it out of 190.5 altogether and put it back there in 191.1 so it applies to level one, two, and three?

HONORABLE TRACY CHRISTOPHER: It does. It applies to all three.

MR. ORSINGER: Which does? 190.5?

HONORABLE TRACY CHRISTOPHER: 190.5.

MR. ORSINGER: It does?

HONORABLE TRACY CHRISTOPHER: Yeah.

MR. ORSINGER: It looks to me like that's part of 190.4 level three. No, it's not, so it applies to all three? Then it's duplicative.

MS. WOOTEN: It applies to one and two only if you have a discovery control plan in those levels, right? Otherwise, it's only going to apply to three.

MR. ORSINGER: I think you have a discovery control plan in level two by operation of the rules.

MR. MEADOWS: You do, and one.

HONORABLE TRACY CHRISTOPHER: Well, it says

in the heading that you have one.

MR. ORSINGER: Right. Right.

HONORABLE JANE BLAND: Well, I think we can do some more work on this because we probably don't need two different provisions in two different places talking about modification, so we can work on that --

CHAIRMAN BABCOCK: Right.

HONORABLE JANE BLAND: -- and, you know, put them in one place and make them consistent.

MS. WOOTEN: You're right. It applies across the board as is, 190.5.

CHAIRMAN BABCOCK: All right. Any objection to adding e-mail addresses under 191.3? That's something that's becoming -- Orsinger.

MR. ORSINGER: I'm totally in favor of e-mail addresses, but I would like to strike "if available, fax number" so that we can eliminate service by fax.

HONORABLE TRACY CHRISTOPHER: Me, too.

MR. ORSINGER: It's time for us to go ahead and step across that threshold.

PROFESSOR CARLSON: Let it go.

MR. ORSINGER: We need to force everybody to stop faxing.

MS. BARON: But, Richard, then you forget

how we spent at least a whole day here at this meeting discussing when a fax service is actually received.

MR. ORSINGER: I remember that well. That was a very frightening moment.

PROFESSOR CARLSON: It wasn't fax. It was telephonic something something.

MR. ORSINGER: And our Chair, which was not our present Chair, thought that when you -- when you faxed something that it was sent out, you know, along the lines and was traveling around the world and eventually showed up on the other side. That's the level of expertise we had.

HONORABLE STEPHEN YELENOSKY: It's a bunch of tubes out there.

CHAIRMAN BABCOCK: There were tubes. That wasn't me, was it?

MR. ORSINGER: No, it wasn't you.

HONORABLE STEPHEN YELENOSKY: That was the internet.

MR. ORSINGER: So, really, I mean, I'm only half facetious here. I would like to kill fax service. There's still one or two people where you have to type your e-mail and print it and then fax it to them, so I'm ready to take that step.

MS. BARON: Well, I think it's effective in

December, right, that we have to have an e-mail address for service in the state, so I don't know if that means that you can continue to serve by fax or not, but I agree. I have a fax machine for no reason whatsoever.

MR. ORSINGER: Do we have the option to favor e-mail over fax, and we can just refuse to serve by fax?

MS. BARON: I don't know.

MR. ORSINGER: And we don't have to have a fax machine because this says "if available," so if I don't have a fax machine and I refuse to serve by fax then I've stepped into the future.

MS. BARON: Just unplug it.

HONORABLE TRACY CHRISTOPHER: Certified mail.

MR. ORSINGER: Okay. I can do that.

CHAIRMAN BABCOCK: What if you have a fax machine but the person you're trying to serve doesn't?

MR. ORSINGER: I'll use e-mail.

CHAIRMAN BABCOCK: I'm just talking about the language here, "if available." Who -- available to whom?

MR. MEADOWS: Would you like us to make this for level three cases only?

CHAIRMAN BABCOCK: No, no, no. I think this

ought to be for family law cases only. All right. There's a proposal to --

HONORABLE TRACY CHRISTOPHER: Well, this would require a lot of rule changes, but I agree, let's get rid of the fax.

PROFESSOR HOFFMAN: There's a proposal to destroy all fax machines.

PROFESSOR CARLSON: There are also scanners, be nice.

MR. MEADOWS: I think this is --

MR. HAMILTON: On 191.3(a)(2).

CHAIRMAN BABCOCK: 191.3(a)(2).

MR. HAMILTON: "If the party is not represented by a lawyer," why do we not require that party to show an e-mail if they have one?

CHAIRMAN BABCOCK: Yep. I don't know why you wouldn't. Don't you think so, Bobby?

MR. MEADOWS: Yeah, absolutely.

PROFESSOR CARLSON: "If available" or --

MR. MEADOWS: We came here for improvement.

HONORABLE JANE BLAND: Good catch, Carl.

MR. ORSINGER: You came here to change the world.

MS. WOOTEN: If you do it for the unrepresented party, should it be "if available, qualified

e-mail address and fax number"?

MR. MEADOWS: Yes.

MS. WOOTEN: And then is there a need with the new State Bar rule to specify the e-mail address that has to be provided in light of the fact that there are now two potentially under the State Bar rule?

MR. DAWSON: What?

MS. WOOTEN: I don't remember the name, but you can have a separate address that -- e-mail address that you have for getting State Bar notifications, for example, versus the e-mail address you have for service. They are different classifications. I don't know if we need to specify which one is provided.

HONORABLE TRACY CHRISTOPHER: I would probably say your service address. I mean I think that's the idea behind that.

MS. WOOTEN: Uh-huh.

HONORABLE TRACY CHRISTOPHER: Is that everybody has designated --

CHAIRMAN BABCOCK: Okay. Yeah, Peter.

MR. KELLY: Just I haven't worked through all of the issues on this, but if 191.3 requires signing disclosures by the attorney if the party is represented, by the party if the party is not represented, what about nonparties who receive subpoenas, depositions on written

questions, et cetera, et cetera, and I just was trying to look at some of the other rules, and they all talk about parties, and I do think there has to be some accommodation made for nonparties.

CHAIRMAN BABCOCK: Yeah. Do you agree with that, Bobby?

MR. MEADOWS: I think so.

CHAIRMAN BABCOCK: Thanks, Peter. What about the change in 191.3(c)(1)?

MR. MEADOWS: So this got a good bit of discussion in our subcommittee. It's a change in favor of the Federal -- language from the Federal rule, and so there is a -- I mean, I'm persuaded by the argument that there is a difference between a good faith argument and a frivolous argument. So, I mean, I just think we ought to get a reaction to it. The reason is because you can make a frivolous argument in good faith arguably. What you should be doing is not -- is not making a frivolous argument. So that's what carried the day of the subcommittee in terms of the change.

CHAIRMAN BABCOCK: Okay. Peter.

MR. KELLY: I was at an oral argument in Beaumont just two weeks ago, and the question to one of the parties made it clear that the judge was using "frivolous" as a synonym for "losing case"; and I think

with 30 years of, frankly, tort reform propaganda trying to persuade people that "frivolous" means "losing" and now actually having heard members of the judiciary making that parallel, that equation, I would avoid using the word "frivolous," because what's -- some people consider any losing argument to be frivolous, and so I think "good faith" should -- is a better standard for that.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: I'll have to study this later, but I don't think you-all tracked Rule 13 as closely, and they talk in there about groundless. They have -- and have a definition of "groundless" as opposed to "frivolous," and we have a lot of Rule 13 appellate opinions, mostly court of appeals, but some Supreme Court, and I think it would be wise for us to have the same sanction standard here as in Rule 13 so that we can have all of that case law to guide us.

MR. MEADOWS: Right. So this change recognizes that it could implicate other language in other places, including Rule 13. The question here is this language is taken from Federal Rule 26(g)(1).

PROFESSOR HOFFMAN: Bobby, it's also taken from Chapter 10 of the Civil Practice and Remedies Code, which is the statutory sanctions provision, which tracks the Federal rule, so the nonfrivolous language in here is

already in state positive law.

MR. ORSINGER: Yeah, and we -- as a committee we tried to write a rule for sanctions that was compliant with Chapter 10, and we gave up after about two years because we couldn't do it. The standards actually are slightly different between Rule 13 and Chapter 10; and we're writing a rule here, not a statute; and so unless we want to align all of our sanction rules, which would -- which is a challenge, because I was here and we tried it, I think that the rules ought to stay consistent.

I really don't like that the sanction rule for frivolous pleadings, which is really not frivolous, is articulated differently from the rule for sending nonmeritorious discovery, which is maybe closer to what our statute for Chapter 10 is in the Civil Practice and Remedies Code. So what I'm suggesting is a closer alignment between how we articulate when you can get sanctioned on discovery, and that's just one point.

Another thing is that if this is already there I just didn't realize it. You can't send discovery except after -- formed after reasonable inquiry. To me that's a little problematic because a lot of the times you're sending discovery about areas that you can't -- that you don't know, you can't get the reasonable inquiry. And so in a typical family law case I'm going to send

discovery about a whole laundry list of potential assets that I have.

PROFESSOR HOFFMAN: I think you're misreading.

MR. ORSINGER: I must be misreading it.

PROFESSOR HOFFMAN: The "reasonable inquiry," which is actually a shortened version of "reasonable inquiry formed under the circumstances," which comes from Rule 11, is meant to say taking into account whatever the situation is. So if you're sending discovery and you inherently can't know the thing that it is that you're trying to know, it can't be unreasonable for you to have sent it. So, in other words, that language is intended -- at least on the Federal side that's how the courts interpret that language -- to soften the consequence of that, to make it appropriate to whatever circumstances that --

MR. ORSINGER: Okay. So my reaction to that is that that turns a tremendous amount of power over to the trial judge to sanction a lawyer who in good faith is doing discovery to find out things that he or she doesn't know. Now, maybe that's not too much power to turn over to a Federal judge, but in a state court that's a very powerful weapon. In a state court you're turning over a very powerful weapon to a judge to say, "I don't think you

-- you just sent your request for production before you did any investigation about the categories of information you asked for." I don't think that -- I don't think that that standard is in our rule right now, is it?

MS. GREER: It's not.

PROFESSOR HOFFMAN: So it's in Chapter 10.

MR. ORSINGER: Yes, but it's not in our rule as a condition for discovery or sanctions if you send a request that the judge says you didn't do a reasonable inquiry before you sent that discovery request. This is introducing now a threat that if you do legitimate discovery without having done reasonable inquiry, however that's defined, that you're going to get sanctioned for it, and I don't know whether the sanction is just finding the lawyer or striking pleadings of the plaintiff or the defendant, but this is -- this is very disturbing to me. You guys may think this is nothing, but to me this is a lot.

MR. HAMILTON: The reasonable inquiry only applies --

CHAIRMAN BABCOCK: Marcy.

MR. HAMILTON: -- to the answer.

MS. GREER: I agree with Richard's point about making the rules consistent, and Rule 13 spells it out that it is not groundless or brought in bad faith or

groundless and -- or brought for the purpose of harassment and then it defines what "groundless" is. So we already have something that we could tap into that would be consistent, and I think that makes a lot more sense because instead of putting it in the good faith, we're putting it in groundless and not brought in bad faith, and I think that covers the waterfront and avoids a lot of the concerns that have been raised.

MR. MEADOWS: So, so how about this as a thought? So Rule 26, brought for the idea of change, and the change we're going to recommend is language from Rule 13.

MR. ORSINGER: What would be wrong with just saying that Rule 13 applies to discovery requests and responses and not try to rewrite a new rule that you're potentially creating different standards for?

MS. GREER: Because I think there might be a question as to what an "other paper" is and whether that's a discovery request, because this is focused on pleadings, motions, and other papers, presumably that are filed of record, and discovery is not filed, so I think it's worth making that clear and just repeating the language.

MR. ORSINGER: What would be wrong with saying that Rule 13 applies? Then it eliminates any doubt. We could just -- instead of writing all of this we

could just say Rule 13 applies to discovery requests and responses.

PROFESSOR HOFFMAN: So I wasn't on the discovery committee, but in defense of them, they hadn't made much of a change here, I don't think. So the "reasonable inquiry" language is in here right now. All they've done is they've said this good faith standard is different from the Federal rule standard and it turns out also different from Chapter 10, and so they just substituted it to -- so the nonfrivolous is right in Rule 11 and it's right in our own Chapter 10.

MR. ORSINGER: Rule 11, Federal Rule 11.

PROFESSOR HOFFMAN: Federal Rule 11.

MR. ORSINGER: But not in state Rule 13.

PROFESSOR HOFFMAN: That's correct, but in 191 -- in the rule right now, 191.3(c), the language you were just worried about, the "formed after reasonable inquiry" is in there. It's just in there with the good faith standard, and so I don't disagree with you that it may end up being better to borrow from our own Rule 11.

MR. ORSINGER: Rule 13.

PROFESSOR HOFFMAN: Sorry, Rule 13, rather than adding the nonfrivolous language that comes from those two different places, but I don't think it's -- this is I think a pretty modest issue. It's just the language.

Okay.

CHAIRMAN BABCOCK: Okay. Well, let's sleep on it. We'll crank up again tomorrow morning at 9:00 a.m. Thanks, everybody. Really good day of work.

(Recessed at 4:59 p.m. until the following day.)

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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 16th 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 $ 1,872.25 .

Charged to: The State Bar of Texas.

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

/s/D'Lois L. Jones
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