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8 MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

9 November 12, 2004

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19 Taken before D'Lois L. Jones, Certified

20 Shorthand Reporter in Travis County for the State of

21 Texas, reported by machine shorthand method, on the 12th

22 day of November, 2004, between the hours of 9:15 a.m. and

23 3:36 p.m., at the Texas Law Center, 1414 Colorado, Room

24 101, Austin, Texas 78701.

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2                   CHAIRMAN BABCOCK: Welcome, everybody, to  
3     our first post-election of 2004 meeting. Congratulations  
4     are in order, I think, for several of our members. I  
5     think we went undefeated in this election. Jan Patterson  
6     won a contested election to the Austin court of appeals.  
7     Bob Pemberton in the opposite party did as well, and I  
8     understand the vote was -- the margin was about the same,  
9     even though they were in opposite parties, so they speak  
10    well for our committee. And Stephen Yelenosky, the  
11    favored winner in the district court in Travis County, and  
12    Scott Brister, who I guess is still a member of our  
13    committee was elected, and then Tom Gray, Jane Bland, and  
14    Levi Benton won, although they didn't have much  
15    opposition, like zero opposition. So congratulations to  
16    everybody. The voters were wise in their choices based on  
17    our experiences.

18                   We have a number of things to do today, but  
19    I'm certain that we're going to get done today. Justice  
20    Hecht and Chief Justice Jefferson have a commitment  
21    tomorrow, so we will get through this agenda today, and I  
22    suppose we ought to just start with you, Justice Hecht, on  
23    the status of things.

24                   HONORABLE NATHAN HECHT: Well, since our  
25    last meeting we have a new Chief Justice, Wallace

1 Jefferson, who has served as the liaison, another liaison  
2 from the Court to this committee. He was sworn in  
3 yesterday formally by Justice Scalia, who was good enough  
4 to come down to do the honors; but Wallace has been on the  
5 job since shortly after his appointment; and so we have  
6 been operating with seven until day before yesterday,  
7 Wednesday, when Governor Perry swore in David Medina as  
8 our eighth judge; and David is formerly a district judge  
9 in Harris County and was in the general counsel's office  
10 at Cooper Industries for a while and then most recently he  
11 has been the Governor's counsel; and so he has taken the  
12 oath and is moving in as we speak; and we've got lots of  
13 work for him to do; and we are expecting an appointment  
14 for the last vacancy on our Court almost anytime now.

15                   We had a near miss. Justice O'Neill and her  
16 husband, Kerry, were hit by a drunk driver in Washington,  
17 D.C., and Kerry was knocked unconscious and was in the  
18 hospital for a couple of days up in Washington, and  
19 Harriet was bunged up pretty good, but thankfully they're  
20 doing better, and Harriet's been at work all week and both  
21 were at the ceremony yesterday. So if you see them or  
22 have a chance to drop them a note you might think about  
23 it, because they seem to be doing much better.

24                   Of course, you have heard that Al Gonzalez,  
25 formerly of our court, has been nominated by the President

1 to be Attorney General of the United States and so we're  
2 very proud -- we continue to be very proud of Al.

3 I went to David Peeples' retirement party  
4 several weeks ago, which was a great affair. Most of San  
5 Antonio was there, and all of them speaking lauditorially  
6 of David.

7 HONORABLE DAVID PEEPLES: Those are the only  
8 ones invited.

9 HONORABLE NATHAN HECHT: And deservedly so.  
10 And it was good to see that tribute being paid to people  
11 who have served the judiciary for many years. Judge  
12 Pemberton won election, but that's not the only thing or  
13 not even the most important thing that's happened to Bob.  
14 Where's Bob?

15 CHAIRMAN BABCOCK: He's stuck right over  
16 here.

17 HONORABLE NATHAN HECHT: He's got a new  
18 little girl. Eloise?

19 HONORABLE BOB PEMBERTON: Ella Louise.

20 HONORABLE NATHAN HECHT: Ella Louise. So  
21 he's a judge and a dad at the same time and that's good,  
22 and I understand Pete Schenkkan's son gets the key to  
23 Newport Beach in December, so that's good. Maybe that's  
24 better than all of the rest of them.

25 The Court put out some rules orders several

1 weeks ago, and I hope they're available to you, but if  
2 they're not, they can be made available to you. One  
3 regarding rules -- the service process rules, the jury  
4 instructions, and then some technical amendments to the --  
5 not really technical, but small amendments to the Rules of  
6 Judicial Administration for multidistrict -- for the  
7 multidistrict panel that Judge Davidson requested to help  
8 expedite things over in that area, which he reports is  
9 working pretty well, and so that's a tribute to the  
10 committee, too. We wrote those rules pretty fast, and  
11 even though we had experience with Rule 11, there was  
12 still a lot of intricacies to work out, and the pretrial  
13 judges that I know about are all saying they're working  
14 pretty well, so that's good.

15                   And then the Bar sent in a report on  
16 referral fees and advertising and recommended that the  
17 Court submit it to the Bar for referendum, and we did  
18 that, and I think that referendum is either under way or  
19 imminent. I just got an e-mail from the litigation  
20 section yesterday encouraging members of that group to  
21 vote for both -- both parts of the referendum. It's  
22 divided between the referral fee provisions and the  
23 advertising provisions.

24                   We've still -- the Court is still looking at  
25 the substance of the advertising provisions, like we did

1 the last time. There has been some confusion about this,  
2 so let me just say that when we last promulgated  
3 advertising rules we were aided by a good deal of briefing  
4 on both sides of the constitutional issues whether  
5 these -- in essence whether these rules were an  
6 infringement on freedom of speech, protected by the  
7 Constitution. And this time, because of the timing of the  
8 process, because the Bar had set for itself a very short  
9 time period to finish this project, we got one brief on  
10 the legality of the rules but not the kind of in-depth  
11 analysis that the Court had before, so we're still looking  
12 at that.

13                   And the press asked, "Well, isn't this a  
14 little peculiar that you would put rules out for comment  
15 and then study the legality of them later," and it is a  
16 little bit, but just the timing issue. I mean, we could  
17 have asked the Bar to stand down, but then we didn't want  
18 to interfere with this project that they've undertaken and  
19 have carried through remarkably well, and so that's the  
20 reason for it, but we're still looking at the  
21 constitutional issues that are involved in the advertising  
22 rules.

23                   And other than that I don't think I have  
24 anything else to report to you. I'd be happy to answer  
25 any questions.

1                   CHAIRMAN BABCOCK: Yeah. I've got one  
2 question, and I think I know the correct answer, which is  
3 the one I've been giving, and that is we did several years  
4 ago an enormous amount of work on the recusal rule, and we  
5 worked it pretty heavily, and that's been pending before  
6 the Court for sometime, but in the interim, the United  
7 States Supreme Court decided the Republican Party of  
8 Minnesota vs. White case, which impacts recusal area, and  
9 it's been my sense that the Court might after it's  
10 finished with its work rewriting the Code of Judicial  
11 Conduct, might send that recusal rule back to us for  
12 further analysis.

13                   HONORABLE NATHAN HECHT: Yeah. This  
14 Court -- this committee did a great job on a very careful  
15 and detailed recusal rule. Then the presiding judges  
16 submitted a competing proposal that they felt like got the  
17 job done as well in something -- in a somewhat less  
18 complex fashion. Meanwhile, the Minnesota vs. White issue  
19 jumps up and we start looking at the Code of Judicial  
20 Conduct, and so it has just seemed wise to the Court to  
21 defer the recusal decision until we know more about the  
22 whole lie of the land.

23                   So the committee that's been working on the  
24 judicial conduct revisions, which Chip also chairs, is  
25 finished with its work and now we can go back and take a



1 look at it again, but it probably will mean this committee  
2 looking at it again, because Minnesota vs. White changes a  
3 lot of stuff, and so we just need to view recusal through  
4 that prism, which we have not done in the past.

5 CHAIRMAN BABCOCK: Great.

6 MS. BARON: Can you just tell us what it  
7 held for those of us who aren't familiar with the case?

8 HONORABLE NATHAN HECHT: Minnesota  
9 Republican Party vs. White said that elected judges do not  
10 give up their constitutional rights of free speech when  
11 they're running for office and they are free to comment on  
12 any issue they choose. So if you want -- a candidate  
13 wants to talk about what he thinks about the death penalty  
14 or abortion or whether President Bush should be  
15 re-elected, he or she is free to do that, and so that --  
16 of course, we have provisions, like most states, in our  
17 Judicial Conduct Code that prohibit that, all those  
18 things, and the --

19 MS. BARON: Did it address recusal, though?

20 HONORABLE NATHAN HECHT: No.

21 CHAIRMAN BABCOCK: No.

22 MS. BARON: Okay. That's what I was  
23 confused about.

24 HONORABLE NATHAN HECHT: But then recusal  
25 gets to be a much bigger issue because ordinarily somebody

1 who talks about issues that they shouldn't has got bigger  
2 problems than recusal, but now those problems have melted  
3 away and recusal becomes a bigger issue.

4 MS. BARON: Okay. Thank you.

5 HONORABLE NATHAN HECHT: So far, as far as I  
6 know, I haven't looked just real carefully, but I don't  
7 think we've had any great deviations from the past code in  
8 Texas. I think judicial candidates have voluntarily  
9 chosen to limit their campaigning to the kinds of things  
10 they could say before, but I think it's only a matter of  
11 time --

12 CHAIRMAN BABCOCK: Right.

13 HONORABLE NATHAN HECHT: -- before someone  
14 will say, "I'm going to talk bad if I want to."

15 CHAIRMAN BABCOCK: Right. Any other  
16 questions? It's a rare opportunity to be able to ask the  
17 Supreme Court justice questions.

18 MR. ORSINGER: Can we ask about specific  
19 cases?

20 HONORABLE NATHAN HECHT: I may not answer.

21 CHAIRMAN BABCOCK: That would be out of  
22 order. Speaking of the order, we have a lot of loose ends  
23 that we have -- that I have allowed to dangle for too  
24 long, and the primary one is Justice Hecht's letter to me  
25 dated June 16th of 2003 and the accompanying list of rules

1 that are potentially implicated by House Bill 4. We've  
2 had on the agenda for several sessions now reports by the  
3 subcommittee chairs building off this list of what rules  
4 need further study and revision, and I say "building off  
5 the list" because the list was said not to be exhaustive,  
6 although there is certainly many things -- many things on  
7 it, the majority of which we've already dealt with, but  
8 there are a lot of little things that we haven't, and we  
9 need to get through that.

10 So the various subcommittee chairs have to  
11 varying degrees talked about that since our last meeting  
12 and I hope are ready to report and give us a sense of what  
13 is thought we should do or recommend to the Court in terms  
14 of studying and making recommendations of rules that are  
15 impacted by House Bill 4, and Bobby Meadows got called to  
16 trial. He told me he might and indeed he did, so Bobby is  
17 not able to report, but I think John Martin was delegated  
18 something at 11:00 o'clock at night or something.

19 MR. MARTIN: Yes. I had a lengthy e-mail  
20 from Bobby at 11:00 o'clock the other night, and that  
21 committee studies Rules 171 through 205. Judge  
22 Christopher thinks we should at least attempt to try to  
23 see if we can write a rule to address the issues that  
24 arise when responsible third parties that don't have to be  
25 designated until 60 days before trial are designated late,

1    what does that do to the discovery deadlines.  This was  
2    all done by e-mail, and I think several people suggested  
3    that it may not be possible to deal with that with a rule.  
4    It may just have to be dealt with on a case-by-case basis,  
5    but that was one issue that was suggested for discussion  
6    by that subcommittee.

7                    Another one that came up is apparently under  
8    the new medical malpractice amendments that were in House  
9    Bill 4 you can't take depositions until after the reports  
10   are produced, and so there's a question about how does  
11   that impact Rule 202, and there's a case out of Beaumont  
12   addressing this issue, and I could be wrong about this,  
13   but I think the Beaumont case held that a plaintiff cannot  
14   use Rule 202 to take a presuit deposition of a potential  
15   defendant doctor.

16                   MS. SWEENEY:  No, that was after suit is  
17   filed.

18                   MR. MARTIN:  After medical suit is filed.

19                   MS. SWEENEY:  Because of the moratorium  
20   that's been imposed you can do very limited depositions,  
21   but you can't do the defendant's deposition until after  
22   the report has been filed, but it's not a 202 case at all.  
23   It's not 202.

24                   MR. MARTIN:  Well, somebody mentioned a Rule  
25   202 case.

1 HONORABLE KENT SULLIVAN: Judge Gaultney  
2 wrote it, so maybe we ought to ask him. Just a thought.

3 MR. MARTIN: I have not read the case.

4 MR. LOW: Have you read it, Judge?

5 HONORABLE DAVID GAULTNEY: I think the type  
6 of motions we're hearing is passed, but she's correct, it  
7 was not a 202 case. It was a suit had been filed, and it  
8 was a question of whether the treating physician defendant  
9 could be deposed before the report was provided.

10 MR. MARTIN: Okay. I'm not sure there's  
11 anything for the committee to do there or not, but that  
12 was another one that was in an e-mail. Bobby tells me  
13 that Judge Christopher thinks the committee should really  
14 just do an overall canvas of that group of rules to see if  
15 there are any other issues that ought to be addressed.  
16 That has not been done yet, and then the other issue is  
17 that Carl has reminded me that the Court Rules Committee  
18 has sent up several proposed revisions to that set of  
19 rules that are just sitting there, and I guess the  
20 question is should the subcommittee of this committee go  
21 ahead and take a look at those?

22 CHAIRMAN BABCOCK: Maybe we should, but  
23 right now let's try to focus on things that House Bill 4  
24 either mandated or because of House Bill 4 the rules are  
25 not in sync anymore.

1                   MR. MARTIN: The only House Bill 4 issues  
2 that anybody raised were the ones that I mentioned.

3                   CHAIRMAN BABCOCK: Okay. Responsible third  
4 parties I think probably run across several different  
5 subcommittees. Richard, I thought that maybe it hit -- it  
6 hit some of your rules, 15 through 165a; and I thought,  
7 Paula Sweeney, that maybe some rules in the 216-299a range  
8 were hit by the responsible third parties. Do you-all  
9 agree or disagree?

10                  MR. ORSINGER: Well, I think it's certainly  
11 possible. We have not received a suggestion from any  
12 orders that any part of the rules that fall within the  
13 scope of my subcommittee would need to make changes. The  
14 statutes, the statute itself is self-enacting, and so  
15 really the only urgency is if there's a conflicting rule  
16 of procedure, but if we were to undertake to be sure that  
17 specifications in the statute that are not currently part  
18 of the rule are in the rule so that people who are reading  
19 the rule pick up the statute statutory language then we  
20 have not done that yet.

21                  CHAIRMAN BABCOCK: What John was talking  
22 about, I think, comes from section 4.12 of House Bill 4,  
23 which talks -- which requires Rule 194.2 to disclose  
24 responsible third parties as soon as practicable. Am I  
25 right on that, John?

1 MR. MARTIN: Yeah. I'm looking at Tracy's  
2 e-mail, and I think that's right.

3 MR. ORSINGER: To me, Chip, that would be a  
4 discovery issue and not a pleading issue.

5 CHAIRMAN BABCOCK: I know, but if you look  
6 at section 4.01 there are some potential issues that Chris  
7 Griesel flagged that deal with pleading issues.

8 MR. ORSINGER: Then we're going to need to  
9 undertake that. I apologize to say that we haven't  
10 analyzed that, so I'm going to need to get the  
11 subcommittee together to consider that.

12 CHAIRMAN BABCOCK: And the reason why I  
13 thought that Paula's committee might be involved is  
14 because 4.01 might also deal with issues relating to the  
15 charge on responsible third parties. Have you-all looked  
16 at that, Paula, or thought about that? Agree, disagree?

17 MS. SWEENEY: I've done a lot of heavy  
18 thinking, but, no, we haven't. We'll get together by  
19 e-mail first, and no one has brought anything to our  
20 attention at all. There's been no correspondence, I think  
21 probably because most of those cases haven't gotten to the  
22 jury charge stage yet.

23 CHAIRMAN BABCOCK: Right.

24 MS. SWEENEY: But we'll look at it and  
25 report back.

1                   CHAIRMAN BABCOCK: Okay. Great. And so  
2 next time, just so the record is clear, on the overall  
3 broad issue of responsible third parties we'll have  
4 Bobby's -- Bobby Meadow's subcommittee, which deals with  
5 Rules 171 through 205, to look at the discovery issue; and  
6 I think the cross-reference there to the statute is  
7 section 4.12; and then we'll have Richard's subcommittee,  
8 which is Rules 15 through 165a, to look at pleading  
9 changes, if any; and the cross-reference on the statute is  
10 4.01, although there may be other provisions; and then  
11 Paula's subcommittee, which deals with Rules 216 through  
12 299a, will look at any issues relating to the charge; and  
13 I think you'll find that, the cross-reference being  
14 section 4.01 in the House Bill 4; and there may be  
15 subsequent sections as well that deal with that. So we'll  
16 have that as an agenda item at our next meeting.

17                   MS. SWEENEY: Which is January?

18                   CHAIRMAN BABCOCK: Yes. We haven't set the  
19 2005 schedule yet, but we'll -- I'll get with Justice  
20 Hecht and Lisa, and we'll set that soon, and, by the way,  
21 while I'm on that, if anybody knows of conflicts,  
22 significant conflicts like Bench-Bar or some, you know,  
23 big deal conference that your university is going to put  
24 on on two weeks notice, let us know by e-mail about that.  
25 We'll try to avoid those weekends. I think we've got



1 Bench-Bar, don't we, Angie?

2 MS. SENNEFF: October 13 and 14th.

3 CHAIRMAN BABCOCK: We'll try to avoid --  
4 well, there's more than one. There's several. We'll try  
5 to avoid those to the extent we can. We've got football  
6 games we've got to worry about, and we've got all sorts of  
7 things.

8 Okay. So we'll put that behind us. And,  
9 Elaine, you looked at some issues relating to House Bill  
10 4 -- well, why don't you just tell me what you looked at?

11 PROFESSOR CARLSON: For the 735 to 822 rule  
12 subcommittee, the issue was raised as to whether House  
13 Bill 4 mandating a cap on appellate security or appeal  
14 bond might be applicable in other contexts, such as appeal  
15 bonds when a party appeals from the JP court to county  
16 court.

17 MS. SWEENEY: We can't hear you.

18 PROFESSOR CARLSON: Oh, I'm sorry. The  
19 issue was raised as to whether the change in House Bill 4  
20 that put a cap on appellate security, AKA supersedeas  
21 required to suspend a money judgment based on a judgment  
22 debtor's net worth or substantial economic harm, also  
23 would apply to other appeal bonds outside that process,  
24 such as an appeal from the justice court to the county  
25 court, because House Bill 4 provision says "not

1 withstanding any other law or rule of the court, the cap  
2 is X."

3                   When I went back and looked at the entire  
4 statutory scheme under Chapter 52 of the Civil Practice  
5 and Remedies Code, there is no problem because security is  
6 defined by that as "a bond or deposit as provided by the  
7 Texas Rules of Appellate Procedure," so that's a nonissue.

8                   The other thing I tried to hoist upon Chip  
9 and I got it back on the plane this morning --

10                   CHAIRMAN BABCOCK: Yeah, nice try.

11                   PROFESSOR CARLSON: Which is just me being a  
12 buttinski, when I was working on my treatise this summer I  
13 noticed that House Bill 4 had about five different  
14 provisions of mandatory jury instructions or presumptions;  
15 and, of course, the committee and the Court have addressed  
16 the exemplary damage mandatory requirements, but  
17 particularly in the the health care provider area there is  
18 a number of mandatory instructions or presumptions,  
19 including emergency medical care, that the jury is to be  
20 charged with; and there is also a provision dealing with  
21 certain economic losses that if a claimant seeks recovery  
22 in any case or loss of earnings, loss of earning capacity,  
23 et cetera, the court must instruct the jury as to whether  
24 the recovery for compensatory damages is subject to  
25 Federal or state income taxes.

1                   So I just kind of threw this at Chip in an  
2   FYI, "Here's some provisions," on the plane. He said,  
3   "Will you address that in the meeting?" Looking at Rule  
4   277, it says that "The court shall submit such  
5   instructions or definitions as shall be proper to enable  
6   the jury to properly pass upon or render a verdict." I  
7   think it would probably not be profitable, might even be a  
8   little bit reckless, for us to start putting in  
9   particularized instructions that apply to only certain  
10   kinds of cases; and to be very honest, I don't know what  
11   other statutes might be out there that provide for  
12   mandatory jury instructions in particular kinds of cases.  
13   So in keeping with my job as an academic, I have raised a  
14   nonissue and presented it and hopefully not be defeated.

15                   MR. SCHENKKAN: Law Review article to  
16   follow.

17                   CHAIRMAN BABCOCK: Does everybody agree that  
18   that's the proper approach, rather than try to write into  
19   the rule what the statute already says and presumably the  
20   parties will bring up to the court at the appropriate  
21   time, just to let it sit there as it is? Anybody disagree  
22   with that approach? Okay. Anything else?

23                   PROFESSOR CARLSON: That concludes my  
24   report, Mr. Chairman.

25                   CHAIRMAN BABCOCK: All right. Terrific.

1 Judge Lawrence has a written report that is available  
2 somewhere.

3 HONORABLE TOM LAWRENCE: It's on the table  
4 back here.

5 CHAIRMAN BABCOCK: It's on the table in the  
6 back, and this relates to Rules 523 through 734 as  
7 impacted by House Bill 4, and could you just run us  
8 through that, Judge Lawrence?

9 HONORABLE TOM LAWRENCE: Well, the problem  
10 is the requirement in House Bill 4 that there be a jury  
11 charge with regards to the exemplary damages question, and  
12 to give you a little background, there are about a  
13 thousand JPs in Texas, of which approximately at any one  
14 time four or five percent are attorneys. Many JPs or some  
15 JPs do not have any staff whatsoever. It's just the judge  
16 himself and no one else that works for him.

17 There are a considerable number of jury  
18 trials where there are pro se's on both sides, an even  
19 larger number where there is an attorney on one side and a  
20 pro se on the other, a relatively small percentage where  
21 there are attorneys on both sides. There has been a  
22 provision in the Civil Practice and Remedies Code in  
23 41.012 that there be a jury instruction on -- I don't have  
24 my code in front of me, but that there be a jury  
25 instruction that has been in effect since 1995, which has

1   been for the most part routinely ignored by the justice  
2   courts because of a specific provision, Rule 554, which  
3   says, and I'll quote, "The justice of the peace shall not  
4   charge the jury in any cause tried in his court before a  
5   jury." So there is not a jury charge.

6                   Now, there are two different types of cases  
7   the JPs handle. One is what we refer to as a justice  
8   court suit which is filed under the Rules of Procedure, in  
9   which case the Rules of Evidence would be in effect. The  
10   other is a small claims court case, which is filed under  
11   Chapter 28 of the Government Code. The Legislature  
12   created those rules, and the Rules of Evidence are not in  
13   effect.

14                   Now, when the Legislature passed House Bill  
15   4 this past year and when they passed in 1995 the  
16   provision that required instructions, they did not amend  
17   the small claims court provisions to require a jury  
18   charge, and so it's my belief -- and I don't think the JP  
19   legislative team really even noticed this, and I think  
20   they'll probably seek to correct this problem in the next  
21   session, but there's really not been what you call an  
22   outcry or alarm at the lack of any jury charge since 1995.

23                   My recommendation would be that, because of  
24   all the problems that I've relayed in the outline, my  
25   recommendation would be that we not try to repeal 554 to

1   require a jury charge, that if you turn to the last page  
2   in my handout there is what I would call a verdict form  
3   and that you allow me to go to the Texas Justice Court  
4   Training Center and provide them with this jury verdict  
5   form and then have them send out to the JPs the jury  
6   verdict form; and what that will do is that will comply  
7   with the express provisions that the Legislature wanted,  
8   which is that if you award exemplary damages you have to  
9   have a unanimous vote, all six must agree; and this would  
10   allow us to comply with that, but it would not require a  
11   jury charge or instruction, which I think would be a  
12   tremendous problem in the justice courts right now. So  
13   that would be my recommendation.

14                   CHAIRMAN BABCOCK: Okay. Go ahead, Justice  
15   Hecht.

16                   HONORABLE NATHAN HECHT: Tom, do you have  
17   any sense how often punitive damages are awarded in  
18   justice cases or small claims court cases?

19                   HONORABLE TOM LAWRENCE: Well, I would say  
20   very seldom; and another part of the problem is that the  
21   justice court rules actually allow oral pleadings; and the  
22   small claims court provisions, which is a bill that I got  
23   through a number of years ago, does require written  
24   pleadings, but there are no formal pleading rules at all.  
25   So what that means is that often you're in the middle of a

1 trial before you even know that the plaintiff is asking  
2 for any kind of punitive or exemplary damages, and it  
3 would probably very rarely be pleadings, and it's  
4 requested really fairly seldom, and usually it's requested  
5 when it's not even appropriate.

6 HONORABLE NATHAN HECHT: And do you know if  
7 those damages are subject to the jurisdictional limits of  
8 the court?

9 HONORABLE TOM LAWRENCE: Yes. Attorneys  
10 fees, the compensatory damages, everything except court  
11 costs and post-judgment interest would be part of the  
12 amount in controversy, which is \$5,000. I would also  
13 point out that it's been the law in Texas at least since  
14 1919 in one case I found out of the Amarillo court and it  
15 is the practice that the county courts where there has  
16 been an appeal from the justice courts to the county  
17 courts, they do in fact provide jury charges. So if the  
18 case was appealed from the justice court to the county  
19 court then there would be a jury charge, and they would  
20 fully comply with House Bill 4.

21 CHAIRMAN BABCOCK: So what you're suggesting  
22 is that we recommend that the Court do nothing about this,  
23 but in some fashion approve this verdict form?

24 HONORABLE TOM LAWRENCE: Well, I don't know  
25 that it requires an approval. Certainly if you want to,

1 but if it's the sense of the committee and the Court  
2 doesn't oppose it, I would say let the Justice Court  
3 Training Center send this out in the infrequent times it's  
4 going to be needed, and I would suspect that maybe there  
5 would be an amendment to this bill in the next session by  
6 the JPs. There is a motion, a move afoot to raise the  
7 jurisdictional limits of the justice courts to at least  
8 \$10,000. Now, if that passes, we may want to come back  
9 and revisit the idea of a charge or some kind of a limited  
10 modified charge in the future, but I would say for the  
11 time being let us do this.

12 Yes, it's the last page of the handout.  
13 Yeah, now, before that, two pages before that would be  
14 kind of a sample jury charge in JP court on exemplary  
15 damages, which begs the question, if the law requires that  
16 we have a jury charge on exemplary damages and the rules  
17 prohibit the jury charge presumably on everything else  
18 then are we going to charge the jury on exemplary damages  
19 but no charge on anything else in the case? There are  
20 just so many problems involved in trying to have a charge,  
21 and it's just not a big problem.

22 CHAIRMAN BABCOCK: If the committee  
23 recommended this, what would be the mechanism for the  
24 Court to communicate to the state that, yeah, we -- that  
25 they think this verdict form is okay?



1 HONORABLE TOM LAWRENCE: To the state?

2 CHAIRMAN BABCOCK: I mean, how are we  
3 going -- we don't propose a rule change, how are we going  
4 to do this?

5 HONORABLE TOM LAWRENCE: Well, I mean, I  
6 would communicate or the Court can designate someone or  
7 the committee could to talk to the Justice Court Training  
8 Center to get this out with appropriate instructions and  
9 explanation and then that would be sent out to all the JPs  
10 in the state.

11 CHAIRMAN BABCOCK: Okay.

12 HONORABLE TOM LAWRENCE: Now, as far as  
13 communicating with the Legislature, whatever your pleasure  
14 is. I would certainly be willing to go and talk to  
15 somebody, or you would or maybe the Court. I don't know.  
16 It's been a requirement since 1995 that there be a charge  
17 under 41.012, and it's not been done, and there's not been  
18 any mention of it. In fact, it's for the most part  
19 totally escaped the justice courts that that's been  
20 required. So it doesn't seem to be a hot issue.

21 CHAIRMAN BABCOCK: Okay. Richard.

22 MR. ORSINGER: Yeah, I would like to maybe  
23 ask a couple of questions, but in most instances if  
24 somebody loses a significant judgment do they appeal for a  
25 trial de novo in the county court?

1 HONORABLE TOM LAWRENCE: It is. An appeal  
2 from the JP court is a trial de novo at the county court.

3 MR. ORSINGER: So that's why we're not  
4 seeing these issues in the courts of appeals because  
5 usually they get tried with more robust procedural  
6 framework in a county court?

7 HONORABLE TOM LAWRENCE: Right.

8 MR. ORSINGER: And on the verdict form is  
9 there -- I mean, theoretically, punitive damages are  
10 supposed to be on clear and convincing evidence rather  
11 than a preponderance, but I don't even know if you're  
12 charging the jury -- I mean, I don't know, the jury  
13 doesn't even know what constitutes an assault and battery,  
14 they don't know what constitutes preponderance of the  
15 evidence, so maybe they don't need to know what  
16 constitutes clear and convincing evidence.

17 HONORABLE TOM LAWRENCE: Well, it may come  
18 out because one these juries may provide cases or may talk  
19 about the law, but it doesn't come from the Court.

20 MR. ORSINGER: Should the verdict form say  
21 anything about the burden of proof, or are we just not  
22 worried about that part of it?

23 HONORABLE TOM LAWRENCE: Well, where do you  
24 stop?

25 MR. ORSINGER: Yeah.

1                   HONORABLE TOM LAWRENCE: When you start  
2 doing that where do you stop? And this is sort of a  
3 minimum that complies with House Bill 4 requirement that  
4 exemplary damages be unanimous. So that's what I was  
5 trying to do, is make sure that we did what the  
6 Legislature wanted acted on.

7                   MR. ORSINGER: And just as a matter of  
8 interest, is it typically tort cases or property boundary  
9 cases or what gets tried to juries in those courts?

10                  HONORABLE TOM LAWRENCE: Oh, everything.

11                  MR. ORSINGER: It could be contract cases?

12                  HONORABLE TOM LAWRENCE: Oh, yeah. Yeah,  
13 everything. The only thing we don't have jurisdiction  
14 over is slander and libel and I think one or two other  
15 things, and honestly, we don't get a lot of medical  
16 malpractice, but we get a lot of doctors suing patients  
17 and patients suing doctors, but the jurisdictional limit  
18 is, except in deed restriction cases, \$5,000. Deed  
19 restrictions we have an unlimited jurisdiction.

20                  CHAIRMAN BABCOCK: Judge Yelenosky. That  
21 sounds funny.

22                  HONORABLE STEPHEN YELENOSKY: My  
23 understanding of what Judge Lawrence is suggesting is not  
24 that the committee or that the Supreme Court do anything,  
25 but that he propose something to the JPs that will get

1    them by, because it seems to me for us to do or for the  
2    Court to do anything to say this is blessed in some way is  
3    problematic because a lawyer could come in the JP court  
4    and say, "Here's HB4. Give me my charge." I don't think  
5    it's appropriate for the Supreme Court to preempt that  
6    argument or a decision on what's required in JP court  
7    unless and until there is a change in the law.

8                   CHAIRMAN BABCOCK: Yeah. That's a good  
9    point. Sort of what I was trying to say but said much  
10   better. Any comments about this verdict form itself? I  
11   wondered if when you have a form that says "Verdict for  
12   the Plaintiff" whether that's not subliminally telling the  
13   JP jury that --

14                  HONORABLE TOM LAWRENCE: Well, there is a  
15   separate jury form for the verdict the other way, but I  
16   didn't provide that.

17                  CHAIRMAN BABCOCK: Okay.

18                  MR. ORSINGER: Well, we had a huge fight  
19   over whether the verdict for the defendant has to be  
20   unanimous or on a -- I mean, on a five to six vote or not,  
21   didn't we? Did we ever resolve that issue? Remember,  
22   there was an argument that you couldn't return a verdict  
23   of any kind on punitive damages unless it was unanimous?

24                  HONORABLE STEPHEN YELENOSKY: On the  
25   liability issue? We resolved that.

1                   PROFESSOR CARLSON: I think the Court  
2 resolved that.

3                   CHAIRMAN BABCOCK: The Court resolved that.  
4 He said "yes" to that.

5                   MR. ORSINGER: You can get a verdict for the  
6 defendant on 10 out of 12 or you have to have 12 out of  
7 12?

8                   CHAIRMAN BABCOCK: 12 out of 12. Okay. Any  
9 other comments about the verdict form? Professor Carlson.

10                  PROFESSOR CARLSON: Judge Lawrence, maybe in  
11 the side where you say, "All six jurors must agree to  
12 award exemplary damages" you might want to track the HB4  
13 language at a minimum because I think it says "finding of  
14 liability for and damages" and your form just suggests a  
15 unanimous as to the damage number.

16                  HONORABLE TOM LAWRENCE: Okay. Well, I  
17 mean, I have no pride of authorship in this, and I would  
18 be happy to have -- any comments for rewording something  
19 would be appreciated.

20                  CHAIRMAN BABCOCK: Yeah, that probably makes  
21 some sense. Okay. Any other comments about this? Okay.  
22 Anybody think that we should do more than what Judge  
23 Lawrence is proposing on this topic? Okay.

24                  MR. BOYD: I think we should do less. I  
25 mean, only in the sense that I think the record should be

1 clear that this committee is not officially approving the  
2 distribution of this form because this form in and of  
3 itself I think violates Rule 554, because the court is not  
4 supposed to charge the jury at all in justice court under  
5 Rule 554.

6 CHAIRMAN BABCOCK: I think that was the  
7 point that Judge Yelenosky made a minute ago.

8 HONORABLE TOM LAWRENCE: Well, the  
9 difficulty becomes -- and a lot of JP Courts do provide  
10 some type of a verdict form because when the parties  
11 finish their closing arguments someone has to tell the  
12 jury what to go do and there has to be some brief way to  
13 do that. We have a justice court desk book, and that's  
14 provided in the handout, and there are some brief  
15 instructions that are provided for in there just to tell  
16 the jury what to do and how to render a verdict, and  
17 that's about it, but if you don't do that the jury is just  
18 going to sit there and look at themselves because there  
19 are no other instructions, so you have to tell them  
20 something.

21 CHAIRMAN BABCOCK: Okay. All right. There  
22 are a couple other loose ends, again, with House Bill 4.  
23 There is a lot of stuff in House Bill 4 about health care  
24 liability claims and specifically section 10.01, and  
25 there's almost a system of notice, pleadings, and

1 submission of expert reports. Does anybody on any of the  
2 subcommittees think that there are rule revisions required  
3 as a result of that, or has anybody looked at that? Those  
4 of you who do med mal, I guess.

5 MR. ORSINGER: Chip, I'll tell you that I  
6 don't think that the requirements of House Bill 4 conflict  
7 with the existing pleading rules, although if someone  
8 disagrees with me say so, and we almost have to make a  
9 philosophical decision in specific areas that are heavily  
10 regulated by statute whether we're just going to expect  
11 the practitioner to know the statute to go to or whether  
12 we're going to undertake to write a rule to call to the  
13 practicing lawyer's attention that's looking at the Rules  
14 of Procedure that you've got special procedures in certain  
15 areas. In the revamping of the rules that we did several  
16 years ago, I think what Dorsaneo calls the -- I forgot  
17 what he calls it.

18 PROFESSOR CARLSON: Recodification.

19 MR. ORSINGER: Recodification. We did have  
20 a philosophy where we stated a procedure and then there  
21 were well-recognized exceptions. We tried to amend the  
22 rule to call that to attention, and maybe that's a result  
23 of the fact that so many members of my subcommittee are  
24 law professors and they're teaching procedure to people  
25 who don't know it, and so if they say, "Oh, okay, this is

1 the way you handle this thing," but then there are whole  
2 segments of that that are not covered by that rule, it's  
3 natural for the professor to have to say, "But you've got  
4 to rook at this statute, this statute, and this statute."  
5 And so in fairness we tried to bring in everything, but we  
6 can't do it all the time.

7                   There are a lot of special statutes out  
8 there that are just not worth burdening the Rules of  
9 Procedure with, and so I feel like we need to make a  
10 philosophical decision do we want to have either a new  
11 subsection of our pleading rules or our stand-alone  
12 pleading rule that covers the med mal area or do we just  
13 put something in a comment to look at the med mal statute  
14 or we just assume med mal lawyers are smart enough to know  
15 where to look.

16                   CHAIRMAN BABCOCK: I'd like to assume the  
17 latter, but Buddy.

18                   MR. LOW: It seems like to me the committee  
19 has three things: Some things the Legislature asks the  
20 Court to implement by rules.

21                   CHAIRMAN BABCOCK: Yeah. I think we've  
22 already done that.

23                   MR. LOW: Certainly we need to do that.  
24 There are some things that the rules are inconsistent, and  
25 we certainly need to do that, but I don't think we need to



1 just draw a rule just because the law has expanded, and  
2 the law -- lawyers in that field should know the law; and  
3 at a minimum if you think something might be inconsistent  
4 in the med mal thing, then you could put a note or a  
5 footnote on that; but if it is inconsistent with that then  
6 we have to draw a rule.

7 CHAIRMAN BABCOCK: Right. I think that's  
8 exactly where we need to be, and I think, subject to being  
9 contradicted by Justice Hecht or Lisa, we have recommended  
10 rules in all the areas where the bill mandated it. So  
11 what we're really doing now is trying to make sure there  
12 is no inconsistency in the rules, and that's behind the  
13 issue of responsible third parties where there may be  
14 inconsistencies in the rules.

15 MR. LOW: And if the rule says so many days  
16 for this but the Medical Mal Act says differently then  
17 that's inconsistent. So, you know, we just -- but not  
18 everything is inconsistent.

19 CHAIRMAN BABCOCK: Yeah. It would be a rule  
20 that was just inconsistent because of a legislative  
21 directive that applied to all instances with the rule.

22 MR. LOW: Right.

23 MS. SWEENEY: I think with regard to Chapter  
24 74 there have been so very, very few of those cases filed  
25 and even fewer than that have made it to the appellate

1 courts. All of the ones that have made it to the  
2 appellate courts have been on interlocutory issues. I  
3 don't -- if there have been any new law cases actually  
4 tried, it's less than a handful, because I don't know  
5 about them; and, John, I don't know if you've heard of any  
6 or, Buddy, if you have, but --

7 MR. LOW: No.

8 MS. SWEENEY: -- I don't think there have  
9 been any tried, so there have not yet been appellate court  
10 opinions that reflect inconsistencies that are causing  
11 problems. I mean, there are a lot of other issues, but I  
12 don't know of anything where the issue is, well, the rules  
13 say one thing and Chapter 74 says another and what do we  
14 do. So I think we may be looking for problems that have  
15 not yet manifested and probably we just need to keep an  
16 eye on it and wait for reports from the field, none of  
17 which I'm hearing yet.

18 CHAIRMAN BABCOCK: Okay. Anybody disagree  
19 with that? John, any conflicting information?

20 MR. MARTIN: No, I don't know of any  
21 problem.

22 CHAIRMAN BABCOCK: Okay. Good. Speaking of  
23 interlocutory appeals, there are, as I understand it, no  
24 rules with respect to interlocutory appeals; and there's  
25 now a decision, perhaps authored by our own Justice Duncan

1 out of San Antonio, and another opinion out of El Paso  
2 that may have suggested slightly different procedures.  
3 Anybody know anything about that?

4 PROFESSOR CARLSON: That's for agreed  
5 interlocutory appeals.

6 CHAIRMAN BABCOCK: Right. For agreed.  
7 Yeah, I'm sorry. Now you can agree to go up, and the  
8 question is whether there ought to be procedural rules to  
9 determine how one does that. Am I right about that,  
10 Elaine?

11 PROFESSOR CARLSON: Yes, and I would think  
12 that we would want to have clarifying rules on that.

13 MR. ORSINGER: We've had a debate that I  
14 remember about who is the appellant, who is the appellee,  
15 whether we ought to treat it as a petition for review with  
16 a hundred pages or a 50-page brief, and we did a little  
17 exploration of that. I don't know think we ever got where  
18 it --

19 MR. LOW: I guess we didn't know what we  
20 were doing because we agreed to do that in a case.

21 CHAIRMAN BABCOCK: When you say "we," Buddy,  
22 you are not talking about this committee.

23 MR. LOW: Both sides, both the plaintiff and  
24 defendant. I happened to be representing the plaintiff,  
25 and the judge ruled a certain thing on following certain

1 law, and it was agreed that it would be better to appeal  
2 it than just try the whole case and find out, and we  
3 didn't have any problem at all. We just -- one was  
4 appellant and one was appellee, and maybe I didn't learn  
5 much about it, but it worked.

6 CHAIRMAN BABCOCK: Frank.

7 MR. GILSTRAP: I think you might want to run  
8 this past Bill Dorsaneo. I believe the appellate rules  
9 subcommittee did have -- maybe I dreamed this, but a  
10 telephone conference about this. The problem is, is that  
11 there are five reported opinions under this permissive  
12 appeal subsection of 51.014, I think it's (c) and -- or  
13 (b), I believe, and there's five reported opinions, and  
14 nobody's gotten it right.

15 CHAIRMAN BABCOCK: In your humble opinion.

16 MR. GILSTRAP: No, no, no. No, no, no.  
17 That's not my humble opinion. That's the humble opinions  
18 of the court of appeals. Nobody has got it right. Every  
19 court of appeals said this has been done wrong. Some  
20 courts of appeals said this wasn't reversible error, but  
21 it is something that needs to be addressed, and I think  
22 probably you might want to talk to Bill about this.

23 CHAIRMAN BABCOCK: Justice Gaultney.

24 HONORABLE DAVID GAULTNEY: Well, I think we  
25 did also have a discussion in this committee, I don't know

1    how many meetings ago, in which we talked about whether or  
2    not there would be a filing of a notice and what exactly  
3    would invoke the jurisdiction of the appellate court, and  
4    so we -- we did have a telephone conference, and there was  
5    -- I think Professor Dorsaneo made a preliminary report,  
6    so there is an issue there that needs to be addressed.

7                   CHAIRMAN BABCOCK:   Yeah.

8                   MR. GILSTRAP:   So I didn't imagine the  
9    dream?

10                  HONORABLE DAVID GAULTNEY:   There were  
11   several issues that need to be --

12                  CHAIRMAN BABCOCK:   Frank, as the oldest  
13   member of this subcommittee currently present at this  
14   meeting, can you get with Bill and bring this issue back  
15   to the full committee at the next meeting?

16                  MR. GILSTRAP:   Yes.

17                  CHAIRMAN BABCOCK:   And you might -- you  
18   might take a look at sections 102 and 103 and 10 -- I'm  
19   sorry, just those two, of House Bill 4 that deal with the  
20   interlocutory appeals.

21                  MR. GILSTRAP:   Conflict --

22                  CHAIRMAN BABCOCK:   Those sections may be  
23   broader than what we're talking about, but you ought to  
24   look at those as well; and let's just see what rules, if  
25   any, we need on interlocutory appeals.   So we'll take that

1 up at the next meeting, if that works for everybody.

2 Richard Orsinger, there was a rule -- excuse  
3 me, there was a bill that dealt with class actions, Senate  
4 Bill 1601, dealing with approving settlement or judgment.  
5 I think we've already dealt with that, though, in our  
6 class action recommendations, right?

7 MR. ORSINGER: I believe that that was  
8 folded into our comprehensive recommendation to the Court,  
9 but --

10 CHAIRMAN BABCOCK: I'm pretty sure that's  
11 right.

12 MR. ORSINGER: Maybe I better double-check  
13 that if nobody remembers.

14 CHAIRMAN BABCOCK: It's the last item on  
15 Justice Hecht's June 16th, 2003, letter to me.

16 PROFESSOR CARLSON: Chip?

17 CHAIRMAN BABCOCK: Yes, Elaine.

18 PROFESSOR CARLSON: My very muddled memory  
19 is that we did talk about the cy pres, but I don't know if  
20 it was before House Bill 4 or after.

21 MR. ORSINGER: It was before, I think.

22 PROFESSOR CARLSON: And then we had a vote,  
23 and I think the vote was not --

24 MR. ORSINGER: Well, we voted not to do  
25 anything in the Rules of Procedure about it.

1 PROFESSOR CARLSON: Right.

2 MR. ORSINGER: And I'm not sure that we want  
3 to, frankly; but, again, this is the question. We have a  
4 specific procedure for a very kind of infrequent  
5 situation, and are we going to write a rule about that or  
6 are we going to let the class action lawyers look at the  
7 statute?

8 CHAIRMAN BABCOCK: Richard, would it be too  
9 much trouble to just take a look at --

10 MR. ORSINGER: Not at all.

11 CHAIRMAN BABCOCK: -- the statute, Senate  
12 Bill 1601?

13 MR. ORSINGER: Not at all.

14 CHAIRMAN BABCOCK: And I think perhaps  
15 Justice Hecht is not sure that we have looked at this.

16 HONORABLE NATHAN HECHT: At least the first  
17 one. I don't remember a report to the Court about how  
18 much was done.

19 MR. ORSINGER: No, we didn't. We didn't  
20 ever adopt anything.

21 CHAIRMAN BABCOCK: Well, but even report to  
22 the Court that we don't think something should be adopted.

23 PROFESSOR CARLSON: We looked at this before  
24 House Bill 4, I think.

25 MR. ORSINGER: I know that we talked about

1 it and decided to do nothing, but I could be wrong, but  
2 regardless of that we would be happy to look at it fresh  
3 and then make a recommendation.

4 CHAIRMAN BABCOCK: Let's have that issue on  
5 the agenda for next time, and it's looking at Rule 42 of  
6 the Rules of Civil Procedure in light of Senate Bill 1601.  
7 So we'll get that on the agenda.

8 Pam, are there any -- Pam Baron, are there  
9 any rules that your committee is aware of that House Bill  
10 4 impacts?

11 MS. BARON: No, and I think Steve and I both  
12 looked at it, so no.

13 CHAIRMAN BABCOCK: Okay. Judge Peeples, I  
14 wouldn't think that your two rules would have been  
15 impacted by House Bill 4.

16 HONORABLE DAVID PEEPLES: Don't think so.

17 CHAIRMAN BABCOCK: Okay. We talked to  
18 Bobby. Ralph Duggins, on 215 anything?

19 MR. DUGGINS: No. Last time we reported we  
20 had nothing to do pending the draft of the model  
21 discovery.

22 CHAIRMAN BABCOCK: Paula, we've heard from  
23 you. Justice Duncan is not here on Rules 300 through 330.  
24 Elaine, do you know anything that affects those rules?

25 PROFESSOR CARLSON: I don't.



1                   CHAIRMAN BABCOCK: I've heard from Judge  
2 Lawrence. Elaine, we've heard from you on Rule 735  
3 through 822. Bill Dorsaneo is not here. Frank, are you  
4 aware of any other rules other than the ones we've just  
5 talked about that impact the TRAP rules?

6                   MR. GILSTRAP: No.

7                   PROFESSOR CARLSON: Chip?

8                   CHAIRMAN BABCOCK: Yeah.

9                   PROFESSOR CARLSON: I thought at the last  
10 meeting or the meeting before there was an agenda item,  
11 again, the years have not been kind, I think it was  
12 Justice Radack made a suggestion to delete the conference  
13 requirements on motion for rehearing.

14                  CHAIRMAN BABCOCK: Right.

15                  PROFESSOR CARLSON: And that issue was  
16 raised at the UT conference, and there seems to be a  
17 robust support for that notion since it's silly.

18                  MR. ORSINGER: It's my understanding that at  
19 the Supreme Court level there is kind of a de facto  
20 relaxation of that ruling, and I check with the clerk's  
21 office every now and then.

22                  MS. BARON: Yeah. I actually had a  
23 conversation with the clerk's office. It's not required  
24 at the Supreme Court.

25                  MR. ORSINGER: I think the Supreme Court is

1 kind of relaxing that requirement even though it's in  
2 black and white.

3 CHAIRMAN BABCOCK: Justice Bland.

4 HONORABLE JANE BLAND: It is on the agenda  
5 under Dorsaneo's report, and I apologize, Lisa, but the  
6 problem that we have is there are members of our court  
7 that believe that de facto relaxation of the rules is not  
8 really a good idea, that we should either have a rule and  
9 enforce it or not have the rule, and it's a problem with  
10 certificates of conference on motions for rehearing, and  
11 it's a problem with certificates of service.

12 And the problem that we see with respect to  
13 certificates of service is that the Rule of Civil  
14 Procedure certificate of service rule is dramatically  
15 different and less comprehensive than the certificate of  
16 service rule that is required by the TRAPs, and I think  
17 it's the position of our court and I think the reason that  
18 Chief Justice Radack sent the letter to this committee or  
19 Justice Hecht asking him to refer it to this committee  
20 that give us a rule that is the same for the Rules of  
21 Civil Procedure and the Rules of Appellate Procedure  
22 because it's causing confusion among the Bar, and we're  
23 getting a number of nonconforming certificates of service,  
24 and it puts us in the position of either having to accept  
25 nonconforming certificates of service or strike them, and

1     neither alternative is very palatable to our court.

2                   CHAIRMAN BABCOCK:   Frank.

3                   MR. GILSTRAP:   Is this issue something that  
4     relates to the legislative changes?  If it's not --

5                   CHAIRMAN BABCOCK:   No.

6                   MR. GILSTRAP:   -- then I think we're just  
7     straying out of our subject matter, and there is a whole  
8     range of issues of rules that have been discussed in the  
9     past, and this is one of them.  If we want to go there,  
10    that's fine.  I just don't want to go there inadvertently.

11                  HONORABLE JANE BLAND:  That's true.  I stand  
12    down.  You're right.  It doesn't have anything to do with  
13    House Bill 4, but I thought since Elaine brought it up and  
14    Chief Justice Radack asks me about it after every  
15    meeting --

16                  PROFESSOR CARLSON:  Chip said anything else  
17    dealing with the appellate rules we need to discuss.

18                  HONORABLE NATHAN HECHT:  This is on Bill's  
19    list when he reported the last time.

20                  CHAIRMAN BABCOCK:  I can't remember if he  
21    reported on this or not.

22                  HONORABLE JANE BLAND:  We didn't get to it.  
23    It was at the bottom of the agenda last time, and we  
24    didn't get to it.

25                  CHAIRMAN BABCOCK:  Okay.  Well, Angie, will

1 you make a note that this is something that Chief Justice  
2 Radack is interested in? We didn't get to it last time,  
3 and we need to get to it, so let's dig out those documents  
4 and put them on the agenda for next time. All right.  
5 That will work.

6 Buddy, on the evidence subcommittee, section  
7 801 of the House Bill 4 repeals the evidentiary bar on  
8 seatbelt nonuse. Is that something that necessitates a  
9 change in either the Rules of Civil Procedure or Rules of  
10 Evidence since that bar is mentioned in both?

11 MR. LOW: I have not addressed that. I've  
12 overlooked it. I saw 407, and we were working because of  
13 our amendment now looking at a possible amendment to 407b  
14 in the State Bar, but I have not looked at that and I  
15 apologize, so I'll have to get my committee to focus on  
16 that.

17 CHAIRMAN BABCOCK: Let's put that on the  
18 agenda, too, because this is something, as I understand it  
19 that --

20 MR. LOW: Right.

21 CHAIRMAN BABCOCK: -- in both the Rules of  
22 Civil Procedure and in the Rules of Evidence the seatbelt  
23 bar is mentioned.

24 HONORABLE DAVID PEEPLES: I'm not aware of  
25 that.

1 PROFESSOR CARLSON: I don't think so.

2 HONORABLE DAVID PEEPLES: Supreme Court did  
3 that way back and then the Legislature ratified it and  
4 then they changed it last year. I don't think it's in the  
5 rules.

6 MR. TIPPS: Where would it be in the rules?

7 MR. LOW: It's never been in the rules.

8 Like David says, it's just been accepted. I mean, the  
9 Court wrote an opinion, and it never was questioned.

10 CHAIRMAN BABCOCK: So you don't think it's  
11 in the Rules of Evidence or the Rules of Procedure?

12 HONORABLE BOB PEMBERTON: Chip, I think it  
13 may have been buried in the Transportation Code somewhere  
14 in the seatbelt law and then it got repealed -- got  
15 changed last session.

16 CHAIRMAN BABCOCK: Okay. Well, then maybe  
17 we don't need to do anything. Is everybody pretty  
18 confident that it's not in the rules?

19 MR. LOW: Yeah, I know it's not in the  
20 rules.

21 CHAIRMAN BABCOCK: Okay.

22 MR. LOW: But I thought maybe you were  
23 asking that we draw a rule --

24 CHAIRMAN BABCOCK: No, no, no.

25 MR. LOW: -- to adopt that because it's

1 never been in the rules. It started with a Supreme Court  
2 opinion some years back.

3 CHAIRMAN BABCOCK: That's okay. We don't  
4 need to take on things -- problems that aren't there.

5 Okay. Anybody -- the Jamail report is  
6 already done. Any other HB4 issues that anybody is aware  
7 of? Okay. So we -- yeah. I'm sorry. Harvey.

8 HONORABLE HARVEY BROWN: I think that we  
9 should look at and have a real healthy debate about the  
10 supersedeas bonds. Right now there's a rule that says --  
11 and some people remember the rule number, I don't, but it  
12 says once a supersedeas bond is filed there is no  
13 discovery. Well, now that there is a 25 million-dollar  
14 cap on the amount of bond or 50 percent of your net worth  
15 some parties are saying, "Well, we're really not secured;  
16 therefore, we should be allowed to do discovery and try to  
17 have some type of equitable relief to prevent us from  
18 being more insecure in the future because the company or  
19 the defendant does something," so I think some courts are  
20 struggling with that issue.

21 CHAIRMAN BABCOCK: Okay.

22 PROFESSOR CARLSON: 621a. Rule 621a.

23 CHAIRMAN BABCOCK: That's not a -- that's  
24 not a House Bill 4 inconsistency issue, I don't think, is  
25 it?

1 HONORABLE HARVEY BROWN: Not necessarily,  
2 but it's a question of what are the ramifications of House  
3 Bill 4 on that rule which says there's no discovery.

4 CHAIRMAN BABCOCK: Okay. Justice Hecht,  
5 what about that? Is that something the Court would like  
6 us to look into or can you tell?

7 HONORABLE NATHAN HECHT: I can't tell.

8 CHAIRMAN BABCOCK: Okay. The way we've been  
9 doing it is if the Court wants us to look at something  
10 they'll tell us, but now that you've raised it we'll see  
11 about assigning it to a subcommittee. It would probably  
12 be Judge Lawrence's committee that has Paula Sweeney, Jeff  
13 Boyd, and Carl Hamilton on it, if it was assigned, so we  
14 will get on that. Thanks.

15 MR. ORSINGER: Can I ask a follow-up  
16 question?

17 CHAIRMAN BABCOCK: Yeah.

18 MR. ORSINGER: Is discovery permitted on the  
19 issue of net worth when the bond is being cut down? Is it  
20 clear that discovery is permitted?

21 PROFESSOR CARLSON: Yeah.

22 MR. ORSINGER: So the question here is after  
23 you've had discovery in a trial on net worth can you do  
24 later discovery on like the financial condition of the  
25 defendant?

1                   PROFESSOR CARLSON: I think what Harvey is  
2 saying is now that you can partially supersede a judgment,  
3 you don't have to supersede punitives, for example, can  
4 you do discovery on the parties -- their asset situation?

5                   MR. ORSINGER: You're talking about  
6 discovery in aid of collecting the judgment?

7                   PROFESSOR CARLSON: Yes.

8                   MR. ORSINGER: For the unbonded part.

9                   PROFESSOR CARLSON: Uh-huh. I think that's  
10 what you were saying, wasn't it?

11                  MR. ORSINGER: I think that's a pretty  
12 important question, I agree.

13                  PROFESSOR CARLSON: Harvey, did I --

14                  HONORABLE HARVEY BROWN: Yeah. That's  
15 right, and sometimes the party has posted 25 million, so  
16 you don't have any discovery on the net worth issue.

17                  MR. ORSINGER: Uh-huh. Okay.

18                  HONORABLE HARVEY BROWN: And then there is a  
19 question do they get any discovery.

20                  MR. ORSINGER: Interesting.

21                  CHAIRMAN BABCOCK: Okay. Yeah. Judge  
22 Peeples.

23                  HONORABLE DAVID PEEPLES: Just on the  
24 general question of what issues we study, I would like to  
25 suggest that we wait until the Supreme Court asks us to



1 study something before we study it because if you look  
2 back over the years we spent untold man hours, person  
3 hours, studying things and then we never hear back from  
4 the Supreme Court, and we don't have the right to expect  
5 them to implement what we recommend, but I think that -- I  
6 mean, I would prefer that before we spend very much time  
7 on anything, we get some indication from the Court that  
8 they're interested in hearing from us on it.

9 CHAIRMAN BABCOCK: I completely agree with  
10 that, Judge, and to the extent it's been within my power  
11 that's how we have been doing it for the last five years.

12 HONORABLE DAVID PEEPLES: Lately, it's true.

13 HONORABLE STEPHEN YELENOSKY: You're not  
14 thinking like the academic that you now are.

15 CHAIRMAN BABCOCK: Okay. Here is something  
16 that the Supreme Court has asked us to look at. Justice  
17 Wainwright forwarded me a request to study an issue  
18 relating to exhibits that are admitted, tendered in offer  
19 of proof or offered in evidence being part of the court  
20 reporter's record, and I just got this a couple of days  
21 ago, and I told him we would be -- we would bring it up  
22 and refer it to the appropriate subcommittee for  
23 discussion at our next meeting, and the question is what  
24 is the appropriate subcommittee.

25 David Jackson, our court reporter, should

1 surely be involved in this, but what subcommittee did we  
2 think was the appropriate one? It spans Rules 75, 14 and  
3 -- 75 and 14 and Rule 13 of the TRAP rules.

4 MR. ORSINGER: You know, I can make a  
5 comment here. I know you don't want to get into the  
6 merits of it, but I think this is almost stealth eminently  
7 a beneficial recommendation, and in my personal experience  
8 there's quite a variety among court reporters as to  
9 whether they consider marked and offered but rejected  
10 exhibits to be their responsibility or not, and sometime  
11 ago this committee decided the best repository for  
12 exhibits was the district clerk, I think, until the record  
13 was being filed by -- if I understand that process, and I  
14 have had a problem with court reporters not recognizing  
15 rejected exhibits as part of the record, and you don't  
16 realize that until you're writing your brief and you've  
17 got to chase them down and so --

18 CHAIRMAN BABCOCK: Richard, we just  
19 determined who's subcommittee this goes with.

20 MR. ORSINGER: I can write the  
21 recommendation over lunch.

22 CHAIRMAN BABCOCK: I knew it would reveal  
23 itself if given enough time, but would you make sure that  
24 David Jackson who is not --

25 MR. ORSINGER: Yeah.

1                   CHAIRMAN BABCOCK:  -- on your subcommittee  
2 gets involved in it?  And, Angie, make sure that Justice  
3 Wainwright's request gets to Richard, and let's follow-up  
4 with Justice Wainwright so that he knows that we've done  
5 this.  So there's one, Judge Peeples, that fits the rule  
6 of when the Court asks we respond.

7                   Speaking of the Court asking, there is  
8 something that I want to take out of order because we have  
9 some guests that have traveled to be with us; and it  
10 relates to Item 8, which is proposed Rule of Judicial  
11 Administration 14; and Tom Wilder, the District Court  
12 Clerk for Tarrant County is here and would like to speak  
13 briefly on this; and Clyde Lemon from the Harris County  
14 district clerk's office is here.

15                   This material was provided to you only  
16 recently, and there has been -- since we got it and put it  
17 on the agenda there has been a flood of e-mail traffic  
18 that has come in that I don't even know if it's on the  
19 website, and in addition one page of the proposed rule was  
20 not included in the PDF file, so we've got all sorts of  
21 problems here, but this generally -- and Justice Hecht may  
22 want to give us more background on this, but the Texas  
23 Judicial Council did a substantial study, held public  
24 hearings, and made recommendations regarding access on the  
25 internet to court records, and it's a big issue

1 nationally, a lot of states have studied it.

2                   In the materials we have some report on what  
3 other states have done, but there is a proposed rule, and  
4 the Court has asked us to look at it and give the Court  
5 our comments. And, Justice Hecht, do you want to give  
6 people more background, because I know you know more about  
7 it than I do?

8                   HONORABLE NATHAN HECHT: The Congress passed  
9 a statute that requires the U.S. courts to make available  
10 electronically all documents that they have  
11 electronically; and since the U.S. courts are going to  
12 electronic filing, that will soon be a lot of documents;  
13 and things basically fall into three categories, things  
14 that the parties send in, things that the court itself  
15 generates, and then other.

16                   And the Federal statute says that the  
17 Supreme Court of the United States shall make rules to  
18 protect privacy interests. So after that statute passed,  
19 the U.S. Judicial Conference designated a couple of groups  
20 to work on these, implementing the statute, and there are  
21 two basic implementation problems. One is all of the  
22 policy issues that surround how much of this goes to the  
23 internet, under what circumstances, what is redacted, how  
24 does it get redacted, the policy issues about what should  
25 be known through this electronic access process. That's

1 the policy issue.

2                   Then there's just a mechanical issue about,  
3 okay, then how do you do all that, physically, how do the  
4 parties and counsel and the clerks and the court make sure  
5 that this happens. The policy issues on the -- in the  
6 Federal system have more or less been decided by the  
7 committee that the U.S. Judicial Conference charged with  
8 doing that, and without going into detail, they have been  
9 decided very much toward making what's filed available  
10 electronically. Then -- and there are some exceptions.  
11 Then the Federal advisory committees are in the process of  
12 going through trying to figure out a mechanical way to  
13 carry out policies that have been cited.

14                   As Chip says, a whole bunch of states are  
15 doing this at the same time, not because Congress requires  
16 it but because they either have a state statute telling  
17 them to do it or because they just think it's a good idea;  
18 and the Judicial Council here in Texas took this issue up  
19 about a year ago; and they have had numerous meetings on  
20 this, mostly aimed at the policy issues but to some extent  
21 at implementation; and they have gotten a lot of good  
22 information from the clerks' offices about what people are  
23 doing or wanting to do or in the process of hoping to do  
24 at various different places in the state; and they have  
25 made a recommendation to the Court, which is in this

1 stuff, I think, right?

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE NATHAN HECHT: And so then the  
4 Court just got this a little while ago and has not had a  
5 chance to discuss the policy issues, and our liaison --  
6 well, not our liaison, but, yes, I guess our liaison to  
7 this group that has worked on this for the last year was  
8 Chief Justice Phillips, and he's gone, so that leaves a  
9 bit of a vacuum there, and we've got some -- the Court is  
10 just going to have to take this up and go through the  
11 discussions and try to get up to speed on the policy  
12 issues.

13 But no matter how the policy issues come  
14 out, the Court will want this committee's views on how to  
15 implement those policies, how to make them work, what  
16 instructions to give the clerks and so on. So rather than  
17 wait until next meeting, which may be in January, but even  
18 so, rather than wait that long, we decided to go ahead and  
19 send this over to you so that you have it, you can start  
20 looking at it.

21 There's a lot of stuff here, and it's very  
22 interesting to look not only through the Judicial  
23 Council's proposal but through the analysis of the other  
24 states so you can begin to see what the privacy issues  
25 are. And then while the Judicial Council I think has done

1 a very good job of venting those issues, still there may  
2 be some input from this committee on that because the  
3 privacy issues are heavily affected by types of cases.  
4 There are wholly different privacy concerns in family  
5 cases than there are in med malpractice cases than there  
6 are in contract cases.

7                   The same thing is true in the Federal  
8 system. There are immigration cases, and Social Security  
9 cases have whole different problems than ordinary civil  
10 cases and criminal cases. And so it will -- it really  
11 will require a great deal of input from different areas of  
12 practice to be able to see how this disclosure is going to  
13 work throughout the state, and because both -- there's  
14 basically two sides of the debate, and both sides have a  
15 gigantic interest in how this comes out, because the  
16 interest in public access to information in the court  
17 system is a historic and deep-seated interest. The  
18 interest of privacy is equally important and deep-seated,  
19 and there has to be some balancing here.

20                   And the changes in what electronic access  
21 means, that is to say as the internet keeps changing, but  
22 what we thought was a big problem five years ago may have  
23 disappeared and now something else is a big problem, it  
24 really requires us to do a good bit of thinking about  
25 this.

1                   But on implementation and on just how to  
2 roll it out, several clerks offices are way ahead of all  
3 of this, and they have done a lot of work on this, and so  
4 I guess we'll hear from them.

5                   CHAIRMAN BABCOCK: Yeah. And Tom Wilder  
6 from Tarrant County is here, and there is a letter on our  
7 website from Lisa to myself that has been perhaps  
8 misconstrued. I don't think Lisa intended to say nor does  
9 this committee mean that there are no efforts being made  
10 in this regard, Tarrant County being a good example.  
11 Harris County is another that I'm aware of. Just that we  
12 don't have any statewide statute or statewide rule that  
13 governs this, and that's what this effort is all about.

14                  But, Tom, if you could in five or so minutes  
15 just give us a report on what your county is doing, and if  
16 there are some issues that you would like us to be  
17 sensitive to as we're going through the rule and making  
18 our recommendations to the Supreme Court, that would be --  
19 that would be terrific.

20                  MR. WILDER: All right. Shall I present  
21 from the podium, or do you have somewhere else you prefer?

22                  CHAIRMAN BABCOCK: Well, you can squat in  
23 the middle or you can go to the podium or whatever your  
24 pleasure is.

25                  MR. WILDER: All right. Thank you, Mr.



1 Chairman. Justice Hecht and Mr. Chairman, members of the  
2 committee, I don't think this is on, but I rarely need  
3 amplification of my voice anyway. Our county got into  
4 this some 10 years ago when I was elected. I'm going to  
5 give you a little history because our county is like a  
6 microcosm of the rest of the state. Various clerks  
7 offices are in the Stone Age on this; others of us are out  
8 in front of the pack. Because we got started on it early,  
9 we have sort of addressed some of the issues that you will  
10 hear both pro and con about this and which Justice Hecht  
11 so ably laid out.

12                   There are concerns at the Federal level. I  
13 work with a House committee and have filled out two  
14 massive surveys from the GSA over the last year regarding  
15 the use of Social Security numbers, and in your draft rule  
16 that you have that I believe -- Lisa, do they have the  
17 draft rule?

18                   MS. HOBBS: Uh-huh.

19                   MR. WILDER: You are addressing that, and it  
20 needs to be addressed because if we don't address it  
21 they're going to address it at the Federal level, at least  
22 the staff tells me, and that's going to have a huge impact  
23 on our operations.

24                   Ten years ago when I first took office in  
25 '95 our county judge, Tom Vandergriff, asked me to put

1 together one of these systems. I have a lot of, you know,  
2 sort of large-scale computer knowledge, and I proceeded to  
3 do so. Little did I know that it would take the approval  
4 of 26 district judges, 14 county judges, the sheriff, the  
5 district attorney, the county clerk, and an assorted  
6 commissioner's court; and the judge, I kid him to this day  
7 that he sort of suckered me into doing this because I was  
8 the rookie.

9                   Well, after about nine months of various  
10 debate and hearings or whatnot, we came up with a plan  
11 that is much like the draft rule that you have, only it  
12 was in the form of court orders, and our judges signed  
13 those. Other county elected officials had to be coerced  
14 into signing them, and we've had sort of a running gun  
15 battle for 10 years over that. What you are doing here  
16 today will in large measure stop a lot of that wrangling  
17 and hopefully hold down the number of lawsuits and other  
18 contests that we get from outsiders who want bulk  
19 distribution of records, which my judges have never  
20 allowed and which I have been ordered not to allow, and  
21 we've won two lawsuits on that from major entities where  
22 the courts held that -- basically they were thrown out on  
23 summary judgment. We have issues up to and including  
24 today in our county where the sheriff is attempting to  
25 grab judicial information off the mainframe and put it on

1 a free and open website. The county clerk had previously  
2 attempted that, and the judges ordered her not to do it.  
3 She has the same court orders and the same duties that I  
4 do.

5                   So this is a -- much needed access to these  
6 records, though, exists from landlords, employers, I mean,  
7 Lockheed, Bell, all your major employers in town, many  
8 information vendors who do work for other employers,  
9 landlords who get sued if they don't do background checks  
10 on tenants, and I could quote you chapter and verse on  
11 that, but I'm going to try to cut this short. So you have  
12 many, many entities. Nonprofits even check backgrounds on  
13 volunteers anymore.

14                   So I have hundreds of subscribers, and this  
15 is the key portion. Rather than throw this open on an  
16 open website, if you will, my judges prefer that we hold  
17 it under a subscriber agreement, and we would have a  
18 little fee. Of course, district clerks don't have the  
19 money -- when I go to commissioners court to get something  
20 I have to bring revenue. County courts have money.  
21 That's another issue, but it's a practical reality. JPs  
22 would be in the same boat. They don't get money, neither  
23 do I. So I've got to bring revenue to do it, and just as  
24 a matter of philosophy, you would want those who use the  
25 system to pay for it.

1                   Now, the way this newest technology was  
2     implemented was the web access. My old technology was a  
3     dial-up system that for all practical purposes it was a  
4     remote access from people's offices or whatever. The web  
5     access that we put on where you can actually in addition  
6     to our case management data, which there is an exhibit on  
7     the original court order that says what that data is, what  
8     is judicial records, the web access was like an addendum  
9     that simply let subscribers come in another door. I was  
10    glad to see Ralph Duggins being a member of this committee  
11    because his firm is a subscriber to this.

12                  The way the judges handled that was to have  
13    a debate at the Bar association, and it was debated pro  
14    and con, and over two-thirds of the Bar wanted this  
15    access. In fact, the one that the judge asked to be -- to  
16    do the con, he said, "Now, Tom, I'm going to be against  
17    you today, but as soon as you get that system in place I  
18    want to be one of your first subscribers," because I get  
19    nothing from compliments from the Bar, the news media, the  
20    people that use this; and yet it allows the judiciary to  
21    control their records as is recited in Nixon vs. Warner  
22    and other important cases that are part of the body of  
23    law. There's also over 20 years of attorney general's  
24    opinions and other cases where it has been held that  
25    judges may control the records and direct their custodian,

1 the clerk of the court, to operate in a certain fashion.

2                   So you have a rule before you that will take  
3 away a lot of the problems that have approached this,  
4 including those who want to put this on a wide open  
5 access, no restrictions, which I do not believe is in the  
6 public's best interest, and I will be happy to take your  
7 questions after about that, but again, I'm going to try to  
8 shortcut this a little bit.

9                   On your existing rule, there were some  
10 things that although the rule passed 16 to 3 it was  
11 posited by Justice Phillips that those of you who would  
12 want a free and open access vote one way and those who  
13 would want it a more restrictive subscriber access a` la  
14 Tarrant County would vote the other way. Well, the vote  
15 was 16 to 3 to do it with the more limited area.

16                   However, somehow or another in the rule  
17 there was several things put in here that would make it  
18 impractical for us to implement it, especially if we  
19 already had a system going or if you had, you know, old  
20 disposed records and you wanted to include them in  
21 something new or you started this from a certain date and  
22 went forward, to go forward, but really you need to  
23 include all your records in this if you possibly can in  
24 the interest of a subscriber having the most access.

25                   And I would respectfully refer you to these

1 several places in rule -- the proposed Rule 14. First  
2 Rule 14.5(d)(1), and, Lisa, was this sent to the  
3 committee, this document that I have?

4 MS. HOBBS: (Nods affirmatively.)

5 MR. WILDER: They have this, okay. As I  
6 read Rule 14, there are two classes of records. There are  
7 court created records and then other filings in the case.  
8 Our judges took the position that if it was open at the  
9 courthouse, in other words, Mr. Clerk, if you had a paper  
10 filed and it was open in the public, that that should also  
11 be open on this more restricted website. What that does  
12 is keep the doctrine of practical obscurity in place. If  
13 you're coming down to look at a paper file, you've got to  
14 have a name and, you know, and/or a case number. You've  
15 got to come downtown. You've got to park. You've got to  
16 come in and find the record, and basically there are  
17 barriers there to the casual snoop who may just be looking  
18 for records for something that's inappropriate.

19 By using a controlled website like this with  
20 subscriber agreement application, we know who we're  
21 dealing with; and with a little fee in there -- and Judge  
22 Sudderth, who chaired the committee for the judges, he  
23 actually negotiated that fee as to what it would be to be  
24 enough to eventually -- we're not covering our costs now,  
25 but be enough that just your casual teenage surfer

1 wouldn't be interested in hooking onto this system.

2                   It also gives me the ability to if they  
3 violate the security rules or use the information in some  
4 inappropriate way, that I can cut them off; and you have  
5 that in your rule, that I must, you know, have the proper  
6 security things and, you know, sort of monitor this, and  
7 that's good.

8                   You also outlaw or prohibit bulk  
9 distribution of records, which has been -- which is an  
10 awful thing, and again, I'm not going to get into that  
11 unless you have individual questions. You do make the  
12 same allowance that our judges do --

13                   MS. SWEENEY: Can you just tell us what that  
14 means? That bulk distribution, can you just tell us what  
15 that is?

16                   MR. WILDER: In my first big fight and one  
17 of the first lawsuits that -- the first times I was sued  
18 was somebody wanted all of our court records downloaded to  
19 an individual, to a disk, basically a bulk download of  
20 records. So everything that was in our mainframe database  
21 would be given to them in bulk.

22                   Now, there are problems with that. First of  
23 all, how is a criminal judge ever going to expunge a  
24 record if you sold tapes and disks all over the country?  
25 Now, other counties do this, but my judges have never

1    wanted to do that; and, frankly, the county fathers never  
2    wanted to do it.  When I had a fight with another entity  
3    in the county, my commissioners court gave me \$5,000 and I  
4    hired Senator Harris to brief the Attorney General, and we  
5    got a so-called prior determination that we do not have to  
6    even bring it before the Attorney General again about this  
7    bulk download of records.

8                    But you're actually putting that in a rule,  
9    because I had a conversation with one of my colleagues in  
10   another county this morning, and she's deluged with all of  
11   these requests.  They're very expensive to comply with,  
12   and yet they don't do the job for their requestor because  
13   the day you hand out that disk it's outdated.  With 52,000  
14   cases a year, you know, if you hand out a disk and they  
15   don't get another one till the month later or six months  
16   later when their people that are buying that information,  
17   they're not getting the rest of the case; whereas when  
18   they come in under a subscriber agreement they're getting  
19   what happened that day.  It's updated right to that day.

20                   So if the person was acquitted or the DA  
21   dropped the charges, it may still show that pending on  
22   that disk, but it's going to be up to date.  If I had an  
23   expunction order, boom, it's gone that day within five  
24   minutes.

25                   But then if you sold tapes and disks -- one



1 of the ones that sued me was in Florida. Now, how would I  
2 go to Florida and try to get that expunged if -- and we  
3 have hundreds of expungements now, because people  
4 understand when you're charged with a crime that's on your  
5 record forever; and as you know, I'm sure, you're only  
6 entitled to an expungement generally speaking if you're  
7 found not guilty or the DA dropped the charges or your  
8 no-billed by the grand jury or whatever; but it is  
9 definitely in your -- or the person's best interest to  
10 come in and get an expungement because employers will deny  
11 you, you know, employment. Landlords may deny you an  
12 apartment. Lenders may deny you on credit if you've got  
13 any kind of criminal background. I've seen that happen.  
14 So that's what the bulk download talks to. Yes, Andy.

15 MR. HARWELL: Just a question. How do you  
16 differentiate the downloaded record from a paper record if  
17 someone comes into the office during this interim period  
18 before it's expunged and buys a paper record, which they  
19 can do because it's an open record? You wouldn't then go  
20 back out to capture that document that had been copied and  
21 sold to this individual, would you? How do you see the  
22 difference there?

23 MR. WILDER: That's true. Frankly, you  
24 don't. When the paper record -- again, to paraphrase  
25 Nixon vs. Warner, there is a common law right of access

1 because the records of the judiciary have an exemption  
2 under Public Information Act. They are considered to be  
3 open for inspection, but that right is not unlimited, as  
4 that case says. Who limits it? The judges, with the  
5 clerks' participation. So, yes, a paper record, if I  
6 sold, say, a copy of the indictment, there's no way that I  
7 could physically get that back. We don't know where  
8 that's going, but that doesn't happen that often.

9                   What you have there is an ability of, say,  
10 one of these information vendors that's doing background  
11 checks for employers, and if they have a disk, they've got  
12 that in their possession, it's difficult to get it back,  
13 but if I have control of that record -- in other words,  
14 it's much more -- the capability for a more widespread  
15 distribution exists with the disk and even out of state  
16 that probably isn't there on the paper record.

17                   Now, my judges have always taken the  
18 attitude that if it was open in the paper file, we could  
19 put it on the web access, again, as long as we kept it in  
20 a controlled way, but I have given each of my judges the  
21 technical ability -- all they've got to do is put an X in  
22 a box if they just can't stand for a particular document  
23 to be on my website, even though it's controlled by, you  
24 know, the subscriber agreement and a little fee and  
25 whatnot, they can just X a box and say, "Don't put this on

1     there," and we can hide that. That's very easy to do.

2                     What we can't do is go back through the  
3     hundreds of thousands of cases that we've got and do that  
4     on a go-back basis, so I would urge anything that this  
5     committee does, do it on a prospective basis; and, of  
6     course, those counties that have microfilm, as Bonnie  
7     Wolbrueck and I were discussing, how do you go back and  
8     dig it out of microfilm? Now, we're converting all of our  
9     microfilm to image products where it's essentially a  
10    seamless system, and we're getting off the microfilm  
11    because of the limitations. If the feds came in and said,  
12    "Okay, you can't show Social Security numbers in any court  
13    document anymore," as I have told them, I don't know how  
14    you comply with that if you're using microfilm as your  
15    primary backup document, and if you've destroyed the paper  
16    record, that's all you've got. I'm sure you-all do that  
17    much more in the county courts possibly, Andy, than we do  
18    in the district courts.

19                    But essentially the system that we have in  
20    place and which this rule pretty much tracks, with these  
21    few exceptions, is something that will take care of your  
22    problems; and in 10 years, other than the ones who want to  
23    try to break the rule and either put the stuff on a free  
24    and open website like the sheriff that we're -- my local  
25    administrative judge was quoted in the paper this morning

1   that we have a court order in place, the clerk is ordered  
2   not to allow access to this information, and the status  
3   quo will be maintained. He alluded to the work of this  
4   committee, that he wanted to wait and see what this  
5   committee decides because that may alter what we do. Now,  
6   I hope that -- did that answer your question, someone?  
7   Andy, do you have something else?

8                   MR. HARWELL: I had one other question. So  
9   you approve the subscriber then that wants to pay the  
10  35-dollar fee?

11                  MR. WILDER: Right.

12                  MR. HARWELL: What are the criteria for this  
13  subscriber to be either approved or denied access to your  
14  system?

15                  MR. WILDER: Just what you have in your  
16  rule, that basically I have to treat everyone the same.  
17  Now, I have denied one person or one entity access to the  
18  records, and that was the Republic of Texas, and Mr.  
19  McClaren that was out here and took hostages out in West  
20  Texas, before he got into that -- they're letting him out  
21  of jail. I'm not sure why. He threatened me as well as  
22  other clerks, but he is -- he was sitting in my office and  
23  wanted to make copies of all the records that I had, and I  
24  said, "No, that would be physically impossible." He  
25  wanted to set up a copy machine in my office, and I said,

1 "Well, we'll be here till you and I are both old and gray  
2 if you expect to make copies of all the records. So, no,  
3 that's unreasonable. I'm not going to allow it." Then he  
4 wanted a bulk download of everything, and I disallowed  
5 that because I'm ordered not to allow it in my county.

6 Thirdly, then he said, "Well, I want to hook  
7 onto your online system," and I declined that because they  
8 have a history of misuse of court records, which was  
9 discussed in various court cases, including Nixon vs.  
10 Warner. So on that basis I declined to allow him to have  
11 them; and about that time he decided he would get violent;  
12 and he's, like I said, either out of jail or getting ready  
13 to get out of jail.

14 So we don't really say, no, you can't have  
15 them, but after the fact if I found that they were somehow  
16 misusing them, and we've not -- the only problems I've  
17 had, there's been a few over 10 years that wouldn't follow  
18 the security rules, and we cut them off until they decided  
19 to follow our rules.

20 Yes, ma'am.

21 HONORABLE JANE BLAND: Bottom line, are you  
22 in agreement with the proposed rule, and if you're not,  
23 can you tell us what areas of disagreement you have with  
24 the rule?

25 MR. WILDER: Yes, I will. As I mentioned

1 before, 14.5(d)(1), case records other than court created  
2 records. There appears to be a split arrangement in the  
3 rule. Now, Lisa and I had some back and forth yesterday  
4 on that. She felt like we could overcome this if my  
5 judges wanted to have all the documents under the  
6 subscriber agreement, not just the ones that are not court  
7 created documents. And to this date that's -- I mean, I  
8 talked to them before I came down here. That's what they  
9 would like to do.

10                   There is a sentence in the last paragraph.  
11 In fact, it's the last sentence of 14(e), as in elephant,  
12 that says that if the judges create a local rule and  
13 you-all -- and the Supreme Court approves it, they cannot  
14 -- at least as I read it, essentially in court include the  
15 court created documents, so I'd ask you to take out that  
16 last sentence so we could incorporate -- in other words,  
17 we could put the whole file under the protection of the  
18 subscriber agreement and, therefore, under the protection  
19 of the judiciary.

20                   CHAIRMAN BABCOCK: Tom, are you talking  
21 about 14.5(e)?

22                   MR. WILDER: It's the very last sentence,  
23 let me get the actual --

24                   MS. HOBBS: It's 14.4(e).

25                   MR. WILDER: Maybe I misquoted it.

1 MS. HOBBS: On the bottom of page three.

2 MR. WILDER: Lisa, do you have it there?

3 MS. HOBBS: 14.4(e) on page three.

4 CHAIRMAN BABCOCK: Okay. Thank you. That's  
5 all I needed. Tom, one other question, could you get us a  
6 copy, just a form copy, sample copy, of your subscriber  
7 agreement?

8 MR. WILDER: I have provided that to various  
9 levels of staff, but I'll be happy to -- in fact, it's on  
10 my website, but however the committee would like to have  
11 it, I will be happy to.

12 CHAIRMAN BABCOCK: Well, we could probably  
13 get it from your website.

14 MR. WILDER: [www.tarrantcounty.com](http://www.tarrantcounty.com), and go  
15 to "web access," and that has got a copy of the subscriber  
16 agreement there.

17 CHAIRMAN BABCOCK: Great.

18 MR. WILDER: And that agreement was written  
19 by one of our judges. She was the chief of civil  
20 litigation, Dana Womack, at the time she represented me.  
21 She's now one of my district judges, and that subscriber  
22 agreement has worked well. It is adapted by another  
23 agreement that's on there about if you want web access.

24 CHAIRMAN BABCOCK: Judge Yelenosky has got a  
25 question, and then after that we're going to take a break.

1 And, Tom, can you hang around during the break and answer  
2 some questions?

3 MR. WILDER: Yes, sir. I'm here at your  
4 pleasure.

5 CHAIRMAN BABCOCK: Judge Yelenosky.

6 HONORABLE STEPHEN YELENOSKY: I just wanted  
7 to ask, a couple of words you used, if you could explain  
8 what you meant by them, one was "improper purpose" that  
9 some people may have and "misuse."

10 MR. WILDER: Yes, sir. That's somewhat  
11 nebulous. I'll recite something that apparently happens  
12 in the family section. Some of my family law judges until  
13 they fully understood the protections of the court order  
14 weren't real happy with the idea of putting these up on  
15 the web because Ms. Jones -- there are actually people in  
16 churches who apparently want to search the divorce records  
17 for members of the church and then make copies of them and  
18 pass them out, especially under the old rules where you  
19 can allege adultery or whatever, and there are -- I guess  
20 we used to call them busy bodies, who will go and try to  
21 find records and go hand them out in the church to  
22 embarrass people.

23 There are also political opponents.  
24 Probably the most misuse of court records comes in the  
25 political field. We had an issue in our county on court



1 statistics that I've always closely held, and I understand  
2 other clerks don't put them out at all, where a challenger  
3 to a judge, well, he selectively quoted some court  
4 statistics off of an internal report that put the judge  
5 that he was running against in a bad light; and I  
6 contested him on it and said, "You didn't do this  
7 correctly. You pulled it off the wrong line, and  
8 basically it shouldn't have been used in the first place."  
9 That's sort of another debate, but --

10 HONORABLE STEPHEN YELENOSKY: Well, if we  
11 use that standard, we wouldn't have political campaigns at  
12 all.

13 MR. WILDER: I understand. But if I had had  
14 that stuff under the subscriber agreement that we have, I  
15 could control that to some degree. Not entirely. None of  
16 this is foolproof.

17 HONORABLE STEPHEN YELENOSKY: Well, and  
18 that's my concern, is you're controlling it, because  
19 there's clearly discretion there. Anyway, we will get --

20 MR. WILDER: It's discretion with the  
21 overview of my judges who can always overrule it.

22 HONORABLE STEPHEN YELENOSKY: And as a judge  
23 to be, I'm still concerned about it.

24 CHAIRMAN BABCOCK: Okay. Tom, thanks so  
25 much. We're going to take break, and if anybody has got

1 questions during the break, this discussion about this  
2 rule is not going to end today, although I know that the  
3 Court is anxious to get our views. We're going to study  
4 it more closely; and we have a subcommittee that has met,  
5 albeit briefly, about it; and we'll get into that after  
6 the break. But we're in recess. Thanks.

7 (Recess from 10:56 a.m. to 11:20 a.m.)

8 CHAIRMAN BABCOCK: Okay. Tom is going to  
9 take five minutes. He's going to be on the clock, so  
10 listen attentively, and we'll get the cow bell and the  
11 foghorn when we get to five minutes. Tom, how about it?

12 MR. WILDER: Thank you, Mr. Chairman.  
13 Again, the split case record thing would be a real problem  
14 for us to implement. I just ask you to look at the  
15 verbiage that's in my document here as to why my judges  
16 after talking to them again this week would prefer that  
17 you just simply let us image the case file and not put it  
18 into two categories of court created documents and other  
19 filings. If you put the court created documents, if you  
20 allow people to put them wide open on the web, you are  
21 really not offering them protection there.

22 The date of birth, this would be a real  
23 chiller. If you restrict the date of birth to the  
24 sensitive data sheet, I mean, other things ought to be on  
25 that sensitive data sheet, since I'm the one that proposed

1 it, but the date of birth is not one of those. You can  
2 find dates of birth a lot of places, but what we use date  
3 of birth for and what, like Lockheed, if they're looking  
4 in to see if somebody has got a criminal background,  
5 they're going to use that date of birth as a unique  
6 identifier and something to -- you know, we're going to  
7 have 16 whatever person's name that they log on for; and  
8 if they have got the date of birth, which they would have  
9 on their application, they're going to be able to use  
10 that. But if we can't display that, that kills the use of  
11 it because they're not going to take the chance that they  
12 might pick the wrong one and deny them hiring, and I'll go  
13 into that in more detail if you want.

14                   The cost of copies, for whatever reason this  
15 popped up in the draft rule. We've always taken the  
16 position that since we have an exemption under 552 of the  
17 Government Code, which is the Public Information Act, the  
18 records maintained by and for the judiciary, that we then  
19 should not be subject to the cost schedule that's mandated  
20 in that particular statute. That has always held up.  
21 If -- right now I get 35 cents a copy, which is based upon  
22 a workflow study and it's based upon other statutes that  
23 allow me to charge that. Other counties get different  
24 amounts based upon what their costs are. I cannot get  
25 more than what my actual costs are.

1                   This would be a hit of \$150,000 a year to my  
2 county. My commissioners would go crazy, and I can tell  
3 you what we spend for that, if you -- you know, what we  
4 use that money for. So if you'd please consider deleting  
5 that as far as mandating what a -- it essentially would be  
6 only 12 cents if we use the GSA cost schedule.

7                   That copy fee, we do not charge a copy fee  
8 on our web access, just when they come to the courthouse  
9 to make paper copies, but the way I read it you would even  
10 be restricting what we do at the courthouse on that. So  
11 those few of -- oh, and one last thing, the Family Code  
12 proceedings, currently your rule would prohibit the  
13 display of any family court case on a website, even one  
14 with a subscriber agreement as we have.

15                  Now, I don't personally think that's fair to  
16 the family Bar. Harris County has problems with that; and  
17 I know my colleague, visiting with the chair yesterday,  
18 and I would simply ask you to reconsider that because,  
19 after all, they can come to the courthouse and look at  
20 that paper file; and if you keep it under -- if you make  
21 the whole file subject to a subscriber agreement, which  
22 right now you've got this split situation, then you afford  
23 yourself to be covered under the doctrine of practical  
24 obscurity where they have some costs and some barriers to  
25 jump over just like they would if they had to come to the

1 courthouse.

2                   So with that, I appreciate you listening.

3 If the chair wants to entertain any other questions, I  
4 will be happy to answer it.

5                   CHAIRMAN BABCOCK: Thanks very much. As I  
6 said before, we're not done with this by a long shot, so  
7 we'll have plenty of additional opportunity to talk about  
8 it. The phrase "practical obscurity" I'm glad to see has  
9 now been turned into a doctrine as of --

10                  MR. WILDER: Theory, theory. Thanks, Mr.  
11 Chair.

12                  CHAIRMAN BABCOCK: You're welcome. Thanks  
13 very much for coming and talking to us. Our subcommittee  
14 on this is the subcommittee on judicial administration,  
15 which Mike Hatchell chairs, and consists before today of  
16 Ralph Duggins, Sarah Duncan, Tom Gray, and Stephen Tipps.  
17 We've had a couple of people who have asked to be included  
18 for the purposes of this rule, and they all bring great  
19 expertise to us, so I think it would be appropriate to add  
20 Alex Albright, Bonnie Wolbrueck, and Andy Harwell, all  
21 whom have got practical experience on this.

22                  In Hatchell's absence, Ralph and Stephen and  
23 I have had two minisubcommittee discussions about this  
24 rule, and I think it might be helpful if we just throw out  
25 a few things that we see as a practical matter, if it's

1 all right if I can go first.

2                   The one issue I see right off the bat is  
3 that there is no cross-reference or no attempt to blend  
4 this rule with 76a. There are different definitions for  
5 what a court record is, and it seems to me -- and, of  
6 course, as we all know, 76a was a highly negotiated, if  
7 that's the right word, rule that a special committee spent  
8 a lot of time working on. It may or may not need  
9 revisions, but in any event it needs to be harmonized with  
10 this rule, and right now there are certainly conflicts  
11 that I can see.

12                  I also see that, as often happens, you get  
13 people working on rules and they try to solve all  
14 problems. I'm not sure granting immunity in a rule is  
15 something that is necessarily within the rule-making  
16 authority, but Rule 14.9 of this proposed rule purports to  
17 grant immunity to Bonnie and Andy, and, nice try, but I'm  
18 not so sure that --

19                  MS. WOLBRUECK: And the problem with that  
20 is?

21                  CHAIRMAN BABCOCK: Well, you can fight hard  
22 for it in the subcommittee, but I would have concerns  
23 about that. There -- you know, having specific sanctions  
24 in a rule, we've talked about that a lot in the context of  
25 other rules. We seem to have a lot of sanctions

1 availability to judges if they want to use sanctions, and  
2 I don't know about adding that.

3                   And there are, as people have said to me on  
4 the break, a number of First Amendment issues that are all  
5 over this rule, and I think we're going to have to study  
6 it very carefully to make sure that we do it in a way that  
7 is constitutional and, more importantly, that the record  
8 that we create, because it will probably be on some of  
9 this a compelling needs standard, specifically if we try  
10 to restrict the use of public documents. We're going to  
11 have to come up with a compelling need to justify that,  
12 and we need to keep that in mind as we go through. But  
13 those were just some of the basic general ideas that  
14 struck me as I was reading it; and, Stephen, as the person  
15 that has the least amount of hair on our subcommittee,  
16 will go next.

17                   MR. TIPPS: Don't know what I did to earn  
18 that. I just have -- I mean, I will just add one thing to  
19 your list. The one thing that is not clear to me about  
20 this rule was the reference in I think it's 14.5(d)(2)(c),  
21 which is the listing of specific types of records that are  
22 to be excluded from remote access by the general public.  
23 The third one is "statements of reasons for defendant  
24 stipulations, including any attachments thereto." I have  
25 no idea what that is. And I doubt that anybody --

1                   CHAIRMAN BABCOCK: Lisa says that's criminal  
2 language.

3                   MR. TIPPS: Oh, okay. Well --

4                   MS. HOBBS: In the recommendation from the  
5 subcommittee to the Texas Judicial Council that was clear  
6 and then somehow it was just kind of a typo that didn't  
7 get clarified in the actual recommendation from the Texas  
8 Judicial Council to the Court.

9                   MR. TIPPS: That clarifies that, and then  
10 one of the issues that we had discussed in our many  
11 telephone meetings concerns this notion of creating a  
12 sensitive data form for each case that would contain the  
13 data that we're most interested in protecting, and Ralph  
14 and I both had expressed some concerns about whether that  
15 was a good idea in that we would be putting sensitive data  
16 in a place, in a form that if it did get out that could  
17 create real problems, but I visited with Mr. Lemon about  
18 that from the Harris County district clerk's office at the  
19 break, and he indicated to me that he felt that as far as  
20 the Harris County district clerk's office goes that a form  
21 like that could be adequately protected, but I think that  
22 that's obviously something that we would want to give  
23 close attention to.

24                   CHAIRMAN BABCOCK: Okay. Ralph.

25                   MR. DUGGINS: I would pick up right where



1 Stephen left off and say that I know that Tom says -- Tom,  
2 you think that this can be adequately protected by a  
3 firewall or some sort of security measure, but I just  
4 think it's really a knee-jerk reaction to this is that  
5 that's placing on a modem or a way to get this out so  
6 easily by computer all the sensitive personal information  
7 that if somebody can hack into the -- into it or a member  
8 of the staff makes an error, somehow it gets it in the  
9 wrong form, that we're just inviting problems. And that's  
10 just, as I said, was one of our initial reactions.

11 MR. WILDER: It would never even be in the  
12 same database.

13 MR. DUGGINS: But it would be in an  
14 electronic database.

15 MR. WILDER: We would have to scan it in  
16 order to keep it for -- you know, in case the paper burned  
17 up or whatever, but that would be -- you can have  
18 different areas that there wouldn't even be a pathway into  
19 that.

20 MR. DUGGINS: But somebody could easily put  
21 it in the wrong database or if they did retrieve it from  
22 the database then it can just be transferred on and on and  
23 on. I'm just saying it's a concern that I have.

24 MR. WILDER: And I understand you want to  
25 play devil's advocate with that because that's a good way

1 to do it, to get it out on the table. We're used to  
2 handling things like adoptions, for instance. In all the  
3 years I've been there and all the years before no adoption  
4 record -- even though we archive those, no adoption record  
5 has ever been released accidentally or otherwise, or we've  
6 never been hacked into, and it absolutely can be  
7 technically done to sequester that information that is not  
8 to be disseminated to the public.

9 MR. DUGGINS: Okay. Well, that was one of  
10 the issues we shared. Also, it seems to me the way that  
11 in the definitions are done in 14.2 that it includes notes  
12 of a judge, and I don't think that that's -- if I'm  
13 interpreting it correctly, in my view it should not  
14 include a judge's notes taken at a bench trial or any  
15 hearing or oral argument, whatever. Because it's so  
16 broadly written.

17 And then I think the 14.4(b) where we -- you  
18 speak of what you call a user agreement, in my view that  
19 ought to be standardized because if you're going to have a  
20 different user agreement for each county, we're going to  
21 have problems, and there ought to be something in there  
22 about what's called scraping -- I know Anne will  
23 understand that -- where commercial users can use a  
24 spider, what's sometimes called a spider or robotic search  
25 tool, to ping databases constantly to look for some

1 celebrity's name or some high profile person and just pick  
2 up on some piece of information that may have been filed  
3 or put in a court file that day; and I think these use  
4 agreements ought to preclude that type of use; and in my  
5 own view, we ought to try to standardize it and limit  
6 commercial use of this. Those were some of my observe --  
7 well, they were our observations, I think.

8 CHAIRMAN BABCOCK: Okay. Great. Yeah,  
9 Bonnie. Sorry.

10 MS. WOLBRUECK: That's okay. I'll just make  
11 a general statement regarding this. First of all, I know  
12 that the committee realizes this, but I need to voice it  
13 anyway. The clerks take their responsibility as  
14 custodians of the record very seriously and -- but because  
15 of that, I really think a rule is necessary. You must  
16 understand that these decisions right now are being made  
17 on a county by county basis, and I think that it's very  
18 important that when we're addressing privacy issues along  
19 with public issues that the Court really take a hard look  
20 at this and make a determination so that clerks know  
21 exactly how we need to take care of those court records  
22 that we have.

23 I know that over 15 years ago when I had a  
24 gentleman walk in my office one day that wanted copies of  
25 all of my divorces because he was going to set up a dating

1 service, I knew then that we would probably have some  
2 concerns over privacy issues, but -- and, you know, we're  
3 still dealing with trying to determine, you know, what to  
4 give to people and possibly what not to release.

5                   So just so that everybody here realizes that  
6 clerks have some issues with this, differing opinions  
7 throughout that state on how to handle it. Many of that  
8 has to do with personal reasons, other reasons, but the  
9 point being that a rule needs to be determined so that  
10 clerks in the state know exactly how we handle these court  
11 records.

12                   CHAIRMAN BABCOCK: Okay. Buddy.

13                   MR. LOW: One of the things, a lot of the  
14 lawyers don't even think of administrative rules. You  
15 know, we've had administrative rules, and I see lawyers  
16 that don't even know about them. Okay. Now, we quite  
17 often enter into confidentiality agreements where, you  
18 know, you can't file -- you mark something confidential  
19 and then, you know, you do that. So we would have to tie  
20 it in, as you say, to 76a because if the lawyers don't  
21 know about it then they're certainly not going to  
22 incorporate this in their confidentiality agreement for  
23 some procedure. So some way we need to tie it in or make  
24 reference to it in 76a. I don't know how, but we need to  
25 not overlook the fact that a lot of lawyers won't even

1 know about it because it's not in the rules.

2 CHAIRMAN BABCOCK: Yeah. There are some  
3 huge policy decisions. Are you going to have one system  
4 for paper records and another system completely different  
5 system for electronic records, and if so, what are your  
6 standards? It's a pretty meaty issue. David Peeples.

7 HONORABLE DAVID PEEPLES: Could I ask Mr.  
8 Wilder how this works. If I'm at my computer in my home  
9 miles away from Tarrant County, and let's say the name  
10 Thomas Wilder is in a lawsuit somewhere that if I walked  
11 into Tarrant County, I could look that up.

12 MR. WILDER: Yes.

13 HONORABLE DAVID PEEPLES: And if I walked in  
14 I could get it in paper, and my question is can I get it  
15 from San Antonio without coming to Tarrant County? As I  
16 understand it, I've got to pay you-all some money and  
17 become a subscriber and then I could search the Tarrant  
18 County records; is that right?

19 MR. WILDER: If you were, say, in Houston,  
20 yes, sir, that's how you would have to do it. If you came  
21 to Tarrant County, you could look it up on the free  
22 computer.

23 HONORABLE DAVID PEEPLES: So the subscriber  
24 is just a way that I from a remote position could do what  
25 I could do if I was in Fort Worth.

1 MR. WILDER: Yes.

2 HONORABLE DAVID PEEPLES: If I was doing a  
3 search on Google or something and I put your name in,  
4 "Thomas Wilder," will it show that there is something in  
5 Tarrant County?

6 MR. WILDER: No.

7 HONORABLE DAVID PEEPLES: Okay. So a  
8 subscriber agreement makes it off the web, so to speak.

9 MR. WILDER: Yes, exactly. It's  
10 sequestered. You come in through a door, and you couldn't  
11 go to any of the search engines and utilize them to find  
12 so-and-so has got court cases in Tarrant County.

13 MR. GILSTRAP: But, Tom, I think you also  
14 mentioned you can't text search your documents.

15 HONORABLE DAVID PEEPLES: Same thing.

16 MR. WILDER: Exactly. This was similar to  
17 what Ralph was talking about about this ping issue. You  
18 can't ping our system, and any competent security  
19 operation can set that up that way. You may not do a text  
20 search where you enter in "Give me every case that has the  
21 phrase 'Social Security' in it." You can't search it that  
22 way.

23 MR. ORSINGER: If I could follow-up on what  
24 David Peeples just said, it's not just the licensing or  
25 subscriber agreement that stops it from being on Google.

1 If I understood our discussion, Tom, that just technically  
2 the data is in visual files --

3 MR. WILDER: Yes, sir.

4 MR. ORSINGER: -- and it is not susceptible  
5 to electronic search by a remote computer. So it's just  
6 technically impossible --

7 MR. WILDER: It's technically impossible.

8 MR. ORSINGER: -- for it to be, quote, on  
9 the internet. You have to sign onto the system and then  
10 use an indexing system looking for a name that you know,  
11 and then that's only going to be one of the litigants.  
12 It's not a name that appears in a judgment or a pleading.

13 MR. WILDER: That's correct. It's only the  
14 party -- you must search by party name or the case number,  
15 or on criminal cases you can enter our local CID number if  
16 you happen to know it.

17 CHAIRMAN BABCOCK: Paula, did you have a  
18 question? Paula.

19 MS. SWEENEY: I have a real concern about  
20 the philosophical direction that we're going to take on  
21 this. Are we at some point going to discuss the  
22 underlying idea of do we have freedom to access these  
23 records or not? Because I'm very concerned here that we  
24 have gatekeepers protecting records from the public as a  
25 threshold when they're records of our court proceedings.

1 So what's the chair's direction on that?

2 CHAIRMAN BABCOCK: Well, it's -- I have no  
3 direction, but I do have the Court's transmittal letter,  
4 and Justice Hecht and I were talking about it this  
5 morning, and the transmittal letter suggests that we ought  
6 to look at it structurally given the fact that this other  
7 committee has spent an enormous amount of time, had six  
8 public hearings, et cetera, et cetera. My comment,  
9 perhaps foreshadowing yours, was it will be a cold day in  
10 hell when this committee doesn't weigh in on policy  
11 considerations, but anyway, I think we'll have a fair and  
12 open discussion of it. Judge Yelenosky.

13 HONORABLE STEPHEN YELENOSKY: Just an  
14 observation, given the time frame in which we usually  
15 work, I don't think we should assume that the technology  
16 as it is now is how technology will always be, and if  
17 we're going to do this over a period of time it might be  
18 good to assume that just about anything is technologically  
19 possible or may be.

20 CHAIRMAN BABCOCK: Yeah. Andy.

21 MR. HARWELL: Do we all agree at least, or  
22 maybe not, that if a record is open to the public in the  
23 clerk's office then that record should also be open to the  
24 public through the internet or if someone walks in and  
25 pulls it up in the office? I mean, are we going to



1 differentiate between what is a public record over the  
2 internet versus what comes into the office? And that goes  
3 back to what you're saying. I mean, I --

4 CHAIRMAN BABCOCK: I think there's been a  
5 huge debate about that. If you look through these papers,  
6 the report of the committee, that there was a lot of  
7 discussion; and this doctrine of practical obscurity, this  
8 phrase maybe, is that if it's in the clerk's office, yeah,  
9 it's there, it's public; but nobody can get to it or very  
10 few people can get to it. But if you put it on the  
11 internet, I mean, it truly is accessible; and you've got  
12 to think about what you're making truly accessible.  
13 There's a big argument that one can have on either side of  
14 that, but I don't think you would get a consensus if you  
15 went around the room today on whether if it's public in  
16 paper it ought to be public electronically.

17 MR. HARWELL: Can I also add --

18 CHAIRMAN BABCOCK: Sure.

19 MR. HARWELL: There are also in the county  
20 clerks, not the district clerks, but the county clerks,  
21 we're having to deal with these same issues on the land  
22 records side with the title companies, and so it might be  
23 good if maybe we looked at how that's progressing, too,  
24 because I know in title companies there's a lot of work  
25 being done in other states with these issues as well.

1                   CHAIRMAN BABCOCK: Yeah. Yeah. And this  
2 report talks about a lot of issues, maybe not as  
3 comprehensive as you know it. Buddy and then Richard.

4                   MR. LOW: Chip, would they have some system,  
5 like right now you can go down and you tell them, "I want  
6 to see the records in Jones vs. Smith," and the clerks  
7 will get them. Somebody that goes to the courthouse,  
8 they're not records like that anymore. Can they go down  
9 and say, "I want to see the records," and can they sit  
10 down at something and draw them up right there?

11                  MR. GILSTRAP: They've got a terminal.  
12 There's a terminal that's open then.

13                  MR. LOW: So if they can do that, we're not  
14 depriving them of anything they have now. It's just to  
15 add something to it, as I understand it. Is that the  
16 way --

17                  CHAIRMAN BABCOCK: Richard.

18                  MR. ORSINGER: On the mechanical side of it,  
19 I don't want to stop any kind of philosophical debate  
20 here, but, you know, we already have -- I mean, there is  
21 no incremental cost to people coming into the district  
22 clerk's office and asking for a file because the office  
23 has got to be open during business hours and it's got a  
24 lot of employees and it's got tables and chairs and  
25 everything, but if we're going to implement a remote

1 electronic system that requires software to be designed  
2 and maintained, there is a cost that's an additional cost.

3                   And so it seems to me like we have to ask  
4 ourselves on a county by county basis or on a statewide  
5 basis how much are we willing to pay to make this  
6 information more accessible remotely and automatically,  
7 and should we make the user of that easy access pay its  
8 own way, and that's what's -- I think that's what effort  
9 has been made in Tarrant County to try to make it pay its  
10 own way, and I think we'll get around to that at some  
11 point because some proposals are, well, since we have an  
12 obligation to make these records available to the public,  
13 let's just make them available to the public on the  
14 internet without recognizing that we're talking about  
15 hundreds or maybe even millions of dollars to make that  
16 happen.

17                   CHAIRMAN BABCOCK: Yeah. Justice Hecht.

18                   HONORABLE NATHAN HECHT: To be -- to clarify  
19 a little bit, the -- please keep in mind in talking about  
20 the policy decisions, because they are very difficult and  
21 they involve a lot of different competing interests, that  
22 this is not the first group to have talked about those;  
23 and so if we don't look at the work that's already been  
24 done and consider all the arguments, because I assure you  
25 that in various forms all over the country people have

1 argued that -- these issues very vehemently. I think it's  
2 most helpful at this point in that process for this  
3 committee to go through those articles and add to them or  
4 comment on them or put your two cents in because there's  
5 ongoing debate; and even the rule that's adopted in the  
6 short term is not going to be the end of the matter  
7 because technology is changing and the interests are  
8 perceived differently as time passes.

9                   But the other thing that this committee  
10 could add to the discussion that has not been looked at as  
11 carefully as this committee is capable of is the mechanics  
12 of how any rule is going to get done and specifically  
13 whether Tarrant County is -- and Harris County are  
14 indicative of Morris County and Trinity County and Cameron  
15 County. We have 254 of them, and whether -- how this is  
16 going to roll out on a statewide basis with lawyers  
17 practicing different places different ways and that kind  
18 of complexity that has to be the implementation of the  
19 policy.

20                   So I'm not trying to -- the Court talked  
21 about this, and we knew we couldn't discourage you from  
22 looking at the policy issue, and there wasn't any point in  
23 trying, but at the same time don't lose sight of the fact  
24 that you're one group out of scores that are talking about  
25 this, and -- but you're only one group out of one that's

1 talking about, or maybe two, that's talking about  
2 implementation.

3 CHAIRMAN BABCOCK: Yeah, Paula.

4 MS. SWEENEY: Well, all right. Looking at  
5 the mechanics of it, on the letter from Polly Jackson  
6 Spencer to members of the Texas Judicial Council, under  
7 alternative two, which is "Modified remote access," "Place  
8 the following limitations on remote public access."

9 No. 3, "Regardless of whether a subscriber  
10 type system is in place the following case records should  
11 be excluded from remote access: A, medical, psychologic,  
12 or psychiatric records including any expert reports based  
13 on medical, psychologic, or psychiatric records."

14 You just closed the file on all malpractice  
15 cases as to the nuts of the case, because all reports from  
16 all the experts are going to be based on medical,  
17 psychological, or psychiatric records. Ditto most product  
18 liability cases where causation is in question and the  
19 issue is whether Drug A caused Disease B and all of the  
20 experts opine based on the records. So, and looking at  
21 the list of the folks on this committee, I don't see any  
22 trial lawyers, so maybe they just didn't think about that  
23 or maybe it didn't matter to them, but that's the very  
24 heart of a lot of these cases that go to public safety.  
25 If a drug is killing people and the testimony establishes

1 it or doesn't, I don't see why you would exclude all of  
2 those expert reports just because they're based on medical  
3 -- underlying medical records.

4 CHAIRMAN BABCOCK: By the way, we invited  
5 Judge Spencer, who was the chair of the committee that  
6 studied this, to attend today's meeting. She wasn't able  
7 to just only because we gave her such late notice, but I  
8 expect that she will be at future meetings and can give us  
9 the benefit of what their committee did, and somebody said  
10 to me during the break that they felt disadvantaged when  
11 talking about what the Jamail committee did because they  
12 didn't really have a good sense of what the Jamail  
13 committee would -- what they considered, where they were  
14 coming from. We had some trial lawyers on the Jamail  
15 committee, but probably not enough appellate lawyers. So  
16 she I'm sure will be here, as will I think Elizabeth Kilgo  
17 was the staff person that worked on this, so we'll get the  
18 benefit of that.

19 But this is obviously a very important  
20 issue, and we'll -- you know, we'll have a full discussion  
21 about it, all aspects of it, but Justice Hecht's point is,  
22 you know, in terms of how this thing is going to work,  
23 we're certainly the last line of defense on that other  
24 than the Court, so we need to pay careful attention to it.  
25 Harvey.

1                   HONORABLE HARVEY BROWN: Since this has been  
2 studied a lot, it seems to me there is some overlap  
3 between the mechanisms and maybe constitutional questions.  
4 If there's some article that some of us could look at to  
5 get a better sense of that overlap I think that would be  
6 helpful, because I think some of us have the initial  
7 reaction of "Boy, there is some real First Amendment  
8 problems," and to draw those lines I think it would be  
9 helpful to know what those problems are.

10                  CHAIRMAN BABCOCK: Yeah. The report itself  
11 has citations to it.

12                  HONORABLE HARVEY BROWN: Okay.

13                  CHAIRMAN BABCOCK: But I know the Federal  
14 system issued a fairly lengthy report that has a  
15 bibliography, so that would be a good place to start.  
16 Alex.

17                  PROFESSOR ALBRIGHT: Ernie Young and Toni  
18 Reese from the University of Texas faculty were on these  
19 committees, and they're not in Austin this year, but I  
20 just drafted an e-mail. I'm going to talk to them and see  
21 if they have anything like that that might be helpful to  
22 us.

23                  CHAIRMAN BABCOCK: If you get some resource  
24 material, just let Angie know so we that can let everybody  
25 know if they want to study on it.

1 PROFESSOR ALBRIGHT: Right, uh-huh.

2 CHAIRMAN BABCOCK: That would be great.

3 Lisa.

4 MS. HOBBS: I wanted to add too is that --  
5 and I know it's been said, but just to reiterate one more  
6 time, is most of the recommendations are not changing the  
7 access that you have at the courthouse. Most of the  
8 recommendations just come into play -- or the more  
9 controversial recommendations just come into play when you  
10 then make records that are available at the courthouse  
11 available on the internet, or online actually. Not really  
12 on the internet but online, and so I think that's kind of  
13 important to keep in the back of your mind as you look  
14 through all the material, is that when are we  
15 distinguishing between something that's available at the  
16 courthouse and then something electronically available,  
17 and the rule is meant to give more access to records, but  
18 then to just make that access protect people's privacy  
19 interests as well.

20 CHAIRMAN BABCOCK: Okay. Anymore  
21 preliminary thoughts about this? Yeah. Justice Gaultney.

22 HONORABLE DAVID GAULTNEY: Just so I can  
23 understand what our charge is, there is a draft rule  
24 attached to this material. Are we supposed to begin with  
25 this, because the letter itself that Paula was referring



1 to of July 16th is a much broader referral than just a  
2 draft rule, as I read it?

3 CHAIRMAN BABCOCK: Well --

4 HONORABLE DAVID GAULTNEY: I can go through  
5 the draft rule, and I have concerns. Some of them are the  
6 broadness of the definition of case record, for example.  
7 I'm just trying to get a feel for where this committee is  
8 going on that.

9 CHAIRMAN BABCOCK: If you'll look at Lisa's  
10 letter of November 2nd, and obviously it could be subject  
11 to amendment at any time, "The Court requests that the  
12 subcommittee on the rules of judicial administration  
13 consider the mechanics of the proposed rule, assuming the  
14 Court adopts the policy recommendations of the Judicial  
15 Council and presents the rule with any recommendations to  
16 the full committee." That is what I take our charge to  
17 be.

18 That, as Paula pointed out, you can hardly  
19 talk about mechanics without getting into policy, even if  
20 you were inclined to draw a hard line. It's almost  
21 impossible to do, but, you know, this committee has strong  
22 views, as some of you have already been expressed about  
23 these issues, and we do want to obviously recommend a rule  
24 that's constitutional. We don't want to recommend to the  
25 Court that they implement something that works great but

1 is going to get struck down by a Federal court in Austin.

2 MR. ORSINGER: Chip?

3 CHAIRMAN BABCOCK: Yeah.

4 MR. ORSINGER: I'm a little concerned about  
5 what resources we have available to estimate the costs  
6 associated with different proposals. Has any standing  
7 committee or court administration body evaluated what  
8 kinds of proposals would have -- what kinds of costs  
9 associated with it or are we just going to be guessing at  
10 that ourselves?

11 CHAIRMAN BABCOCK: Lisa, are we going to be  
12 guessing?

13 MS. HOBBS: Well, the rule only comes into  
14 play if a county or district court clerk decides to have  
15 their records available online. So it's not a rule that  
16 requires a county or a district court to put their records  
17 online. It just says if you do, here are the guidelines  
18 that you should follow. So that's kind of the initial  
19 standpoint, is we're not forcing any county -- the rule  
20 would not force any counties to put money into a system  
21 that would allow their records to be available online.

22 MR. ORSINGER: Would the rule purport to say  
23 you either can or cannot charge a fee for this service  
24 that you offer?

25 MS. HOBBS: My understanding, and I did sit

1 through some but not all of the subcommittee public  
2 hearing, my understanding is we wanted to leave that as  
3 much to the local entity as we could and so that they  
4 could make that call and they have -- some have systems in  
5 place, some don't, and that we would only reference the  
6 Government Code as a way of stating that you can fund this  
7 however the Legislature allows you to fund it, and I guess  
8 we were not -- in trying to make our rule as broad as the  
9 Legislature allows you to do something, we may have gotten  
10 too specific, and maybe that rule should be more broad to  
11 make that clear. But the Legislature does step in, I  
12 believe, in some situations and tell counties -- or I'm  
13 not exactly sure how it works, but I'm sure that Mr.  
14 Wilder would, and put some limitations on fees that you  
15 can charge and for various things that you implement.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOW: Chip, they've always been able to  
18 charge for copies or costs. Could this be considered like  
19 a copy? In other words, even though it's not a paper,  
20 it's a copy electronically, and I've never heard of a case  
21 that was struck down to be unconstitutional because of the  
22 cost of the making a, you know, copy or producing it or  
23 something. Maybe there is such a case, but that's  
24 certainly not my field, though.

25 HONORABLE NATHAN HECHT: But on this -- I

1 mean, this is a good illustration. On this issue, this  
2 committee might make -- might want to make its views known  
3 on whether it's a good idea generally speaking for lawyers  
4 to have to pay to get to this or not. But that's not  
5 going to -- you know, neither this group nor the Court can  
6 force the counties to spend money on this to fund it. We  
7 don't know if there will be state funding, so that -- in  
8 answer to Richard's question, that's just a whole set of  
9 issues over here that, again, are sort of off our table,  
10 but if you were interested in exploring it like Tarrant  
11 County has been or Harris County, then this is the way you  
12 have to go about it.

13 MR. ORSINGER: Well, if we were to get  
14 through the philosophical part and want to get about the  
15 business the Court wants us to attend to and if we put the  
16 financial part of it off the table, too, then what is it  
17 we're really considering?

18 HONORABLE NATHAN HECHT: Well, we're  
19 considering how this is going -- how this is going to  
20 work, just the mechanics of the service that Tom has begun  
21 to describe and then is described in the rules, the  
22 several questions that people have raised already about  
23 immunity or about this and that procedural in the rule.  
24 This committee needs to look at that as well as, as I say,  
25 comment on do we think access should be broader, narrower;

1 but keep in mind that we have no mandate to do this, so  
2 that if we decide we think certain kinds of records should  
3 be available, there is still no requirement that Kennedy  
4 County make them available if they don't have any money  
5 and they don't want to do it.

6 MR. ORSINGER: Well, if I can just finish,  
7 the Judicial Committee on Information Technology, which I  
8 sat in on some when we were -- when the committee was  
9 considering what to recommend, we had a lot of industry  
10 information about what different information access  
11 alternatives were available and the cost associated with  
12 them and whether they would be provided by the government  
13 or whether they would be provided by someone who had a  
14 license from the government or whatever, and I'm having a  
15 hard time seeing how we're going to be able to grapple  
16 with what -- you know, is it -- his county, for example,  
17 has decided you can only get an image. You cannot get  
18 digital information; you can only get an image.

19 If we were to say we want the rule to  
20 provide that you can get digital information about the  
21 content of the document, we won't have any idea what that  
22 would cost, and I'm wondering if the counties will even  
23 care what we say. I mean --

24 HONORABLE NATHAN HECHT: Well, the -- they  
25 care, as Bonnie says, to this point, which is now they're

1 off doing their own thing. Each county clerk and district  
2 clerk, they have been working on this independently,  
3 sometimes together, and they have decided to do different  
4 things. The local judges are telling the clerks, "Do  
5 this, don't do this. This is a good idea. Don't do  
6 that," and it's far enough along, plus we have the  
7 Federal -- we have everything that's going on in the  
8 Federal system right beside us that it's time to say,  
9 okay, you can't put -- take the family context, you can't  
10 put family pleadings on the internet that have people's  
11 Social Security numbers and home addresses.

12 CHAIRMAN BABCOCK: Found a way right to his  
13 heart, didn't you?

14 HONORABLE NATHAN HECHT: Digitally or any  
15 other way. If that information has to be disclosed in  
16 pleadings because of statutes then we have to either find  
17 a way around that or else you can't disclose that. So the  
18 concerns are now that this is going forward without any  
19 attempt to organize it or to control it, it's time to  
20 begin to come in and say, "Okay, you can do this, you can  
21 do this, you can do this, but you can't do that." On the  
22 other hand, to say that you must do something that costs  
23 money, obviously we have no authority to do that.

24 CHAIRMAN BABCOCK: We're not going to stop  
25 the debate, but we do have an honored guest who wants to

1 address us briefly on a totally different topic. Most of  
2 you know Eduardo Rodriguez, who is the President-Elect of  
3 the Bar. And, Eduardo, I know you want to talk a little  
4 bit about the referendum, so now's your time.

5 MR. RODRIGUEZ: Thank you. First of all, I  
6 want to thank all of you for -- on behalf of the lawyers  
7 in Texas for the time that you-all take to participate and  
8 help the Supreme Court and help all of us through your  
9 work. It's -- I know that everyone does it because of  
10 your sense of professionalism, but I just want you to know  
11 that I and the State Bar of Texas and the lawyers of Texas  
12 appreciate the time that you've done that.

13 Secondly, probably the most important thing,  
14 lunch is out there; but the third thing I want to remind  
15 you-all is Sunday night is the end of electronic voting on  
16 the referendum. I got a report this morning that we've  
17 got about 9,500 people have voted electronically so far.  
18 Those of you that have not voted yet, please do so before  
19 Sunday. Those of you that have firms, during the lunch  
20 hour contact somebody back at your firm to send out an  
21 e-mail to everybody that's there. We really would  
22 appreciate as many people voting electronically as  
23 possible. It would be a cost savings to the Bar, and it's  
24 the first time that we've been able to use this process,  
25 and we want to see how it proceeds.

1                   We're planning on asking the Supreme Court  
2   to allow us to vote electronically for the presidential  
3   elections next year, so I would just remind you that the  
4   referendum is out there and we need to see if as many  
5   people can vote electronically. And the cutoff is Sunday  
6   night, so after that we wait a period of time, and those  
7   people that have not voted electronically will get paper  
8   ballots and will have 30 days to return them, and we will  
9   know the results sometime around Christmas time, around  
10  the 20th of December and so forth. That's what I wanted  
11  to ask you-all, and I appreciate your time.

12                   CHAIRMAN BABCOCK: Thanks, Edwardo. You  
13  meant president of the State Bar, right, that presidential  
14  election?

15                   MR. RODRIGUEZ: Yes, sir. We don't have the  
16  other one next year. Thank you-all.

17                   CHAIRMAN BABCOCK: You bet. All right.  
18  Back to the fight. Bonnie, you wanted to say something?

19                   MS. WOLBRUECK: I just wanted to comment.  
20  I'm sure that everybody here knows it, but every time the  
21  Legislature has met over the last couple of sessions they  
22  have proposed a uniform legislation regarding our entire  
23  records, and a bill passed during the last session  
24  regarding criminal records, so this is an ongoing issue  
25  with the Legislature, and with that session coming up



1 again in the very near future I'm sure that additional  
2 bills will be filed again. I only state that as, you  
3 know, I would hope that the Court could make some  
4 decisions as timely as possible and not have it  
5 piecemealed by the Legislature, which is going to happen.

6 CHAIRMAN BABCOCK: Andy had his hand up  
7 first, and then Buddy and Carl, and then you, Frank.

8 MR. HARWELL: This is kind of addressing  
9 what Buddy and Richard were talking about. The fee for  
10 digital record or an image, in other words, you want to  
11 download it to your computer. I'm on the legislative  
12 committee for the Association of County and District  
13 Clerks, and we're meeting next week to talk about a fee  
14 that could be charged, and right now it's been thrown  
15 around -- nothing has been voted on or anything -- it's up  
16 to 2 cents per image. I don't know if you-all have heard  
17 about that or not, that it could be up to 2 cents per  
18 image on that fee.

19 The other thing is about talking about  
20 paying for this. You know, this is not too much unlike  
21 the Texas Online where if an attorney wants to file they  
22 pay an additional fee to go through Texas Online that's  
23 totally separate from the clerk.

24 And then the last point I wanted to make is  
25 that the county clerks do have a dedicated fee that is

1 charged that's a \$5 records management fee; and I know  
2 Bonnie, you and Tom and the district clerks probably tried  
3 to work on a fee that's get paid. Right now we charge a  
4 records management fee on the court which is comingled  
5 with the district clerk, and that's used at the expense of  
6 the commissioner's court.

7 MR. WILDER: But they don't give us the  
8 money.

9 MR. HARWELL: Maybe there's a way that can  
10 be dealt with and pay for these kind of activities.

11 CHAIRMAN BABCOCK: Buddy.

12 MR. LOW: Chip, back to Richard's point and  
13 Justice Hecht, we can't tell somebody what to charge, but  
14 the problem if we don't do something, they say, "You're  
15 allowed to do this, do this, do this," but we don't tell  
16 them they're allowed to make a reasonable charge. Some of  
17 the clerks may think they can't. So we have to at least  
18 allow them or put something in there. Not how much, but a  
19 reasonable charge, and it might be different for each  
20 clerk, but I think we do have to address that because you  
21 tell somebody what they can do, what they can do, what  
22 they can do, and you don't say that, I think it's  
23 misleading.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: In Polly Spencer's letter

1   there are two alternative approaches, and we have only a  
2   rule apparently for alternative two. Does that mean that  
3   we are not to consider alternative one at all?

4                   MS. HOBBS: Polly was on the -- or Judge  
5   Spencer was on the subcommittee that held the public  
6   hearings, and the subcommittee was divided on option one  
7   and option two, so they -- instead of deciding, because  
8   they couldn't, they just recommended to the Texas Judicial  
9   Council that a separate -- that's the main body that  
10  recommends policy things to the Court. They looked at  
11  both of the two recommendations and they voted 16 to 3 to  
12  go with the option two, I believe, which is why the rule  
13  is only written under one option.

14                   So the subcommittee was split. It went to  
15  the Judicial Council. The Judicial Council voted, and  
16  they voted 16 to 3 in the way the rule was written.

17                   MR. HAMILTON: So we don't need to worry  
18  about alternative one then.

19                   HONORABLE NATHAN HECHT: Well, for example,  
20  this committee could say 20 to 4, you could take a vote  
21  and say that "We think alternative one should be pursued;  
22  however, we recognize the Judicial Council is recommending  
23  alternative two; and now with respect to how that  
24  operates, if you're going to go that way, you should do  
25  this, this, this, this."

1                   CHAIRMAN BABCOCK: Richard, do you have  
2 anything else?

3                   MR. ORSINGER: Well, I just wanted to say  
4 this may not be a factor, but we struggled through  
5 something like this when we were trying to get the courts  
6 of appeals to put their opinions online free of charge,  
7 and I remember in particular talking to the chief justice  
8 of the El Paso court of appeals, and they made over a  
9 hundred thousand dollars a year selling copies of their  
10 opinions and were going to have to let two staff attorneys  
11 go, and blah-blah-blah. They finally went down and fixed  
12 that in the Legislature, and I think they got an  
13 appropriation to make up for that lost revenue, but I  
14 don't know whether copies is a revenue item at the trial  
15 court level or not. Is it, Bonnie?

16                  MS. WOLBRUECK: Yes, it is.

17                  MR. ORSINGER: Okay. So as long as it is  
18 optional with the county they can decide if they want to  
19 give that revenue up or whatever, but that was a stumbling  
20 block for probably at least three years to try to get the  
21 courts of appeals to voluntarily make their opinions  
22 available for free on the internet.

23                  CHAIRMAN BABCOCK: Judge Yelenosky.

24                  HONORABLE STEPHEN YELENOSKY: With regard to  
25 the cost issue, I don't know if it was Carl or Richard,

1 somebody said earlier they didn't see where there would be  
2 any objection to that, and in general I would agree, but  
3 it could be costs wouldn't raise any constitutional  
4 problem, but to the extent there is a required subscriber  
5 system and to the extent online access raises  
6 constitutional questions, I do think that method of  
7 charging does raise a constitutional issue because the  
8 stated purpose in effect is to create a barrier, not  
9 exclusively to raise revenue, and we heard that here  
10 today, that the purpose of the subscriber system is to  
11 keep certain people or people with certain purposes from  
12 using it.

13                   So I do think that takes it out of the realm  
14 of simply being a recouping of costs and would be similar  
15 to saying perhaps, without prejudging the question, that  
16 with regard to an open records request, "Well, you only  
17 want one page, but to get that one page you have to be a  
18 subscriber, and that costs X per month."

19                   CHAIRMAN BABCOCK: Justice Jennings.

20                   HONORABLE TERRY JENNINGS: In regard to some  
21 of these comments about cost and so forth, my  
22 understanding of the rule that we're talking about, what  
23 we're really talking about is remote access; and to me  
24 remote access is a service that a county can on its own  
25 make available to the public. This rule is not talking

1 about limiting access to public records or to court  
2 records that are already available, and if a county wants  
3 to go through the additional expense -- and I think this  
4 is what Lisa may have been getting at earlier.

5                   If the county itself wants to take that  
6 additional expense of providing this additional service, a  
7 lot of the philosophical issues I have are resolved  
8 because if you look at it from the perspective of this is  
9 just a service that the county may undertake on its own, I  
10 think that resolves a lot of those philosophical problems  
11 because the access is there. If somebody wants to pay  
12 additionally for this service above and beyond what we  
13 normally have done in the past, I think that resolves some  
14 of the philosophical questions, at least in my mind.

15                   CHAIRMAN BABCOCK: Okay. Yeah, Alex.

16                   PROFESSOR ALBRIGHT: I just want to make  
17 sure that everybody understands that data isn't free to  
18 collect. If these counties are going to be doing this, in  
19 order to have data you have to store the data, and you  
20 have to have the servers available to serve it out, and  
21 that costs huge amounts of money, and so I think I just --  
22 I don't agree that the sole purpose of the fee is to  
23 create barriers.

24                   HONORABLE STEPHEN YELENOSKY: No, I was  
25 saying when you create a subscriber system it raises that

1 question because the stated purpose of the subscriber  
2 system was to limit it to individuals who have a purpose  
3 that's considered legitimate.

4 PROFESSOR ALBRIGHT: I think that's what one  
5 speaker said. I'm not sure that's what everybody would  
6 say.

7 CHAIRMAN BABCOCK: Okay. Any other  
8 comments? Yeah, Frank.

9 MR. GILSTRAP: I just want to add one more  
10 thing about the cost. I mean, it is true, as Lisa says,  
11 that if we create some requirements for a system and the  
12 good people in Loving County decide, well, we're going to  
13 implement this, this is what they're going to have to do,  
14 and they don't have to do it. So it's, you know, not  
15 costing the people in Loving County anything because they  
16 don't have to implement the system.

17 It's quite different, though, to say that  
18 we're going to mandate these requirements and say that to  
19 Tarrant County because they already have a system, and  
20 they're almost certainly not going to get rid of it. So  
21 whatever decisions we make here could have huge cost  
22 consequences for these entities that already have these  
23 systems, and, you know, I don't think we can do that in a  
24 vacuum. We've got to recognize that it is going to cost  
25 money.

1 CHAIRMAN BABCOCK: Yeah, I think that's why  
2 Tom is here in part. Paula.

3 MS. SWEENEY: I'm real concerned about the  
4 substance of this, that it's a rollback of Rule 76a on the  
5 issue in almost any injury case that I alluded to before,  
6 and now I'm reading deeper into this, and it's pretty  
7 clear that the intent is to exclude the medical evidence  
8 that relates to things that are publicly dangerous that  
9 Rule 76a was designed to make available and accessible.

10 HONORABLE NATHAN HECHT: Well, Paula, it's  
11 just not.

12 MS. SWEENEY: Pardon?

13 HONORABLE NATHAN HECHT: It's not. 76a is  
14 untouched. You can get everything under 76a with this  
15 rule or without the rule. This is a question of "And now  
16 what are we going to put on the internet?" You can go  
17 down to the courthouse. 76a is untouched. Nobody is  
18 quarreling with that. I agree with Chip there needs to be  
19 some -- I mean, there is no interface here between this  
20 proposed rule and 76a, but even if this rule passed as it  
21 was, you could still go down to the courthouse and get any  
22 of the information under Rule 76a that you would otherwise  
23 be entitled to.

24 So the only thing this affects is now what  
25 are you going to be able to remotely access. That's



1 not -- this doesn't -- what you can get walking in the  
2 courthouse door, you can still get and forever get. This  
3 doesn't touch that, but the question is what can you dial  
4 up either from your law office, Ralph's law office, or  
5 from Czechoslovakia and mine using these spiders; and this  
6 is all the concern, is how far should we go in putting the  
7 very private information, not the basics of the case, but  
8 identifying information, bank numbers, Social Security  
9 numbers, credit card numbers, dates of birth, that kind of  
10 stuff.

11 MS. SWEENEY: And I have had no concern or  
12 quarrel of any kind with those, you know, Social Security  
13 and so on. But, I mean, that's a reality in the world we  
14 live in, but another reality is that the internet is here,  
15 and just about everything is on it, and what's not on it  
16 is about to be on it, and to -- I think it's a little bit  
17 of a head in the sand approach to say, "We're going to put  
18 a lot of stuff on there, but we're going to not put some  
19 stuff on there because it's important."

20 And so on the one hand I completely agree  
21 with the personal sensitive information being -- never  
22 entering the computers. In fact, I don't let my clients  
23 reveal that stuff on the record at all because somebody  
24 could get their deposition and then, there you go, there  
25 is all their addresses and so forth, and a lot of people

1 on the other side have the same protections for their  
2 clients. So there's nothing wrong with that, but to take  
3 things here that are actually the heart of the liability  
4 of a lawsuit and exclude those from the internet, I think  
5 is artificial, and I think it is putting a cache on the  
6 internet that ought not to be there. I mean, people can  
7 search these files for every other possible form of  
8 information or data or read them or whatever, but to  
9 exclude the core liability issues in one category of cases  
10 seems to me to be trying to get through the back door what  
11 couldn't be done during the 76a debates through the front  
12 door.

13 CHAIRMAN BABCOCK: Richard Munzinger.

14 MR. MUNZINGER: I just have a basic problem  
15 with the idea that something may be public if used by one  
16 person but not public if used by another person who  
17 intends mass distribution. And I'm frightened to some  
18 extent that I may agree with Paula.

19 MS. SWEENEY: That's a first.

20 MR. MUNZINGER: I think there was one other  
21 time, Paula. But it does bother me that -- and I'm very  
22 sensitive to what Richard is saying. If you start  
23 imposing obligations on district clerks to pay for these  
24 things, that's one thing. The rule probably ought to be  
25 written with "if a district clerk or county clerk decides

1   that they want to make this available then this is the way  
2   it will work" as distinct from the Supreme Court imposing  
3   an obligation to make it available.

4                   But who is to determine whether one public  
5   use or another public use is legitimate, that smacks of  
6   censorship. It smacks of prior restraint. It smacks of  
7   weighing whether users have the same validity; and simply  
8   because something is available technologically speaking  
9   and available to the masses for commercial or  
10   noncommercial purposes, I'm no friend of plaintiffs  
11   lawyers, but, by golly, if the Texas Supreme Court and  
12   Texas law says that information in a file is public, how  
13   can you say it's not public if the intended user wants to  
14   use it for mass distribution?

15                   It's a logical inconsistency, and it is not  
16   something that I -- and I don't see how you can say it. I  
17   don't see how you can say it's public for Richard to go  
18   down and find out that Dr. Smith diagnosed so-and-so  
19   arising from Drug X if Richard walks in and does it in  
20   person, but the identical information contained in a file  
21   not designated private, not designated confidential  
22   because it can't be under Rule 76a, is unavailable for you  
23   because it can be mined or dinged by a computer or by a  
24   plaintiff's firm in Dallas looking to have a class action  
25   against all Vioxx manufacturers or whoever it might be.

1                   If it's public, it's public. If it's not  
2 public, it's not public. And let's honor the law,  
3 whatever the law are.

4                   CHAIRMAN BABCOCK: Judge Lawrence.

5                   HONORABLE TOM LAWRENCE: We are talking  
6 about civil and criminal?

7                   CHAIRMAN BABCOCK: Yes.

8                   HONORABLE TOM LAWRENCE: Are we talking  
9 about the JP courts also?

10                  HONORABLE NATHAN HECHT: Yes.

11                  MS. HOBBS: Yes.

12                  CHAIRMAN BABCOCK: Richard.

13                  MR. ORSINGER: I'm going to sound like a  
14 broken record, but even those of you who are very much  
15 public advocates want to exempt something like Social  
16 Security numbers. Paula, as family lawyers we don't have  
17 the same latitude to direct our -- to control our privacy  
18 because the Family Code and I think even Federal law  
19 requires that people who are paying child support have  
20 their Social Security numbers in the child support decree,  
21 and I need to pull the Family Code and look at it, but I  
22 think we're required to even put the Social Security  
23 number of children either in the petition or the decree.  
24 I can't remember for sure. I routinely strip that  
25 information out, even though it's required by law, and I

1     suppose the State Bar can file a lawsuit against me if  
2     they want to, but that is how strongly --

3                     CHAIRMAN BABCOCK:   Richard, I would advise  
4     you against saying that on the record.

5                     HONORABLE NATHAN HECHT:   In their building.

6                     CHAIRMAN BABCOCK:   In their building.  
7     They'll just serve you right here.

8                     MR. TIPPS:   Good thing Edwardo's left.

9                     MR. ORSINGER:   You know, the thing is if  
10    we're going to be selectively protective, which I think a  
11    strong argument can be made that dates of birth and Social  
12    Security numbers for children should be private or should  
13    not be worldwide even though they might be available to  
14    those that walk in, the practical costs of trying to  
15    determine which pieces of information contain an entry  
16    that requires privacy is going to be I think an impossible  
17    problem, which I think it's mentioned in passing in one of  
18    Tom Wilder's paragraphs here.

19                    And so the only way you're going to protect  
20    child support decrees probably is just to say that none of  
21    this applies to Family Code cases; and if you do that,  
22    well, that's 60 percent of the cases that are filed on the  
23    civil side are Family Code cases.   So I don't know.   It's  
24    an issue for me, and yet I don't like Social Security  
25    numbers being in jackets, but I like less somebody in

1 eastern Europe culling all of our files for Social  
2 Security numbers and then sticking them into programs and  
3 seeing if they can't unlock the key to some, you know,  
4 Wells Fargo bank account or something, so anyway, I think  
5 it's complicated.

6 CHAIRMAN BABCOCK: Judge Sullivan and then  
7 Buddy. Sorry.

8 HONORABLE KENT SULLIVAN: Eventually it  
9 seems to me that you're headed down a road towards  
10 revisiting the fundamental policy decisions that have  
11 previously been made about what should be public and what  
12 should not be public. My suspicion is that many of the  
13 decisions that were made historically were based probably  
14 in part, practically speaking, at a paper driven set of  
15 court records and that records, even if public under 76a  
16 and otherwise, were not subject to massive and widespread  
17 abuses; and I think the reality is that -- in other words,  
18 that there was probably some acknowledgement that there  
19 might be some problems, but the problems would be  
20 contained and would probably be relatively marginal.

21 I don't know that everyone would make the  
22 same choices today looking at the prospect of exactly the  
23 reverse, that once everything that is currently public is  
24 available on the internet, we can no longer say at all  
25 that there isn't a likelihood of widespread and truly

1 massive abuse of that information. So I do wonder if  
2 you're not looking at a wholesale review of the substance  
3 of the issue.

4 MR. GILSTRAP: Let's stop there.

5 CHAIRMAN BABCOCK: Could I just insert a  
6 comment on that? Because I think that the paranoia of  
7 some of the public access groups and the media groups is  
8 that option two or alternative two will be adopted here  
9 and then the next step will be to rollback 76a into the  
10 more limited access that we have for the internet thing,  
11 not the other way around, and I don't know if that  
12 paranoia is justified or not. I only recall the statement  
13 that just because you're paranoid doesn't mean they're not  
14 out to get you. Buddy.

15 MR. LOW: In response to Richard, I think  
16 we're overlooking the fact that we are not protecting  
17 anything. I mean, if you want to go to the courthouse you  
18 can get it. It's not hidden from them. Somebody might  
19 not have the money to ride the bus down to the courthouse,  
20 so maybe it's not accessible to them. So the same thing.  
21 Maybe certain things we can choose. We are not protecting  
22 anything that's open. You can go to the courthouse and  
23 get it. You can go down and sit in the courtroom, but you  
24 can't send your camera down there. I mean, I don't see  
25 the issue.

1                   CHAIRMAN BABCOCK: Richard Munzinger and  
2 then Judge Lawrence.

3                   MR. MUNZINGER: I agree with everything Kent  
4 said. Yes, it is open to abuse and frightening abuse,  
5 frankly, in the current context. The GHOD committee for  
6 killing fat, old, Catholic, balding lawyers in El Paso,  
7 Texas, might get after me pretty quick, but who is the  
8 person that's going to tell me that I can't have access to  
9 that? I go down to the Tarrant County District Clerk  
10 today, and I say, "I am the American Association of  
11 Curious Searchers. I want to sign up." Is the district  
12 clerk going to say, "I've never heard of you. You can't  
13 do this"?

14                   What kind of protection is that, and who  
15 gives the district clerk the authority to make that kind  
16 of protection or a judge to make that kind of protection?  
17 These are judgment calls that have to be made in  
18 accordance with law and known standards to ensure that  
19 freedom of information in our society is honored. That's  
20 my point. I don't doubt that there is abuse, but if  
21 you're going to allow access, I dang sure don't think you  
22 ought to be saying -- in all due respect to district and  
23 county clerks -- that somebody can judge that the GHOD  
24 committee can't have the information, but the Catholic  
25 committee can.



1 HONORABLE KENT SULLIVAN: And I think it's  
2 very important that we not pretend ultimately that we're  
3 not making that decision.

4 MR. MUNZINGER: Exactly so, because we are,  
5 in fact, doing so.

6 HONORABLE KENT SULLIVAN: That's right.

7 MR. HARWELL: I don't want to have to make  
8 that decision as a clerk.

9 CHAIRMAN BABCOCK: Judge Lawrence.

10 HONORABLE TOM LAWRENCE: Well, I am a  
11 custodian of records, and I deal with these requests all  
12 the time, and once it has been determined that a document  
13 is a public record the most troublesome thing is if it is  
14 sitting in a file and somebody comes in and has to have a  
15 clerk take time out to go find the file and sit there and  
16 watch them look through it. That takes a lot of time, and  
17 it's expensive and disruptive.

18 The next best thing is if it's something  
19 that we can generate a report from the computer because we  
20 have that information internally on a computer system, and  
21 there is actually a schedule. The local Government Code  
22 through the Legislature determines most of the cost and  
23 expenses for these. We have a schedule for generating  
24 electronic documents, and we charge according to the fee  
25 schedule in Harris County. And sometimes we give

1 permission that on the first of every month there is a  
2 document dump, and it's sent out electronically to various  
3 individuals that have requested what has been determined  
4 to be public records. So and that still requires a little  
5 bit of clerk time, somebody has got to do that, but if it  
6 is a public record, if it's on the internet then we don't  
7 have to do anything, and that is above all things the  
8 least disruptive. And I'm hard-pressed as a custodian of  
9 records, once something has been determined to be a public  
10 record, I'm hard-pressed to justify not allowing access to  
11 that. I can do it, but I would likely wind up as a  
12 defendant.

13 CHAIRMAN BABCOCK: Okay. Andy, last  
14 comment. Then we will break for lunch.

15 MR. HARWELL: Chip, in the land records  
16 side, about two years ago the DD214 military discharge  
17 documents were being put on the internet by a county  
18 clerk's office. That went out in the vapor trail, have  
19 any of you-all heard of the vapor trail if you deal with  
20 the military? They put in there that your Social Security  
21 numbers that are on the DD214 are now being broadcast on  
22 the internet.

23 There was a large uprising with  
24 administrative people. Vada Sutton in Bell County had  
25 just an enormous amount of military people coming in.

1   What was done through the Legislature, and, forgive me, I  
2   don't have the statute, but it said that if those records  
3   are available to the public then the Social Security  
4   number has to be removed.

5                   We have -- in McClennan County we have  
6   DD214s back 60, 70 years back. So that would be an  
7   enormous amount of work to go back, so what I chose to do  
8   is just take those records out of the public view, and the  
9   Legislature also put in there you have to be a qualified  
10   applicant to view those records, either the actual  
11   veteran, a family member, or attorney, so that right there  
12   is exactly something that's happened that we can look at  
13   and see. It would be an awful lot of trouble for the  
14   clerks to go back and take out any information, but the  
15   Legislature answered that by saying if it is made public  
16   then you have to, so there might be some ways that you can  
17   get around some of those issues like that.

18                   CHAIRMAN BABCOCK: Okay. Let's break for  
19   lunch and be back at about 1:30.

20                   (Recess from 12:30 p.m. to 1:44 p.m.)

21                   CHAIRMAN BABCOCK: Okay. Richard, you  
22   ready?

23                   MR. ORSINGER: Ready for me?

24                   CHAIRMAN BABCOCK: Ready for you. Well,  
25   sort of. Ready as we can be for Richard. Is Judge Bland

1 here? Yes, she is.

2 As most of you know, the Federal side is  
3 dealing with the issue of electronic discovery, both  
4 exfoliation issues and what your obligations are to retain  
5 electronic discovery at various points in threatened or  
6 pending litigation, and several people have approached me  
7 and the Court about whether Texas should have a rule of  
8 comparable complexity to what is being considered on the  
9 Federal side. We have a rule, which was done or was  
10 recommended by this committee and approved by the Court at  
11 the time that we redid the discovery rules, but we don't  
12 have anything that takes into account a lot of the recent  
13 decisions in the Federal side, particularly in the  
14 Southern District of New York.

15 So I think, Justice Hecht, if I'm correctly  
16 expressing his views, sort of wanted to hear from us today  
17 as to whether or not this is a project that needs to be  
18 taken on. Is that more or less where we are?

19 HONORABLE NATHAN HECHT: Yeah. Just a brief  
20 history, when Texas revised the discovery rules some years  
21 ago we put in a paragraph on electronic discovery, and I  
22 wish Steve were here, but maybe Alex remembers. I think  
23 we just sort of made that up in the end.

24 PROFESSOR ALBRIGHT: Yeah, we kind of made  
25 up it up, but there was a group of people in Washington or

1 Oregon or someplace that got a copy of the draft rule, and  
2 they were collecting information all over the country and  
3 they said, "Wow, we think you got it right." They were  
4 very impressed with our attempt at the time.

5 JUSTICE HECHT: But we just sort of made  
6 this up out of whole cloth. But it then began -- became  
7 the basis for the debate in the Federal system over  
8 whether they should amend their rules to take up some of  
9 the provisions that Texas has in its rules and other  
10 issues, and that blossomed into a national conference and  
11 then there have been several other practitioners  
12 conferences, mostly in Arizona, and in September  
13 amendments to the Federal rules were published for  
14 comment, and there will be a comment period until next  
15 spring next time and public hearings in the spring, and I  
16 wonder if we shouldn't begin to look at those developments  
17 to see whether there should be some refinement in our  
18 electronic discovery rule.

19 Interestingly, as late as February of last  
20 year -- of this year, when Steve Susman called all around  
21 the state asking trial lawyers and trial judges whether  
22 they had much experience with electronic discovery, the  
23 report was essentially "no." And as far as I know we've  
24 had no cases dealing with any significant issues under our  
25 rule, but the Federal courts have had a number of cases,

1 dozens at least, on these issues and whether we should  
2 begin to look at those.

3 CHAIRMAN BABCOCK: Okay. Comments, Justice  
4 Bland.

5 HONORABLE JANE BLAND: Well, I think it may  
6 make some sense to -- I guess our current rule is 196.4,  
7 and it might make some sense to compare that with the  
8 proposed Federal rules and make some recommendations about  
9 whether or not we ought to bring our rules in line with  
10 the Federal rules or not and something akin to what  
11 Robert's subcommittee did with Rule 42 and class actions,  
12 because I think it just makes sense to try to at least be  
13 informed when we depart from the Federal standards, and  
14 that way we don't create different rules under the state  
15 standard and the Federal standards.

16 And I don't think that Rule 196.4 is --  
17 there are a couple of differences with it and the proposed  
18 rule, the proposed Federal rule. One is that the proposed  
19 Federal rule deals with preservation of electronic  
20 information; and our rule does not; and I think that's a  
21 big issue in these cases that rely on electronic  
22 information, when does your duty to preserve electronic  
23 information arise; and we do have some common law case law  
24 out of the Texas Supreme Court, not involving electronic  
25 discovery, but involving a lighted reindeer; and the Court

1 took that opportunity to talk about when your duty to  
2 preserve evidence arises.

3                   But it might be fair to say that the  
4 differences are great between preserving electronic  
5 information that can be inadvertently discarded without  
6 you even knowing about it. It can roll off your server or  
7 roll off your e-mail without you doing anything  
8 intentional to destroy it, backup tapes get replaced and  
9 that sort of thing. That's one thing that I think the  
10 Federal rules attempt to address, is the preservation of  
11 electronic information, and then there's -- the Federal  
12 rules also talk about how that information ought to be  
13 produced; and that is also an issue and might be worth us  
14 looking into to see if we want to put some guidelines  
15 about how it ought to be produced, whether it needs to be  
16 in searchable format, whether it needs to be the document  
17 itself, I guess JPEG, correct me if I'm wrong, or its  
18 native format, which you would be able to look to see if a  
19 document had been modified and that kind of thing.

20                   And then the final thing that the Federal  
21 rules address that differs from our rule is I think the  
22 Federal rules have a provision about how the inaccessible  
23 information, how retrieving that information -- how the  
24 costs of retrieving that information are assessed; and our  
25 rule definitively says if the information is not

1 ordinarily accessible the requesting party pays the cost  
2 for any special retrieval; and that's a big issue because  
3 there are technology issues. You might have information  
4 on technology that's now outdated and difficult to  
5 retrieve. You might have technology or data in  
6 inaccessible forms, like, for example, magnetic backup  
7 tapes that are only intended to be used given some  
8 catastrophic event and as a result are pretty expensive to  
9 pull up and retrieve responsive documents out of.

10                   And the Federal courts have -- you know, in  
11 their common law decisions have spent a lot of time  
12 analyzing who should pay; and in particular a judge out of  
13 New York, Judge Sheindlin, has written a series of cases  
14 called the Zubulake cases, some of you may be familiar  
15 with; and in that she assesses how -- or she doesn't  
16 assess, but she comes up with a framework for analyzing  
17 how costs ought to be assessed; and the Federals also I  
18 think come up with a framework. We may not even need to  
19 go there since we have a rule that already addresses that  
20 issue, but it is different than the Federal rule, so it  
21 might make sense to compare.

22                   CHAIRMAN BABCOCK: Okay. Does anybody on  
23 the committee have experience with electronic discovery  
24 where there's been claims of exfoliation or there have  
25 been issues? Judge Sullivan.



1 HONORABLE KENT SULLIVAN: Yes.

2 CHAIRMAN BABCOCK: Any problems? You had to  
3 make rulings interpreting our rule or --

4 HONORABLE KENT SULLIVAN: No. As I sit here  
5 and think about it, ultimately, there are two cases that I  
6 can think of in which ultimately the matter was resolved  
7 and didn't really require any significant interpretation  
8 of the rule by me. The bigger issue that seems to come up  
9 is the question of what extraordinary measures will be  
10 taken, who will supervise those extraordinary measures,  
11 and like that I've dealt with several times.

12 CHAIRMAN BABCOCK: Yeah, Alistair.

13 MR. DAWSON: I haven't dealt with the issue  
14 in court in Texas, but I've studied this issue quite a bit  
15 and I've taught it to students in CLE classes and what  
16 have you and studied the cases. I think you're right that  
17 largely the case law is outside the state of Texas. I  
18 would point out parenthetically that there is one case  
19 that I forget the name of that held that the Zubulake  
20 factors don't apply in Texas, and I presume -- I haven't  
21 looked at it in a while, but I presume it's because the  
22 rule specifically addresses who pays what costs, and so  
23 the court said that those factors don't apply.

24 So to the extent that the Court or this  
25 committee wants to consider some form of cost shifting, I

1 think I agree with Jane there needs to be some change in  
2 rule. I think the issue that I see when I look at all  
3 these cases is, No. 1, the duty to preserve, because  
4 unlike paper documents these documents just disappear  
5 automatically unless you take affirmative steps to stop  
6 that process. That is largely a matter of common law in  
7 most other states. I'm not aware of other states that  
8 have written that into their Rules of Procedure. That's  
9 not to say you couldn't, but I think it would be a bit  
10 unusual.

11                   The other big issue, and it's the one that  
12 Judge Sullivan referred to, is access to information.  
13 Once you have preserved it are you going to give one party  
14 or the other sort of unfettered access, and this becomes a  
15 huge issue in databases where there's privacy issues and  
16 things like that. And, you know, A lot of courts solve  
17 that on a case-by-case basis, and I'm not sure it's  
18 suitable for rule-making, but essentially electronic  
19 discovery I think raises a whole panoply of issues, some  
20 of which -- a lot of which are probably covered by our  
21 rule, but not to say we couldn't make other changes that  
22 make them more --

23                   CHAIRMAN BABCOCK: Judge Bland.

24                   HONORABLE JANE BLAND: My only problem with  
25 common law rule-making -- I mean, common law

1 interpretation on preservation issues is it's usually in  
2 the context then of somebody having failed to preserve and  
3 what are we going to do about it, and there's no way to  
4 put companies who do business in Texas on notice of what  
5 they need to do to comply with our rules of discovery and  
6 our rules for preservation until somebody gets dinged with  
7 death penalty sanctions because they failed to secure  
8 information on a particular server. And it would be  
9 helpful, I think, if we at least looked to see if we --  
10 I'm not suggesting that we have to have a rule, but I  
11 think it would be worth a subcommittee studying the issue  
12 of whether we ought to give some guidance about what your  
13 preservation obligations are so that we're addressing it  
14 before the problem arises rather than after and then try  
15 to decide if what they came up with was reasonable.

16 CHAIRMAN BABCOCK: Buddy.

17 MR. LOW: What rule now says a document that  
18 I have to preserve, and I know I do because it's required,  
19 but what rule do we have in the Rules of Procedure?  
20 There's a rule that says I can't test something and  
21 destroy in testing it and so forth must preserve, but is  
22 there a rule on just a plain piece of paper I've got that  
23 says I have to preserve it after I've been sued? I don't  
24 know of a rule of procedure that does that. So if we  
25 don't have one on that, why have one on electronics? I

1 mean --

2 CHAIRMAN BABCOCK: Justice Bland.

3 HONORABLE JANE BLAND: The difference  
4 between something that's destroyed by testing and  
5 electronically destroyed information is that somebody  
6 makes an affirmative decision to test and destroy the  
7 evidence. With electronic information every time you turn  
8 off your computer there is information that was on the  
9 computer that if you turn it back on the next morning will  
10 no longer be there. It's called -- I'm not any expert on  
11 this, but defragging, and you may not know this; but your  
12 IT people at your firm may have a policy about how long  
13 they keep deleted information, about how often they back  
14 up information for disaster recovery purposes; but you as  
15 the person with knowledge of relevant facts may have no  
16 idea that that information is still accessible, but only  
17 until next month when they destroy the backup tapes as  
18 part of their regular -- and so basically information is  
19 being deleted or not preserved without anybody  
20 affirmatively issuing the order to destroy the documents.  
21 It just happens in the ordinary course of business.

22 MR. LOW: I know, but, see, you have a duty  
23 to preserve, I mean, certain things once you get sued. In  
24 other words, just a piece of paper. I read this Rule  
25 196.5 is like you've got to fuse, in order to test it you

1 have to test it to destruction, so therefore, you could  
2 get a court to allow everybody to do that and so forth,  
3 but that's all handled, as Alistair said, on a  
4 case-by-case, and then, you know, you've got that and you  
5 could have preserved it. Well, you had it when you got  
6 sued, so did you -- you know, that goes to the question  
7 did you intentionally allow that? How's a rule going to  
8 educate anymore on my lack of knowledge in computers than  
9 what I know I have to do now?

10 CHAIRMAN BABCOCK: Pete had his hand up and  
11 then Alex.

12 MR. SCHENKKAN: I think there's hardly  
13 anything we can do that's more important than this task in  
14 the future. This is a huge tidal wave --

15 MR. TIPPS: Pete, we can't hear you down  
16 here.

17 MR. SCHENKKAN: I think there is hardly any  
18 task we could assign ourselves or help take on than this  
19 one. This is an enormous tidal wave that's about to break  
20 over the American legal system. My large institutional  
21 client that operates in other states and courts are  
22 experiencing this already in these other forums. The  
23 answers that are going to be arrived at have to work  
24 nationally. We really can't effectively have 50 different  
25 rules in different states plus a national rule that's a

1 51st version because we're going to have to have one set  
2 of rules for the computers and the people who operate the  
3 computers and the people who know what's in the computers  
4 and the people who know how hard it is and how expensive  
5 it is to retrieve it from the computers at different  
6 stages of the process.

7                   It fits back to a comment that Justice Hecht  
8 made at an earlier meeting about we're pricing ourselves  
9 out of the dispute resolution business. If you think  
10 that's been true from what we've been seeing in discovery  
11 so far, you ain't seen nothing yet if we don't find a good  
12 cost effective way to say what the rules are on what has  
13 to be kept and what has to be retrieved.

14                   It may well be that our rule is still the  
15 best rule out there or the best starting -- that's an  
16 entirely possible answer, but we ought to restively look  
17 at that question; and if we think ours is and is better  
18 than the Federal rule, maybe our task this time is not to  
19 change our rule but to supply some strong comments with as  
20 much as support as we can generate to the feds to try to  
21 get them to move theirs closer to what we think is the  
22 best answer.

23                   But I really do hope we will make this a  
24 high priority and we will try to attract the participation  
25 of some lawyers who are knowledgeable about it, and

1 especially I'm interested in some general counsels of some  
2 major corporations whose clients have enormous computer  
3 operation systems, information databases, and problems.  
4 They are the ones we really need to figure out how are we  
5 going to make this work on a systematic basis.

6 CHAIRMAN BABCOCK: Alex.

7 PROFESSOR ALBRIGHT: I'm in charge of  
8 technology at the law school, and so I'm in the middle  
9 right now of trying to write out policies for retention  
10 and disaster recovery for all of our data that we keep at  
11 the law school, so I have been very involved in it from  
12 that side, and I also worked on the rule that we have now.  
13 I think the beauty of the rule we have now is that it's  
14 general, and we did -- we came about it from the point of  
15 view of documents that if you have it, you have to produce  
16 it; and the issue is who is going to pay for producing it,  
17 because data is a thing, it's not a piece of paper; and we  
18 definitely wanted to distinguish data from documents. We  
19 didn't want people to say they got -- they deserve data  
20 when they requested documents.

21 But I think what Judge Bland was talking  
22 about, the people that create documents and create data  
23 and keep data have obligations to retain it that is  
24 dependent upon the document retention or information  
25 retention policies of where they work and their duties to

1 keep certain information for a certain period of time.

2                   Then there are all these backup tapes that  
3 are not part of retention in that sense, your duty of  
4 retention. They are completely part of disaster recovery,  
5 but in many organizations those duties have gotten mixed  
6 up. So when you're conducting discovery there is lots of  
7 data that I may have created and may have thought I had  
8 deleted and I thought it was gone forever, but because my  
9 company keeps tapes for two years that data is still there  
10 on a tape somewhere, and it may be very expensive to get  
11 it, but it can be gotten.

12                   So I think for us to get into what you have  
13 a duty to retain, that's much different than what the  
14 Supreme Court says would just be -- you know, it's very  
15 difficult to articulate even within your company what you  
16 have a duty to retain and what you don't. I think for  
17 discovery it's whatever you retain in the ordinary course  
18 of your business and then you have the duty to retain  
19 certain information after you anticipate litigation. I  
20 think that's about as far as you can go.

21                   I agree with Pete. I think it makes sense  
22 for us to look at the Federal rule and see what we're  
23 doing and kind of follow what's going on. I think it  
24 would be very interesting. The fact that we haven't had  
25 much litigation perhaps indicates that there hasn't been



1 much problem with the way our rule is working right now.  
2 It could be that our rule is so bad nobody pays any  
3 attention to it. That's the other alternative, but I  
4 think it deserves looking at what the feds are doing and  
5 comparing it to what we've got.

6 CHAIRMAN BABCOCK: Richard Orsinger.

7 MR. ORSINGER: My experience with this is a  
8 little bit different perspective because in the family law  
9 we fight over individual computers. We don't fight over  
10 mainframes off in Cincinnati or something like that, and  
11 one of the problems that -- it's easy for a judge to make  
12 a decision that computer X, that a technician will come in  
13 and make a mirror copy of the hard drive without looking  
14 at the contents. You just have a duplicate, an electronic  
15 duplicate, and then that electronic duplicate goes into  
16 some kind of safekeeping place.

17 But then you get to the more difficult  
18 problem of how do you ferret out the confidential  
19 information from the nonconfidential information and who's  
20 going to supervise that process, and do you have this  
21 independent court-appointed technician print everything  
22 and then have the lawyers vet what's privileged and what's  
23 not, and that's usually a messy process.

24 Another thing, probably more frequent for  
25 family lawyers than anything else I'm going to say is not

1 something the Rules of Procedure can address, but probably  
2 my most frequent problem is when a client brings in  
3 e-mails from the other side that they have printed off of  
4 the home computer or off of AOL or whatever and it  
5 includes communications with the opposing party's lawyers.  
6 So you've got all these e-mails -- you've got a stack of  
7 e-mails on your desk, and it's got a lot of stuff in there  
8 about the other side's litigation strategy and everything,  
9 and I just take it all and put it in an envelope and seal  
10 it and file it with the court and ask for an in camera  
11 inspection. I don't know what you do there, and I'm not  
12 sure that this committee can decide that, but maybe some  
13 CLE people could talk about it. At the family law level  
14 that is a really frequent problem.

15                   And the problem probably that maybe we could  
16 address that concerns me that doesn't happen frequently,  
17 but it does happen some, is TROs to seize personal  
18 computers. Somebody will go down and get a family law  
19 judge to sign a TRO to seize a dozen computers at a  
20 business or three computers or a laptop or whatever, and  
21 one case that my law firm was involved in the judge issued  
22 a TRO to pick up certain identified computers and then  
23 issued a show cause order for the husband to show up at  
24 2:00 o'clock that afternoon and then as part of the TRO  
25 instructed the lawyers not to tell the client what the

1     hearing was about.

2                     So we were prohibited -- we had to tell our  
3     clients to be there at 2:00, and we had somebody that was  
4     headed out to the office while he was going to be at the  
5     courthouse to go in and take the computers and then we  
6     were prohibited from telling him what the hearing was, and  
7     we actually tried to get a mandamus on that one, and the  
8     Dallas court of appeals turned it down, although in those  
9     days probably they were turning everything down.

10                    But to me, if a government official is going  
11    to seize personal property, the Fourth Amendment is  
12    implicated, and I know that normally we think of the  
13    Fourth Amendment in terms of criminal investigation, but  
14    you know, if a government agent is going into someone's  
15    home or business and seizing property at the direction of  
16    the government, I think there ought to be probable cause.  
17    And so I don't know -- I'm sure that no one is ever going  
18    to get a TRO against IBM or anything like that, but, you  
19    know, 60 percent of the docket I hear is family law, and  
20    so when we're --

21                    CHAIRMAN BABCOCK:   You're pretty proud of  
22    that, aren't you?

23                    MR. ORSINGER:   But, you know, after all  
24    within three years or five years probably we'll all be  
25    practicing family law.

1 CHAIRMAN BABCOCK: So you got a leg up, huh?

2 MR. ORSINGER: There's another level at  
3 which -- and I'll be attending if I'm still on the  
4 committee, so I'll be sure to remind you, but it's not  
5 always two huge corporations or one really, really rich  
6 plaintiffs lawyer trying to make, you know, GM disgorge  
7 everything they've got. You know, and so we've got to  
8 write these rules in a way that they'll work with  
9 individual litigants who are fighting over specific  
10 computers, and then I can kind of ask around my family law  
11 friends and find out what's being litigated by them.

12 CHAIRMAN BABCOCK: Do you think we ought to  
13 look at this rule or not?

14 MR. ORSINGER: Oh, I think we should look at  
15 this rule. I mean, I think this rule is serviceable,  
16 although I've heard a lot of fights between people as to  
17 whether you ought to have a rigid rule that the party  
18 requesting has to pay to recover archived data. The New  
19 York case basically is a balancing and the judge has  
20 discretion. You have balancing factors.

21 You know, there are some areas where taking  
22 discretion away from trial judges is appropriate and there  
23 are other areas where we just have to trust our trial  
24 judges to have good judgment and give them a little  
25 freedom to do what's right in the specific circumstances,

1 and I think that part of it ought to be looked at pretty  
2 carefully.

3 But I do think that it's worth looking at.  
4 I agree with Pete. I think that we're going to see more  
5 and more of this both at the big case level and at the  
6 small case level.

7 CHAIRMAN BABCOCK: Yeah. Anne McNamara,  
8 when you were at American did this -- and, of course, you  
9 had a national, you know, docket, was this a problem that  
10 you had to deal with?

11 MS. McNAMARA: Yeah. It was a daily issue.  
12 You know, at what point do you need to start cloning data  
13 from computers and preserving things, when can you destroy  
14 it, when is it over. If you wait long enough there is  
15 another case that implicates some of it, so it is a big  
16 issue. I'm not sure that it lends itself to a lot of  
17 specific rule writing for the reasons some folks have  
18 mentioned. It's a little bit different everywhere, and  
19 the machines do a lot of different things, but it is a big  
20 issue.

21 CHAIRMAN BABCOCK: Yeah. Okay. Alistair.

22 MR. DAWSON: One of the things that I see is  
23 troubling is recycling of backup tapes, because they have  
24 these things on a cycle where they rotate them in and out  
25 the debate is, look, I'm supposed to preserve evidence.

1 It's theoretically possible that there might be something  
2 on there that I don't know about it. I'm in the middle of  
3 this litigation, so there's one side that says you  
4 shouldn't destroy anything, which means you've got to  
5 suspend your recycling of backup tapes, but that costs a  
6 lot of money.

7 And there's nothing in our rules nor in the  
8 case law in Texas that I'm aware of that really addresses  
9 that conflict, and I'm not sure whether it lends itself to  
10 rule-making or not, but I can tell you there would be a  
11 lot of happy clients if there were some rules about when  
12 you have to preserve, when you -- you know, what to do  
13 with backup tapes, when they can -- you know, are required  
14 to suspend their policies and when they're not, because it  
15 really is expensive. I mean, we're talking, depending on  
16 length of time, millions of dollars just to suspend the  
17 recycling of backup tapes.

18 PROFESSOR ALBRIGHT: That's disaster  
19 recovery. That's not retention. That's what I would say.

20 HONORABLE JANE BLAND: But not according to  
21 Judge Sheindlin.

22 MR. DAWSON: Then I'll hire you.

23 CHAIRMAN BABCOCK: One of the problems with  
24 these New York decisions is that there are duties imposed  
25 on outside counsel to ensure that documents are saved, and

1 I guess it's one thing if you're in Judge Sheindlin's  
2 court in the Southern District of New York and you can say  
3 to your client, "Look, we think this is how she's going to  
4 rule, and I've got to let you know about this so you've  
5 got to spend all this enormous amount of money and effort  
6 to do it." It's quite another thing if you're before  
7 another judge in that district or in the Southern District  
8 of Texas or the Northern District or in state court, you  
9 know, what obligations do you have, so I think it could be  
10 productively looked at from the lawyer's perspective as  
11 well.

12 I personally have had three cases where this  
13 has been a huge issue. One was in the Eastern District of  
14 Virginia where we had multiple hearings about electronic  
15 discovery that our side said had been deleted after the  
16 litigation started and days and days of testimony about  
17 it, and another case in the Eastern District of Texas  
18 where there were a multitude of issues about electronic  
19 discovery.

20 The one that was headed down for resolution  
21 before the case settled was critical documents that had  
22 been deleted after the litigation and then our litigation  
23 opponent had gone back and recreated them. So the  
24 original documents had been destroyed but they said,  
25 "Well, this is as good as gold because we went back and

1   recreated it," and that raised issues as well.

2                   And the third case was in a state court in  
3   Maryland where the plaintiff had after the lawsuit ditched  
4   all their electronic data, and that one resulted in death  
5   penalty sanctions for the plaintiff, so I can't say that I  
6   have any experience in Texas state court, but like Pete, I  
7   think this is a little bit of a tidal wave that it may  
8   wash over us before long; and it wouldn't be a bad idea if  
9   we got ahead of the curve and at least looked at it; and I  
10   think that our discovery rules are very well respected  
11   around the country, such that we may be able to influence  
12   the Federal side if -- you know, depending on what we  
13   decide to do, and the Federal side is getting very  
14   involved, I think it would be fair to say; and that might  
15   not be right for us. We might not think that's the right  
16   way to go, and I know there's a lot of people in the  
17   Federal system that think the advisory committee is headed  
18   in the wrong direction on the Federal side. So it seems  
19   to me it might be a good thing to look at. Richard.

20                  MR. ORSINGER: You know, when we're looking  
21   at the subject we might look into the Rules of Evidence  
22   also. We have a lot of really thorny authentication  
23   issues with the production of electronic evidence, and we  
24   did amend our rule to get rid of the best evidence rule  
25   problems. Now the computer printout is considered to be a



1 duplicate of the original information on the hard drive,  
2 which was an intellectual barrier for awhile, but the  
3 authentication of computerized information and the  
4 distinction between the application of the hearsay rule  
5 and the requirements for authentication are not -- how  
6 they apply in terms of computer-generated information is  
7 very unclear, and as long as we are putting our minds to  
8 it we probably ought to keep an eye on some of the Rules  
9 of Evidence that we might could, you know, tweak them a  
10 little bit, and they might work a little better, too.

11 CHAIRMAN BABCOCK: Okay. Any other comments  
12 on this? Yeah, John.

13 MR. MARTIN: I think I read recently that  
14 there's going to be a public hearing on the Federal rule  
15 in Texas early next year.

16 CHAIRMAN BABCOCK: Dallas, I think.

17 MR. MARTIN: So I was going to say if you're  
18 serious about wanting to influence that process, that  
19 might be something to target because that train is moving  
20 along.

21 CHAIRMAN BABCOCK: Yeah. Of course, we  
22 first have to know what to say, but, yeah, Frank.

23 MR. GILSTRAP: Don't forget Tommy Jacks I  
24 think has some expertise in this area. He's spoken widely  
25 on it, on electronic discovery.

1 CHAIRMAN BABCOCK: Tommy Jacks has?

2 MR. GILSTRAP: Yes, he has. As a matter of  
3 fact, you can go to his website and he will send you a  
4 Power Point presentation on electronic discovery.

5 CHAIRMAN BABCOCK: Okay.

6 MR. DAWSON: Did you say Tommy Jacks?

7 MR. GILSTRAP: Yeah, Tommy Jacks.

8 CHAIRMAN BABCOCK: Okay. Well, what do you  
9 think? We ought to look at it or --

10 HONORABLE NATHAN HECHT: Yes.

11 CHAIRMAN BABCOCK: Well, it makes sense that  
12 the discovery subcommittee do that, and, Justice Bland,  
13 since you're the most passionate voice on this, maybe you  
14 could organize that group into looking at it, and it might  
15 make sense if Tommy Jacks is -- has worked on this, and  
16 Anne McNamara, too, would have a lot of experience, if you  
17 consulted them and maybe even drafted them to help you,  
18 would be a good idea.

19 Yeah, Harvey.

20 HONORABLE HARVEY BROWN: I was going to  
21 suggest it might be helpful to have a couple of lawyers  
22 who really have a lot of computer expertise as ex officio  
23 members. You know, there are some lawyers who really know  
24 computers very, very well. It might be helpful.

25 CHAIRMAN BABCOCK: Yeah. There is -- of

1 course, Peter Vogel has asked to do this every time  
2 something comes up, and he's very astute. Justice Bland,  
3 there's also a lawyer at my firm by the name of Mary Lou  
4 Flynn-DuPart. A lot of names for one person, but she is a  
5 very -- has a deep understanding of this and has been  
6 through a lot of these battles on the Federal side.

7 MR. ORSINGER: You know, former plaintiff's  
8 lawyer Craig Ball in Houston pretty much confines his  
9 practice now to electronic discovery issues either as a  
10 hired advocate or as a court-appointed master or whatever.

11 CHAIRMAN BABCOCK: How do you spell his last  
12 name?

13 MR. ORSINGER: B-a-l-l. Craig Ball.

14 CHAIRMAN BABCOCK: I thought you added a  
15 syllable there.

16 MR. ORSINGER: I said he was a former  
17 plaintiff's lawyer because I don't know that he's actively  
18 litigating the docket, but I think he's -- last time I  
19 talked to him he was full-time just electronic discovery  
20 and had a role as a court-appointed neutral in many cases,  
21 so if anyone is interested, I've always had an easy time  
22 working with him. You might call him. I bet he would  
23 have a lot to contribute.

24 PROFESSOR CARLSON: He's actually in  
25 Montgomery.

1 MR. ORSINGER: Montgomery, okay.

2 CHAIRMAN BABCOCK: County or Alabama?

3 PROFESSOR CARLSON: City.

4 MR. ORSINGER: Is that somewhere near the  
5 county of Houston or the state of Houston?

6 CHAIRMAN BABCOCK: Okay. Anymore on that?

7 All right. Just since I've been jumping around all day  
8 I'm going to jump around to Item 7, which we can get rid  
9 of easily. Item 7 is the retention of records, retention  
10 and disposition of exhibits and deposition transcripts.

11 The history of this is that Charles  
12 Bacarisse primarily has been concerned about this issue  
13 and had thought about maybe seeking a legislative solution  
14 to the problem, but he checked with Justice Hecht and what  
15 the Court's pleasure was, and I met with Charles two days  
16 ago to see where he was, and everybody is being very  
17 polite to everybody else, "No, you do it." "No, you do  
18 it," and the bottom line is Charles and Justice Hecht and  
19 I agree that this is probably an area where rule-making is  
20 more appropriate than legislation, so we are going to  
21 suggest that this issue be looked at by the subcommittee  
22 of our group that handles Rules 1 through 13c, which would  
23 be Pam Baron; and Jane Bland, who is in a volunteering  
24 mood today, volunteered to assist in that project as well.

25 MS. BARON: She didn't. She did not

1 actually.

2 CHAIRMAN BABCOCK: She didn't? Never mind.  
3 Strike that then.

4 MS. BARON: But I've got a great  
5 subcommittee, so...

6 CHAIRMAN BABCOCK: Okay. Who is that?

7 MS. BARON: I've got Steve and Bonnie --  
8 excuse me, Judge Yelenosky, clerk Bonnie Wolbrueck. I'm  
9 the only nonelected official. There may be somebody else.

10 CHAIRMAN BABCOCK: Okay.

11 MS. BARON: But I think Bob has actually  
12 worked on this issue before, and Bonnie will have insight  
13 from the district clerk's perspective.

14 HONORABLE BOB PEMBERTON: I thought it was  
15 the rule of practical impossibility, but I have no memory  
16 of that.

17 MS. BARON: We're going to do some memory  
18 enhancement with him.

19 HONORABLE BOB PEMBERTON: I will go under  
20 hypnosis before the next meeting to try to bring this  
21 back.

22 MS. BARON: I do have a question, though.

23 CHAIRMAN BABCOCK: Sure.

24 MS. BARON: My understanding of Charles'  
25 concern, why he's been initiating this request with the

1 Court, is not so much the length or timing or what has to  
2 be retained but the cost of notifying parties and  
3 attorneys, and is that what we're supposed to be focusing  
4 on?

5 JUSTICE HECHT: Yes.

6 MS. BARON: All right.

7 JUSTICE HECHT: He wants to throw everything  
8 away that he doesn't have to keep, and so the issue is  
9 what do we do by way of giving attorneys or other people  
10 notice? Do we publish it in the Bar Journal? Can we put  
11 in there maybe twice a year that the clerks are going to  
12 throw stuff away if you don't come get it or something to  
13 facilitate the storage problems?

14 And historically, when Bob worked on this we  
15 had a task force that looked at it, too, but this was back  
16 when throwing it away meant it was gone forever; and now I  
17 think Charles is archiving everything electronically, so  
18 it's not getting rid of it forever. It's just getting rid  
19 of the paper copy; and the storage costs that the clerks  
20 face -- Bonnie is not here, but they're all complaining  
21 about how much money it costs to store all these records;  
22 and, of course, in the last two or three years with budget  
23 constraints people are trying to save money.

24 So the problem takes on a new face when  
25 you're just talking about getting rid of one copy of it,

1 and so how easily -- how easy would it be to accommodate  
2 this? But the rub is that there is a state statute on  
3 archival and then there are other administrative rules, I  
4 think.

5 MS. BARON: Is it your understanding,  
6 though, that they're archiving things like exhibits and  
7 depositions that are filed?

8 HONORABLE NATHAN HECHT: I don't know. And  
9 the fellow who was here --

10 MR. DUGGINS: Tom. You might ask him about  
11 Tarrant County.

12 MR. WILDER: Yes, the exhibit things, we are  
13 holding those, and we would love to have a more  
14 streamlined way to unload them, especially on the civil  
15 side. There are some issues on the criminal side  
16 regarding what might have DNA on it that we've had to deal  
17 with, and I don't want my clerks making a decision, you  
18 know, "This has DNA" or "This doesn't," so we basically  
19 agreed to keep the criminal stuff until the law firms quit  
20 arguing over DNA. You know, even after somebody may have  
21 been executed they're still arguing over that, but the  
22 civil records very definitely we would love to have some  
23 streamlined procedure.

24 I've got three giant rooms. The news media  
25 has done -- I've got more press off of that than anything

1 else. It looks like Raiders of the Lost Ark. At the end  
2 of it you're looking down these huge racks of stuff, of  
3 evidence and exhibits, and we would love to move to get  
4 rid of some of that.

5 CHAIRMAN BABCOCK: Any other questions about  
6 this?

7 MS. BARON: There will be.

8 CHAIRMAN BABCOCK: I'm sure. Just holler.  
9 Item 4, I think, Richard, proposed Rule 103 has already  
10 been posted by the Court, right.

11 MR. ORSINGER: Yes, it has, but there is a  
12 little something to discuss. Do you want to take a minute  
13 or two?

14 CHAIRMAN BABCOCK: Yeah.

15 MR. ORSINGER: Lisa Hobbs has written these  
16 proposals, and I want to thank her for doing all that hard  
17 work and did a great job. If there's one constituency  
18 we've ever reached, it's the private process servers.  
19 They are so happy with what we've done. I will read you  
20 one e-mail because everything else is a variation of this.  
21 They either put a sentence in front of it, a key word in  
22 the middle of it, or a sentence after it, but it's "I  
23 would like to thank the Court for putting forth the  
24 changes to the TRCP Rules 103 and 536. These changes have  
25 been needed for a very long time. I support the changes



1 as published." We probably got 150 e-mails that have  
2 variations of that particular message there.

3           It seems like the only people that don't  
4 like it are a few constables; and I can't tell, but the  
5 people in here who are former constables say, "I was a  
6 former constable, and it was a nightmare for us. You  
7 know, we didn't have time to do it, and we couldn't do our  
8 service and everything." So I'm not really sure that  
9 anybody is unhappy. I think the lawyers haven't noticed.  
10 I think there's hardly anything here from a lawyer.

11           And there are some transitional issues like  
12 "Well, if I'm certified now do I get three years on my  
13 last exam," and this, that, and the other. And then the  
14 others are interested to know about the registration and  
15 application process, and there is a packet here which has  
16 not been aproved by the Supreme Court yet, but that was  
17 our best effort to consolidate the information that we  
18 received from people in the industry; and, you know, the  
19 essentials are if you're convicted of a felony or a  
20 misdemeanor of moral turpitude, you can't serve process;  
21 and if that happens to you after you've been certified  
22 then you're going to lose that certificate if the Supreme  
23 Court finds out about it.

24           There's an administrative agency -- pardon  
25 me, an administrative board called the Process Service

1 Review Board, which apparently is going to be appointed by  
2 the Supreme Court with no legislative authority or  
3 constitutional authority or anything; and we don't know  
4 who they will be, but they will definitely be serving  
5 without compensation. Don't know where they will meet or  
6 who will store their records, but we do know that the  
7 certifications will be somehow, I guess at the Supreme  
8 Court, on the internet so lawyers can check and see if the  
9 process was served by a certified person.

10 MS. HOBBS: Through the Office of Court  
11 Administration.

12 MR. ORSINGER: Through OCA? Okay. One  
13 point of controversy is that proposed Rule 103 as  
14 promulgated permits the private process servers to serve  
15 writs and orders. Writs and orders. Okay. Now, some of  
16 these writs allow you to take somebody's furniture and put  
17 it in the street. Another writ allows you to take a minor  
18 child away from the parent. Another writ allows you to  
19 take a person in your car down to the county jail. I  
20 mean, there's a lot of writs out there that, as one of  
21 these guys said, probably they're going to want to have  
22 people that are wearing guns serving those writs, and that  
23 may well be true; but I think the inclusion of writs and  
24 orders as something that could be served through private  
25 process may be something that you might want to raise your

1 eyebrow at.

2                   Now, as a reverse, and maybe I shouldn't  
3 even say this, but it's possible that if this is  
4 controversial enough it may prompt the Legislature to  
5 react to the rule, saying, "Well, we don't really want  
6 18-year-old kids serving, you know, writs of attachment on  
7 human beings, so we're going to go ahead and adopt a law  
8 and establish an agency and have licensing just like  
9 everybody else," in which event maybe it would be salutary  
10 to leave writs in there. On the other hand, you know, I  
11 can -- I mean, I have been around when there were some  
12 tense writs served for minor children in family law  
13 matters, and, you know, it could be a point of  
14 controversy.

15                   So, anyway, I'm real happy with what's  
16 happened so far; and, Lisa, what is your perception? Have  
17 you been getting different signals from what I have talked  
18 about here?

19                   MS. HOBBS: No. I think you covered all the  
20 rules -- all the major comments that we're getting, and  
21 the majority of them are in favor of the rule, and the  
22 ones that are against the rule concentrate on the writs  
23 part of the rule. So you provided a fair summary of the  
24 comments I've received.

25                   MR. ORSINGER: Okay. There was one piece in

1 here that was critical. In our proposed -- we've  
2 authorized or we've recognized or acknowledged the  
3 legitimacy of I think two of these courses; isn't that  
4 right? Two of them. And, yeah, Houston Young Lawyers and  
5 Texas Process Servers Association. There was one e-mail  
6 in the packet that said that they went to one of these  
7 two, and it really was a two-hour course, not an  
8 eight-hour course, and it really was a bunch of war  
9 stories and not much law or procedure and that the test  
10 was really a joke.

11 MS. HOBBS: And, Richard, I got an e-mail in  
12 response to that yesterday that it has been clarified that  
13 he did not attend the TPSA course, and he has withdrawn  
14 his comment about that course.

15 MR. ORSINGER: Okay. Well, we might -- I  
16 mean, we might want to kind of keep an eye on the courses  
17 that have been identified to be sure that they're  
18 legitimate, but, you know, they do a good job of that in  
19 the driving classes. I have to go to those all the time,  
20 and they make you stay there and pay attention the whole  
21 time and take a test. If they can do that for that level  
22 of administration, we ought to be able to do it on this  
23 one. But --

24 MR. GILSTRAP: Will you have a comedy  
25 course?

1                   MR. ORSINGER: Yeah, I've taken the comedy  
2 course, too, and it's not much better. I did it on the  
3 internet one time, and that was worse than going to class.

4                   CHAIRMAN BABCOCK: Judge Lawrence has got a  
5 serious comment about your frivolity.

6                   HONORABLE TOM LAWRENCE: Well, several  
7 questions. When we talked at the last meeting, did we  
8 talk about writs being in this or was that something that  
9 was added?

10                  HONORABLE NATHAN HECHT: I don't recall. It  
11 was added. It was not in the recommendation that came  
12 before, but it was added.

13                  HONORABLE TOM LAWRENCE: I've got a few  
14 calls on this issue of writs, and I was looking through  
15 the writ of attachment rule, distress warrant execution  
16 and garnishment, injunction and sequestration. It's kind  
17 of interesting. Some of them talk in terms of "the  
18 citation may be served in the same manner prescribed for  
19 citations," which I presume would be private process  
20 servers. Others use the term "sheriff or constable or  
21 officer" in determining what can be done under the writ.  
22 And are we saying or is the Court saying that a private  
23 process server can serve a writ of sequestration,  
24 garnishment?

25                  HONORABLE NATHAN HECHT: Well, the proposed

1 rule would let you serve -- would let a private process  
2 server serve whatever process he could serve by court  
3 authorization as long as he followed these procedures, so  
4 if there were a statute limiting service to an officer  
5 with the idea that that were public officer then the  
6 answer would probably be "no."

7 HONORABLE TOM LAWRENCE: Well, for example,  
8 in the writ of attachment rule, the service of the  
9 citation, apparently Rule 598(a), says it can be served in  
10 the same manner prescribed for citation. Then you've got  
11 597 that says "sheriff or constable" and then 604, 606,  
12 and 607 use the word "officer." "Officer will return" or  
13 whatnot. So it's a little -- but the question is going to  
14 be, if I've got a writ of sequestration or an execution or  
15 a distress warrant, does that mean that the private  
16 process server can serve that and handle everything  
17 involved in that; or are we going to have the private  
18 process server serve it and then where it says "sheriff,  
19 constable, or officer," somebody not involved in the  
20 service is going to somehow get put into this process?

21 HONORABLE NATHAN HECHT: No, I think that  
22 identified a problem, as Richard did, that we're going to  
23 have to clarify either by ironing out those  
24 inconsistencies or taking "writs" out.

25 MR. ORSINGER: Well, you know, you could

1 take "writs" out of here and not damage much civil  
2 litigation. The writs, writs are usually where you're  
3 using the force of law against someone against their will.  
4 I mean, that's not always the case; but most writs are  
5 issued out because the court has made either a preliminary  
6 or a final decision that somebody is going to have to do  
7 something they don't want to do; and private process  
8 serving for the most part is just getting lawsuits going  
9 and getting stuff served that allows the litigation to  
10 move along; and so taking "writs" out probably wouldn't  
11 damage the benefit that we're accomplishing; and frankly,  
12 I can't imagine an 18-year-old woman trying to, you know,  
13 move a bunch of furniture out of a house when an FE&D has  
14 been granted or trying to arrest somebody and take them to  
15 jail. I don't even know if they can. Maybe you would  
16 know better than I, but some of these writs I think that  
17 private process servers are going to refuse to do because  
18 they're just likely to get them shot or stabbed or hit.

19 HONORABLE TOM LAWRENCE: Well, if you talk  
20 to a constable or sheriff that does civil process they  
21 will tell you that the service of citation is relatively  
22 simple compared to service of writs, which is what they  
23 spend most of their time training on. I don't know that  
24 the private process servers spend any time training on  
25 writs of execution, distress warrants, writs of

1   sequestration or garnishment. I mean, this is not  
2   something that -- I don't think they receive any training  
3   on. I think if you took writs out that you would solve a  
4   big problem, and I'm presuming that when you say "writs,"  
5   would that mean a writ of possession in a forcible? It  
6   would?

7                   HONORABLE NATHAN HECHT: Yes, it would, but  
8   once again, I think we have to look at whether it wouldn't  
9   be simpler just to take "writs" out.

10                  HONORABLE TOM LAWRENCE: Well, I think it --  
11   I would recommend taking "writs" out, for the time being  
12   at least until this is studied a little more. I think  
13   it's going to be very problematic.

14                  CHAIRMAN BABCOCK: Justice Bland.

15                  HONORABLE JANE BLAND: First I want to say  
16   to Richard that I think you grossly underestimate what an  
17   18-year-old woman can accomplish.

18                  HONORABLE NATHAN HECHT: He deserved that.

19                  HONORABLE JANE BLAND: But I do not think  
20   that the -- and Levi or Kent can correct me if I'm wrong,  
21   but I don't think that the district judges use private  
22   process servers to serve writs, and so I think we're  
23   better off taking it out and leaving it out. I had to  
24   make the second comment just so I could make the first.

25                  CHAIRMAN BABCOCK: Anybody else have any



1 thoughts on that? Yeah, Jeff.

2 MR. BOYD: What is the source of what we're  
3 talking about now that allows these new individuals to  
4 serve writs? 103 as written doesn't do that. What am I  
5 missing?

6 MR. ORSINGER: The proposed rule does. You  
7 need to be looking at this. That piece of paper is really  
8 not the proposed Rule 103, and I don't know why.

9 MR. LOW: I thought I had everything.

10 MR. BOYD: So this --

11 MR. ORSINGER: I don't know what this is.  
12 This was a version of 103 that was sitting out there, and  
13 I don't think it's the proposed rule. I don't know where  
14 it came from. I had nothing to do with it.

15 MR. MUNZINGER: So could someone read it  
16 outloud? It's a relatively short sentence that we need to  
17 have read. It's not included in anybody's packet.

18 MR. ORSINGER: I can read it. "Process,  
19 including" -- this is it. It's in the first phrase.  
20 "Process, including citation and other notices, writs,  
21 orders and other papers issued by the court may be  
22 served."

23 MR. BOYD: Now, has that been published?

24 MR. ORSINGER: This is effective February 1  
25 unless the Supreme Court pulls it back.

1                   MR. BOYD: And that's the version that was  
2 published, not this?

3                   MR. ORSINGER: True. So the writs and  
4 orders part is something that's new. It's not in our  
5 current 103.

6                   HONORABLE TOM LAWRENCE: Doesn't the  
7 Property Code specify sheriff or constable for writ of  
8 possession?

9                   MR. ORSINGER: Well, I think that what  
10 Justice Hecht is saying is that the statute would trump  
11 the rule, but you know, why would we have a rule that's  
12 contrary to the statute?

13                  HONORABLE TOM LAWRENCE: Well, the statute  
14 in the Property Code I believe says writs of possessions  
15 after evictions have to be sent to a sheriff or constable.

16                  MR. ORSINGER: The current Rule 103 says  
17 "citation and other notices may be served," so adding  
18 "writs and orders" is to change the Texas practice because  
19 under the current rule, if you had a court order that  
20 would permit you to serve, the order would be limited to  
21 citation.

22                  HONORABLE TOM LAWRENCE: I understand. What  
23 I'm saying is this rule as amended with "writs" would be  
24 in conflict with the Legislature when they drafted the  
25 Property Code and said only sheriffs and constable can

1   serve a writ of possession. I think you've got a conflict  
2   there.

3                   CHAIRMAN BABCOCK: Carl, then Frank.

4                   MR. HAMILTON: I would take out "other  
5   papers" also if you're going to take out "writ."

6                   MR. ORSINGER: Well, that raises another  
7   kind of -- "other papers issued by the court may be served  
8   by" and you've got three choices, sheriff or constable or  
9   someone authorized by law, someone pursuant to a court  
10  order, or a certified person. Some of these e-mails said,  
11  "Well, you could interpret that to mean that any notice of  
12  a setting."

13                   We have one from a judge in Midland who  
14  reads the rule as exclusive and that, therefore, lawyers  
15  may be impaired from sending notice of hearing themselves  
16  because that's another order, order setting a hearing on a  
17  motion to, you know, compel or expand the number of  
18  interrogatories or whatever; and he expressed the concern  
19  that if we were satisfied with the language maybe we ought  
20  to clarify with a comment that we're not saying that  
21  notices of hearing have to be served by Category 1, 2, or  
22  3 and that lawyers should still be able to serve notices  
23  through the Rules of Procedure. Now, the rules that  
24  permit service already may take care of that, but I think  
25  it's reasonable.

1 CHAIRMAN BABCOCK: Frank, then Jeff.

2 MR. GILSTRAP: Apparently allowing a private  
3 person to serve writs is problematic. I have this image  
4 of like the bounty hunter coming out and breaking in and  
5 taking somebody's computer, that type of thing. So is  
6 there any reason to allow private persons to serve writs?  
7 What are the advantages of it, if any?

8 MR. ORSINGER: I can't think of one. I  
9 mean, it seems to me like if you're going to use force,  
10 whether it's against property or a person, you just need  
11 to be a peace officer; you need to be trained; you need to  
12 be armed; you need to know what the limits of the  
13 Constitution are and --

14 MR. DUGGINS: Except if you had a common  
15 writ of injunction.

16 MR. GILSTRAP: Common writ of what?

17 MR. DUGGINS: An injunction. Just in a  
18 civil case. It doesn't involve seizing people or  
19 property, just the issuance of an injunction.

20 MR. GILSTRAP: More the nature of a service.

21 MR. DUGGINS: Yes. And if you're trying to  
22 find somebody, it's hard to get a constable or sheriff to  
23 sit outside for hours and hours waiting on them. It is  
24 convenient to use a process server in that circumstance.  
25 I agree with everybody on the other circumstances.

1                   MR. GILSTRAP: Why don't we just allow them  
2 to serve writs of injunction and that's it, or temporary  
3 restraining orders and that's it. That might be one  
4 approach.

5                   MR. DUGGINS: I think we should consider  
6 carving that out because it's merely service of a court  
7 order, but you can't do it presently by a process server.

8                   HONORABLE TOM LAWRENCE: You know, if you  
9 look at the writ of attachment, you've got different  
10 language used which is a little confusing, because Rule  
11 598a says, "The defendant shall be served in any manner  
12 prescribed for service of citation" and then Rule 597  
13 says, "The sheriff or constable receiving the writ shall,"  
14 and then 604, 606, and 607 talk in terms of the officer  
15 making such sale. "The officer executing the writ of  
16 attachment," and so I'm not -- it's a little confusing,  
17 and then you -- so which rule would trump which rule?

18                  CHAIRMAN BABCOCK: Buddy.

19                  MR. LOW: You know, aren't we really talking  
20 about writs that require the server to take action against  
21 person or property? And the other writs, they don't do  
22 that, and anybody could serve, like a writ of injunction.  
23 He's not required to take action against a person or  
24 property, so wouldn't -- isn't it -- aren't those the  
25 writs we're talking about that require action, that server

1 take action against the person or property, like  
2 physically take property?

3 CHAIRMAN BABCOCK: We're talking about  
4 taking them out, you mean?

5 MR. LOW: Pardon?

6 CHAIRMAN BABCOCK: Talking about taking them  
7 out?

8 MR. LOW: Right, taking them out, but then  
9 that would leave in the other like a writ of injunction,  
10 you just serve or a notice and so forth, and it sounds  
11 like to me the only ones we're worrying about is where the  
12 server must take physical action against a person or  
13 property.

14 CHAIRMAN BABCOCK: Or the Property Code, if  
15 the Property Code requires --

16 MR. LOW: Yeah.

17 HONORABLE TOM LAWRENCE: I don't have my  
18 Property Code, but I believe it says "sheriff or  
19 constable" for writ of possession.

20 MR. ORSINGER: You could say "and other  
21 notices," comma, "and where by permitted by law, writs,  
22 orders, and other papers" so that we automatically make  
23 the rule subordinate to the statute.

24 MR. LOW: I know, but how does that take  
25 care of a writ of injunction?

1                   MR. ORSINGER: Well, maybe we should say  
2 "where not prohibited by law." I mean, we've got some  
3 provisions there that really seem to require a peace  
4 officer, a certain writ, and others like a writ of  
5 injunction there's no requirement that that be served by a  
6 peace officer, so we might be able to just --

7                   HONORABLE TOM LAWRENCE: No, in the writ of  
8 injunction you've got Rule 686 that says "serve like  
9 citation." 688 uses the term "sheriff or constable," and  
10 689 uses the term "officer."

11                  MR. ORSINGER: 688 is for temporary  
12 injunctions or permanent injunctions?

13                  HONORABLE TOM LAWRENCE: Let me look.

14                  CHAIRMAN BABCOCK: Frank.

15                  MR. GILSTRAP: There's another problem. I  
16 mean, this term "writ" is extremely vague. I mean, what  
17 about writ of certiori? What about a writ of prohibition  
18 or a writ of mandamus? I mean, those are all writs, which  
19 is kind of a vague term meaning an order issuing from the  
20 court, kind of; and before we just stick in that vague  
21 term we might want to scrutinize exactly what we're  
22 allowing to be done; and maybe we need to limit it -- I  
23 mean, I like Buddy's idea, something along those lines,  
24 something that requires something more than just handing  
25 somebody a piece of paper.

1 CHAIRMAN BABCOCK: Elaine.

2 MR. LOW: You could put in there "except as  
3 provided" -- "where contrary by law" or something like  
4 that, and if the Property Code requires something, well,  
5 then it wouldn't be inconsistent.

6 CHAIRMAN BABCOCK: Elaine.

7 PROFESSOR CARLSON: I disfavor including  
8 writs at all and the proposed Rule 103.

9 MS. SWEENEY: You just favor or you  
10 disfavor?

11 PROFESSOR CARLSON: Disfavor.

12 CHAIRMAN BABCOCK: Not in favor.

13 PROFESSOR CARLSON: Not in favor.

14 MR. ORSINGER: She's against.

15 PROFESSOR CARLSON: I'm against. And in  
16 response to Judge Lawrence I think that the reason that  
17 the rules sometimes refer to sheriff or constable, other  
18 times officer, other times "as prescribed by the rules of  
19 citation," these rules were principally promulgated before  
20 Rule 103 was amended to allow the court to authorize a  
21 private person to serve, and I just don't think we went  
22 back and looked at that in terms of who was serving those  
23 writs.

24 CHAIRMAN BABCOCK: Jeff.

25 MR. BOYD: The new proposed rule adds what I



1 think was intended to be a solution to the question that  
2 was raised at our last meeting, and that's that any person  
3 certified by order of the Supreme Court can serve. Is  
4 there a proposed order of the Supreme Court already? And  
5 is that in our materials?

6 MS. HOBBS: It's over there on the --

7 MR. BOYD: What I'm wondering is maybe the  
8 order of the Supreme Court should just say these persons  
9 can serve citation only but not writs and other papers.

10 MR. ORSINGER: Well, that doesn't fix the  
11 problem that people under subdivision (2), who are also  
12 18-year-old women, will be doing it under subdivision (2)  
13 instead of subdivision (3).

14 MR. BOYD: But that problem has existed for  
15 a long time if that's a problem, because the rules on  
16 attachment and distress warrants and all those say that  
17 they can be served by anybody authorized to serve  
18 citation, and Rule 103 has for sometime allowed them any  
19 person authorized by law or written order of the court who  
20 is not less than 18 years of age to serve citation.

21 I mean, as I recall, we got into this just  
22 because of the idea that serving citation didn't always  
23 have to be a constable and if we could set it up in a way  
24 to allow other people to serve citation, and we decided to  
25 solve that -- address that issue by saying we'll allow

1 people authorized by a Supreme Court order to do so. So  
2 the Supreme Court order could just say, "We hereby order  
3 that the following people can serve citation but not writs  
4 or other papers."

5 MR. ORSINGER: Well, the existing practice  
6 before this effective rule for persons authorized by  
7 written order only applies to citation and other notices,  
8 so the insertion of "writs and orders" is a change on the  
9 previous practice.

10 MR. BOYD: No, because if you look at the  
11 rules on service of a writ of attachment or distress  
12 warrant or others, it says those can be served by anybody  
13 authorized to serve citation, which takes you back to this  
14 rule to say any person.

15 CHAIRMAN BABCOCK: Judge Lawrence.

16 HONORABLE TOM LAWRENCE: Well, that's right.  
17 It does allow the service of a writ, but virtually  
18 everything else other than the actual service of the writ  
19 has to be done by a sheriff, constable, or officer. So as  
20 a practical matter a private process server could serve  
21 it, but they're not going to send that over to the sheriff  
22 or constable, who are not going to have anything to do  
23 with that if they didn't serve it. So while it's  
24 theoretically possible for a private process server to  
25 serve the writ of attachment, he can't do anything else.

1 Everything else involved in that writ has to be a sheriff  
2 or constable or officer.

3 CHAIRMAN BABCOCK: Okay. Yeah, Carl.

4 MR. HAMILTON: Well, I think that the  
5 concept of private process serving was always just  
6 intended, wasn't it, for citations to facilitate the  
7 service of citations and subpoenas, perhaps; but if we  
8 exexpand to it writs, as Tom points out, how is that  
9 person going to care for and take care of property that's  
10 sequestered or something like that? They don't have any  
11 ability to do that.

12 CHAIRMAN BABCOCK: Why was "writs" inserted  
13 later?

14 HONORABLE NATHAN HECHT: There was some  
15 suggestion that it should be because it was as -- as has  
16 been pointed out by a couple of people, sometimes it's  
17 hard to serve injunctions on people, it's hard to catch  
18 them, same problem that you have with serving citation.

19 MR. ORSINGER: TROs particularly.

20 HONORABLE NATHAN HECHT: TROs.

21 MR. ORSINGER: They can duck a TRO for days.

22 HONORABLE NATHAN HECHT: And that that's one  
23 of the reasons that private process servers are so welcome  
24 by the Bar, is because they have a profit incentive to get  
25 the job done as opposed to the sheriff or constable who

1 may or may not act, because, in all fairness, they've got  
2 lots of other things to do; and so -- and, frankly, to get  
3 comments like we've gotten and we're talking about now to  
4 see if this is really a good idea or a bad idea.

5 CHAIRMAN BABCOCK: Okay. Frank.

6 MR. GILSTRAP: Wouldn't the problem be  
7 solved by simply allowing private process servers to serve  
8 citation or notice? I mean, you're never served with a  
9 writ of injunction. You're served with a notice of a  
10 temporary injunction, I believe. You're not served with a  
11 TRO. You're served with a notice of a TRO. Is that  
12 correct?

13 MR. DUGGINS: No, it's a writ.

14 MR. ORSINGER: There actually is a piece of  
15 process. Even though what the judge signs is called a  
16 temporary restraining order, it's really an order directed  
17 to the clerk of the court to issue a temporary restraining  
18 order, which is a piece of process.

19 MR. GILSTRAP: I thought you got a notice.

20 MR. ORSINGER: You have a notice of the  
21 hearing. If you get a TRO you typically get a hearing at  
22 the temporary injunction hearing, and that notice is with  
23 the TRO, and you have to serve not only a temporary  
24 restraining order signed by the clerk of the court, but  
25 you have a notice of the temporary hearing signed by the

1 clerk of the court, two separate pieces of process  
2 resulting from one combined order signed by the judge, and  
3 most people confuse the TRO, "I got a TRO signed by the  
4 judge." They got an order for the issuance signed by the  
5 judge.

6 HONORABLE NATHAN HECHT: And covered by Rule  
7 687.

8 MR. GILSTRAP: I'm wrong.

9 CHAIRMAN BABCOCK: Elaine.

10 PROFESSOR CARLSON: But even with TROs and  
11 injunction, I think before you subject a citizen to  
12 contempt or the potentiality for contempt that it should  
13 be served by an officer, not by a process server.

14 CHAIRMAN BABCOCK: Why?

15 PROFESSOR CARLSON: I think not only because  
16 of the training of those folks, I think the ramifications.  
17 Maybe someone won't take it real seriously if -- well,  
18 Richard is not, if an 18-year-old girl -- apparently he's  
19 not paying attention.

20 HONORABLE JANE BLAND: I'm listening, and I  
21 made my comment.

22 CHAIRMAN BABCOCK: Yeah, but we can run with  
23 this all day.

24 PROFESSOR CARLSON: We've only just begun.

25 CHAIRMAN BABCOCK: Yeah, in light of

1 Richard's recent experience with an 18-year-old girl.

2 PROFESSOR CARLSON: I just think there is  
3 something about --

4 MR. ORSINGER: Which is none, I might add.

5 CHAIRMAN BABCOCK: Yes, Carl.

6 MR. HAMILTON: Rule 103 specified citations  
7 and other notices, so it wouldn't be a big problem just to  
8 list under the new rule exactly what these people could  
9 serve. Not very many things, but just list them.

10 CHAIRMAN BABCOCK: Yeah. Buddy.

11 MR. LOW: But some of the private process  
12 servers are better trained than the constables. We had a  
13 constable in my little county that couldn't read and  
14 write. I mean, he wasn't going to school. That is the  
15 absolute truth and --

16 CHAIRMAN BABCOCK: But when he served an  
17 injunction people stood up and took notice.

18 MR. GILSTRAP: But he does have a badge. He  
19 does have a badge.

20 MR. LOW: That's right. And, I don't know,  
21 we've come a long way now because in my county a lot of  
22 people can read and write. I'm not certain about some of  
23 those other counties.

24 CHAIRMAN BABCOCK: Yeah, Richard.

25 MR. ORSINGER: You know, probably 99.9

1 percent of the TROs are family law TROs. I mean --

2 CHAIRMAN BABCOCK: 60 percent of the cases,  
3 99 percent of the TROs.

4 MR. ORSINGER: I know there are TROs in  
5 family law constantly. I don't see it that often now that  
6 the foreclosure craze is over, but we definitely would  
7 need to perpetuate private process servers for TROs in  
8 family law matters, because, you know, you frequently have  
9 people that are avoiding service there; and you can't get  
10 a constable or sheriff's deputy to stake somebody out for  
11 eight hours, so we have to be sure we can keep that  
12 process alive.

13 CHAIRMAN BABCOCK: Okay.

14 MR. DUGGINS: It's a real problem, too, in  
15 trying to prevent somebody from taking businesses where  
16 the small business owners are fighting over the breakup of  
17 a business, and somebody is trying to grab or hide  
18 records. I mean, I think we do need to allow it in those  
19 limited circumstances because you cannot get a constable  
20 or sheriff to hide out and find this person and get them  
21 served.

22 MR. ORSINGER: And they won't do clever  
23 things like pretend like they're delivering flowers, you  
24 know, or be carrying a file that looks like a business  
25 file and you open it up and it's got the process inside.

1 Peace officers are not that --

2 MR. DUGGINS: Pizza delivery.

3 MR. ORSINGER: Yeah. There's a lot of

4 tricks of the trade.

5 CHAIRMAN BABCOCK: Okay. Any other

6 comments? Richard, anything else to say, last word?

7 MR. ORSINGER: (Nods negatively.)

8 CHAIRMAN BABCOCK: Okay. Does this give you

9 a sense of --

10 HONORABLE NATHAN HECHT: Very helpful. Yes.

11 Very helpful. Thank you.

12 CHAIRMAN BABCOCK: All right. Great. Paula

13 is here on Item 5, the electronic jury shuffling.

14 MS. SWEENEY: You-all have a one-pager in

15 your stack on this, which is a letter from Judge

16 Christopher to Justice Hecht about Rule 223 of Rules of

17 Civil Procedure, which is the jury shuffle rule; and her

18 proposal is that when a lawyer wants a shuffle, that

19 instead of shuffling manually the clerk be able to shuffle

20 in the computer, rerandomize the jury cards and produce a

21 now shuffled list without the time delay and so on of

22 having the panel sitting around in the hall while the

23 cards are manually shuffled. I've heard no other comment

24 from any other group or comment on this. I personally

25 think it's a great idea and would commend it to you and



1 would open the floor to comment for anybody that wants to  
2 say anything about it.

3 MR. ORSINGER: I don't know, Paula probably  
4 hasn't tried as many cases in South Texas as I have,  
5 but --

6 CHAIRMAN BABCOCK: Family cases.

7 MR. ORSINGER: Family law cases. If I'm in  
8 a hostile county where the opposing lawyer is very well  
9 positioned at the courthouse, I want to be able to watch  
10 the jury shuffle, and I've tried to watch it, and I think  
11 that it's been a good practice. If you make this entirely  
12 electronic, it's not verifiable, and we're struggling with  
13 that issue now with the presidential elections. There are  
14 some states that have no paper trail for ballots that were  
15 cast, and we're about to see litigation on that, I  
16 understand, and I'm just -- I know that probably it's a  
17 hell of a lot more convenient, but if a shuffle is turned  
18 over to somebody that goes back into their office and hits  
19 a button on the computer, you've just lost all  
20 accountability, and it bothers me. It really does.

21 MR. LOW: What rule says you get a chance to  
22 watch the shuffle?

23 MR. ORSINGER: Well, I go in there, and I  
24 watch them shuffle it up.

25 MR. LOW: No, my question is -- now that's

1 the 18-year-old. What rule says you have a chance to do  
2 that, to watch them? The clerk goes back there and they  
3 come back and they say they shuffled it. You say, "You  
4 violated the rule."

5 MR. ORSINGER: No, I follow the clerk.  
6 Well, I haven't had to do this lately, but I follow the  
7 clerk back --

8 MR. LOW: What if she goes in the ladies  
9 bathroom and does it?

10 MR. ORSINGER: Well, if it's a ladies room,  
11 I wouldn't go in.

12 MR. MUNZINGER: He would get that  
13 18-year-old process server.

14 MR. ORSINGER: Maybe nobody else cares, but,  
15 you know, if you've ever tried a case in a hostile small  
16 county against a well-positioned adverse attorney, the  
17 courthouse is not your friend.

18 MR. LOW: Well, I've been there many times.

19 MS. SWEENEY: I've tried a lot of med mal  
20 cases in little bitty counties against one of six doctors  
21 where, you know, I kept my car doors locked and my windows  
22 up until I was out of town, but I've not had the  
23 circumstance where I felt like I was getting screwed in  
24 that particular way.

25 MR. LOW: There are other better ways.

1 MS. SWEENEY: There's other ways.

2 CHAIRMAN BABCOCK: Justice Bland and then  
3 Judge Benton.

4 HONORABLE JANE BLAND: The reason that Judge  
5 Christopher requested the rule change is that the way that  
6 the rule is written now adds about an hour to an hour and  
7 a half of time to voir dire selection; and not only is  
8 that time valuable to the lawyers who are trying to get  
9 their jury picked and the judge, but to the jurors who  
10 must sit out in the hallway doing nothing while we type  
11 all the jury information cards up, put all the slips of  
12 paper in the trash can to shuffle, pull them out,  
13 reconstitute the jury with new numbers, and go and recopy  
14 that information to give to the lawyer.

15 So it's not just a simple process. It's a  
16 several step process that involves making multiple copies,  
17 so the computer regeneration would allow the bulk of this  
18 time to be saved, and it's critical time. It's time when  
19 everybody has a lot to do, so I think that we should allow  
20 for this in light of a problem that we know exists; and  
21 then, Richard, you can follow the clerk into the clerk's  
22 office and watch the clerk punch the button on the screen  
23 to see the random generation and report back to us if you  
24 think there's a problem; but I don't think we have any  
25 evidence yet that this would be a problem; and right now

1 we do have an existing problem to address; and that  
2 problem is that we always add an hour and a half of time  
3 in doing a shuffle.

4 Not to mention the fact that I think that,  
5 having watched my clerk do a lot of shuffles, it's less  
6 random than you think, not because of any intention on her  
7 part, but just because you cut things up and throw it into  
8 a trash can and who knows how good and random it gets  
9 redistributed; and just by, you know, experience, the jury  
10 doesn't always end up looking all that different than it  
11 did -- the jury order number doesn't end up looking all  
12 that different. That's for another day. I think this is  
13 a problem that's out there that here is a creative way to  
14 cut down on the time the jury spends out in the hallway  
15 that makes us all look bad.

16 CHAIRMAN BABCOCK: Justice Hecht.

17 HONORABLE NATHAN HECHT: It would be helpful  
18 to know how Harris County does that technically, whether  
19 there's a program, because the smaller counties are not  
20 going to know how to do this; and they may have  
21 computer-generated or computer kept jury lists, but they  
22 just wouldn't know how to do a random shuffle on the  
23 computer; and so it might be useful to find out from  
24 Charles or somebody just technically how they do it; and  
25 if that were a separable part of the system or if it were

1 a part of the system that everybody has and they're not  
2 using, then it would be very easy to move to that and  
3 assure that the new one you get done, you really have a  
4 newly randomized list as opposed to a computer -- I mean,  
5 someone might think that, well, if you just sort it on zip  
6 codes or something that would reshuffle it, but it's not  
7 the kind of reshuffling that you want because there's an  
8 intended order, or sort on last names or something.  
9 That's not random. So we would need to know how the  
10 computer people actually get that done.

11 MR. ORSINGER: Well, is this the kind of  
12 thing the Office of Court Administration could promulgate  
13 a piece of software --

14 HONORABLE NATHAN HECHT: Might be.

15 MR. ORSINGER: -- that would be validated as  
16 accurate and then we could require that they use it?

17 HONORABLE NATHAN HECHT: It might be  
18 because, I mean, there are plenty of computer programs  
19 that do this, that can randomize lists, but they just need  
20 to be available.

21 CHAIRMAN BABCOCK: Frank.

22 MR. GILSTRAP: Why don't we allow it if the  
23 parties consent, and if somebody wants to be a stick in  
24 the mud and say, "I'm afraid of getting hometowned in this  
25 small town. I want to watch them shuffle it," they can.

1 CHAIRMAN BABCOCK: Elaine, then Paula.

2 PROFESSOR CARLSON: Texas is pretty unique  
3 having jury shuffle. I think we may be one of the few,  
4 perhaps the only, jurisdiction that has it; and, of  
5 course, it's only available in counties in which you have  
6 interchangeable jury panels, two or more district courts.  
7 Three for sure, two if the two agree. Our rule hasn't  
8 been criticized in the academic literature.

9 CHAIRMAN BABCOCK: Has or has not?

10 PROFESSOR CARLSON: Hasn't.

11 CHAIRMAN BABCOCK: Has not.

12 PROFESSOR CARLSON: Has as being misused in  
13 some instances as an Enron against Batson.

14 MR. ORSINGER: An Enron against what?

15 PROFESSOR CARLSON: Enron against Batson.  
16 You go in, you say, "I want to reshuffle, redistributing  
17 my odds here," so we're used to it in Texas, but it's  
18 certainly not something that is the norm across the United  
19 States. I had understood Judge Christopher's remarks --  
20 and I must have misunderstood them -- that because the  
21 jury shuffle was used at a time when we used jury cards  
22 and now we electronically are randomly selecting  
23 prospective jurors that perhaps there is not a need for a  
24 shuffle in those instances.

25 CHAIRMAN BABCOCK: Okay. Paula.

1 MS. SWEENEY: Well --

2 CHAIRMAN BABCOCK: Then Judge Benton.

3 MS. SWEENEY: We've already been to that  
4 party in this group several times and have articulated  
5 that the shuffle rule in its existence isn't really an  
6 issue, and I don't think that this raises that issue, and  
7 I do think and we've had the debate a bunch of times that  
8 it's important to retain that, but as to letting the  
9 lawyers agree, I think you would end up obliterating the  
10 rule. I think there's -- there are enough times when  
11 there are just obstructionists in the process on one side  
12 or the other or both that are just not going to agree to  
13 anything, and I think if you leave it open to that, you  
14 probably -- you eviscerate doing this if we did it.

15 CHAIRMAN BABCOCK: Judge Benton.

16 HONORABLE LEVI BENTON: Yeah, Professor  
17 Carlson really just raised the issues that I wanted to  
18 raise. I was unaware that the purpose of the rule and its  
19 origin had been discussed before. I don't know why we  
20 still have the rule in 2004; and I, frankly, would like to  
21 see the Court on its own motion without any debate here  
22 just do away with the rule; but if we're going to have the  
23 rule, Frank's concerns and Richard's concerns are of no  
24 moment, because if you're concerned about the shuffle then  
25 you might as well go back further in the process and

1   insist on being there when the summons go out, insist on  
2   being there when the will is reconstituted.  If there  
3   are -- if the system lacks in integrity, it's going to  
4   lack in integrity at several points and not just when a  
5   shuffle is requested.

6                   CHAIRMAN BABCOCK:  Yeah.  I once used my  
7   opponent's shuffle as a basis for a Batson challenge  
8   because without having any information about the jury  
9   other than he went in and looked at them he asked for a  
10  shuffle, and the effect was to move a disproportionate  
11  number of people of one race around in the panel.

12                  MR. LOW:  But that's the whole thing.  I  
13  mean, if you see 15 or -- well, you know, you're in  
14  trouble if you see that many, but if you see several right  
15  in a row and so forth and you don't think you've got a  
16  good gathering of it, you should be able to shuffle.

17                  PROFESSOR CARLSON:  These 18-year-old women.

18                  MR. LOW:  Yeah.  I mean, I'm not --

19                  CHAIRMAN BABCOCK:  Richard and then Justice  
20  Bland.

21                  MR. ORSINGER:  To me the shuffle has an  
22  independent purpose from the original jury summons.  If  
23  you're looking at a panel and you detect what you think is  
24  a pattern, whether it's a conscious pattern or an  
25  accidental pattern that you don't have a fairly mixed



1 jury, this is a palpable way where you can assure yourself  
2 that you do have the random sequencing. Now, you can't  
3 eliminate discrimination that occurs. That's been  
4 litigated all the way to the Supreme Court, and we have a  
5 lot of safeguards, but if you've ever gone to a place  
6 where it looks like the panel is stacked on the front end  
7 or the back end and that just doesn't look normal to you  
8 and you could shuffle, then if you end up about the same  
9 or worse off at least it's random; and to me that's an  
10 entirely different question from whether you want to  
11 challenge the integrity of the process all the way back to  
12 the beginning.

13 CHAIRMAN BABCOCK: Justice Bland, then  
14 Paula.

15 HONORABLE JANE BLAND: The reason that Judge  
16 Christopher sent the letter in now is because Harris  
17 County is in the process of building a new jury assembly  
18 room and also is getting software together to facilitate  
19 the delivery of jurors to courtrooms; and as part of that  
20 they're going to scan every juror information card or  
21 every bit of information that a juror has -- well, now it  
22 gives you, will be on the computer. So the idea of  
23 electronic shuffle is not only will it randomly regenerate  
24 the panel, but it will also attach with it all the jurors'  
25 information so when you press the button, information will

1     come out in the right order.

2                     So not only does it save time in terms of  
3     the reshuffling, it also eliminates the reordering and the  
4     recopying and all of that. That's the reason why it's  
5     here now, and I will talk to Tracy and to Charles about  
6     giving us some information about how they're planning to  
7     do that, but I know that's what they would like to do; and  
8     when you have as many district courts and county courts as  
9     there are in Houston, it really will save time in the  
10    whole voir dire process.

11                    CHAIRMAN BABCOCK: Paula.

12                    MS. SWEENEY: With all due respect to the  
13    Batson issue, of which I am a champion, that's a red  
14    herring in this venue, in this rule, I think; and I think  
15    it's being used to eliminate the shuffle for -- with  
16    unintended consequences. I've used the shuffle when I've  
17    gone to pick a malpractice jury and in the first 12 people  
18    there were eight health care providers and none on the  
19    whole remaining 60 people. So for that case this panel,  
20    where it may have been randomly constituted, but the  
21    coincidences were that that was an inherently horrifically  
22    unfair panel for me -- John would have liked it for that  
23    case.

24                    Is it possible that somebody might use it  
25    for a Batson related reason for an inappropriate racial or

1 religious or protected categories? Sure. I mean, there's  
2 a possibility for abuse of almost every rule we have, but  
3 we can't keep letting the dog of abuse -- the tail of  
4 abuse wag the whole dog of these rules; and the rule was  
5 here for cases where a panel supposedly randomly  
6 constituted and even properly randomly constituted turned  
7 out to be unfair for that particular case, where, you  
8 know, you walk in and you've got six insurance adjusters  
9 in the first 10 or whatever would be unfair in your  
10 particular facts of your case, and so you rerandomize  
11 them.

12                   You get one shot, so we don't have the  
13 abuses that we used to have of everybody is wanting to  
14 shuffle back and forth. You get one shot at it. If it  
15 can be done expeditiously electronically, I think that's  
16 terrific because I hate that delay, and then you have at  
17 least one more shot, and if they all show back up there  
18 again then you're just not going to have a good day, but  
19 at least you had a crack at making what appears to be  
20 unfair for that particular case fairer, and I hate to see  
21 us even picking up the idea of getting rid of one of the  
22 safety valves that's in the system.

23                   MR. LOW: I totally agree, because I've had  
24 the experience where I'm the defendant, and the bank  
25 president, the head of the corporation, everybody I want

1 on the jury is No. 40 to 44, and we're never going to get  
2 there, so I'm going to ask. It happens. It's not a  
3 matter of race, and I don't even know how they pick them.  
4 I get there and they're there, but I know how to shuffle  
5 them.

6 CHAIRMAN BABCOCK: Not if we make it  
7 computer-generated.

8 MR. LOW: I don't know anything about  
9 computers. If they tell me they did it, I figure they  
10 did.

11 PROFESSOR CARLSON: That's just it. You're  
12 not looking for fair and impartial jurors. You're looking  
13 for jurors partial to your case.

14 MR. LOW: No, I want one that's equal where  
15 it will be -- well, maybe favor my client a little.

16 CHAIRMAN BABCOCK: Richard Munzinger.

17 MR. MUNZINGER: I just want to note that for  
18 the second time today I agree with Paula. We all want to  
19 watch the sky and listen for the trumpets, but it isn't a  
20 question of not wanting a fair and impartial jury. Of  
21 course you want a fair and impartial jury. You want fair  
22 and impartial jurors that reflects the community, and when  
23 your bank president is No. 40 and the first 13 are labor  
24 union members, and you've got a case involving a labor  
25 union, you may not get a fair reflection of your

1 community. The shuffle is a valid, valuable tool to a  
2 trial lawyer who is looking for justice and truth, and  
3 don't take it away from him.

4 CHAIRMAN BABCOCK: Yeah, I don't think the  
5 proposal, in fairness, was to take it away but rather just  
6 to be able to touch a button to reshuffle it.

7 MR. GILSTRAP: The point was moving.

8 MR. ORSINGER: Yeah, the point was to make  
9 it nonverifiable.

10 HONORABLE LEVI BENTON: I join, although I  
11 think you're a champion of this -- the Batson issue  
12 because I think, as Richard put it, it's not an  
13 opportunity for truth or justice because truth or justice  
14 ought to be the same whoever is in the box.

15 MR. MUNZINGER: That's nice to think.

16 MR. ORSINGER: I agree with you, it ought to  
17 be.

18 MR. MUNZINGER: Everybody comes to trial  
19 with their preconceptions and their self-interest, and to  
20 pretend that you can pick up 12 people at random and you  
21 are going to find 12 that are going to be equally fair, I  
22 don't believe it's true. I don't believe it's good or bad  
23 for either side of the lawsuit. Why do we have 36 people  
24 come and sit in the jury box. Just take twelve off the  
25 street and say, "Go try the lawsuit." Well, that's not an

1 intelligent jury trial.

2 HONORABLE LEVI BENTON: I have had a case go  
3 to trial where one side picks six, the other side picks  
4 six. We need 12 people.

5 MR. MUNZINGER: When I heard someone say  
6 that it was criticized in the circles of academia it  
7 bothered me. It bothered me greatly. I generally suspect  
8 those things.

9 CHAIRMAN BABCOCK: Poor Elaine is wounded  
10 deeply by this. Judge Peeples, did you have a comment?

11 MR. ORSINGER: Is she as angry as Judge  
12 Bland?

13 HONORABLE JANE BLAND: I didn't hear it.

14 HONORABLE DAVID PEEPLES: Those of you who  
15 want the shuffle in court, do you contend that if there  
16 truly has been a random shuffle in the central jury room  
17 and the panel that arrives at the courtroom is a random  
18 shuffled panel that you ought to have a second chance if  
19 you just don't like the way it came out?

20 MR. MUNZINGER: Yes, I do.

21 MS. SWEENEY: You get one shuffle.

22 HONORABLE DAVID PEEPLES: I know this gives  
23 you that, but this was written back before we had computer  
24 shuffles.

25 MR. LOW: I know, but we still had people.

1                   HONORABLE DAVID PEEPLES: It works both  
2 ways, as Buddy and Paula have said, but I would be willing  
3 to write the rule so that if we could be very sure that  
4 the panel that arrives at the courtroom was randomly  
5 shuffled, and in the big cities you've got a lot of courts  
6 and you take excuses and reschedule people and you take  
7 what you've got leftover, and if that can be shuffled  
8 again and go out randomly to the courts, what is the  
9 injustice in taking what randomly you got? It might be  
10 good for you; it might be bad for you; and if it's good  
11 for you, it's bad for the other side and vice versa; but  
12 if randomness does happen in the central jury room, what  
13 is the injustice of having a fair and equal chance and if  
14 it comes out a little bit at one end or the other, what's  
15 wrong with that?

16                   MR. LOW: But if you get a fair mix, you get  
17 a better shot doing it twice to get an equal mix than you  
18 do just one.

19                   MS. SWEENEY: Yeah. Statistically speaking  
20 if it comes out skewed as it relates to that case and you  
21 shuffle again, I mean, the statistics tell you it's not  
22 going to come out skewed for that same case again  
23 probabilitywise.

24                   CHAIRMAN BABCOCK: Harvey.

25                   HONORABLE HARVEY BROWN: Well, as somebody

1 who is a trial lawyer now but was a judge for a while, I  
2 just think it's different perspectives. I think the  
3 judges have seen this abused, and when it's abused it  
4 bothers you, and I think most trial judges at some time  
5 have seen somebody ask for a shuffle when they haven't  
6 seen had time to study the sheets about the people, so  
7 we've seen it.

8                   On the other hand, I do recognize that it  
9 can be valuable, although I've also seen it work the other  
10 way. The defendant asks for the shuffle and then you get  
11 -- the health care providers were in the back and all of  
12 the sudden now are up front and you're unhappy. I've  
13 always wondered why a second random is much better than a  
14 third random. Does the party that turned out really bad  
15 with the first shuffle seems like maybe they want a  
16 shuffle now? I understand there are some dynamics here,  
17 but it seems to me the proposal on the table today is a no  
18 brainer.

19                   MR. GILSTRAP: Yeah.

20                   HONORABLE HARVEY BROWN: This is simple.  
21 Maybe some people might say that we should allow the  
22 parties to by agreement opt out. I think that's not  
23 necessary to change or articulate it, but I think this is  
24 pretty simple.

25                   CHAIRMAN BABCOCK: Alex.



1                   PROFESSOR ALBRIGHT: You know, one reason we  
2 have peremptory challenges and we have the shuffle, it  
3 gives the parties the feeling that they have some control  
4 over who's on the jury, and I don't think anybody in this  
5 room wants to give up the feeling that they have some  
6 control over the jury, and that helps your client accept  
7 the jury's decision, and I think we have to go through a  
8 lot of this just for that reason.

9                   CHAIRMAN BABCOCK: Okay. Let's take a vote.  
10 How many people believe that the language of Rule 223  
11 should be changed to allow for a computer shuffle? Raise  
12 your hand.

13                   Against? 27 in favor, one not voting, the  
14 chair not voting, so that would be two not voting.

15                   MR. HAMILTON: That's assuming it's a  
16 random.

17                   MR. ORSINGER: I would like to append on  
18 there that --

19                   HONORABLE LEVI BENTON: That's assuming we  
20 have a shuffle.

21                   MR. ORSINGER: I would like to append on  
22 there that we ought to consider having a standard protocol  
23 for all the courts across the state that's issued by the  
24 Office of Court Administration.

25                   CHAIRMAN BABCOCK: We're going to get down

1 to the details because Paula's committee is going to write  
2 a rule implementing this.

3 MS. SWEENEY: Yes, sir, we sure are. And  
4 it's going to be titled "The Sanctity of the Shuffle."

5 HONORABLE LEVI BENTON: I think we ought to  
6 turn all of these things over to Justice Brister.

7 MR. ORSINGER: But we like juries.

8 CHAIRMAN BABCOCK: Well, we'll call it the  
9 Brister shuffle or maybe the Brister hop. Okay. Paula,  
10 we'll try to get to that next time if your subcommittee is  
11 able to put some language together.

12 MS. SWEENEY: Yes, sir, we're very diligent.

13 MR. HAMILTON: Can I ask a question about  
14 that? It's my understanding from our court personnel that  
15 our jury lists come from Austin from random driver's  
16 licenses.

17 HONORABLE DAVID PEEPLES: The jury pool list  
18 comes from Austin, and it's got driver's license and voter  
19 registration people on it.

20 MR. HAMILTON: The pool?

21 HONORABLE DAVID PEEPLES: The pool that will  
22 be summoned to the courthouse on a given day.

23 MR. HAMILTON: Yeah, that's what I'm talking  
24 about.

25 HONORABLE DAVID PEEPLES: The list comes

1 from Austin, and the county decides how many they do.

2 MR. HAMILTON: Does that come from Austin by  
3 paper or by a computer?

4 MR. WILDER: It comes by tape.

5 MR. HAMILTON: Paper?

6 MR. WILDER: No, sir, it's electronic.

7 MR. ORSINGER: And is it random when it  
8 comes or is it sequential?

9 MR. WILDER: It's just all in there, and  
10 basically we do the -- when we spin the -- we call it spin  
11 the wheel. It's an electronic wheel. We have an  
12 algorithm that does all the random kicking out of the  
13 6,000 or so a week that I call.

14 MR. ORSINGER: So does every county have its  
15 own algorithm, or is there a standard algorithm?

16 MR. WILDER: Yes, every -- to my knowledge,  
17 we have our own. It's held up a court challenge. It was  
18 created by an academic professor, and to my knowledge  
19 every county does it differently.

20 HONORABLE LEVI BENTON: Tom, I'm just  
21 curious, do you-all use the pi squared method or the KS  
22 method?

23 MR. WILDER: I haven't looked at that. The  
24 last challenge, court challenge we had to our algorithm  
25 was about seven years ago, and I, frankly, haven't looked

1 at it since. I can't tell you.

2 HONORABLE LEVI BENTON: Okay. I'm just  
3 curious.

4 MR. ORSINGER: Well, if there's two methods  
5 that means that the academics probably disagree which one  
6 is accurate.

7 HONORABLE LEVI BENTON: Well, I'm only aware  
8 of two, but I'm not an academic.

9 PROFESSOR CARLSON: Well, I am, and I'm  
10 proud of it.

11 CHAIRMAN BABCOCK: No more giving the  
12 academics problems. So we're done with this.

13 Richard, on the subcommittee on information  
14 technology, there are some proposed rules, and are you  
15 ready to discuss them?

16 MR. ORSINGER: You know, Chip, I wish I had  
17 some help here.

18 CHAIRMAN BABCOCK: Item 6 on the agenda.

19 MR. ORSINGER: I know that, but I wasn't  
20 able to get ahold of the actual rules themselves.

21 CHAIRMAN BABCOCK: While you're looking,  
22 Justice Hecht, where are these rules in the Court's  
23 panoply of things? Is it -- I mean, these are pretty far  
24 along, but I don't think our group has discussed them.

25 HONORABLE NATHAN HECHT: Well, you recall

1     that, what is it, about a year and a half ago or so now or  
2     maybe not quite that long, we presented -- an electronic  
3     filing proposal was presented to the committee, and people  
4     from the Office of Court Administration were here. We  
5     were meeting over in the broadcasters building, and we  
6     asked them questions, and we talked about how this was  
7     going to work. We gave them some suggestions, and this  
8     was on a case -- this was on a county by county approval,  
9     but this was not a statewide rollout. This was just an  
10    individual kind of a test project.

11                 So they had some preliminary rules that they  
12    were going to use to start this project. They implemented  
13    it in several counties. Several other counties wanted in.  
14    There were a couple of rules changes along the way that  
15    people -- that the people who were using the project  
16    suggested. We made those again on an ad hoc basis. This  
17    was just for the purposes of the project, and the  
18    representation at that meeting and since has been that  
19    when the project was far enough along that there was a  
20    recommendation that it be used statewide by clerks that  
21    want to use it, then we would begin to look at statewide  
22    rules because we didn't want a rule on electronic filing  
23    in Bexar County and another rule in Harris County.

24                 We wanted -- once you got through  
25    experimenting with it to see what was the best way to go,

1 then we wanted to standardize state rules. So these are  
2 the proposed standardized state rules that would apply to  
3 electronic filing, and they are taken from the rules that  
4 have been in use by the counties that have been using  
5 this, of which there are now a number.

6 MS. HOBBS: I want to say it's 16 live and,  
7 I mean, the Court gets a new county almost every week to  
8 approve the rules, so --

9 HONORABLE NATHAN HECHT: Well, this is  
10 starting to grow, this electronic filing project, and I  
11 think, Richard, you were involved in its development in  
12 Bexar County?

13 MR. ORSINGER: Right. But as a subcommittee  
14 of this committee we have received absolutely no input  
15 from anyone; and the counties where I practice, I don't  
16 think that they've fully implemented, or at least I  
17 don't -- I don't think they have in Dallas.

18 MS. HOBBS: Dallas County is live now.

19 MR. ORSINGER: When did they go online?

20 MS. HOBBS: Recently this fall, September or  
21 something.

22 MR. ORSINGER: Okay.

23 MR. WILDER: It's just the county, county  
24 courts.

25 MR. ORSINGER: Are we being asked just to

1 look at these tweaks, which are really just kind of  
2 practical suggestions to make it work smoothly, or are we  
3 being asked to say that it is now ready to mandate  
4 statewide?

5 HONORABLE NATHAN HECHT: Well, not mandate.

6 MR. ORSINGER: For the counties that are  
7 going to accept electronic filing it would be mandated?

8 HONORABLE NATHAN HECHT: Yes.

9 MR. ORSINGER: Okay. Well, we have no  
10 information base to do that. Chip, we don't have a vote  
11 from the subcommittee. If you'd like me to, I will get a  
12 meeting together, but the truth is we have no input from  
13 anyone as to how it's working. Are you-all getting any  
14 letters or complaints from anybody or any suggestions that  
15 there's anything bad?

16 HONORABLE NATHAN HECHT: No. But you should  
17 check with OCA. I mean, they have been doing the  
18 implementation; but as far as I know, not only do we not  
19 hear anything bad, but county after county, as Lisa says,  
20 comes up and says, "We want to do it, too," so -- and this  
21 is -- the Federal courts are -- have been mandated to go  
22 to this. Some of them have been using it voluntarily for  
23 the last couple of years, but now Congress has required  
24 them all to go to electronic filing, and you don't have  
25 any option except in some instances you can walk down to

1 the courthouse and file it or something, but generally  
2 speaking it's going to be required, and so we're nowhere  
3 near that in Texas, but we're far enough along that we  
4 need to begin to have standard procedures so that there  
5 aren't any differences county by county.

6 MR. GILSTRAP: Is it correct that no Texas  
7 court has mandatory electronic filing?

8 HONORABLE NATHAN HECHT: Yes.

9 MR. GILSTRAP: Is that correct?

10 HONORABLE NATHAN HECHT: That's correct.  
11 The part of the project was to make it completely  
12 voluntary. Many of the judges in the counties who are  
13 using it wanted the authority to order it, and we stopped  
14 short of that. We did give them some more power to entice  
15 people to do it, but it's not mandatory. But it is, as I  
16 say, far enough along that we need to take what the  
17 prototype rules were, which are three pages of rules, and  
18 disperse them into the Rules of Civil Procedure.

19 MS. HOBBS: And my understanding is that  
20 Harris County judges have approved a rule, and it's about  
21 to be submitted, too.

22 HONORABLE LEVI BENTON: That's right.

23 MR. ORSINGER: You're talking about putting  
24 these in the Rules of Procedure and not just a  
25 miscellaneous order?



1 HONORABLE NATHAN HECHT: Yes.

2 CHAIRMAN BABCOCK: You got a proposal,  
3 Richard?

4 MR. ORSINGER: Let me spend some time with  
5 OCA. I'm sorry. And I guess we'll get the whole  
6 subcommittee to comment on it, although, are we actually  
7 getting -- we may be getting counties that are signing on,  
8 but are we getting lawyers that are actually doing it? Do  
9 we have a few hundred examples or do we have a few  
10 thousand examples?

11 MS. HOBBS: I would guess closer to the  
12 thousand than the hundred, but that's just based on, you  
13 know, anecdotal evidence. I do not know specifically  
14 from OCA, but I'm guessing OCA can tell you exactly how  
15 many filings are coming through every day or every month  
16 or --

17 MR. ORSINGER: Okay.

18 MS. HOBBS: I mean, I bet you can get raw  
19 data on that.

20 MR. GILSTRAP: Once the Federal courts  
21 mandate it, I think people kind of -- they are going to be  
22 a lot less reluctant to do it in state court, and I think  
23 the Eastern District of Texas just mandated electronic  
24 filing now.

25 HONORABLE NATHAN HECHT: Well, and the

1 report from the Federal people is the Bar is running  
2 downhill to have this, and there was some concern that it  
3 favored the large law firms, but it's turned out that the  
4 opposite was true, and, actually, the Bar's response is  
5 that especially favors smaller practitioners because they  
6 don't have the expense of trying to get things to the  
7 courthouse.

8 MR. LOW: Judge, we escaped the problem, I'm  
9 assuming, that we had initially when they were filing with  
10 somebody who in turn would relate it to the clerk, and  
11 then the question was if they didn't relate it, they  
12 weren't a deputy clerk, so therefore, you didn't file it  
13 on time, and that thing now is being filed directly, as I  
14 understand it.

15 MR. ORSINGER: Nope. Nope. It is the same  
16 system that you always heard about.

17 HONORABLE NATHAN HECHT: But we changed  
18 that. We changed the problem about when it was filed when  
19 we talked to OCA at first about the prototype rules, and  
20 it may be useful when the subcommittee comes back to have  
21 OCA come over again and show you the --

22 MR. LOW: Yeah, they did. They came. Has  
23 anybody had any experience? I mean, certain things you  
24 have to swear to. Is that perjury? Usually perjury is if  
25 you swear false swears.

1                   MR. ORSINGER: But these rules provide --  
2 especially the amendments in these rules provide that an  
3 affidavit has to be a photographic image and not just a  
4 digital.

5                   MR. LOW: I thought it said --

6                   MS. SWEENEY: It did.

7                   MR. ORSINGER: But I believe this provides  
8 that an affidavit has to be an actual --

9                   MR. LOW: Let's see. I'm sorry. I read it  
10 earlier. It says "documents required to be verified or  
11 sworn to under oath may be electronically filed only as a  
12 scanned image."

13                  MS. SWEENEY: It is.

14                  MR. ORSINGER: Yeah, what that means is you  
15 actually have a picture of the affidavit that has ink on  
16 it. Now, you don't have the original, but that's what we  
17 have with fax filing right now. You have an original --

18                  MR. LOW: I don't know. I'm just  
19 questioning if that really meets with other laws about  
20 swearing to and has to be perjury if you're not right. I  
21 just raise that. That's all.

22                  CHAIRMAN BABCOCK: Well, Richard, I think  
23 for the next meeting then you ought to --

24                  MR. ORSINGER: Okay. I'm sorry. I did not  
25 realize this was ready for final action.

1                   CHAIRMAN BABCOCK: I think it is, and go  
2 over it with your subcommittee, talk to OCA, and do  
3 anything else you think you need to to swab it out, and  
4 this will probably take a little bit of time.

5                   MR. ORSINGER: Okay. And, Judge Hecht, are  
6 we going to do like we do with the instructions to the  
7 jury, and this will be an order that's appended to a rule  
8 rather than going through and trying to stick them in the  
9 various rules where they fit?

10                  HONORABLE NATHAN HECHT: No, this sticks  
11 them in.

12                  MR. ORSINGER: Well, we're talking about  
13 maybe amending quite a few rules of the Rules of Civil  
14 Procedure.

15                  HONORABLE NATHAN HECHT: Four, five, six,  
16 seven, eight, nine, twelve to be exact that the Court  
17 would be proposing.

18                  CHAIRMAN BABCOCK: Yeah. We've got, you  
19 know, redlined --

20                  MR. ORSINGER: Okay.

21                  CHAIRMAN BABCOCK: -- rules here that we can  
22 do, that we can go through.

23                  Okay. Justice Hecht, in terms of priority  
24 for our next meeting, I would think that the Judicial  
25 Administration Rule 14 would be a top -- may be the top

1 priority.

2 HONORABLE NATHAN HECHT: I hope, actually,  
3 if we could get some proposal on destruction of court  
4 records, just because the Legislature will be in session,  
5 and I know Charles wants to get some legislation if he  
6 can't get a rule.

7 CHAIRMAN BABCOCK: Listening to that, Pam?

8 HONORABLE NATHAN HECHT: And so I don't  
9 think it's too hard. It's kind of tricky, but I don't  
10 think it will be real controversial when we get a  
11 proposal, and if we could do that, that would take that  
12 issue off the table.

13 CHAIRMAN BABCOCK: Okay. So, Pam, we will  
14 give top priority to the retention and disposition of  
15 exhibits and depo transcripts for the next meeting, so  
16 that will be number one priority. Rule 14 is second?

17 HONORABLE NATHAN HECHT: Yeah.

18 CHAIRMAN BABCOCK: Okay. So we'll have to  
19 be sure that Hatchell -- I've e-mailed Hatchell already to  
20 tell him that this is something that needs some work,  
21 immediate work. We will have a couple of months to deal  
22 with it, but that will be the second priority. Is there  
23 anything else that's time sensitive? Jury shuffles, HB4?  
24 Probably the HB4 cleanup is probably.

25 HONORABLE NATHAN HECHT: Yeah. And the jury

1 shuffle should be easy.

2 CHAIRMAN BABCOCK: Right. Once Paula writes  
3 her rule that enshrines jury shuffling forever.

4 MR. GILSTRAP: Maybe we will have HB4  
5 finished by the time that the House passes HB5.

6 CHAIRMAN BABCOCK: Right. So we probably  
7 ought to do that. And --

8 HONORABLE NATHAN HECHT: And then electronic  
9 filing.

10 CHAIRMAN BABCOCK: Yeah, electronic filing,  
11 and Justice Wainwright's court reporter's record, and the  
12 certificate of conference on motions for rehearing, and  
13 any appellate rules that -- TRAP rules that Dorsaneo  
14 hadn't gotten to. Does that sound like an appropriate  
15 order of business? Okay.

16 HONORABLE NATHAN HECHT: And we can move up  
17 any that the subcommittee chairman certifies will not take  
18 more than five minutes.

19 CHAIRMAN BABCOCK: Is that going to be under  
20 oath? Can we get him for perjury, Buddy?

21 MR. LOW: Yeah.

22 CHAIRMAN BABCOCK: Okay. Any other -- we've  
23 gotten through the agenda in record time. Thank you,  
24 everybody. Is there any other business that we need to  
25 talk about today?

1 (Meeting adjourned at 3:36 p.m.)  
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2 CERTIFICATION OF THE MEETING OF  
3 THE SUPREME COURT ADVISORY COMMITTEE

4 \* \* \* \* \*

5

6

7 I, D'LOIS L. JONES, Certified Shorthand  
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12 I further certify that the costs for my  
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