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7 MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

8 April 2, 2005

9 (SATURDAY SESSION)

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18 Taken before D'Lois L. Jones, Certified

19 Shorthand Reporter in Travis County for the State of

20 Texas, reported by machine shorthand method, on the 2nd

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23 East 11th Street, Suite 200, Austin, Texas 78701.

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Documents referenced in this session

05-6 Rules 14 & 15, 3-30-05 subcommittee draft

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2 CHAIRMAN BABCOCK: We're back on the record
3 dealing with Rule 15, and we got through 15.4 and 15.5,
4 and, Stephen, I understand that you, as opposed to going
5 out drinking with the crowd last night, stayed up and did
6 research and want to put something in the record.

7 HONORABLE STEPHEN YELENOSKY: It wasn't
8 quite that bad. I admit it, however, I'm a little
9 embarrassed, but I woke up thinking about it.

10 CHAIRMAN BABCOCK: Is there anything you
11 wanted to put on the record, Stephen?

12 HONORABLE STEPHEN YELENOSKY: Yeah. I'll
13 try to do this pretty quickly. It's really just in
14 consideration of the comments yesterday and that after the
15 good work of the subcommittee and what became apparent
16 yesterday, there may be a way to more clearly delineate
17 the obligations of the person filing or distinguish those
18 from the obligation of the clerk in the following manner.

19 First, under 15.4 -- unrelated to that
20 point, but under 15.4(a) I think we may need to be more
21 explicit that we're starting from the point that anything
22 that's excluded from public access on paper is, of course,
23 excluded remotely and then when we get to some later
24 points those will no longer be necessary. For instance,
25 the reference to not allowing remote access to something

1 that's sealed or been offered in camera is obviated from
2 starting from the premise that if you can't get it on
3 paper, you can't get it remotely. So that's just the
4 point about 15.4(a).

5 The next thing about 15.4(a) is to remove
6 any reference to the court or court clerk and merely make
7 it a "notwithstanding anything in Rule 15.3 the following
8 may not be available by remote access" and then you have
9 your laundry list. As Judge Gray was saying, you want to
10 get a whole laundry list in there together, but there's no
11 reference to the clerk so that the duties of the clerk and
12 the person filing are not misconstrued.

13 Then you would have a new section -- I don't
14 know what the number would be at this point, but just to
15 keep things in order, 15.4(b) at this point would be
16 something like "Captions by person filing" and then that
17 would contain what's now under 15.5(a), which is all about
18 the 36 point font. And then you would have -- within
19 that, however, you would make clear that the captioning is
20 only with respect to what are now items (b), (c), (d),
21 (e), and (i), should the person be aware of a court order
22 that prohibits access. And that would take care of
23 Richard's concern that lawyers are going to have to
24 caption things that might be excludable under (g), exhibit
25 tender, just make clear that that's not a captioning

1 requirement.

2 Then you would go to 15.5, "Exclusion by
3 court clerk," and that would say, first of all, the court
4 clerk is supposed to exclude what's been captioned, and it
5 could say, given the possibility of the change in
6 technology in the future, it could say "the document
7 captioned or portion of such documents containing the
8 material prohibited from remote access," should that
9 technology become available, followed by the sentence that
10 there's no duty to examine -- what's now in 15.5(b),
11 there's no duty to examine beyond what's captioned, except
12 for 15.5(b), which would say, "The court clerk shall also
13 exclude from remote access (f) and (g)," which are case
14 records in Family Code and exhibits tendered or admitted
15 at hearing on trial.

16 As I said before, I would have put (h) under
17 here, but I don't think that's necessary because what's
18 under (h) is not accessible even on paper, so that's taken
19 care of up above. What that does is it gives the
20 independent obligation of the clerk to exclude things that
21 the clerk without captioning should know, be able to
22 identify, which are Family Code proceedings and exhibits
23 that were tendered at trial, and that's the basic
24 structure.

25 CHAIRMAN BABCOCK: Okay. Thanks. Let's go

1 to -- well, Judge Gray, where would you like to go, 15.6
2 or back to 15.1?

3 HONORABLE TOM GRAY: I think we can finish
4 the little parts of the rule, meaning 15.6 through 9 more
5 quickly than we can the first part, so let's knock them
6 out of the way while everybody is still getting their
7 first cup of coffee and then go back. I'm sure when we
8 get back to the scope we'll need to completely redo the
9 rule anyway.

10 CHAIRMAN BABCOCK: Okay.

11 HONORABLE TOM GRAY: 15.6 was just designed
12 to make sure that, because some clerks are hiring third
13 party providers to actually do their remote access, that
14 they would have to comply with this rule. I was hoping
15 that that one was rather noncontroversial.

16 MR. BOYD: I do have a question. Would it
17 apply to present pending contracts, and if it were able to
18 do that, can a rule alter the current rights under an
19 existing contract?

20 MS. HOBBS: There are currently contracts
21 out there that we were intending -- my thought was that I
22 would want them to have to follow this rule, but you're
23 right, I hadn't thought about the legal implication of
24 that.

25 CHAIRMAN BABCOCK: Isn't there a

1 constitutional prohibition of impairing contract?

2 MS. HOBBS: Yeah.

3 CHAIRMAN BABCOCK: So I don't know if you
4 could do it other than prospectively.

5 MS. HOBBS: But the issue has been raised.
6 I'll make sure.

7 MR. ORSINGER: There's a public necessity
8 exception to that, both at the Federal and state level.
9 Whether we rise to that or not I don't know.

10 CHAIRMAN BABCOCK: Okay. Well, I think for
11 these purposes it's sufficient to note that that's an
12 issue. Good point, Jeff. Yeah, Carl, and then Richard.

13 MR. HAMILTON: Does this mean that the third
14 party that's contracted with has the obligation to
15 determine what goes out and what stays, or do they just
16 mechanically provide that based upon what the clerk gives
17 them?

18 HONORABLE TOM GRAY: Hadn't thought about it
19 in that context, but my -- I mean, it would all depend
20 upon the scope of the contract, would be the way I would
21 look at it, and if the clerk can, in effect -- while the
22 duty may be nondelegable, they may delegate the duty by
23 contract and then the third party provider may actually
24 take upon themselves the financial consequences of failure
25 to fulfill the duty.

1 HONORABLE STEPHEN YELENOSKY: Rather than
2 saying "the third party must comply" you could just say
3 "the contract must provide for compliance with this rule"
4 and then the clerk can work out whether they're going to
5 do the screening or the other party.

6 CHAIRMAN BABCOCK: Does that sound right,
7 Tom? "The contract must provide"?

8 HONORABLE TOM GRAY: Well, I don't know. I
9 hadn't --

10 HONORABLE LEVI BENTON: I don't know why
11 we're really worrying about this. The clerk has
12 nondelegable duties.

13 HONORABLE STEPHEN YELENOSKY: That's true.

14 HONORABLE LEVI BENTON: I mean, yes, they
15 can contract with vendors, but it's the clerk's legal
16 duty.

17 HONORABLE TOM GRAY: It will be the third
18 party provider that will be looking for what the meaning
19 of this rule is when they get sued because they have
20 breached a duty.

21 HONORABLE LEVI BENTON: I'm sorry. Excuse
22 me, Tom. The third party would have -- well, the third
23 party is not going to face legal culpability for the
24 clerk's failure to fulfill its obligation under law.

25 HONORABLE STEPHEN YELENOSKY: Right. Right.

1 He's right.

2 CHAIRMAN BABCOCK: Richard, then Tom Wilder.

3 MR. ORSINGER: I'm wondering if under this
4 section we shouldn't go a little bit further and require
5 that third party providers -- or provide that the third
6 party providers are bound by this rule rather than just
7 bound by a contract signed in accordance with this rule so
8 that we might have arguably some direct authority over a
9 violator through contempt or something else.

10 In other words, this just says "create a
11 contractual obligation to follow the rule." Could we not
12 say, "This rule applies to third party providers and any
13 contract with them shall so provide," shall so provide, so
14 we have both a direct rule and perhaps the authority of
15 the Court plus contract law.

16 CHAIRMAN BABCOCK: Tom Wilder. Then Judge
17 Benton.

18 MR. WILDER: Mr. Chairman, you run into a
19 situation with this -- I'm not sure I know how to work it
20 out with this wording, but we'll try. I just fought this
21 battle again last week. The commissioners courts in all
22 of our counties jealously guard provider contracts, and we
23 as clerks have no right to contract with any party unless
24 commissioners court gives us that authority or takes it.
25 In most instances the county judge signs all contracts

1 with vendors or providers. The clerk has no authority to
2 execute contracts.

3 Now, my judges gave me -- we don't have a
4 vendor. We built our own, so I don't have any ax to grind
5 here, but I'm telling you that's going to be a little bit
6 of a problem because when commissioners court gets into it
7 -- essentially you need to try to bind the vendor as
8 closely as you can here because once commissioners court
9 gets into it there's all sorts of things that can emanate
10 from that.

11 CHAIRMAN BABCOCK: Judge Benton.

12 HONORABLE LEVI BENTON: The vendor -- I
13 agree with what Tom said, and we all know at the end of
14 the day it's the patronage of the local commissioners and
15 they decide generally who gets contracts. The vendor is
16 going to have an economic incentive to comply with the law
17 and to assist the clerk in complying with the law. If the
18 clerk fails to comply with the law then perhaps maybe, I
19 don't know, some citizen who is aggrieved has a mandamus
20 action against the clerk and maybe against the
21 commissioners court, but this provision, therefore, it
22 seems to me is really meaningless because it's the clerk's
23 nondelegable duty.

24 CHAIRMAN BABCOCK: Carl.

25 MR. HAMILTON: Of course, that, I suppose by

1 implication the vendor would have access to all of the
2 confidential information that's not available to the
3 public, huh?

4 CHAIRMAN BABCOCK: That's very true.

5 MR. HAMILTON: And the vendor is part of the
6 public.

7 HONORABLE STEPHEN YELENOSKY: Well, only the
8 stuff that's not available to the public remotely.
9 Presumably something that's sealed wouldn't be given to
10 the vendor, so it's -- you're not violating the access.

11 CHAIRMAN BABCOCK: Not necessarily.

12 HONORABLE STEPHEN YELENOSKY: I mean, why
13 would they have access?

14 MS. HOBBS: Some vendors actually can
15 provide a case management system for local courts.

16 MR. WILDER: Sometimes a case management
17 system is not set up for this, but the clerks do, under
18 191.008 of the Local Government Code, they do -- even if
19 the county has established a central database like that
20 with a vendor running it, the access to that communal
21 database -- and the commissioners have an ironclad right
22 to create that. They have done so in our county on the
23 criminal side, but each clerk has the right to control
24 access under that statute as well as a bunch of AG
25 opinions. So the clerk, if they will -- the problem is if

1 they will, because some clerks -- and I have to deal with
2 them a lot, they give in to commissioners court because
3 that's who controls their budget.

4 CHAIRMAN BABCOCK: Anybody else? Any
5 suggestions on modifications to this language, Richard?

6 MR. ORSINGER: Let me on the anything else
7 part, this may implicate the electronic filing procedures
8 that we eventually put in place, and if some document that
9 were not supposed to be available for remote access were
10 filed electronically through a service that maintains a
11 database, such as right now the Lexis/Nexis does --

12 CHAIRMAN BABCOCK: Right.

13 MR. ORSINGER: -- Fort Bend County and
14 Montgomery County, and if you sign on Lexis/Nexis you
15 thereby gain access to everything that's been
16 electronically filed. We want to be sure that this
17 requirement would mean that someone who has electronically
18 filed something and retained a copy of it would not allow
19 their subscribers or other people to have remote access to
20 their copy.

21 So it seems to me like this ought to be
22 written in such a way that it would prohibit even
23 electronic service provider with their own database from
24 allowing remote access to this information, which is why I
25 would prefer to see the rule directive on, you know,

1 "shall not be made available," you know, and broad enough
2 that it's not just the person who has contracted with the
3 district or county clerk to maintain their database, but
4 also the electronic filing service providers would be
5 covered by the same directive.

6 MR. WILDER: You're absolutely correct,
7 Richard, because in Dallas County the commissioner seized
8 the court records years ago.

9 CHAIRMAN BABCOCK: Sounds ominous.

10 MR. WILDER: Yeah. And they seized them,
11 they sell them to the phone company for, you know, a set
12 rate, and the phone company makes a determination on who
13 gets what, so you've got that situation sitting there
14 right now. The old clerk that was there before Jim Hamlin
15 never should have allowed that. They charge a dollar a
16 minute, I might add.

17 CHAIRMAN BABCOCK: Well, should the rule
18 focus on the party that the Court clearly has jurisdiction
19 over, not to use a technical term too technically, but
20 should it focus on the clerk and direct the clerk in its
21 contractual dealings to the extent it can to ensure
22 compliance with this rule?

23 MS. HOBBS: That's why I made it passive
24 voice, is because like Tom says, the clerk is not actually
25 the one doing the contracting. So that's why it's

1 passive.

2 MR. WILDER: I would suggest one thing and
3 then I'll hush. Right now with the approval of my judges,
4 we bring the judges into it because they darn sure have
5 the power to have some control over there. When you get
6 to the part that says "clerks may" -- I would add "with
7 the approval of the judges," as we have done because
8 that's going to -- if a clerk uses a vendor, those judges
9 can control then and have the right to delegate power to
10 the clerk to do certain things, and that adds an
11 additional amount of control to that.

12 CHAIRMAN BABCOCK: Lisa, you wrote it in
13 such a way that it's not suggestive of who requires the
14 third party to comply. You just say that the contract has
15 to do it. That's why you're saying it that way.

16 MS. HOBBS: Right. I mean, I think Richard
17 has a good point that maybe we should maybe broaden that
18 to not just this, but something else. But either way, I
19 wrote it passive because I didn't know really on a local
20 level who is going to be the one making the call or making
21 the contract.

22 CHAIRMAN BABCOCK: And as Tom points out,
23 you may run into a political thicket if the Court is seen
24 to be directing county commissioners to do or not do
25 something.

1 MS. HOBBS: Right.

2 CHAIRMAN BABCOCK: So you wouldn't want to
3 do it too directly. Judge Benton.

4 HONORABLE LEVI BENTON: Tom's points about
5 adding some provisions to have the judges involved, I
6 would urge the subcommittee and this committee to not go
7 there because --

8 CHAIRMAN BABCOCK: Speaking as one of those
9 people.

10 HONORABLE LEVI BENTON: Yeah, because we
11 already have some degree of angst about our immunity in
12 acting outside of judicial capacities, and that would
13 clearly be acting outside of a judicial capacity, so --

14 CHAIRMAN BABCOCK: Yeah, I hear you.

15 HONORABLE TOM GRAY: Would the following
16 language meet Richard's need, because I did think it was a
17 good observation that it doesn't require the third party
18 as currently written to actually comply with the rule
19 independently? The rule as written, although somebody may
20 have changed one word following "caption," and "the third
21 party has an independent duty to comply with the
22 requirements of this rule."

23 HONORABLE STEPHEN YELENOSKY: Can we do
24 that? I mean, how do we make these things apply other
25 than by contract?

1 HONORABLE TOM GRAY: By rule.

2 HONORABLE STEPHEN YELENOSKY: How are they
3 subject to the Rules of Judicial Administration?

4 MR. ORSINGER: Well, you know, private
5 process servers are subject to the Rules of Procedure, so
6 we just pass a rule and ultimately you enforce it by
7 holding somebody in contempt if they violate the wrong
8 rule.

9 HONORABLE LEVI BENTON: Private process
10 servers have an economic interest to not be banned by
11 local court order from not being on an approved list.

12 HONORABLE STEPHEN YELENOSKY: Yeah, but he's
13 saying there is authority, and I'm trying to figure out if
14 there is a difference.

15 HONORABLE LEVI BENTON: There is no
16 difference I suspect. I don't even think that's
17 necessary.

18 CHAIRMAN BABCOCK: Richard Munzinger.

19 MR. MUNZINGER: I think you may be creating
20 a problem where one doesn't exist. If the rule says this
21 is how you deal with court records, who cares who has got
22 the court record. It's the court record, a case record.
23 The obligation falls upon the record, and I don't think
24 that it's necessary to say that a district clerk or county
25 clerk who provides this service by contract shall put into

1 his contract all of -- everybody understands this is the
2 law. You've got to do it this way. I think you're
3 creating a problem where none exists.

4 CHAIRMAN BABCOCK: You may be, but if there
5 is a problem, there is going to be a problem, isn't there?
6 Because, I mean, if some vendor from Minneapolis puts --
7 dumps a bunch of records that are confidential under this
8 rule, somebody is going to be irritated about it and going
9 to try to do something about it, I suspect. What are they
10 going to do?

11 MR. MUNZINGER: A vendor from Minneapolis
12 must obey this rule because that vendor deals with a
13 record which is the subject matter of this rule, and, yes,
14 he may ignore his obligation, but it would be enforceable
15 it seems to me by a clerk or by others, but I don't know
16 that a rule has to provide that somebody -- that we have
17 to have a contract that protects us to enforce this rule.
18 I would just think if the Supreme Court of Texas says, "If
19 you're going to fool with case records, boys, this is the
20 way it's done," period, no matter who you are or how you
21 do it. That's what it says.

22 CHAIRMAN BABCOCK: Richard, then Skip.

23 MR. ORSINGER: Well, I think that this is a
24 little limiting to say that it only applies to people who
25 are under contract to provide remote access. The

1 electronic filing service providers may not be under
2 contract to provide remote access, but they may provide
3 remote access because it's their business plan to do so,
4 and they should be required to respect the standards.

5 Additionally, what if someone who is not
6 under contract to provide remote access, but instead goes
7 to the file and makes copies and then puts that
8 information in its database and makes it available
9 remotely? They are not under contract with the county.
10 They have exercised the right to walk into the courthouse.
11 They have scanned whatever documents they want and then
12 they put them on the internet, and we have lost -- we have
13 no -- we don't even purport to assert control over them.

14 I would rather that we just simply prohibit
15 remote access to these defined case records and not worry
16 about whether they're under contract or whether they got
17 it from someone else who is under contract or got it
18 before there was a contract or got it because someone
19 filed through their electronic filing service, provider
20 service.

21 CHAIRMAN BABCOCK: Okay. Skip and then
22 Judge Gray.

23 MR. WATSON: I think I agree with Richard.
24 We know from, for example, the Kobe Bryant case, that it's
25 going to happen. I mean, the stuff is going to get out,

1 and the issue is to me twofold. One, what Richard was
2 saying. We've got to say thou shalt not do it, and then
3 second, we've got to build in something that says we don't
4 care who you are, these are the court's records and if you
5 do do it something is going to happen. To me it's -- that
6 ought to be the two-step, and it should not get more
7 complicated than that.

8 HONORABLE STEPHEN YELENOSKY: I don't know
9 that we can do that. I mean, somebody has a right to a
10 piece of paper, and you're saying they can't publish it on
11 the internet. I think all we can control is whether the
12 clerk makes it remotely accessible. If it's a public
13 document I don't think we can say that that document is
14 precluded from being republished anywhere by any means by
15 somebody else except the clerk and with the clerk's
16 contractor.

17 CHAIRMAN BABCOCK: Judge Gray.

18 HONORABLE TOM GRAY: As I indicated when I
19 launched on this, I didn't think there was going to be --
20 I think the Court, I mean, given what we've got to cover
21 today, they know what our concerns are at this point by
22 what's on the record, and I would say call for a vote of
23 generally does something need to be included in the rule
24 regarding contracts with third parties to obligate them or
25 not.

1 CHAIRMAN BABCOCK: Lisa Hobbs.

2 MS. HOBBS: I agree that we might just need
3 to vote on it, but let me just say we're talking about two
4 different issues here. One is when a clerk contracts with
5 a vendor, and the other is bulk distribution, which is not
6 included in this rule because the committee voted against
7 it last time, and then the subcommittee also voted against
8 it, with the exception of the minority report that's on
9 the table. And so bulk distribution is the idea that the
10 clerk should not be allowed to sell her records to other
11 people and then totally lose control about what happens
12 with them, and the way you rein in bulk distribution and
13 the way you rein in those third parties is you don't allow
14 the clerk to sell her records.

15 CHAIRMAN BABCOCK: Let's -- I think Judge
16 Gray has got a good suggestion. Let's vote on the rule as
17 amended, and let me just be sure for the record that I've
18 got it right, Judge Gray. It would read, as amended, "If
19 a third party is under contract to provide remote access
20 to case records for a court or court clerk, the contract
21 must require the third party to comply with this rule, and
22 the third party has an independent duty to comply with
23 this rule."

24 All right. Let's vote on that. Everybody
25 in favor of that language raise your hand.

1 HONORABLE LEVI BENTON: Can you do it again?

2 CHAIRMAN BABCOCK: Sure. "If a third party
3 is under contract to provide remote access to case records
4 for a court or court clerk, the contract must require the
5 third party to comply with this rule, and the third party
6 has an independent duty to comply with this rule."

7 Everybody in favor of that raise your hand.

8 All opposed? Passes, but narrowly, eight to
9 six.

10 MR. ORSINGER: Chip, can I comment?

11 HONORABLE LEVI BENTON: I have the proxy of
12 Judge Christopher and Judge Bland.

13 HONORABLE TOM GRAY: Show me.

14 CHAIRMAN BABCOCK: You've got Bland and
15 Christopher's vote which would tip the scale. Yeah,
16 Richard.

17 MR. ORSINGER: I didn't vote for or against
18 the proposition. I do think constraints are important,
19 but I think this is too narrowly drawn and will be easily
20 circumvented by people who are not under contract to
21 provide remote access, and therefore, the evil we're
22 trying to eliminate will exist --

23 HONORABLE SARAH DUNCAN: I second that.

24 MR. ORSINGER: -- under this proposal. So I
25 didn't fail to vote because I agreed with Judge Benton

1 that it's not appropriate to legislate or rule-make in
2 this area. I feel like this is not sufficiently strong.

3 CHAIRMAN BABCOCK: Yeah, you're on the other
4 end of the spectrum from Judge Benton.

5 MR. ORSINGER: Right. Right.

6 CHAIRMAN BABCOCK: Notwithstanding your deep
7 respect for his view.

8 MR. ORSINGER: True. Absolutely.

9 HONORABLE JAN PATTERSON: I think it's worth
10 saying for legislative history that those of us who voted
11 against it did not vote that way necessarily because there
12 is no duty.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE JAN PATTERSON: It's just the
15 manner in which it's phrased and --

16 CHAIRMAN BABCOCK: Gotcha.

17 HONORABLE STEPHEN YELENOSKY: Chip, what do
18 you think the law is on that? If somebody gets a piece of
19 paper and puts it on the internet, it's a public document.
20 The clerk didn't make it accessible. What's the First
21 Amendment issue?

22 CHAIRMAN BABCOCK: Complicated. But -- and
23 I don't know that I'm exactly a law giver on these things,
24 but --

25 HONORABLE STEPHEN YELENOSKY: Well, taking

1 the Minneapolis, somebody from Minneapolis gets a Family
2 Code file on paper from the clerk in Texas, takes it up to
3 Minneapolis, puts it on their blog page, and now they've
4 violated the Rules of Judicial Administration in Texas and
5 they can be enjoined?

6 CHAIRMAN BABCOCK: It depends on a lot of
7 things, but generally speaking, if somebody gets a record
8 that is confidential under our rules but is not involved
9 in any wrongdoing in obtaining it, any independent
10 wrongdoing --

11 HONORABLE STEPHEN YELENOSKY: Which is the
12 premise.

13 CHAIRMAN BABCOCK: There is a U.S. Supreme
14 Court case called Bartnicki, that says that
15 notwithstanding some illegality or impropriety in the
16 original obtaining of the record that the subsequent
17 person who gets it can't be punished.

18 HONORABLE STEPHEN YELENOSKY: Well, here
19 there's not even an illegality. I think all we're able to
20 do here is prevent the clerk from making everything that
21 we don't want them -- the clerk has everything, of course,
22 readily accessible to people over the internet. But I
23 don't think we have any control over individuals or
24 companies who get paper documents that are public
25 documents and republish them electronically.

1 CHAIRMAN BABCOCK: Oh, I'm sorry. I
2 misunderstood your hypothetical. Yeah. I mean, it goes
3 to the courthouse --

4 HONORABLE STEPHEN YELENOSKY: Yeah. Yeah.

5 CHAIRMAN BABCOCK: -- gets the document and
6 puts it on the internet?

7 HONORABLE STEPHEN YELENOSKY: Well, see,
8 that was Skip's scenario, and I understand the concern,
9 but legally I don't know how we can control that. I don't
10 see how we can prevent --

11 MR. WATSON: Oh, I'm sure you're right.

12 MR. ORSINGER: What if an electronic filing
13 service provider has a contract with the state, but it's
14 not to provide remote access, it's to provide electronic
15 filing?

16 CHAIRMAN BABCOCK: Right.

17 MR. ORSINGER: Under this rule they are
18 permitted to give remote access because their contract is
19 only to file and not to give remote access. This is too
20 narrowly drawn even to catch the vendors who contract with
21 the state.

22 HONORABLE STEPHEN YELENOSKY: Well, and all
23 my point is, is ultimately I think it's only going to be
24 the clerk because we have control over the clerk, or the
25 Supreme Court does, and those we contract with; and maybe

1 obviously that could be put in those contracts; but when
2 you get beyond the contract I don't see how we have any
3 control over it.

4 CHAIRMAN BABCOCK: Yeah. This raises a
5 broader, much broader, philosophical issue that we've
6 already debated and decided.

7 MR. ORSINGER: And who won?

8 CHAIRMAN BABCOCK: Huh?

9 MR. ORSINGER: The decision was what?

10 CHAIRMAN BABCOCK: In my view the bad guys
11 won, but, no, we have decided structurally to make a
12 distinction between documents that are available at the
13 courthouse and documents that are available on the
14 internet, and you have a greater access at the courthouse.

15 MR. ORSINGER: Right.

16 CHAIRMAN BABCOCK: So we have created a
17 dichotomy of access. Internet access is more limited than
18 public access. And when you have that, when you have that
19 dichotomy, you run into all these problems that we're
20 grappling with in this little rule because of that
21 dichotomy between the two types of access, and I advocated
22 one thing and people advocated another, and a pretty large
23 majority thought that we should have this dual system, so
24 we are.

25 MR. ORSINGER: Well, in practical effect the

1 dual system will not apply to any case that's of public
2 interest because someone will go check out the file, scan
3 it, and put it on the internet. So we're only protecting
4 the anonymous people that nobody is going to look at their
5 file anyway. Those are the ones we're protecting, the
6 ones who nobody --

7 HONORABLE STEPHEN YELENOSKY: There is still
8 some protection there from somebody who wants to search
9 the entire family law filings in Travis County.

10 MR. ORSINGER: Sure.

11 CHAIRMAN BABCOCK: And in fairness, the
12 subcommittee, with the possible exception of subparagraph
13 (g), which we talked about at length, I think, was very
14 cautious and careful to try to identify as narrow a group
15 of documents to put into this nonremote access category as
16 they could. So, you know, we may be talking about things
17 at the margins here. I mean, how many times do you have
18 tax returns, you know, in court records? Not that often,
19 quite frankly.

20 So, anyway, let's go to 15.7, Judge Gray.

21 HONORABLE TOM GRAY: Okay. The next
22 noncontroversial section is 15.7(a).

23 CHAIRMAN BABCOCK: Yeah, so much for that
24 noncontroversial section.

25 HONORABLE TOM GRAY: The objective of this

1 section is, okay, remote access is prohibited to all these
2 documents, but there is some people that we want to be
3 able to access them remotely, so we are exempting them
4 from the rule. 15.7(a) is designed to get the party and
5 their attorney exempted. I do note that the language --
6 the two uses of the word "individual" probably needs to be
7 changed to "person" so that it picks up corporations and
8 entities, other entities.

9 So that it would read, "This rule does not
10 limit a person's remote access to case records filed in a
11 proceeding in which the person is a party or an attorney."

12 HONORABLE STEPHEN YELENOSKY: Do we also
13 need to makes it explicit that the clerk is not obligated
14 to make those things available --

15 MR. WILDER: Please.

16 HONORABLE STEPHEN YELENOSKY: -- to the
17 parties? Because otherwise it could be read to say, a
18 party could say, "Well, I'm entitled to remote access to
19 my family law file."

20 PROFESSOR CARLSON: If you look at 15.3 --

21 CHAIRMAN BABCOCK: Yeah. I think we take
22 care of that elsewhere.

23 HONORABLE TOM GRAY: I think we've got to
24 assume that the introductory part of the rules will take
25 care of it.

1 CHAIRMAN BABCOCK: Yeah. Other comments?
2 Judge Benton.

3 HONORABLE LEVI BENTON: Tom, do we want to
4 consider qualifying that it's the attorney of record at
5 the time the request for access is made?

6 MR. ORSINGER: I think we should be careful
7 about that, because in my family law practice frequently
8 I'll want to go back and look at a file that's sealed
9 because the divorce proceeding was sealed, but we're now
10 involved in litigation over enforcement or maybe a
11 modification at a later time, and I would -- even if I was
12 not the attorney of record at the time of the divorce I am
13 the attorney of record now. I want to be able to get
14 access to it. If I was the attorney of record at the time
15 of the divorce and I had been replaced, I think I should
16 still be able to go in and see the file I was the lawyer
17 in, even though I'm no longer the lawyer. You see what
18 I'm saying?

19 HONORABLE TOM GRAY: I actually like Judge
20 Benton's suggestion because of what Richard Orsinger said,
21 because I don't want the subsequent lawyer to have access
22 to the filings that occurred after he was -- he or she was
23 replaced. I don't think you should be able to get to
24 those. That which you were a lawyer of at the time, yes,
25 but once you've been replaced, especially given the fact

1 there may become litigation between you and the party as
2 to why you were replaced, I think that it probably needs
3 to cut off.

4 MS. HOBBS: Well, this is remote access
5 here. It's not your ability to go down to the courthouse.

6 HONORABLE TOM GRAY: Well, that's true.

7 CHAIRMAN BABCOCK: And because of that why
8 are we worried?

9 HONORABLE LEVI BENTON: Yeah. You're right.
10 I was thinking sealed not -- excuse me. I'll exit stage
11 left now. Yeah.

12 CHAIRMAN BABCOCK: Any other comments?
13 Okay. If we make the change that Justice Gray suggests,
14 the rule would read, "This rule does not permit a person's
15 remote access to case records" --

16 HONORABLE TOM GRAY: "Does not limit."

17 CHAIRMAN BABCOCK: I'm sorry. Let me go
18 back again. "This rule does not limit a person's remote
19 access to case records filed in a proceeding in which the
20 person is a party or an attorney." So everybody in favor
21 of that raise your hand.

22 HONORABLE SARAH DUNCAN: I thought that
23 Judge Gray talked about at the time access --

24 CHAIRMAN BABCOCK: No. That was withdrawn.
25 Everybody raise your hand that's in favor of that.

1 MR. ORSINGER: Does "person" include
2 corporation?

3 CHAIRMAN BABCOCK: Yes.

4 HONORABLE STEPHEN YELENOSKY: And it's true
5 that right now that this isn't going to happen. There is
6 no technology for that now?

7 CHAIRMAN BABCOCK: Anybody opposed? Okay.
8 That's unanimous, 15 to nothing.

9 HONORABLE STEPHEN YELENOSKY: Well, my point
10 is I'm still concerned, and so is Tom, right? And Tom is,
11 too, that despite the beginning paragraph somebody is
12 going to read this to say if you have remote access, and
13 this says notwithstanding -- at least this rule does not
14 limit, "I'm a party, give me remote access to what nobody
15 else has remote access to."

16 PROFESSOR CARLSON: You want to put "if
17 available" or something?

18 MR. WILDER: You can't have -- when you're
19 scanning these documents in you cannot have one set of
20 data that is available to the large majority and then all
21 of the sudden open it up wider to one person. Most
22 database are not --

23 MS. HOBBS: I understand, Tom, that most
24 databases can't, but there are currently databases that
25 allow this to happen, and we don't want the rule to

1 preclude that convenience to the parties.

2 MR. WILDER: Harris County has got the same
3 problem, and as Paul says, as long as it's permissive
4 that's all that --

5 HONORABLE JAN PATTERSON: Can you accomplish
6 that goal by saying this rule limits the effect, "This
7 rule does not affect a person's" -- that way you're not --
8 you're exempting them, but not altering what's previously
9 been sent to them.

10 MR. MUNZINGER: If you began by saying, "If
11 a clerk allows remote access, this rule does not limit"
12 and that cures the problem that I think the clerks are
13 concerned about that they're going to face an argument
14 from someone saying 15.7(a) gives them a right to access.

15 MS. HOBBS: I think it almost makes it worse
16 because --

17 HONORABLE STEPHEN YELENOSKY: No, no. It's
18 if the clerk chooses to allow remote access to a party.
19 It's more specific than -- because otherwise if you allow
20 remote access it still could be read that you have a duty
21 to provide this separate, greater access to the parties.

22 CHAIRMAN BABCOCK: 15.3, which we haven't
23 got to, says "a court or court clerk may allow remote
24 access to case reocrds." And if remote access is allowed
25 then things follow.

1 PROFESSOR CARLSON: But what Tom's saying, I
2 provide remote access, but I can't do this, so don't make
3 it look like I can do this or have to do this.

4 HONORABLE STEPHEN YELENOSKY: You read that
5 part and then you say, "This rule does not limit."

6 PROFESSOR CARLSON: It's not technologically
7 feasible in his county.

8 HONORABLE STEPHEN YELENOSKY: And it's not
9 specific.

10 MR. ORSINGER: Wouldn't it be possible for
11 us to maybe say at the beginning of the rule we're not
12 mandating any kind of technological step, and then all the
13 rest of it is kind of written that if you do take this
14 technological step it should have these qualities to it?

15 HONORABLE STEPHEN YELENOSKY: Well, why
16 can't we just add to the sentence at the end of that
17 paragraph, "if the clerk chooses to allow greater access"
18 or "allow this access."

19 CHAIRMAN BABCOCK: Carl.

20 MR. HAMILTON: I assume there's some
21 electronic method to do this, but the clerk under 15.4 and
22 15.5 are going to have a lot of documents that say
23 "excluded from remote access" or they're going to be
24 toggled so that nobody can get remote access, so how does
25 the lawyer in the case override that and gain access to

1 those documents?

2 CHAIRMAN BABCOCK: Judge Gray apparently has
3 the answer.

4 HONORABLE TOM GRAY: The technology is
5 that you go -- that's where you get the password. It's a
6 secondary security system to get -- you get first level
7 right of access to the remote documents that are publicly
8 available and then you get the access through a security
9 or service provider type screen or firewall to go into the
10 next level of security.

11 CHAIRMAN BABCOCK: Tom or Paul, assuming
12 that the Court thinks this is a good idea and therefore
13 mandates it, in other words, this rule passes; and now
14 we're saying to you and Paul, "Guys, make this happen,"
15 what kind of expense are we talking about?

16 MR. WILDER: Well, I will tell you the only
17 way I know how to do it given our current setup is I would
18 have to give a separate password, I would have to
19 basically custom tailor an individual access, which means
20 my clerk would have to go back on those documents in the
21 case that we had punched the button, the toggle, if you
22 will, that says "make unavailable," which we currently
23 have that capability for our judges. If our judges get a
24 document, they don't want me to put it on remote access,
25 they sign a form. We hit the button "make unavailable,"

1 either before or after the fact, so you may assume that
2 there are things in each case.

3 Obviously where you have the parties
4 available, they're going to want to look at the whole case
5 file that's at the courthouse, so what I would have to do
6 is go back to that case, custom tailor a separate
7 database, if you will, that would -- with a separate
8 password and entry that would allow the party to have the
9 greater access that was -- that is not allowed to the rest
10 of them and then that password would expire on a date, but
11 when that -- you know, we would have to renew it every 30
12 days, I guess, or something until the case was over with,
13 and then that person's total access would go away, and
14 they could still be a regular subscriber or whatever.

15 CHAIRMAN BABCOCK: So is the answer real
16 expensive?

17 MR. WILDER: Yeah. Yeah.

18 MR. BILLINGSLEY: It's going to be --

19 MR. WILDER: Paul is the IT professional,
20 and he knows the cost better than me.

21 MR. BILLINGSLEY: I can't give a dollar
22 amount, but it's going to be very manually intensive
23 because we're going to have to go down to each case and
24 decide which parties have access. This is information I
25 probably have captured electronically.

1 MS. HOBBS: The intent of the rule from the
2 subcommittee's perspective is not that this is going to be
3 mandated on any clerk, but just if there is a clerk out
4 there who can do it, who does have levels of access, and
5 they want parties to family cases that we say you can't
6 see the pleadings in family cases and you want your family
7 lawyers to be able to log into your system and you can do
8 it, we just wanted to kind of exempt that from the rule
9 for those parties and their attorneys. It was just an if
10 you have it available. We don't want this rule to be read
11 as that's remote access.

12 HONORABLE STEPHEN YELENOSKY: All I'm saying
13 is put in "if you have it available."

14 MR. BILLINGSLEY: But you said family
15 lawyers. That's an easy group to identify, but when you
16 want just the party for that case, it becomes hard for us.

17 MS. HOBBS: No one wants to make you do it,
18 though. But we don't know where technology is going to go
19 or what vendors might be able to provide a different
20 county on a different day, and we just wanted to leave
21 this door open if there is a way to do it and it's
22 technologically feasible because we think that would be a
23 good thing for attorneys.

24 MR. WILDER: If it's permissive I don't
25 think either Charles or I would have a problem with it.

1 MS. HOBBS: Right.

2 MR. BILLINGSLEY: That's right.

3 MR. WILDER: I would actually -- if the
4 family lawyers are cut off from the full access that they
5 have today under my system, I can see now that you say
6 that, Lisa, that would give me a device either through the
7 deviation clause in here that my judges could come back in
8 with a rule to open that up, because all the family judges
9 have voted to give the lawyers that access. So I could
10 use that as long as it's permissive to go back in and give
11 them a greater level of access but shut out other people.

12 CHAIRMAN BABCOCK: If you added the -- I'm
13 sorry, Alex, you had your hand up.

14 PROFESSOR ALBRIGHT: I just wanted to say
15 that we do this at the university all the time. It's just
16 a matter of having a programmer who codes the -- I mean,
17 the ID number of the lawyers for that case to that case,
18 and it's really not very difficult if your system is set
19 up that way. So I think prospectively this is very
20 possible and probably probable, and I think this is a good
21 way to do it.

22 CHAIRMAN BABCOCK: Paul, she's saying that
23 the people at the University of Texas are smarter than you
24 guys.

25 MR. BILLINGSLEY: Probably have a bigger

1 budget, too.

2 PROFESSOR ALBRIGHT: We have a huge
3 operation.

4 CHAIRMAN BABCOCK: Hey, how about if we did
5 this?

6 MR. BILLINGSLEY: I notice you said
7 programmer. It's going to be a manual process. I take in
8 almost 10,000 case files in a month in Harris County. Now
9 I have to identify all this data.

10 CHAIRMAN BABCOCK: How about if we did this,
11 how about if we added the phrase "if technologically
12 feasible"?

13 PROFESSOR CARLSON: If feasible. You want
14 to say --

15 PROFESSOR ALBRIGHT: I mean,
16 "technologically feasible," it's feasible right now. That
17 makes it sound like more.

18 CHAIRMAN BABCOCK: Okay. So that's a bad
19 idea.

20 PROFESSOR CARLSON: "If the clerk elects" or
21 something like that.

22 PROFESSOR ALBRIGHT: But we have that
23 provision at the beginning of the rule that all of this is
24 at the clerk's discretion, right?

25 HONORABLE STEPHEN YELENOSKY: Well, but it's

1 just not clear. When you get down to this point somebody
2 is going to say unless you say "if the clerk chooses" --

3 MR. MEADOWS: Why don't you just say "it is
4 permissible to"?

5 MR. ORSINGER: You could say "a clerk may."
6 Could you say "a clerk may"?

7 PROFESSOR ALBRIGHT: "May allow."

8 MR. MEADOWS: I like that, but there was
9 some problem with that earlier, Richard.

10 MR. ORSINGER: Oh, okay.

11 MR. MEADOWS: We've never discussed this in
12 any other way except as a permissible way to proceed.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE STEPHEN YELENOSKY: But we've
15 talked about the whole thing being permissible or not.
16 This is the only instance in which we're talking about a
17 subset being permissible or not.

18 PROFESSOR ALBRIGHT: "Notwithstanding other
19 provisions of this rule, the clerk may allow."

20 MS. HOBBS: Yes.

21 CHAIRMAN BABCOCK: Okay.

22 MR. ORSINGER: Do you want to say "an
23 attorney of record"?

24 HONORABLE STEPHEN YELENOSKY: No. That's
25 only one then.

1 MR. ORSINGER: Well, what is an attorney in
2 a proceeding? I know who a party in a proceeding is.

3 CHAIRMAN BABCOCK: Hang on for a second,
4 Richard. Let's get this language down first.
5 "Notwithstanding other provisions of this rule, the clerk
6 may allow remote access to case records filed in a
7 proceeding in which the person is a party or an attorney."
8 Does that --

9 HONORABLE LEVI BENTON: "Attorney of record
10 at the time the request is made." I thought we had -- we
11 didn't vote on that, but the chair of the subcommittee --

12 CHAIRMAN BABCOCK: I thought you withdrew
13 that.

14 HONORABLE LEVI BENTON: No, no. I withdrew
15 the other observation about -- oh, I don't remember. But,
16 no.

17 HONORABLE TOM GRAY: I thought he withdrew
18 it, too.

19 MR. MEADOWS: Stage left.

20 CHAIRMAN BABCOCK: Yeah, stage left is what
21 you said.

22 HONORABLE LEVI BENTON: No. That was
23 another comment. It's on the record. I'll get the
24 record.

25 HONORABLE STEPHEN YELENOSKY: I don't

1 remember either, but I think you're right.

2 HONORABLE LEVI BENTON: Stephen says I'm
3 right, so it must be right.

4 CHAIRMAN BABCOCK: Okay. "Notwithstanding
5 other provisions of this rule a court or court clerk may
6 allow remote access." Okay. And the reason you exited
7 stage left, Snagglepuss, was because -- is because this is
8 just remote access and the attorney --

9 HONORABLE LEVI BENTON: Right, right, right.
10 You're right.

11 CHAIRMAN BABCOCK: Orsinger, who gets fired,
12 can go down to look at the file anyway.

13 HONORABLE LEVI BENTON: That's right.
14 You're right.

15 CHAIRMAN BABCOCK: That's why you exited
16 stage left, so that's why we don't need the language.

17 Okay. Let's go on to 15.7(b).

18 HONORABLE TOM GRAY: For some reason I think
19 this one might be a little more controversial.

20 CHAIRMAN BABCOCK: Oh, great.

21 HONORABLE TOM GRAY: You might recall back
22 from Rule 14 where we were talking about -- 14.3(b) we
23 were allowing some access to the sensitive data form of
24 some various governmental agencies and entities, and this
25 is sort of the carryover of the same concept into 15.7.

1 I wish Bonnie was here in particular to kind
2 of explain the way Title IV-D agencies and the district
3 attorneys' offices and Department of Public Safety have a
4 need to access the records, and this is a recognition of
5 -- Title IV-D agencies are those that are charged by the
6 Family Code to collect child support and do some other
7 things for the Attorney General. They could be a
8 designated entity, and so they are kind of a special
9 caption under category of governmental need to access.

10 CHAIRMAN BABCOCK: Would you need the same
11 prefatory language of "notwithstanding"?

12 HONORABLE TOM GRAY: I thought you-all were
13 going to do something with that prefatory language before
14 (a) or (b). In other words, that would be part of the
15 lead-in with subsection (a) or (b), but yes, you would
16 need that same language.

17 CHAIRMAN BABCOCK: So we will do that colon
18 and then (a) and (b). Okay.

19 HONORABLE TOM GRAY: But the rule,
20 obviously, "This rule does not limit remote access to case
21 records by court officials or personnel." That's
22 obviously to give the judges and their ability to get to
23 the documents or government entities entitled to access by
24 law or court order.

25 CHAIRMAN BABCOCK: Okay. Judge Duncan.

1 HONORABLE SARAH DUNCAN: So the groups of
2 people in (a) and (b) of 15.7 could have conceivably
3 access even to those records that are excluded from remote
4 access in 15.4?

5 HONORABLE TOM GRAY: Yes.

6 HONORABLE STEPHEN YELENOSKY: Yes.

7 HONORABLE SARAH DUNCAN: I just wanted to
8 put that on the record.

9 HONORABLE TOM GRAY: Yes. Those persons who
10 are exempted under 15.7, if the technology is available to
11 get access by remote to all the documents, they can get
12 access to all of them.

13 HONORABLE SARAH DUNCAN: I don't think
14 that's clear in the version of 15.7(a) and (b) that we're
15 looking at. I think it can easily be made clear. I just
16 wanted it on the record that that was the intent.

17 MR. WILDER: That's very good because the
18 Attorney General, in our contract which is covered with
19 court order with the Attorney General, we have all of our
20 in-house, like Social Security numbers, all of that, is
21 allowed on both upstream and downstream.

22 HONORABLE TOM GRAY: So I think the clerks
23 have endorsed -- I mean, this really was Bonnie as driving
24 force in making sure that we got this access.

25 CHAIRMAN BABCOCK: Okay. Any dissent from

1 this? Judge Patterson.

2 HONORABLE JAN PATTERSON: Yesterday we made
3 a change to the phrase "by law or court order" to read, I
4 believe, "by court order or other law," because the law is
5 more.

6 CHAIRMAN BABCOCK: What provision did we do
7 that in?

8 HONORABLE JAN PATTERSON: I'm thinking it
9 was 15.4.

10 CHAIRMAN BABCOCK: 15.4?

11 HONORABLE JAN PATTERSON: On the theory that
12 court order is more specific and law is more of a
13 catchall.

14 PROFESSOR CARLSON: 15.4(a).

15 CHAIRMAN BABCOCK: Yeah. "By court order or
16 law" is what we changed it to. Okay.

17 HONORABLE STEPHEN YELENOSKY: Isn't Judge
18 Benton right about that? He's right. It should say "case
19 records otherwise excluded under this rule."

20 HONORABLE TOM GRAY: I'll bet Lisa can take
21 care of that under the prefatory language.

22 CHAIRMAN BABCOCK: Yeah. Okay. Good catch,
23 Judge Patterson. Thank you. Carl.

24 MR. HAMILTON: This may be a minor point,
25 but are we attempting to say that these governmental

1 entities are entitled to access to only certain records
2 that they're allowed to see by law, or are they allowed to
3 see all records at the courthouse?

4 HONORABLE TOM GRAY: The purpose is designed
5 -- and if it's not clear we obviously need to work on the
6 language, but the purpose is to allow these agencies that
7 have a tremendous volume of cases that need access to the
8 records to not have to go to the courthouse to get what
9 they could get at the courthouse. The remote access.
10 Those documents which are not otherwise available remotely
11 because they contain -- the large part of these are
12 because they're family law cases.

13 MR. HAMILTON: But they have access to
14 everything at the courthouse?

15 HONORABLE TOM GRAY: Right.

16 HONORABLE STEPHEN YELENOSKY: But this rule
17 isn't intended to expand that. This portion is just
18 intended to negate what's excluded in the rest of the
19 rule, and again, what Justice Duncan says, I don't know
20 that it should say "all," but it should say that this rule
21 does not affect, limit, remote access to case records
22 which would under this rule be excluded.

23 HONORABLE SARAH DUNCAN: I think we've got
24 two different groups of people.

25 PROFESSOR CARLSON: Yeah.

1 HONORABLE SARAH DUNCAN: The governmental
2 entities may not be entitled to look at all case records.
3 If a document is sealed, it's sealed, and they may or may
4 not can look at it --

5 HONORABLE STEPHEN YELENOSKY: Right.

6 HONORABLE SARAH DUNCAN: -- depending on the
7 terms of the sealing order, but if I'm sitting at home as
8 a judge and I want to see a sealed document, I'm writing
9 an opinion on whether the trial court correctly sealed
10 that document, I should be able to have remote access to
11 that.

12 HONORABLE STEPHEN YELENOSKY: Right. But --

13 HONORABLE SARAH DUNCAN: So we're looking at
14 two different groups of people, and you may need to define
15 the database that each of those groups can look at
16 differently.

17 MS. HOBBS: I --

18 HONORABLE STEPHEN YELENOSKY: Well, that may
19 be hard because (a) lumps together, well, attorneys and
20 parties, and I imagine there are some things that might be
21 submitted in camera that, you know, the court decides are
22 privileged. So the easier thing is just to say that what
23 else we've written in this rule that says you can't have
24 remote access by virtue of this rule doesn't apply to
25 these people. There may be other reasons why they don't

1 get it, but the absolute exclusion on family cases, the
2 absolute exclusion on stipulations in criminal cases,
3 don't apply if you're a party, an attorney, governmental
4 official. Because if you start using "all," you're going
5 to --

6 HONORABLE SARAH DUNCAN: I think for court
7 personnel it should be all.

8 HONORABLE STEPHEN YELENOSKY: Yeah. Well,
9 maybe so, but then we have to split them out.

10 CHAIRMAN BABCOCK: Carl.

11 MR. HAMILTON: So under 15.7 an attorney on
12 the opposite side can have a look at in camera documents
13 that the other side has produced?

14 HONORABLE STEPHEN YELENOSKY: That's what
15 we're saying by -- I mean, that's what we need to be
16 precise about. All we're doing is exempting these
17 individuals from the exclusions elsewhere in this rule.
18 We're not taking away exclusions that come from somewhere
19 else, like privilege.

20 MR. ORSINGER: Well, we've changed this
21 language to "a clerk may provide access," so we certainly
22 don't want to say that a clerk may provide access to a
23 document that's under seal and the lawyer is not entitled
24 to see.

25 HONORABLE STEPHEN YELENOSKY: Well, "The

1 clerk may provide access to records excluded from remote
2 access by this rule."

3 CHAIRMAN BABCOCK: Judge Duncan.

4 HONORABLE SARAH DUNCAN: I think what we're
5 really saying is that I as a judge, Joe as a party, and
6 Tom as a lawyer, can get exactly the same access remotely
7 that we can get at the courthouse.

8 CHAIRMAN BABCOCK: That's the concept.

9 HONORABLE STEPHEN YELENOSKY: If the clerk
10 chooses.

11 HONORABLE SARAH DUNCAN: If the clerk
12 chooses to provide it at all.

13 HONORABLE STEPHEN YELENOSKY: Right.

14 CHAIRMAN BABCOCK: We go a little bit
15 farther for the court personnel, as you say, because
16 you're entitled -- you, the judge sitting at home working
17 on that sealing order, are entitled to a little bit more
18 access.

19 HONORABLE SARAH DUNCAN: That's the same
20 access I would have at the courthouse.

21 CHAIRMAN BABCOCK: Yeah. Okay. Fair
22 enough.

23 HONORABLE SARAH DUNCAN: And I think that
24 may be the concept, the overriding concept that we're
25 trying to implement in both (a) and (b), and maybe we just

1 need to say it that way.

2 MR. WATSON: Can we say it that way?

3 CHAIRMAN BABCOCK: Judge Gray.

4 HONORABLE TOM GRAY: There is a -- and I
5 don't want to dump too much on the programmers, but there
6 is going to be another technical challenge on those
7 documents that are submitted in camera that only one group
8 of attorneys will have access to, but that's just
9 something that's going to have to be dealt with
10 technologically because just because you're an attorney in
11 a case, it's -- I know you're not going to get it at the
12 courthouse, and so the rule, what we're trying to do here
13 works, but that is a technology issue.

14 HONORABLE SARAH DUNCAN: And it's technology
15 that already exists, as Alex was saying, right now. I
16 mean, my husband was telling me the other evening he just
17 got assigned a new advisee. He's never been able to look
18 at his advisee's record before, but the moment it was
19 decided that he was going to be this young man's advisee,
20 he got access to all of this kid's records. So that
21 technology exists. Whether it's being implemented in the
22 court system or not right now I don't think is material,
23 because the world is changing too quickly.

24 CHAIRMAN BABCOCK: There will be changes by
25 the time this rule becomes effective. Okay. I think Lisa

1 has got a pretty good sense of the issues here, so let's
2 go on to 15.8.

3 HONORABLE TOM GRAY: I'm reluctant to even
4 read it at this stage.

5 CHAIRMAN BABCOCK: Okay, I will.

6 HONORABLE TOM GRAY: "A court may submit for
7 approval a written request to the Supreme Court of Texas
8 to deviate from this rule." Recognizing that all rules
9 were made to be broken, we decided we would document it
10 and allow express authorization to deviate from the
11 beginning.

12 CHAIRMAN BABCOCK: Judge Benton.

13 HONORABLE LEVI BENTON: Do you want to add
14 "a court or clerk"?

15 HONORABLE TOM GRAY: No.

16 HONORABLE LEVI BENTON: Why?

17 HONORABLE TOM GRAY: We felt like it would
18 not be advisable to have 400 and -- 508 clerks going
19 independently requesting rules modifications. Nothing
20 against the clerks, you understand, but try to limit the
21 group of folks that are making a course.

22 CHAIRMAN BABCOCK: Lisa.

23 MS. HOBBS: It would be like local rules. I
24 mean, the Harris County judges submit deviations from
25 local rules, and this is kind of the same concept. In

1 fact, there were some maybe on the committee who thought
2 this could be handled under a local rule. I mean just
3 like people submit local rules to the Court for approval.

4 CHAIRMAN BABCOCK: Well, that's kind of
5 where we are now. Every county has got --

6 MR. WILDER: There is precedent for that on
7 fax filing and other things because we all have our own
8 local rules for those.

9 CHAIRMAN BABCOCK: Richard.

10 MR. ORSINGER: I think we ought to rephrase
11 this that "A court may not deviate from these standards
12 except by permission from the Supreme Court," and I will
13 tell you on personal experience that the trial judges
14 around Texas do not uniformly respect the rule that they
15 cannot adopt a local rule unless it's approved by the
16 Supreme Court; and if you expect this to be honored the
17 same way that the local rule is honored, it will not be
18 honored. So I would say that we ought to go further than
19 the local rule and say you cannot deviate from this rule
20 without the express permission of the Supreme Court, and
21 then you can mandamus somebody that doesn't.

22 HONORABLE TOM GRAY: Is that an implied
23 acceptance of their deviation from the other rules?

24 MR. ORSINGER: I think we ought to tighten
25 up that other rule. I tell you, in the counties that I

1 practice in there is a lot of local rules that the Supreme
2 Court has never seen.

3 HONORABLE STEPHEN YELENOSKY: Or standing
4 orders which are mastering --

5 MR. ORSINGER: Yeah. I mean, you would be
6 shocked at what all the different rules are that you have
7 to practice under that have never crossed the Supreme
8 Court's desk.

9 HONORABLE TOM GRAY: Chip, I don't have a
10 problem with the --

11 HONORABLE LEVI BENTON: Friendly amendment?

12 HONORABLE TOM GRAY: -- friendly amendment.
13 Sarah?

14 HONORABLE SARAH DUNCAN: Can we add
15 "written"?

16 MR. ORSINGER: Yeah.

17 HONORABLE SARAH DUNCAN: "Court and court
18 clerks may not deviate from this rule without the express
19 written permission of the Supreme Court of Texas."

20 MR. ORSINGER: You know, that might work,
21 Sarah. That might work.

22 HONORABLE SARAH DUNCAN: Well, it might be
23 the best we can do to try to get something that will work.
24 At least then, Richard, when somebody is deviating from
25 the rule you can say, "I want to see the writing that

1 permits you to do this. "

2 MR. ORSINGER: Okay. Well, I guess I will
3 get that as soon as you get out of jail.

4 HONORABLE STEPHEN YELENOSKY: Do we intend
5 or care if courts within the same county might request
6 different deviations? I mean, technologically that's not
7 going to happen now, but do we care about that?

8 MR. ORSINGER: I bet you that there might be
9 judges who would want to have a more restrictive policy
10 than their neighbor or a less restrictive policy.

11 HONORABLE STEPHEN YELENOSKY: Within the
12 same county.

13 CHAIRMAN BABCOCK: Okay. 15.8 now reads "A
14 court may not deviate from this rule without the express
15 written permission from the Supreme Court of Texas." Does
16 that --

17 HONORABLE SARAH DUNCAN: I think the way
18 this version -- I think you need to include clerks. Say
19 "neither a court nor a clerk," or "clerk and court may
20 not."

21 MR. MEADOWS: Does that suggest then that a
22 clerk can petition the Court for a deviation?

23 HONORABLE STEPHEN YELENOSKY: You need
24 another sentence.

25 HONORABLE SARAH DUNCAN: I don't remember

1 this being discussed in subcommittee that a clerk couldn't
2 seek a deviation, and I guess I don't understand since
3 it's the clerks -- my understanding is that it -- and it
4 may be incorrect, that at least some clerks are doing this
5 without the joinder of their judges. I mean Judge Benton
6 has said he doesn't want to be involved in this, so I
7 think we need to have the flexibility that if a clerk is
8 going it alone without the approval of the judges or
9 participation, that that clerk has the ability to seek a
10 deviation.

11 HONORABLE LEVI BENTON: Well, I don't want
12 to be misunderstood, because we were talking about the
13 contracting with the third party when I said judges don't
14 want to be involved. I just think we need to -- and I
15 think more counties or -- even in a single district court
16 county we just need to give the clerks some flexibility to
17 go directly to the Court. They might not have agreed --

18 HONORABLE SARAH DUNCAN: Go directly to the
19 Supreme Court?

20 HONORABLE LEVI BENTON: Yes. Because
21 sometimes there is disagreements between the clerk and the
22 court.

23 HONORABLE STEPHEN YELENOSKY: Between the
24 court and the clerks or between the courts.

25 HONORABLE LEVI BENTON: Yeah.

1 CHAIRMAN BABCOCK: Okay.

2 HONORABLE TOM GRAY: Chip, I would suggest
3 that Sarah's sentence be the first sentence under 15.8,
4 and then I think you still need the sentence that's there
5 so that they know how to do it, and then there is the
6 question of whether or not to add clerk or not.

7 MS. HOBBS: I mean, I think you can just
8 say, "A court or court clerk may not deviate from this
9 rule without written permission from the Supreme Court of
10 Texas" without saying who is going there to do it and let
11 the counties figure out what their policy is.

12 HONORABLE SARAH DUNCAN: Right. I agree.

13 CHAIRMAN BABCOCK: "A court or a court clerk
14 may not deviate from this rule without the express written
15 permission from the Supreme Court of Texas."

16 MS. HOBBS: I'm not sure how "written
17 permission" could not be express, but it does sound really
18 bold.

19 MR. ORSINGER: Let's put it in bold and
20 underlined.

21 HONORABLE SARAH DUNCAN: Well, you could
22 have written permission to deviate, but you need an
23 express permission to deviate in a particular way.

24 CHAIRMAN BABCOCK: Judge Gray, 15.9. Judge
25 Patterson.

1 HONORABLE JAN PATTERSON: Isn't the
2 prohibition against a court, doesn't that include a court
3 clerk, though? If you prohibit a court surely that
4 prohibits the court clerk.

5 CHAIRMAN BABCOCK: You would think so, but
6 is there any danger in adding court clerks since they're
7 so involved in this?

8 HONORABLE SARAH DUNCAN: They have an
9 independent elected office. I don't know how you can say
10 they're --

11 HONORABLE STEPHEN YELENOSKY: Yeah, we don't
12 control them very well.

13 MR. ORSINGER: In this particular area do we
14 not also have a concern about exhibits that are in the
15 custody of the court reporter? Do we not -- do we not --

16 CHAIRMAN BABCOCK: But, Richard, that
17 doesn't have anything to do with 15.8, does it? You're
18 talking about a request to deviate.

19 MR. ORSINGER: Well, if a court reporter has
20 physical custody of the exhibits tendered during the
21 trial, which they will up until they turn them over to the
22 clerk --

23 CHAIRMAN BABCOCK: Right.

24 MR. ORSINGER: -- do we mean for the
25 constraint not to apply to the court reporter, or does the

1 court reporter follow the same rules that the clerk and
2 the judge does while the court reporter has the exhibits?

3 HONORABLE STEPHEN YELENOSKY: We do have
4 control over the court reporters.

5 CHAIRMAN BABCOCK: Hang on for a second. Is
6 that a 15.8 issue or is that another issue?

7 MR. ORSINGER: Yeah, because you say "the
8 court and the court clerk cannot deviate," and I'm just
9 saying can the court reporter deviate during the period of
10 time that they have custody of the exhibits?

11 HONORABLE STEPHEN YELENOSKY: A court
12 reporter is subsumed under court. I don't know about
13 clerk, but a court reporter --

14 MR. ORSINGER: Okay. I hope you're right.

15 HONORABLE STEPHEN YELENOSKY: We hire them.

16 CHAIRMAN BABCOCK: 15.9.

17 HONORABLE TOM GRAY: Reads just like the
18 last rule in 14. It's sanctions, it's global, it's not
19 specific in the sense of what sanctions, and we hope that
20 it gets --

21 CHAIRMAN BABCOCK: Change "party" to
22 "persons"?

23 HONORABLE TOM GRAY: Yes.

24 CHAIRMAN BABCOCK: Okay. Anything else?

25 Richard.

1 MR. ORSINGER: So that would mean, for
2 example, that if a clerk or a court reporter were to
3 violate the rule, that the court could impose appropriate
4 sanctions against the clerk or the court reporter, right?

5 HONORABLE TOM GRAY: Yes.

6 HONORABLE STEPHEN YELENOSKY: An officer of
7 the court.

8 MR. ORSINGER: And appropriate sanctions, is
9 that something other than contempt?

10 HONORABLE STEPHEN YELENOSKY: Yes. Well, it
11 depends on whether the court reporter is employed by the
12 judge. It may be different if it's not an employee, but
13 sure.

14 MR. ORSINGER: Well, are we talking about
15 sanctions like we would normally apply discovery
16 sanctions? I mean, you can't strike pleadings.

17 CHAIRMAN BABCOCK: We had a long discussion
18 about this yesterday.

19 MR. ORSINGER: You did? Okay.

20 CHAIRMAN BABCOCK: Any reason to treat this
21 language in 15.9 differently than we did when we concluded
22 yesterday?

23 HONORABLE STEPHEN YELENOSKY: Just to give
24 Richard a chance.

25 HONORABLE TOM GRAY: I can't think of any.

1 CHAIRMAN BABCOCK: I can't, either. So
2 let's go to 15.1. Let's tackle some hard stuff now in the
3 51 minutes we have remaining.

4 HONORABLE SARAH DUNCAN: And we still have
5 to get to bulk distribution.

6 CHAIRMAN BABCOCK: We have got 51 minutes,
7 and we'll get to what we can get to, but we're not going
8 to spend a lot of time on bulk distribution, if any. Yes,
9 Richard.

10 MR. MUNZINGER: I don't like "in all Texas
11 courts," having listened to the justice of the peace here
12 yesterday who pointed out all the many, many, many, many
13 problems that that's going to create for him, and I
14 question whether you want this rule to cover justice of
15 the peace and corporation courts, municipal courts, and I
16 think they should be exempt from the rule.

17 CHAIRMAN BABCOCK: Yeah. That's a laundry
18 list item we have, but are you saying that that's in the
19 scope?

20 MR. MUNZINGER: Well, 15.1, "This rule
21 covers remote access to case records in all Texas courts".

22 CHAIRMAN BABCOCK: And you think right here
23 we ought to exempt them?

24 MR. MUNZINGER: Whether it's done here or
25 elsewhere I think you need to be careful that you don't

1 include JP and municipal courts.

2 MR. LOW: And small claims.

3 MR. MUNZINGER: And small claims courts.

4 HONORABLE TOM GRAY: The big problem was
5 over in sensitive data form and how we're going to comply
6 there, but there is some carryover into this one as well
7 because my understanding is that some JP courts are in the
8 process of putting theirs online, and that will have that
9 information in there, but I think that's part of our
10 global cleanup at the end.

11 CHAIRMAN BABCOCK: Okay.

12 MS. HOBBS: And understand that anybody not
13 under this rule has no rules governing them, so they can
14 put whatever they want online. I think there is a
15 misunderstanding sometimes that without them covered under
16 this rule that means everything can go up. It doesn't
17 mean nothing is going up.

18 CHAIRMAN BABCOCK: Right. And as time
19 marches on, probably more stuff from those courts will go
20 up. The question is, I think, in terms of balancing the
21 problems that those courts specifically have by the nature
22 of their documents, like traffic tickets, as opposed to do
23 those courts typically have things that we think ought not
24 to be on the internet.

25 MR. ORSINGER: My feeling without practicing

1 in those courts are that it's very unlikely the
2 information we're concerned about will be involved in
3 their type of litigation.

4 HONORABLE TOM GRAY: The problem is
5 everything we're worried about is involved. There's
6 driver's license numbers, Social Security numbers.

7 MR. LOW: All that.

8 MR. ORSINGER: And there's no --

9 CHAIRMAN BABCOCK: Everything in the
10 sensitive data form is all over their records.

11 HONORABLE TOM GRAY: All over the tickets.

12 MR. ORSINGER: Can we have them use the
13 sensitive data form procedure and then otherwise allow
14 their records public?

15 CHAIRMAN BABCOCK: Judge Lawrence thinks
16 not.

17 MR. ORSINGER: Not?

18 CHAIRMAN BABCOCK: Not. He thinks it can be
19 done, but he thinks that, you know, it's hopelessly
20 complicated.

21 HONORABLE TOM GRAY: And there are some --
22 having been a municipal court judge, there are some huge
23 problems in having the officer fill out the sensitive data
24 form and limiting access then to the ticket and all that.
25 It may be that it just -- that's just got to be fixed

1 separately from the bulk of what we're doing, and we know
2 that, and we're going to try to do that.

3 CHAIRMAN BABCOCK: So should we bite the
4 bullet right here in 15.1 and exempt those courts here
5 from 15.1?

6 HONORABLE TOM GRAY: I don't think we
7 should.

8 CHAIRMAN BABCOCK: Okay.

9 HONORABLE TOM GRAY: Because right now,
10 remote access under this, like Lisa says, at least we can
11 tinker with the end of this rule regarding the JP court
12 and municipal court records, and they're going to be
13 covered then. Otherwise we're going to have a whole other
14 rule related. I just think for right now we need to leave
15 them in there.

16 CHAIRMAN BABCOCK: Okay. Any other comments
17 about 15.1?

18 MR. HAMILTON: Chip?

19 CHAIRMAN BABCOCK: Yeah, Carl.

20 MR. HAMILTON: I think there is some
21 confusion because we're starting out by saying that it
22 only applies to courts. Then we start talking about title
23 records and stuff that are not filed with a court but are
24 with a county clerk, and what if those records are part of
25 court documents? Then are they not available? Or why do

1 we need to have that "other nonadjudicatory records" when
2 we're only talking about record -- case records?

3 CHAIRMAN BABCOCK: Yeah.

4 MS. HOBBS: I think it's just meant to
5 clarify just that, is that we're not talking about your
6 administrative records or the other records that are in
7 the clerk's office, so don't think we are.

8 MR. HAMILTON: Then I think we need to say
9 "filed with the county clerk."

10 MS. HOBBS: Okay.

11 MR. HAMILTON: Instead of "filed as part of
12 the case record."

13 MS. HOBBS: So "or other nonadjudicatory
14 records filed with the clerk such as."

15 MR. HAMILTON: "Filed with the county
16 clerk."

17 MR. ORSINGER: Does it have to be county and
18 not district?

19 MR. HAMILTON: I don't know of any of these
20 that are filed with the district clerk.

21 MR. WILDER: It would be -- if you have a
22 so-called combination clerk, I guess it would be. There
23 are some counties below 8,000, I believe it is,
24 population, that, I don't know, there is half a dozen of
25 them that do both jobs.

1 CHAIRMAN BABCOCK: Just say "filed with the
2 clerk."

3 MR. HAMILTON: Or "filed not in a case
4 record" or something like that. "That are not a part of a
5 case record."

6 MS. HOBBS: So you're worried about if a
7 birth record is part of a case record we want it to apply
8 here, we don't want our scope to limit that.

9 MR. HAMILTON: Right.

10 MS. HOBBS: Good point.

11 HONORABLE STEPHEN YELENOSKY: Ironical that
12 originally we were excluding birth dates under sensitive
13 data form and then right here we're saying this rule
14 doesn't apply to birth records.

15 CHAIRMAN BABCOCK: I wonder, even though
16 it's meant to clarify, I wonder if we don't create more
17 confusion than clarity.

18 MR. WILDER: Because you do have a real
19 tough situation that arose in our county and is going to
20 arise in others where the county clerk files copies of
21 divorce records with title documents as an emolument of
22 title, and we had people calling saying "Why do people
23 have in their deed records the divorce records," and the
24 title company people checked with their attorneys and they
25 said, "We're clear on that and you're clear, Mr. Clerk,

1 because the county clerk gets that" -- "we get that copy
2 of the divorce and file it with the county clerk in order
3 to basically transfer the title" and then the county clerk
4 puts that up on the web wide open, and you've got people
5 unhappy, and I have no idea exactly how to deal with that,
6 but that's an issue that's coming.

7 CHAIRMAN BABCOCK: If -- Judge Gray, if we
8 just said, "This rule covers remote access to case records
9 in all Texas courts, and stop there," Lisa, would that be
10 okay or do you think we need the --

11 MS. HOBBS: Well, our first time in here was
12 so confusing trying to explain to everybody what records
13 we're talking about here. It was meant to provide
14 clarity, and I think now we're all on the same page, and I
15 worry if we take that out that other people may have that
16 same confusion that we had last time.

17 CHAIRMAN BABCOCK: We do define case record
18 as meaning "a document filed in a matter before a court
19 pertaining to its adjudicative function and a court index,
20 calendar, docket, minute, or register of actions."

21 HONORABLE STEPHEN YELENOSKY: What about
22 putting a comment or something to (a)?

23 CHAIRMAN BABCOCK: Well, Carl's point is
24 that the confusion arises that, you know, what if a
25 nonadjudicatory record such as a title record winds up in

1 a file that is in the adjudicative function.

2 MS. HOBBS: And you could just put at the
3 end of that "otherwise not in a case record."

4 CHAIRMAN BABCOCK: Yeah. Okay. Any others?

5 MR. HAMILTON: Just say "not in a case
6 record."

7 CHAIRMAN BABCOCK: Okay.

8 MR. MUNZINGER: But "case record" is a word
9 of art that's defined subsequently meaning a single
10 document.

11 MR. LOW: Yeah.

12 MR. MUNZINGER: You don't want to use "case
13 record" as if you're talking about all the filings in a
14 particular case if you define "case record" to mean a
15 document.

16 HONORABLE TOM GRAY: "Not otherwise included
17 as part of a case record."

18 MR. HAMILTON: "Not part of a proceeding."

19 MR. MUNZINGER: As long as you use the word
20 "case record" to mean "any document filed," you're going
21 to create confusion if you use it to mean something else.

22 HONORABLE SARAH DUNCAN: What if you just
23 said, "This rule does not govern access to a record that
24 is not a case record as defined in 15.2(a)."

25 HONORABLE STEPHEN YELENOSKY: Well, what

1 about saying that -- just define case record and where you
2 say adjudicative function and then say it doesn't apply to
3 a nonadjudicative record unless it's contained in a case
4 record?

5 HONORABLE TOM GRAY: In context, does this
6 fix it: Second sentence, "The rule does not govern access
7 to records that are governed by Rules of Judicial
8 Administration 12 or other nonadjudicatory records filed
9 with the court clerk, such as title records, vital
10 statistics, birth records, naturalization records, voter
11 records, and instruments recorded for public notice, not
12 otherwise included as part of a case record."

13 MR. HAMILTON: "Not otherwise a case
14 record."

15 HONORABLE STEPHEN YELENOSKY: Right.

16 MR. HAMILTON: Because "case record" is
17 defined as a document.

18 HONORABLE TOM GRAY: That's why I said "as
19 part of" because in trying to meet Richard's comments.

20 MR. HAMILTON: Part of the case record would
21 be part of a document.

22 PROFESSOR ALBRIGHT: Can somebody clarify
23 for me the problem we're trying to solve? I thought the
24 problem we were trying to solve is that if someone chooses
25 to file a divorce decree in the county records, that's

1 technically a case record, but if they choose to file it
2 in the county records then they have made it public
3 forever.

4 MR. MUNZINGER: It wouldn't be a case
5 record.

6 PROFESSOR ALBRIGHT: Well, it is. I mean,
7 under the definition it is a document filed in a matter
8 before a court.

9 MR. MUNZINGER: No, a case record is defined
10 as "a matter filed before a court pertaining to an
11 adjudicative function."

12 PROFESSOR ALBRIGHT: Well, it is. It's a
13 judgment.

14 MR. ORSINGER: Well, it's a case record in
15 the proceeding where it was issued, but once you get a
16 certified copy and file it at the deed record office does
17 it cease being a case record? I don't think so. But all
18 of the sudden it's outside the scope of the rule because
19 it's no longer in a Texas court.

20 PROFESSOR ALBRIGHT: Right. And I think if
21 someone chooses to file their divorce decree in the county
22 records then they have made the decision that they're
23 going to make that a public document. If they don't want
24 to make their divorce decree a public document, they could
25 sign a deed to file in the county records.

1 MR. WATSON: That's right.

2 HONORABLE STEPHEN YELENOSKY: Remotely
3 accessible. Publicly remotely accessible as opposed to
4 public document, because that's what we're talking about.

5 PROFESSOR ALBRIGHT: Okay. Okay. So but --
6 so the issue then is to define the documents in the case
7 records as being those records when they're filed in the
8 case file as opposed to when somebody takes them out and
9 files them someplace else.

10 MR. ORSINGER: But I think we're okay with
11 that. Leave the definition of case record alone. The
12 rule only applies to case records in Texas courts, so if
13 it's in the county clerk's office it's not in a Texas
14 court and it's not within the scope of Rule 15 and we
15 don't need to fool around with the definition.

16 CHAIRMAN BABCOCK: That's what I would say.
17 Okay. Any other comments?

18 PROFESSOR ALBRIGHT: But that's the issue
19 that we're trying to deal with? I just wanted to make
20 sure we weren't trying to deal with some other issue.

21 HONORABLE TOM GRAY: I thought the issue we
22 were trying to deal with by inclusion of the description
23 of specific documents was to address the confusion that we
24 all dealt with originally, that clearly those are not what
25 we're talking about in connection with this rule. And

1 there was a lot of confusion, as Lisa referred to earlier,
2 in what was going to be covered by the rule and what was
3 not, and this was our apparently poor attempt to address
4 that problem.

5 CHAIRMAN BABCOCK: Let's go to 15.2(a).

6 MR. MUNZINGER: Did we leave 15.1 as-is or
7 was it amended?

8 CHAIRMAN BABCOCK: We changed it to "not
9 otherwise included as part of a case record."

10 PROFESSOR ALBRIGHT: We did? I think
11 that --

12 CHAIRMAN BABCOCK: We can vote on it. You
13 want to vote on it?

14 PROFESSOR ALBRIGHT: To me we're adding more
15 phrases to just make it more and more complicated.

16 CHAIRMAN BABCOCK: Well, we've got three
17 options. We can delete the second sentence. We can leave
18 the second sentence as-is, or we can add "not otherwise
19 included as part of a case record."

20 MR. ORSINGER: Chip, can I make the
21 suggestion that after the first sentence it all be put in
22 a comment? To me the first sentence is perfectly clear.
23 "This rule covers remote access to case records in all
24 Texas courts." We know what a court is, we know what a
25 case record is, enough said.

1 If you are worried about confusion, why
2 don't we have a comment that says "just in case you
3 wondered, if it's covered by Rule 12 it's not covered by
4 this, and the county clerk's office is not covered by
5 this." You can just lift all you want.

6 HONORABLE SARAH DUNCAN: Make that a motion.

7 MR. ORSINGER: I make a motion.

8 HONORABLE SARAH DUNCAN: I second it.

9 CHAIRMAN BABCOCK: Everybody in favor of
10 that?

11 Okay. Everybody is in favor of that. We'll
12 make the second sentence a comment.

13 HONORABLE SARAH DUNCAN: Richard is not used
14 to winning that easily.

15 CHAIRMAN BABCOCK: I know.

16 MR. ORSINGER: That's because half the
17 committee isn't here.

18 CHAIRMAN BABCOCK: Richard's not used to
19 winning. Okay. 15.2(a), case records. Now, there is a
20 redlined version here.

21 HONORABLE TOM GRAY: Be sure that you're
22 looking at a subcommittee draft dated 3-30-05.

23 CHAIRMAN BABCOCK: Right. So "Case record
24 means a document filed in a matter before a court
25 pertaining to its adjudicative function and a court index,

1 calendar, docket, minute, or register of" -- there is a
2 typo there, should be "of actions." Any discussion on
3 this rule? Justice Duncan.

4 HONORABLE SARAH DUNCAN: My only beef is
5 that "pertaining to" is a misplaced modifier. "Pertaining
6 to" doesn't modify "court." It modifies "document."

7 MS. HOBBS: I thought it was modifying
8 "court."

9 CHAIRMAN BABCOCK: "Pertaining to its."

10 HONORABLE SARAH DUNCAN: Maybe "pertaining
11 to" is an incorrect usage.

12 MS. HOBBS: This was my fix to Mike
13 Hatchell's comment where he e-mailed us -- he included you
14 on that e-mail, didn't he? And he said he didn't think
15 that courts act in an adjudicative function, and so I was
16 trying to track Rule 12, the language in Rule 12, a little
17 bit more closely here, but you're right, we may need to
18 say --

19 HONORABLE STEPHEN YELENOSKY: What is before
20 a court if it's not adjudicative?

21 MS. HOBBS: Your administrative matters.
22 Like pretty much everything I do for the Court is in its
23 nonadjudicative function, arguably.

24 CHAIRMAN BABCOCK: Richard.

25 MR. ORSINGER: The last phrase, is that

1 "register of actions," "or register of" because mine says
2 "or register or"?

3 CHAIRMAN BABCOCK: That's what I just said.

4 MR. ORSINGER: And is this -- has someone
5 verified that this is the list of all court
6 clerk-generated documents, an index, a calendar, a docket,
7 minutes, and a register? Have we left out any important
8 government-created management record? I don't know. But
9 has somebody checked that out, because this is an
10 exclusive list?

11 CHAIRMAN BABCOCK: Carl.

12 MR. HAMILTON: My understanding is that
13 orders are not filed. They eventually end up in a book,
14 and it may be the minute book, but they end up in a book
15 called --

16 MS. HOBBS: It's the minutes.

17 MR. ORSINGER: It's minutes.

18 MR. WILDER: They're in the case file.

19 MR. HAMILTON: But they don't get filed,
20 right?

21 MR. WILDER: Do you mean stamped?

22 MR. HAMILTON: Right. File stamped.

23 HONORABLE STEPHEN YELENOSKY: Ours do.

24 HONORABLE LEVI BENTON: Yeah, they do.

25 MR. HAMILTON: I think ours don't.

1 MR. ORSINGER: I think in Bexar County they
2 don't either.

3 (Simultaneous speakers.)

4 THE REPORTER: One at a time, please.

5 CHAIRMAN BABCOCK: Hey, hey. Yeah. One at
6 a time, everybody.

7 THE REPORTER: Thank you.

8 CHAIRMAN BABCOCK: Lisa.

9 MS. HOBBS: We were under the presumption
10 that some items in that underlined list were not filed,
11 and that's why we didn't have a period after "function."
12 That's why we had to include the list, because some of
13 those items are not filed, and so we wanted to make sure
14 they were included in the definition of case record.

15 CHAIRMAN BABCOCK: Right.

16 MS. HOBBS: So it's a "document filed in a
17 matter and a court index," da-da-da-da-da.

18 HONORABLE TOM GRAY: Chip, and just so that
19 everybody is clear, Bonnie pointed out repeatedly that
20 minute there includes court orders.

21 HONORABLE SARAH DUNCAN: And judgments.

22 HONORABLE TOM GRAY: And judgments, yeah,
23 and that would address Carl's comment as to whether
24 they're filed or not. Whether they are in some counties,
25 they're not in others, they will be taken care of by that.

1 CHAIRMAN BABCOCK: Let's talk about Sarah's
2 problem, which is "pertaining to."

3 HONORABLE SARAH DUNCAN: These are all going
4 to get shipped off to Brian Garner to rewrite anyway.

5 CHAIRMAN BABCOCK: Okay. Don't worry about
6 that one? Any other comments about (a)? Judge Benton.

7 HONORABLE LEVI BENTON: I need Paul's help
8 here, but I recognize that he came to the Harris County
9 judiciary and quasi-judiciary after I did. We don't -- in
10 Harris County I don't necessarily think we define minutes
11 to include orders, as someone just suggested, do we?

12 MR. BILLINGSLEY: Yes, sir, we do.

13 HONORABLE LEVI BENTON: Okay. Fair enough.

14 CHAIRMAN BABCOCK: Okay. Any other comments
15 about (a)?

16 HONORABLE STEPHEN YELENOSKY: I don't know
17 that we do in Travis County.

18 CHAIRMAN BABCOCK: Any other comments about
19 (a)?

20 HONORABLE LEVI BENTON: I'm sorry. So I
21 would, therefore, add "orders" because there might -- I
22 mean, I didn't think we did, so instead of just saying
23 "minutes" I would also add "orders."

24 CHAIRMAN BABCOCK: Okay. Any other comments
25 about (a)?

1 HONORABLE SARAH DUNCAN: I agree with Judge
2 Benton. I have always found this usage of minutes to
3 be --

4 HONORABLE LEVI BENTON: Arcane.

5 HONORABLE SARAH DUNCAN: -- incredibly
6 arcane and obtuse, and if what we're talking about is
7 judgments and orders, I think we ought to say "judgments
8 and orders."

9 HONORABLE STEPHEN YELENOSKY: Right.

10 CHAIRMAN BABCOCK: So do you want to add
11 "judgments and orders" to the list?

12 HONORABLE SARAH DUNCAN: Uh-huh.

13 HONORABLE JAN PATTERSON: We need some
14 charm, don't we?

15 HONORABLE SARAH DUNCAN: I'm sorry?

16 HONORABLE JAN PATTERSON: We need some
17 charm, don't we? I'm just kidding.

18 CHAIRMAN BABCOCK: Okay. Okay, great. (b),
19 "Remote access means" --

20 HONORABLE SARAH DUNCAN: Can we change the
21 "or" to "and," please?

22 CHAIRMAN BABCOCK: "Or" to "and"? I think
23 that's right. Is that right or not? Is that right, Judge
24 Gray? Okay. "And."

25 Okay. (b), "Remote access means searching,

1 inspecting, printing, or copying information in a case
2 record through an internet or other electronic connection
3 other than through a public access terminal supplied by a
4 court or a court clerk or a governmental entity."

5 Comments? Richard.

6 MR. ORSINGER: I think we should add the
7 word "viewing."

8 HONORABLE LEVI BENTON: I agree, too.

9 MR. MUNZINGER: Yes.

10 MR. ORSINGER: As the first word, "Remote
11 access means viewing," comma.

12 CHAIRMAN BABCOCK: Okay. Any opposition to
13 the adding of "viewing"? Okay. Keep going. Anything
14 else?

15 MR. ORSINGER: Well, I don't want
16 downloading -- is that uploading, downloading? I mean the
17 concept of --

18 HONORABLE TOM GRAY: That's bulk
19 distribution. That's another rule.

20 MR. ORSINGER: That's different? Okay.
21 What if it's just on an individual case basis I just want
22 to -- I don't want to download it. I'm not going to look
23 at it on my screen. I'm just going to find the file up
24 there, I'm going to click it, and it's going to download
25 to my hard drive.

1 PROFESSOR ALBRIGHT: That's copying.

2 MR. ORSINGER: That's copying?

3 MR. WILDER: You can print it or not

4 print --

5 (Simultaneous speakers.)

6 CHAIRMAN BABCOCK: Whoa, whoa, whoa. Do not
7 do this. She can't get it down, and we're going to have a
8 bad record. Richard Munzinger.

9 MR. MUNZINGER: The way this is now written,
10 "remote access provided by a governmental entity" would be
11 permitted, so that if I am in El Paso at the county
12 clerk's office I can access Harris County's records.
13 There is no restriction at all on the governmental entity,
14 and I wonder if that's what you want. You're giving
15 complete access remotely to all governmental entity
16 computer terminals.

17 CHAIRMAN BABCOCK: Yeah. I think that was
18 not the intent of it. What the intent was, I think from
19 prior discussions, Richard, was that if I go down to
20 Harris County, I can say to the clerk, "Hey, go back and
21 find me, Munzinger vs. Babcock" or I can sit down at a
22 terminal and I can pull up Munzinger vs. Babcock, so it's
23 the equivalent of being at the courthouse.

24 MR. MUNZINGER: I understand, but the way
25 it's written doesn't have that restriction.

1 CHAIRMAN BABCOCK: I hear you.

2 HONORABLE STEPHEN YELENOSKY: I think we're
3 making a mistake by defining "remote access" as opposed to
4 just "remote" because we want the definition of access to
5 be as broad as possible. We don't want access, and when
6 we start defining it by "searching, viewing," we're going
7 to leave out something technologically where somebody
8 says, "I didn't do any of those things. I captured the
9 digitalized information. I captured it." So don't we
10 just want to say "remote means obtained" or "accessed
11 through an internet or electronic connection"?

12 CHAIRMAN BABCOCK: Well, but we use "remote
13 access" as a term of art throughout this rule, so we --

14 HONORABLE STEPHEN YELENOSKY: Well, you can
15 use it afterwards, but when you start with viewing,
16 searching, inspecting, printing, or copying, "I captured
17 the digital information. I didn't do any of those
18 things," but access is broader than those things.

19 PROFESSOR ALBRIGHT: So you're saying that
20 remote access means access through?

21 HONORABLE STEPHEN YELENOSKY: Through.
22 Right, access through. Because I think access is much
23 broader.

24 MR. ORSINGER: We need to change viewing
25 then because --

1 HONORABLE STEPHEN YELENOSKY: No, you take
2 that out. You say "access through" and that includes
3 viewing, searching, capturing the digital information.
4 There is nothing you can get. If you say "access through
5 the internet" I think that covers everything.

6 CHAIRMAN BABCOCK: Yeah. Judge Yelenosky
7 suggests that we say, "Remote access means access through
8 an internet or other" and delete "viewing, searching
9 inspecting, printing or copying," blah-blah-blah.

10 MR. ORSINGER: Okay.

11 CHAIRMAN BABCOCK: Judge Gray.

12 HONORABLE TOM GRAY: One more time.

13 CHAIRMAN BABCOCK: Yeah. "Remote access
14 means" and then strike "viewing, searching, inspecting,
15 printing, or copying information in a case record through
16 an," add the word access -- excuse me, strike through
17 "record" and then put "access through an internet or other
18 electronic connection."

19 HONORABLE TOM GRAY: Why would you not make
20 it "Remote access means access to a case record through an
21 internet" -- leave "case record" in there?

22 PROFESSOR ALBRIGHT: Yeah. That's what I
23 was saying, too.

24 CHAIRMAN BABCOCK: Yeah. That's a good
25 suggestion.

1 HONORABLE STEPHEN YELENOSKY: Well, but then
2 we're being redundant because later we say "remote access
3 to case records" all throughout this rule. So you need
4 one or the other. If "remote access" includes to case
5 records then we shouldn't be repeating it everywhere else.

6 CHAIRMAN BABCOCK: Richard.

7 MR. MUNZINGER: I don't want to beat this
8 dead horse, but it just occurred to me that the El Paso
9 public library has public computer terminals, and the El
10 Paso public library is a governmental entity provided by
11 the City of El Paso, and once again, as written, I could
12 access this thing. So we need to tighten this up in some
13 way.

14 CHAIRMAN BABCOCK: Well, but would the El
15 Paso library have this -- the kind of access that the
16 court clerk would have?

17 MR. MUNZINGER: Well, we're talking about
18 remote access, and theoretically from a terminal in the El
19 Paso public library I can get on the internet and go to
20 Fort Worth, enter the district clerk's record in Fort
21 Worth and have access because I'm a governmental entity.
22 All I'm saying is we still don't have a geographic or
23 other restriction on the language "governmental entity,"
24 which is far too broad.

25 HONORABLE SARAH DUNCAN: Why?

1 CHAIRMAN BABCOCK: Judge Duncan.

2 HONORABLE SARAH DUNCAN: Why? What's the
3 problem with going to the library in El Paso?

4 MR. MUNZINGER: Well, I'm a company that
5 wants to get all your records, and the whole purpose of
6 this rule is to keep me from getting your records
7 remotely, so I go to the El Paso public library and use
8 the public library's terminal and use -- which I can do
9 today.

10 HONORABLE STEPHEN YELENOSKY: It decreases
11 the practical obscurity because it gives more points at
12 which you can access.

13 CHAIRMAN BABCOCK: That's not what we --

14 MR. MUNZINGER: It's not a governmental
15 entity that --

16 HONORABLE SARAH DUNCAN: But you can't get
17 anything more than the Harris or Tarrant County or El Paso
18 or Bexar or whatever clerk can make available remotely
19 under this rule.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE SARAH DUNCAN: So why do we care
22 where you're sitting when you get it?

23 HONORABLE TOM GRAY: Actually, the argument
24 here is -- remember this is other than a public access
25 terminal. You can get everything -- as it is currently

1 drafted you can get everything that is available in the
2 courthouse on the El Paso municipal library's computer.

3 HONORABLE STEPHEN YELENOSKY: Right.

4 Richard is right because in Travis County --

5 HONORABLE TOM GRAY: And that's not what we
6 intended.

7 HONORABLE STEPHEN YELENOSKY: You could go
8 into Travis County and you could pull up family court
9 records at that terminal, and what Richard is saying is by
10 this definition you could go in a library in El Paso and
11 pull up the family court records in Travis County.

12 PROFESSOR ALBRIGHT: You can only do it if
13 the access is provided by the governmental entity there.
14 This would allow -- Travis County could say, "We want to
15 make the libraries just like the clerk's office under this
16 rule." But now the libraries just have access to the
17 internet, so they can't get any more access than anybody
18 else on the internet does.

19 HONORABLE STEPHEN YELENOSKY: Well, that's
20 the philosophical question. Do we want to through the
21 rule allow clerks to decide that they can create as many
22 access points to family cases as they wish by authorizing
23 governmental entities to do that?

24 PROFESSOR ALBRIGHT: Right.

25 HONORABLE STEPHEN YELENOSKY: The way it was

1 contemplated it wouldn't happen that way. It would be
2 limited to the courthouse.

3 PROFESSOR ALBRIGHT: Right.

4 CHAIRMAN BABCOCK: Lisa.

5 MS. HOBBS: Just so you know, what we were
6 trying to capture is sometimes a clerk's office might have
7 a satellite office in another town, like I think they do
8 this up in Collin County, and we didn't want to preclude
9 if they had a, you know, satellite office where they had a
10 public access terminal. That terminal is what we were
11 trying to capture. It's not at the clerk's office
12 actually.

13 PROFESSOR ALBRIGHT: But the clerk is
14 providing it, right?

15 MS. HOBBS: But the clerk is providing it,
16 yes.

17 HONORABLE TOM GRAY: Actually, the problem
18 is that the clerk wasn't providing some of them because
19 the county provides computer terminals at that satellite
20 office. It's not actually the clerk. It's a county
21 computer, and so that was why we tried to use a more --

22 PROFESSOR ALBRIGHT: So the issue is that
23 the access is authorized by the county clerk because any
24 computer that's hooked up to the internet can access
25 whatever the clerk wants to be accessed through the

1 internet, but if the clerk wants to provide more access to
2 some particular computers, the clerk can authorize that
3 access.

4 CHAIRMAN BABCOCK: Judge Gray.

5 HONORABLE TOM GRAY: I think she just hit on
6 the fix for it. If we change the word "supplied" to
7 "authorized by a court or court clerk" and strike
8 "governmental entity," then the court or court clerk can
9 authorize that county's remote computer terminal to be a
10 public access terminal.

11 CHAIRMAN BABCOCK: That's a perfect fix.
12 All right. Any other different comments on another
13 subject on (b)? Richard, you got something on something
14 else?

15 MR. ORSINGER: Yeah. I'm wondering if maybe
16 that concept you just enunciated should be under 15.3
17 because our exclusions under 15.4 about not making medical
18 and psychiatric records available as a restriction on the
19 clerk's freedom of choice, if a clerk were to say, "I'm
20 going to make Lexis/Nexis the public access terminal for
21 all of the records in my office," they're free to do that
22 under 15.2(b) because by definition they've made
23 Lexis/Nexis their public access terminal.

24 HONORABLE STEPHEN YELENOSKY: Doesn't this
25 drive a huge loophole through 15.8, which says you can't

1 deviate without permission from the Supreme Court?

2 MR. ORSINGER: 15.4 exclusions would not
3 apply to a clerk that decides to make Lexis/Nexis a public
4 access terminal. It seems to me that the freedom or
5 restriction that you've just designed should be under 15.3
6 rather than under 15.2 or else you've given the clerks the
7 freedom to avoid 15.4.

8 HONORABLE STEPHEN YELENOSKY: Why don't we
9 just defer to 15.8? If a clerk wants to make something
10 public access outside the courthouse they go to 15.8 and
11 petition the Supreme Court to do it, and say that it's
12 only a public access terminal in the courthouse?

13 CHAIRMAN BABCOCK: Judge Gray.

14 HONORABLE TOM GRAY: No, with the caption
15 you just added, the problem is that there are clerks now
16 that don't have any paper access. Everything is remote --
17 is public access terminals --

18 CHAIRMAN BABCOCK: Right.

19 HONORABLE TOM GRAY: -- in the outer
20 offices.

21 HONORABLE STEPHEN YELENOSKY: Yeah, but you
22 just say -- you authorize it in the courthouse. If they
23 want to put it somewhere else --

24 HONORABLE TOM GRAY: What's a courthouse?
25 This is the exact discussion we had.

1 HONORABLE STEPHEN YELENOSKY: Well, okay.
2 We may play with that, but the definition would exclude as
3 broad as making Lexis public access.

4 CHAIRMAN BABCOCK: Okay. Last comment on
5 this and then we're going to move on. Sarah.

6 HONORABLE SARAH DUNCAN: It's too prevalent
7 already. We have a Bexar County district clerk terminal
8 on our counter in our clerk's office, so to make everybody
9 go get express written permission from the Supreme Court
10 for that deviation I think is burdensome.

11 CHAIRMAN BABCOCK: Yeah. We've discussed
12 this precise issue on the record before, so Lisa and the
13 Court have plenty of guidance.

14 HONORABLE SARAH DUNCAN: I wasn't finished.

15 CHAIRMAN BABCOCK: Huh?

16 HONORABLE SARAH DUNCAN: I wasn't finished,
17 but I think that the comment is correct -- never mind.

18 CHAIRMAN BABCOCK: 15.3(a). Tom, let's go
19 through this because we are running out of time, as I
20 feared.

21 HONORABLE TOM GRAY: 15.3(a), "Remote access
22 permitted," this is the one that makes it optional with
23 the court or court clerk and then goes through the list of
24 what is required in the event that they choose to have
25 public access, and for the sake of time I won't read it

1 outloud.

2 MS. HOBBS: But this is a big deviation from
3 the Judicial Council's recommendation, and I just point it
4 out. We might want to take a vote because this allows a
5 clerk the option to have a subscriber system, and the
6 Judicial Council recommended that if you do access
7 remotely we want you to have a subscriber system, even if
8 it's just a nominal, you know, sign up on my -- so I know
9 who you are kind of thing, and the idea is they're more
10 comfortable if they know who is looking at the records if
11 something happened. They would at least have the
12 universe. Instead of everybody in the world, they would
13 at least have these people who have subscribed to my
14 system.

15 CHAIRMAN BABCOCK: Judge Gray.

16 HONORABLE TOM GRAY: I'm going to move over
17 here in Richard Munzinger's seat now because it's his
18 response.

19 HONORABLE SARAH DUNCAN: It's a free
20 country.

21 PROFESSOR CARLSON: It's a free country.

22 HONORABLE TOM GRAY: "It's a free country.
23 I don't want them asking me what I want the record for, I
24 don't want them to know I've even looked at the record."
25 Since he's not here right now at this moment I thought I

1 would make that comment.

2 CHAIRMAN BABCOCK: He had to catch a plane
3 and that's --

4 HONORABLE TOM GRAY: But that's what he
5 would say, and that is the countervailing point.

6 HONORABLE JAN PATTERSON: Well done.

7 HONORABLE STEPHEN YELENOSKY: Also with
8 respect to the fee.

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: Two things. First, second
11 sentence, "If remote access is allowed procedures must"
12 and then it goes on "procedures must use appropriate
13 procedures." Grammatically that doesn't fit. I think we
14 ought to say "the county clerk must provide procedures
15 that" do something.

16 MS. HOBBS: Yes.

17 HONORABLE SARAH DUNCAN: Court or clerk.

18 MR. HAMILTON: District clerk. Then in No.
19 (2), I don't understand it. "Permit access only by case
20 number, unless the record is an index" and so forth, and
21 then what happens if it is?

22 CHAIRMAN BABCOCK: We need to add "orders or
23 judgments."

24 MR. HAMILTON: Kind of a dangling idea
25 there. I don't know what happens if it's an index,

1 calendar, docket. Then do you not get access or what?

2 HONORABLE SARAH DUNCAN: You don't -- you
3 can access it other than by case number, caption, or first
4 and last name of the party since those don't apply.

5 HONORABLE STEPHEN YELENOSKY: The docket
6 wouldn't have one case number.

7 MR. HAMILTON: "Access it by case number,
8 caption, or first and last name unless the record is an
9 index." Then what do I do?

10 HONORABLE STEPHEN YELENOSKY: Then you're
11 not limited to that. It would be conceivable under this
12 you could say, "Give me all the dockets from March," and
13 that would be permissible if the clerk wanted to allow you
14 to search that way.

15 CHAIRMAN BABCOCK: Judge Gray.

16 HONORABLE TOM GRAY: There would basically
17 on the screen there would just be a button that you would
18 select the index of all cases pending in the clerk's,
19 something of that nature.

20 CHAIRMAN BABCOCK: Okay. Let's spend the
21 couple of minutes that we have remaining on the big issue,
22 which is whether or not we make the log-in as a matter of
23 discretion or mandated. I think we know Munzinger's view,
24 and so he would be a vote for leaving it discretionary, or
25 probably he would be a vote for not having it at all, but

1 Orsinger.

2 MR. ORSINGER: Regardless of the principle
3 of access, in my view any log-in requirement is an
4 illusory requirement because a corporation can be created
5 solely for the purpose of having a log-in number and then
6 the information can go anywhere in the world for any
7 purpose. So I can see why someone would say, "I'd like to
8 have my arms around everybody so if I make a change I know
9 who to send notice to and everything," but I think a
10 log-in requirement is an illusory security.

11 CHAIRMAN BABCOCK: Lisa.

12 MS. HOBBS: The -- a 12-year-old boy at 2:00
13 o'clock in the morning is probably not going to log in --
14 I mean, he's probably not going to take the time to log
15 in.

16 CHAIRMAN BABCOCK: But he will create a
17 corporation.

18 MR. ORSINGER: A 12-year-old will just hack
19 it.

20 HONORABLE STEPHEN YELENOSKY: Well, but the
21 same thing that makes it hard for the 12-year-old will
22 make it hard for the single parent who doesn't want --
23 doesn't want to pay a fee, just wants to look at one or
24 two things.

25 CHAIRMAN BABCOCK: Yeah. That's right. So

1 the question is mandatory, discretionary, or nothing at
2 all? Elaine.

3 PROFESSOR CARLSON: I'm not as concerned
4 about subscribing or logging in as I am the fee. I favor
5 the imposition of a fee because I think it ties into bona
6 fide use of the records.

7 CHAIRMAN BABCOCK: Yeah.

8 PROFESSOR CARLSON: I've accessed a lot of
9 not court records, but records, official records in
10 Illinois dealing with my parents' estate, and in every
11 instance there was a significant fee. \$8, \$25.

12 HONORABLE STEPHEN YELENOSKY: Should it be
13 proportionate to how much you access it? Because if not
14 it becomes a burden on people who are making very limited
15 use. In other words, if it's a subscriber fee, it's
16 disproportionate for those who maybe only want to access
17 one case.

18 CHAIRMAN BABCOCK: Elaine, would you be for
19 giving the clerks discretion or would you mandate this?

20 PROFESSOR CARLSON: Well, I think the fee
21 should commensurate with the expense of the clerk's
22 office.

23 CHAIRMAN BABCOCK: But in terms of whether
24 there's even going to be a fee and a log-in and a
25 password, would that be discretionary or mandatory?

1 PROFESSOR CARLSON: I would mandate it.

2 CHAIRMAN BABCOCK: You would mandate it.

3 Okay. How many here would mandate this as opposed to
4 making it discretionary? How many would follow her lead?

5 How many would think it should be
6 discretionary?

7 HONORABLE STEPHEN YELENOSKY: Was that the
8 only other option?

9 HONORABLE SARAH DUNCAN: I was going to say,
10 was that the only other option?

11 HONORABLE STEPHEN YELENOSKY: There's a
12 third option.

13 CHAIRMAN BABCOCK: Yeah, there's a third
14 option. The third option is not to have any log-in at
15 all. How many people are in favor of that?

16 HONORABLE STEPHEN YELENOSKY: We're talking
17 about fee now?

18 CHAIRMAN BABCOCK: Huh?

19 HONORABLE STEPHEN YELENOSKY: We're talking
20 about fee?

21 CHAIRMAN BABCOCK: No. We're talking about
22 mandating some procedure. And the vote, for the record,
23 was five think it should be mandated, six think it should
24 be discretionary. The Chair, if he were to vote, would
25 vote for discretion, and Munzinger in absentia probably

1 would vote not to have any at all.

2 MR. ORSINGER: Well, let's have a showing of
3 hands. I'd like to vote for that also.

4 CHAIRMAN BABCOCK: Okay. Show of hands, how
5 many people think that there should be no log-in or
6 password requirement at all?

7 Three present that goes to -- Munzinger
8 might be a fourth, but people who are not here don't get
9 to vote, so that will give the Court a sense of our
10 depleted committee on this issue.

11 HONORABLE JAN PATTERSON: As an appellate
12 judge who didn't vote, may I give you my answer in May?

13 CHAIRMAN BABCOCK: Yes, you may.

14 HONORABLE STEPHEN YELENOSKY: After further
15 briefing?

16 HONORABLE JAN PATTERSON: After further
17 consideration.

18 CHAIRMAN BABCOCK: After further
19 consideration. Although this rule is going to the Court
20 now, so May may be too late.

21 HONORABLE STEPHEN YELENOSKY: That often
22 happens.

23 HONORABLE JAN PATTERSON: I opt in favor of
24 discretion as well.

25 CHAIRMAN BABCOCK: Okay. All right. Any

1 other parts of 15.3 that we want to discuss?

2 HONORABLE TOM GRAY: Question on 15.3(a)(2).

3 I would think that it would be useful to conduct a search
4 by the attorney or attorney of record to include in the
5 ways to access, but it has been awhile, and I don't know
6 if the people that are doing routine litigation would find
7 that useful or not, but I would like at least 30 seconds
8 of discussion on that.

9 MR. ORSINGER: Oh, I think that a lot of
10 people would be interested in seeing what kind of cases a
11 lawyer has filed. I think that would be a very important
12 public --

13 HONORABLE SARAH DUNCAN: I do, too.

14 MR. ORSINGER: -- access.

15 HONORABLE SARAH DUNCAN: That's what I was
16 going to say.

17 HONORABLE STEPHEN YELENOSKY: What about by
18 judge?

19 HONORABLE LEVI BENTON: Already have that in
20 there.

21 MR. ORSINGER: Well, you know, the judge is
22 the court, so can you search by court?

23 HONORABLE STEPHEN YELENOSKY: No, it's not
24 by the court, because in Travis County with the central
25 docket I sign orders from all nine courts.

1 MR. ORSINGER: I think that would be public
2 purpose, too, if it's possible.

3 HONORABLE STEPHEN YELENOSKY: Yeah.

4 CHAIRMAN BABCOCK: Okay. Good comment.
5 Thank you. Anything else? Tom, briefly.

6 MR. WILDER: On 15.3(b) it talks about a fee
7 authorized by law. Are we talking about 51.318 and 319 in
8 the Government Code that is sort of a generic statute?
9 Because there is no specific fee that I'm aware of listed
10 anywhere, but under that statute if you can -- a clerk can
11 recover their costs only and charge basically what their
12 costs are. Is that what we're talking about here, for the
13 record?

14 CHAIRMAN BABCOCK: Yeah. Some other people
15 -- Judge Yelenosky had some thoughts about that. That's
16 what you're thinking, Steve, I assume.

17 HONORABLE STEPHEN YELENOSKY: On the fee,
18 yeah.

19 CHAIRMAN BABCOCK: Judge Gray, did you have
20 any view on that or Judge Duncan?

21 MS. HOBBS: That was the intent of the
22 subcommittee, was to leave it as broad as the statutes
23 allow. The Supreme Court didn't want to get into saying
24 what your fee should or shouldn't be.

25 HONORABLE STEPHEN YELENOSKY: So it would

1 allow for a subscriber fee of significance regardless of
2 what you were going to access?

3 MS. HOBBS: If the Government Code allows
4 them to.

5 MR. ORSINGER: Well, see, this rule would
6 eliminate it as a profit center. Because if that's true
7 you can only recover your costs, this is not going to be
8 an additional source of income for your county after this
9 rule is adopted.

10 MR. WILDER: Absolutely. That's the only
11 statute I have that I could use, based on my knowledge.

12 MR. ORSINGER: Well, we just need to
13 understand, the Supreme Court needs to understand, this is
14 not a neutral proposition. This cuts off all of the
15 counties that are currently in it for a profit or might
16 get into it for a profit if the only authority is to
17 recapture costs.

18 CHAIRMAN BABCOCK: Judge Duncan.

19 HONORABLE SARAH DUNCAN: Under current law
20 there is only 51.318 and 319 now, but that doesn't mean
21 that tomorrow there couldn't be a bill introduced -- or
22 maybe Monday, introduced into the Legislature to permit
23 clerks to use it as a profit center.

24 CHAIRMAN BABCOCK: Yeah.

25 MR. ORSINGER: Like right now they're using

1 fax filing for a profit center without any governmental
2 authority, without any statutory authority, aren't they?

3 MR. WILDER: No. Fax filing the judges set
4 the fee.

5 MR. ORSINGER: Well, could the judges set
6 this fee also?

7 MR. WILDER: Currently the commissioners
8 court sets it, but you're giving the clerks the permission
9 to set it.

10 CHAIRMAN BABCOCK: We understand the issue.
11 Carl.

12 MR. HAMILTON: Are we ever going to get to
13 vote on this whole concept or --

14 CHAIRMAN BABCOCK: No. We -- that train
15 left the station when the Court referred this thing to us,
16 but anything else on 15.3?

17 Okay. Nothing else on 15.3. Here is
18 another issue that we left dangling yesterday and that --
19 there are two issues that we've got to talk about in eight
20 minutes. One is the situation with orders in Rule 14, and
21 I have some language for 14.3(c), which would then move
22 the current 14.3(c) into 14.3(d), but the new 14.3(c)
23 would say, "The court should avoid revealing sensitive
24 data in its orders and opinions to the extent permitted by
25 law. Nothing in this rule permits a court to redact

1 sensitive information from a court order or opinion issued
2 in the adjudication of a case."

3 The concept of those two sentences is don't
4 put it in your orders or opinions unless you have to, and
5 there may be instances where you have to, and if you do
6 have to put it into your orders or opinions, you cannot
7 redact that from the public record. That's the driving
8 force of those two sentences. Discussion?

9 HONORABLE SARAH DUNCAN: Can you read --

10 CHAIRMAN BABCOCK: Levi.

11 HONORABLE LEVI BENTON: I construed what you
12 said as not -- as avoid putting it in.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE LEVI BENTON: As opposed to don't
15 put it in. Try to avoid putting it in as opposed to don't
16 put it in.

17 CHAIRMAN BABCOCK: Right.

18 HONORABLE LEVI BENTON: Which is different.

19 CHAIRMAN BABCOCK: That's true.

20 HONORABLE LEVI BENTON: Okay.

21 CHAIRMAN BABCOCK: And because, as we
22 discussed yesterday, there are instances where either the
23 law, be it rule or statute, requires you to put sensitive
24 data in your orders.

25 HONORABLE LEVI BENTON: But even where the

1 law doesn't make that requirement you're not mandated to,
2 but you're admonished to try to avoid it.

3 HONORABLE STEPHEN YELENOSKY: Don't put it
4 in gratuitously.

5 CHAIRMAN BABCOCK: Don't put it in
6 gratuitously.

7 HONORABLE LEVI BENTON: Okay.

8 CHAIRMAN BABCOCK: Any further discussion on
9 that? Justice Duncan.

10 HONORABLE SARAH DUNCAN: No.

11 CHAIRMAN BABCOCK: No? Judge Gray.

12 HONORABLE TOM GRAY: My only comment is that
13 with the use of the sensitive data form I think you can
14 link it, and it should be a rare case indeed in which it
15 must be included.

16 CHAIRMAN BABCOCK: It may -- that may in
17 practice work out to be the case.

18 All right. We have another issue, and that
19 is the JP, municipal courts, and small claims courts.
20 What are we going to do with them on Rule 14, what are we
21 going to do with them on Rule 15? Judge Gray.

22 HONORABLE TOM GRAY: With that -- I mean,
23 this is cutting with a chainsaw right now because of the
24 urgency of getting it addressed, but I would basically
25 just say blanket under Rule 15 municipal courts and JP

1 courts cannot allow remote access to any of their records.

2 CHAIRMAN BABCOCK: On 15?

3 HONORABLE TOM GRAY: On 15, no remote access
4 to JP and municipal court records.

5 MS. HOBBS: So you're saying exclude them
6 from the sensitive data record requirements in 14, but not
7 allow them to have remote access under 15?

8 HONORABLE TOM GRAY: No. Just addressing 15
9 first, no remote access to any of their records. On
10 sensitive data, I would -- my recollection is it would not
11 be a problem until it became a contested case that
12 citation -- I don't want to say is not publicly available,
13 but the citation is seen only by the officer and the
14 person who receives it until it goes into the court clerk
15 or the judge's clerk and the jacket is created.

16 I just -- the mechanics of how to keep it
17 from having the sensitive data in it is almost too
18 cumbersome to address under the rule, and I would probably
19 exempt it from the requirement of the sensitive data form
20 until such time as it becomes a contested case, and at
21 that point -- and I mean contested case by the fact that a
22 complaint is filed, meaning that it's going to go to a
23 determination by the municipal judge or the JP and the
24 affidavit is filled out.

25 CHAIRMAN BABCOCK: Okay. We've got two

1 different things going on here. Let's take the first one
2 first. Your proposition is to not permit remote access to
3 JP, municipal, and small claims courts.

4 HONORABLE TOM GRAY: Yes.

5 CHAIRMAN BABCOCK: Okay. What's everybody
6 think about that? Judge Benton.

7 HONORABLE LEVI BENTON: I disagree. Those
8 are the cases where the -- where perhaps most need access,
9 although I'm concerned about the data that's out there.
10 Well, that's where your forcible entry and detainer
11 actions are. There is a lot of things that folks want to
12 know about, how management companies are operating, that
13 would otherwise not be available. Dealing with tenants.

14 HONORABLE TOM GRAY: Why would it not be
15 available?

16 HONORABLE LEVI BENTON: I'm sorry, would be
17 available at a greater cost and greater inconvenience.

18 CHAIRMAN BABCOCK: Richard Orsinger.

19 MR. ORSINGER: I would propose that we make
20 those courts subject to the rule except we say "except
21 for eviction cases" because I think there is a legitimate
22 interest in the apartment owners association and others to
23 be able to develop a database about problem renters, and I
24 don't see that --

25 HONORABLE STEPHEN YELENOSKY: Or problem

1 landlords.

2 MR. ORSINGER: Or problem landlords. I
3 don't see the eviction cases will contain the sensitive
4 data, so could we except that out and otherwise restrict
5 them?

6 CHAIRMAN BABCOCK: Buddy Low.

7 MR. LOW: Richard, right now they have their
8 own rules, and they say, though, that district court rules
9 govern except, you know, as provided herein. So wouldn't
10 you want a rule like that and say "these rules apply to
11 those except," and then do the exceptions like he's
12 talking about. It's Rule 523, draw a rule like 523, and
13 then put "except" and get with the JPs and see how they --
14 what they need to except, because I don't know.

15 CHAIRMAN BABCOCK: Does having two hands up
16 in the air mean you get to talk next?

17 MR. LOW: Hey, whoa. Is he surrendering or
18 attacking?

19 MR. HAMILTON: I don't think we need to mess
20 with 15 because it's discretionary with them whether they
21 allow remote access anyway, so just leave them all in
22 there.

23 CHAIRMAN BABCOCK: Judge Gray. You
24 obviously had a revelation.

25 HONORABLE TOM GRAY: Well, in a way. It may

1 or may not be, but the distinction is, the dichotomy is,
2 it's the criminal cases that are presenting the problem,
3 and don't let them put any criminal on remote access.
4 That eliminates the problem with the landlord/tenant
5 situations, the civil cases, and exempt the -- those
6 cases, the criminal cases, from the sensitive data form at
7 least for the time being until we can figure out another
8 fix for that and then require it in the civil cases that
9 are filed in JP court.

10 CHAIRMAN BABCOCK: Okay. Fitting that you
11 get the last word today. The subcommittee did an
12 unbelievable job, and thank you all for being here today.
13 You get two gold stars by your name for being at today's
14 session.

15 I don't know what the Court wants to do, but
16 there was a strong order to us to get this done in this
17 kind of unscheduled emergency session. It may be that the
18 Court finds it too difficult to come up with a rule and
19 they ask us to come back at a later time and give them
20 more of our wisdom, but I think the plan is that the Court
21 itself is going to take this up in two weeks. So Lisa
22 will do her -- work her magic on the proposal and get it
23 to the Court and then we'll hear.

24 We are scheduled for a May meeting. There
25 is some uncertainty about that because it is almost for

1 certain that I'll be in trial in Chicago at that time, and
2 I'm going to talk to Justice Hecht about what he wants to
3 do, whether -- well, what he wants to do in that event,
4 and I'm not suggesting I'm by any means indispensable. So
5 there we are, and we're adjourned. Thank you very much.

6 HONORABLE DAVID PEEPLES: While we're on the
7 record, the Supreme Court must not be under the
8 misimpression that simply because we voted section by
9 section and word by word that we approved the policy
10 decisions embedded in here. Because now that we've gone
11 through it we have not had a chance to revisit those, and
12 some of us had serious misgivings about some of these, and
13 the Court should not be under the erroneous impression
14 that all of our votes add up to endorsement of the policy
15 decisions made.

16 CHAIRMAN BABCOCK: Yeah. I think that's a
17 fair comment, Judge Peeples. I think that in terms of the
18 policy there are views across the spectrum on this, and I
19 think if the Court were to look at our body of work they
20 would see those different views come through. Thank you.

21 (Adjourned at 10:57 a.m.)

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2 CERTIFICATION OF THE MEETING OF
3 THE SUPREME COURT ADVISORY COMMITTEE

4 * * * * *

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7 I, D'LOIS L. JONES, Certified Shorthand
8 Reporter, State of Texas, hereby certify that I reported
9 the above meeting of the Supreme Court Advisory Committee
10 on the 2nd day of April, 2005, Saturday Session, and the
11 same was thereafter reduced to computer transcription by
12 me.

13 I further certify that the costs for my
14 services in the matter are \$_____.

15 Charged to: Jackson Walker, L.L.P.

16 Given under my hand and seal of office on
17 this the _____ day of _____, 2005.

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