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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

August 24, 2007

(FRIDAY SESSION)

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Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in Travis County for the State of
Texas, reported by machine shorthand method, on the 24th
day of August, 2007, between the hours of 9:02 a.m. and
5:02 p.m., at the Texas Law Center, 1414 Colorado, Room
101, Austin, Texas 78701.

INDEX OF VOTES

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Documents referenced in this session

07-15	Draft e-filing rules for JP courts
07-16	Memo from Mike Hatchell, MDL remand Rule 13.7
07-17	Complex cases draft
07-18	Letter from Steve Bresnen, re: complex cases
07-19	Letter from Tommy Bastian, re: home equity loan foreclosure task force
07-20	Proposed TRCP, re: automatic substitution of current state officers as successors in suits

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2 CHAIRMAN BABCOCK: Okay. We are on the
3 record. Welcome, everybody, to the August 24th meeting of
4 the Supreme Court Advisory Committee. Is that Buddy down
5 there yapping? All right, Buddy, come on.

6 All right. Welcome, everybody. Justice
7 Hecht, as usual, will lead off with a report, although
8 maybe not much to report over the summer.

9 HONORABLE NATHAN HECHT: No, not much to
10 report, but I just -- we'll get to it in just a moment it
11 looks like, it's first up, but I want to say how pleased
12 we are with the hard work that Judge Lawrence's task force
13 has done on these justice court e-filing rules, and we
14 really are trying to get these in place by January the
15 1st. They'll cover a lot of cases and a lot of different
16 kinds of cases.

17 The -- I went to part of the meeting that
18 they had, and we had a lot of good input into these, and
19 it just reminds me again that we call on so many people to
20 volunteer to make these processes work and they do such a
21 good job, and, of course, the Court's indebted to them for
22 agreeing to do it and for completing their work, but also
23 the whole system is in their debt, so I just want to say
24 that before we start, but that's all I think I have.

25 CHAIRMAN BABCOCK: Okay. Well, let's get

1 right to JP e-filing rules. I know we have a couple of
2 guests, Mike Griffith and Alan Martin, who are here as
3 resources for us, and I'll turn it over to Judge Lawrence,
4 wherever he is. There he is.

5 HONORABLE TOM LAWRENCE: Okay. You have in
6 your handouts something from Jody Hughes about e-filing, a
7 fairly thick document. There is an introduction, but
8 basically last May 11th -- no, when did they appoint this?
9 It was about seven or eight weeks ago, I guess, the
10 Supreme Court appointed an e-filing committee, and it was
11 a combination of some very experienced JPs in the state
12 plus technical people and some clerks, county and district
13 clerks, and others that have had some experience with
14 e-filing rules to respond to a legislative mandate to come
15 up with e-filing rules to be promulgated by the Court by
16 January the 1st. So Justice Hecht kindly gave us a full
17 seven weeks to get this project up and going. So we --
18 and we met the deadline, and we have a finished version.

19 What you have in the first few pages is kind
20 of an explanation, and then after that is the order
21 appointing the task force, and then we get into what we
22 call the clean version of the rules. After we had gone
23 through all of our discussions and changes, we have a
24 clean version, and then at the end of that is kind of a
25 redline version showing some of the changes that we went

1 through. We were greatly assisted in that there are, of
2 course, as you know, e-filing rules in effect now for the
3 county and district courts that have been in effect for
4 sometime that Jody Hughes administers as part of his job,
5 and we also have two guests here today that were
6 instrumental in formulating these rules and also have a
7 lot to do with the e-filing rules, and that is Mike
8 Griffith, who I'll ask to stand, with Bearing Point --
9 he's with TexasOnline, and then the next one is Alan
10 Martin with the Texas DIR, which actually oversees all of
11 this, and they were at an initial meeting that we had in
12 Austin, and they participated in all of the various
13 e-mails that we had.

14 We started out with the premise that we
15 would try to piggyback as much as possible on the existing
16 e-filing rules for county and district court, knowing that
17 there would have to be some changes, and we had a full-day
18 meeting here in Austin where we actually formulated a plan
19 and went through the rules one by one. Realizing that
20 some of the things would have to be changed, we made those
21 changes. Some of the changes that are made were actually
22 changes that probably the county and district court
23 e-filing rules may want to change themselves, some
24 suggestions that they made that would improve it. Others
25 were changes that needed to be made simply because of the

1 nature of the JP courts.

2 And then we initially had a plan that the
3 acceptance of these rules would be on a county-by-county
4 basis like the existing e-filing rules are, and we would
5 have some accommodation of a majority vote or some other
6 type of a vote by the JPs within that county to decide to
7 do it, and then only those courts that wanted to opt in
8 could opt in, and when we left the meeting that was the
9 plan, but when we got back the next week we started
10 thinking about it and realized that a better way to do it
11 was to establish simply a statewide e-filing rule that
12 would not -- probably not be amended as it is done now
13 sometimes on a county-by-county basis, but it would be
14 statewide e-filing rule that each JP court in the state
15 could choose to opt in or opt out voluntarily, and it
16 would not depend on what other courts in that county
17 wanted to do, each court could make their own decision.

18 We thought that was a better system, and
19 that's the way the rule ended up being devised. We had a
20 few other problems as we got into it, but actually the
21 process went pretty good. It was an excellent committee,
22 and I guess if there are no preliminary questions, we'll
23 go ahead and get started. Anybody have any preliminary
24 questions? Jody, you want to add anything else?

25 MR. HUGHES: We have a question --

1 HONORABLE SARAH DUNCAN: We have a question.

2 MR. HUGHES: -- from Sarah over here.

3 HONORABLE SARAH DUNCAN: What is it in the
4 legislation, Tom, that you think enables an opt-in system
5 as opposed to a mandatory system for all JP courts?

6 HONORABLE TOM LAWRENCE: Well, the
7 legislation just simply tells the -- well, the county and
8 districts now are essentially opt-in. They don't have to
9 participate now in the e-filing if they don't want to, and
10 the Legislature didn't speak to whether or not it was
11 mandatory or silent, so we are simply parroting the
12 existing framework of that. Also, there is another factor
13 involved, and the silent partner in this are the county
14 commissioners courts. Nothing is going to happen unless
15 they vote the money to approve the e-filing for that
16 individual county, so they really are a -- you couldn't
17 mandate a statewide system where the counties had to
18 provide money unless you had some framework for doing
19 that, so this was what made sense under the existing
20 rules.

21 Okay. If you'll turn to page six of the
22 handout, we'll just go through this one-by-one. "General
23 Provisions, Part 1, Rule 1.1, scope. These rules govern
24 the electronic filing and service of court documents in
25 civil cases in all justice of the peace courts that accept

1 electronic filing. These rules are adopted pursuant to
2 Texas Government Code 22.004(f) and may be known as the
3 statewide rules concerning the electronic filing of
4 documents in participating justice of the peace courts."

5 There was some initial discussion as to
6 whether or not the small claims court was considered in
7 the definition of justice of the peace courts. We
8 resolved that. It is our opinion that this would apply to
9 a small claims court case, a justice court case filed
10 under the Rules of Civil Procedure, as well as an eviction
11 case, and in the definitions we further define that and we
12 exclude criminal cases, exclude cases where the JP is
13 acting as a magistrate. If I don't hear anything I'll
14 assume that I'll just keep moving.

15 HONORABLE TOM GRAY: Okay, I'll say
16 something then. The use of the term "court documents," I
17 think you could strike the term "court," because they're
18 at some point party's documents or other's documents and
19 not necessarily court documents. That's just a -- court
20 document has a very specific use of whether or not it's
21 become a state record, and it probably has not, at least
22 with regard to many of the documents that will be
23 referenced throughout the rest of these rules. But other
24 than that comment, please proceed.

25 HONORABLE TOM LAWRENCE: Okay. All right.

1 "Rule 1.2, electronic filing, (a), except as provided by
2 subsection (b) below and subject to Rule 5.1(b), the
3 electronic filing and service of court documents is wholly
4 optional." That is wholly optional both on the part of
5 the Court to accept it and wholly optional on the part of
6 the parties; and then part (b), though, says that "A
7 justice of the peace court may order any party or parties
8 in a particular case to electronically file, serve, or
9 file and serve court documents that are permitted to be
10 electronically filed under Rule 3.1." So we are giving
11 the JP court the ability if they want to in a particular
12 case to order all parties to file some or all of the
13 documents or serve some or all of the documents.

14 CHAIRMAN BABCOCK: Justice Duncan.

15 HONORABLE SARAH DUNCAN: So what happens if
16 a party or an attorney doesn't have the ability to e-file
17 and is ordered to e-file in a particular case?

18 HONORABLE TOM LAWRENCE: I think we talked
19 about that, Jody. I think it was just assumed that the
20 court would not order someone in that situation to do that
21 if they didn't have the ability. Correct me if I'm wrong,
22 my resource guys right here.

23 HONORABLE SARAH DUNCAN: For the record, I
24 wouldn't make that assumption.

25 MR. HUGHES: Yeah, I think that's right, it

1 was that this does give the court some discretion, but it
2 was presumed that the court would not abuse the discretion
3 in that regard.

4 HONORABLE SARAH DUNCAN: It would certainly
5 be an easy way to dispense with a pro se case.

6 HONORABLE TOM LAWRENCE: I'm sorry, what?

7 CHAIRMAN BABCOCK: What kind of case?

8 HONORABLE SARAH DUNCAN: A pro se case.

9 CHAIRMAN BABCOCK: Pro se case.

10 HONORABLE SARAH DUNCAN: Is just to order
11 somebody that can't e-file to e-file and then they
12 couldn't file any documents and then you render judgment
13 against them.

14 CHAIRMAN BABCOCK: Elaine.

15 PROFESSOR CARLSON: We ran across that issue
16 years ago when we were looking at fax filing, and I
17 believe we put in "if feasible" or "if available," that
18 you could accomplish service party to party, if feasible.
19 And if a person wants to give their fax, telecopier
20 number, I think we called it, "if available," so we could
21 try something like that.

22 CHAIRMAN BABCOCK: How does everybody feel
23 about that? Justice Bland.

24 HONORABLE JANE BLAND: I agree with Sarah.
25 I don't -- I don't think ordering people to e-file in the

1 justice courts is good to be in the rule this way, because
2 so many people in justice courts don't have access to
3 computers. You know, libraries are full of people waiting
4 to get on the computer because they don't have a computer,
5 and justice courts are predominantly pro se people.

6 HONORABLE TOM LAWRENCE: Well, I don't know
7 about predominantly, certainly a majority, but we have an
8 awful lot of attorneys, and with the jurisdictional limit
9 going up to 10,000, the percentage of attorneys probably
10 will increase, but substantially pro se, no question about
11 that.

12 HONORABLE JANE BLAND: Well, and certainly
13 they can e-file if they want to, but it seems like for
14 people that can't e-file --

15 HONORABLE SARAH DUNCAN: I also have to say
16 I think it's ironic that we're not going to make this a
17 mandatory system for the justice courts, but they can make
18 it mandatory for any party or attorney they want to make
19 it mandatory for, for whatever reason. That's just ironic
20 to me.

21 HONORABLE TOM LAWRENCE: Well, of course,
22 that parallels the county and district court e-filing
23 rules, doesn't it, Jody, where the court can order it to
24 be mandatory then?

25 MR. HUGHES: Yeah.

1 HONORABLE TOM LAWRENCE: So that's why this
2 is here, is because that's part of the county and district
3 court.

4 CHAIRMAN BABCOCK: Elaine.

5 PROFESSOR CARLSON: Tom, can I ask you a
6 question? Over on 4.5, it kind of ties into Sarah's
7 comment, "The justice of the peace court may maintain and
8 make available electronically filed documents in any
9 manner allowed by law." What are the manners allowed by
10 law? So let's say you do have a pro se litigant and the
11 other side files electronically. How do they check that?

12 HONORABLE TOM LAWRENCE: We have electronic
13 docket books now or most courts have -- let me rephrase
14 that. Courts are allowed by law to have electronic docket
15 books, so if they would -- someone would be able to come
16 in and get a printout or if they have a dumb terminal they
17 could come in and we could put something on the screen
18 that they could look at. The other alternative is that if
19 there are no electronic dockets, they could come in and
20 look at the paper dockets, the paper files. And most
21 courts probably have a combination of both, both
22 electronic and paper.

23 PROFESSOR CARLSON: Thank you.

24 CHAIRMAN BABCOCK: Anybody else think that
25 this is a problem, that the ability of a judge to make it

1 mandatory for a litigant in JP court to file by electronic
2 filing? Yeah.

3 HONORABLE JAN PATTERSON: I agree with
4 the -- oh, did you call on me?

5 CHAIRMAN BABCOCK: Yeah, I did.

6 HONORABLE JAN PATTERSON: I agree with the
7 concerns raised, but if -- but I at least think that if
8 we're going to go with this draft that we ought to remove
9 the word "wholly," because it almost could be ridiculed,
10 "It's wholly optional, but a judge may order," so at least
11 say it's optional but there's a (b). It's not wholly
12 optional in any event.

13 CHAIRMAN BABCOCK: Okay. Richard.

14 MR. ORSINGER: I would ask the question
15 about what -- what is the court clerk or the judge
16 supposed to do when a pro se litigant offers a document in
17 writing after they've been ordered to submit it only
18 electronically? Does the court refuse to accept the
19 document or does the court hold the litigant in contempt?

20 HONORABLE TOM LAWRENCE: Well, I would hope
21 that a court would not refuse to accept the document in
22 that situation.

23 MR. ORSINGER: So then the only enforcement
24 mechanism would be to punish the litigant in some way,
25 right?

1 HONORABLE TOM LAWRENCE: Well, we never
2 discussed what would happen if someone -- the committee
3 never got into that detail.

4 MR. ORSINGER: Well, if the practicality of
5 it is that no court is going to put a litigant in jail for
6 hand-filing a document and contrary to an order and if the
7 court is going to accept a paper filing even though it's
8 been ordered to file only electronically, then as a
9 practical matter we don't have a problem that a litigant
10 will be denied due process because of this order.

11 HONORABLE TOM LAWRENCE: Well, the
12 discussion at the committee meeting from the clerks and
13 some of the people involved in this is that this happens
14 generally when the parties want it to happen because there
15 are so many documents in a case that the parties don't
16 want to have to file things mechanically, they want to do
17 it electronically. So it usually happens in response to
18 all the parties saying, "Please let us do it like that."
19 That's what we're told.

20 HONORABLE KENT SULLIVAN: Then in my
21 estimation the rule should say that the parties can agree
22 to do so. I share the concerns that were expressed
23 earlier. This is a court that is most likely to see pro
24 se litigants and least likely to produce sophisticated
25 litigants because the amount of controversy required are

1 the lowest in our system. It should be the most
2 user-friendly category of courts that we have in our
3 judicial system, and the notion that a court in this
4 category of courts can order litigants who are
5 predominantly pro se litigants to electronically file, to
6 me is completely inconsistent with the model of the court
7 system that we have.

8 CHAIRMAN BABCOCK: Okay. Yeah. Justice
9 Gaultney.

10 HONORABLE DAVID GAULTNEY: Under this rule,
11 could a particular court in a busy county decide that
12 they're going to have a standing order in every case, that
13 all filings will be electronic? And if so, I think then
14 you do have a problem where in small claims court or
15 something like that, you have an accessibility problem.

16 HONORABLE TOM LAWRENCE: Well, I suppose
17 that that could happen, but it could also happen now in
18 county and district court under those rules.

19 HONORABLE DAVID GAULTNEY: Right. And I
20 guess that's part of my concern, is I think there might be
21 clerks or perhaps -- who may refuse to file a written
22 document if there is an order from a district court that
23 says "all filings will be electronic" and if this were --
24 so I think there is some concern with making -- with not
25 having an out for those who have inability to file

1 electronically in my --

2 CHAIRMAN BABCOCK: Jody's got the answer for
3 us.

4 MR. HUGHES: Just to address Justice
5 Gaultney's point in 1.2(b), the language on that first
6 line, "A party or parties in a particular case," I think
7 is intended to preclude kind of a broad standing order and
8 make it be that the judge would have to order it in a --
9 you know, those particular parties in the case that's
10 before the judge.

11 HONORABLE DAVID GAULTNEY: Yeah, I
12 understand that, but if it's the routine of the judge to
13 make that order in every case -- or you're saying that
14 that language would preclude him from doing that?

15 MR. HUGHES: At least in terms, I think, of
16 a standing order that says the judge puts out and tacks up
17 in the -- you know, the bulletin board of the courthouse
18 that says "in all cases or all certain kinds of cases the
19 parties shall e-file," I think that would be contrary to
20 the particular case language.

21 CHAIRMAN BABCOCK: Does Elaine's suggestion
22 fix it if we put in "feasible" in there? Any harm in
23 doing that, Tom?

24 HONORABLE TOM LAWRENCE: I don't think so,
25 no. That's fine.

1 CHAIRMAN BABCOCK: Richard Munzinger.

2 MR. MUNZINGER: Without intending to offend
3 any judge present --

4 CHAIRMAN BABCOCK: You mean this in the
5 nicest possible way.

6 HONORABLE TRACY CHRISTOPHER: Just say,
7 "with all due respect."

8 MR. MUNZINGER: The problem is that the
9 judge is the person who determines the feasibility, and if
10 the judge is intent that there will be no electronic
11 filings in his or her court, the judge simply states, "I
12 find it's feasible." I have practiced a long time, and I
13 have run into a lot of different judges at different
14 levels from the Federal court to the justice court, and
15 I've found that they're all human and the less discretion
16 that you give them to deprive a pro se litigant of
17 justice, the better for the state.

18 CHAIRMAN BABCOCK: You know, over the years
19 I've noticed you have a rougher practice than most of us.

20 MR. ORSINGER: He's out on the frontier.

21 CHAIRMAN BABCOCK: You're absolutely with
22 this frontier justice.

23 Okay. Yeah, Judge Christopher.

24 HONORABLE TRACY CHRISTOPHER: I have ordered
25 electronic filing in some cases, and I'll just kind of

1 tell you what I did and the order that I sent out, and
2 it's not a standing order, but it was -- I basically went
3 through all my new case filings and looked at the type of
4 case and the parties involved, and I automatically
5 excluded anyone that was pro se, because I thought it was
6 too difficult to require a pro se to do electronic filing,
7 and I also for the most part excluded solo practitioners
8 because I felt that they perhaps weren't up to speed on
9 electronic filing also, and so then I sent out an order
10 that says, "You're going to have to electronically file
11 unless you file an objection within ten days." So, you
12 know, I think that you need some of those sort of
13 safeguards in this kind of an order, so I think it's very
14 difficult for pro ses to be, you know, forced to do that,
15 and I think people ought to be able to object to it.

16 CHAIRMAN BABCOCK: Okay. Carlos.

17 MR. LOPEZ: I'm going to stand up because
18 I'm kind of over here in the peanut gallery, but, you
19 know, obviously as a county court I used to do JP appeals,
20 so I would see the litigants that were there, but I
21 wouldn't actually see them while they were in JP court,
22 but earlier as a prosecutor I would cover some JP courts,
23 and so I know that it's somewhat subject to local flavor,
24 but certainly in the Dallas JP courts, I would -- I would
25 urge everybody to think about the fact that most of the

1 people in my experience don't have PCs, don't have
2 internet access. It's changing obviously, and maybe five
3 years from now that won't be the case, but I would be
4 vehemently opposed to any system that doesn't contain a
5 complete opt-out for whoever wants to opt out.

6 In other words, I like the idea of there
7 being a structure in place, a predetermined structure that
8 says if we're going to do it, if everybody agrees, then
9 this is what it's going to look like so that you don't
10 have an ad hoc version of electronic filing in each
11 individual case like I used to have when I was on the
12 district court. We had electronic -- much like Judge
13 Christopher, but we did it differently every way. It was
14 just kind of cobbled together by what the parties wanted
15 to do, and I can see why that's not a great idea. I like
16 the idea of having a preset framework so that if the
17 parties opt into it, here's what it looks like, but if
18 they don't opt into it it can't be forced on them,
19 certainly not in JP court.

20 CHAIRMAN BABCOCK: Kent.

21 HONORABLE KENT SULLIVAN: The need to file
22 objections or even opt-outs I think is problematic. The
23 more that you have to do to avoid falling into some trap
24 as a litigant, particularly a pro se litigant, the less
25 user-friendly the court is, and I think that the key

1 ingredient, particularly for a JP court, is
2 user-friendliness.

3 CHAIRMAN BABCOCK: Okay. Sarah.

4 HONORABLE SARAH DUNCAN: I completely agree
5 with what's been said, and there's also just the
6 constitutional problem. There are incarcerated civil
7 litigants who don't have necessarily -- Professor Carlson
8 is correcting me that they probably have the best access.
9 Since they have a hard time getting a postmark I find that
10 hard to believe. I just -- I think what Judge
11 Christopher's system is is a good place to start, but I
12 have to say I agree with Judge Sullivan that I'm concerned
13 about putting the burden on a pro se litigant to object
14 and get the grounds that might convince the judge not to
15 order electronic filing, heaven forbid, prevail on appeal
16 to show an abuse of discretion for an e-filing order.

17 CHAIRMAN BABCOCK: Well --

18 HONORABLE JAN PATTERSON: Don't we agree on
19 this?

20 CHAIRMAN BABCOCK: So if everybody -- what I
21 think, if people think "if feasible" is not strong enough,
22 it sounds like you're moving toward "if the parties
23 agree." Justice Gray.

24 HONORABLE TOM GRAY: I was just going to say
25 to add into the mix that many pro se parties are paupers,

1 and I didn't entirely understand or didn't begin to
2 understand how a pauper pays the online fees and the third
3 party service provider fee if they fall into one of these
4 mandatory orders.

5 CHAIRMAN BABCOCK: Yeah. Yeah. Hayes.

6 MR. FULLER: Chip, why would it be important
7 for a justice to be able to order electronic filing in a
8 particular case? If it's optional, it's optional, and, I
9 mean, I can understand that perhaps in district court, but
10 I'm not sure why -- why a justice court would need to
11 order electronic filing in a particular case.

12 HONORABLE TOM LAWRENCE: Well, because this
13 is the rule in county and district court of e-filing, and
14 the clerks that were there -- we had clerks I think from
15 three -- we had Dianne Wilson from Fort Bend County, we
16 had somebody from San Antonio and somebody from Travis
17 County. They argued and some of the judges and attorneys
18 that had dealt with it argued that it was a good thing
19 because it gave the judge the ability to order that and
20 the parties wanted that. They said it's -- that it works
21 out well, that there was no indication of abuse. If you
22 want to take it out, that's fine. It's not -- you know,
23 it's not a problem. It was something that some of the
24 clerks argued would be helpful, but we can take it out.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. HARWELL: It seems to me that if you
2 take it out, the "optional" covers your bases with that.
3 And also, are we going to revisit the county and district
4 clerk e-filing rules after we go through this?

5 CHAIRMAN BABCOCK: Not today.

6 MR. HARWELL: No, not today, but I mean, it
7 seems like we're going to have a really good discussion on
8 this, and some things, some parts of those e-filing rules
9 may be able to be upgraded once we go through this
10 process.

11 CHAIRMAN BABCOCK: Yeah. Good point. Well,
12 it seems to me like there's consensus, unless there is a
13 silent majority who really want this language, that it
14 ought to be with the agreement of the parties, the judge
15 can order it but only if the parties agree.

16 PROFESSOR HOFFMAN: Why is it agreement? I
17 mean, I don't -- I hate to distinguish between things that
18 are filed and things that are served. I mean, obviously
19 if we're talking about service, you would want agreement,
20 but if it's just filing, why couldn't that be unilateral
21 so that the option would be if you want to file that way
22 you can, you know, if the other side hasn't opted in
23 you're going to have to serve them the good, old-fashioned
24 way.

25 CHAIRMAN BABCOCK: Well, because I think

1 we're talking about 1.2(b) here, which is where the judge
2 orders it, and the way it's written now it looks like the
3 judge can order it just if the judge wants to, and people
4 have suggested that that's not fair in JP court.

5 HONORABLE SARAH DUNCAN: I think, Professor
6 Hoffman, why do they need to order it if the people agree
7 to do it? If we're going to say you can only order it if
8 the parties agree, well, if the parties agree, why do you
9 need an order, because then somebody's computer could be
10 down, they can't e-file that day, and they get held in
11 contempt. You have contempt proceedings because they
12 couldn't -- just let them agree to do it, and they do it.

13 CHAIRMAN BABCOCK: Richard.

14 MR. ORSINGER: I think that the point that
15 was being made is, is that you should always have the
16 right to electronic filing if you want to, and you should
17 only be able to electronic serve by agreement. You
18 wouldn't want to say that a person cannot electronically
19 file unless the opposing party permits it because, what
20 the heck, the system is there, it's a unilateral act, the
21 other side will get a paper copy, and so they need to
22 break the two apart, and it ought to be always e-filing
23 should be available and the dispute is over e-service.

24 MR. WATSON: Correct.

25 HONORABLE SARAH DUNCAN: Good point.

1 PROFESSOR HOFFMAN: Correct.

2 CHAIRMAN BABCOCK: Okay. So is the solution
3 to just take (b) out of this?

4 HONORABLE TOM LAWRENCE: Well, I think you
5 would have to take (b) out and then you'd have to take
6 everything in (a) out up to (b), electronic filing.

7 HONORABLE TERRY JENNINGS: You would have to
8 rephrase it somehow.

9 HONORABLE TOM LAWRENCE: Let's see if we've
10 got a rule.

11 CHAIRMAN BABCOCK: Well, is that what people
12 think is the best thing to do? Carl.

13 MR. HAMILTON: Yes.

14 CHAIRMAN BABCOCK: Carl thinks so. Well,
15 then it's unanimous. The great dissenter.

16 HONORABLE SARAH DUNCAN: I'm sorry. Take
17 out everything --

18 HONORABLE TOM GRAY: It would say, "The
19 electronic filing and service of court documents is wholly
20 optional." Although you could take out some of that
21 language as well.

22 HONORABLE TOM LAWRENCE: Will that work,
23 Jody?

24 HONORABLE SARAH DUNCAN: Don't you take out
25 "and service"?

1 MR. HUGHES: Well, service is covered under
2 Rule 5, and maybe Rule 1.2 is a little awkward in the
3 sense that it's purporting to cover both filing and
4 service, but then it really says that the service part is
5 covered under Rule 5, and I think part of the intent on
6 that was to get it up front so that people when they're
7 just looking at the beginning of the rule can at least see
8 where it's covered, but it might make more sense, I think
9 as Richard suggested, to just wholly separate them and
10 say, "Filing is completely optional. Service is covered
11 under Rule 5."

12 CHAIRMAN BABCOCK: Okay. Justice Jennings.

13 HONORABLE TERRY JENNINGS: Would it be
14 possible when someone is filing their papers that there
15 could be a check off point where someone could check off,
16 "I'd like to file my papers electronically," and would
17 that help the clerks maybe?

18 HONORABLE TOM LAWRENCE: Well, if they file
19 it then they've already made that decision when they file
20 it.

21 HONORABLE TERRY JENNINGS: When they file
22 their initial papers.

23 HONORABLE TOM LAWRENCE: Well, we're going
24 to get to the service with the responses a little bit
25 later in the rules.

1 HONORABLE TERRY JENNINGS: No, no. I'm not
2 talking about service. If a party wants to file
3 everything they have electronically, can they just when
4 they initially file their suit just have like a document
5 they could check off "I'm going to file everything
6 electronically" and if the other party doesn't do that
7 then, of course, we could talk about service later.

8 HONORABLE TOM LAWRENCE: Well, I mean, I
9 don't think they have to check anything. They just simply
10 file it if they want to do it electronically.

11 HONORABLE TERRY JENNINGS: I'm talking about
12 subsequent documents.

13 HONORABLE TOM LAWRENCE: Well, I mean, I
14 think they would have the ability to file whatever they
15 want to file electronically once the initial suit is filed
16 if they choose to do it.

17 CHAIRMAN BABCOCK: So would it be
18 appropriate in this Rule 1.2 to say, "The electronic
19 filing of court documents is wholly optional"? Does that
20 cause any heartburn for anybody?

21 PROFESSOR HOFFMAN: Just the "wholly."

22 MR. ORSINGER: I just think you ought to say
23 wholly optional with who because if it's wholly optional
24 with the judge then you may be denying to the parties the
25 option, so can we -- I mean, is it necessary to say that

1 it's optional with the party, or does everyone understand
2 that that means the party?

3 CHAIRMAN BABCOCK: Well, it means both,
4 doesn't it?

5 MR. ORSINGER: Well, it shouldn't be
6 optional with the judge. The judges ought to be required
7 to accept electronic filing. I think at least --

8 HONORABLE TOM LAWRENCE: No.

9 HONORABLE SARAH DUNCAN: That was my point
10 initially, and I got shut down.

11 CHAIRMAN BABCOCK: Yeah.

12 MR. ORSINGER: We're not going to -- okay.

13 HONORABLE SARAH DUNCAN: It's an opt-in
14 system.

15 MR. ORSINGER: Well, I know that it's
16 optional as to whether you force everybody to file, but
17 you're saying it's optional whether you allow anybody to
18 file? Okay. I understand now.

19 HONORABLE SARAH DUNCAN: Right. It's an
20 opt-in system by the court.

21 MR. ORSINGER: Okay.

22 HONORABLE NATHAN HECHT: Because of funding.

23 MR. ORSINGER: Then it's not wholly
24 optional, is it?

25 PROFESSOR CARLSON: No.

1 MR. ORSINGER: For a litigant. So then we
2 better not say "optional by a party."

3 HONORABLE TERRY JENNINGS: That's what I'm
4 trying to get at, is can a party notify the court "I'd
5 like to do this" and the court says "okay"?

6 CHAIRMAN BABCOCK: Professor Hoffman.

7 PROFESSOR HOFFMAN: Okay, so, first,
8 whatever language -- again, I agree with Jan we should
9 take out the word "wholly." So if it's optional, it's
10 optional. We ought not to make it super double optional,
11 whatever that means. It's a strange word, so that's one.

12 Then what about -- so let me just sort of
13 throw out some language to fix it. I think this gets at
14 what Judge Lawrence was talking about. "Except as
15 provided," so-and-so, "subject to 5.1, where the court
16 allows electronic filing and service to take place," you
17 know, "where permissible by the Court, the electronic
18 filing and service of court documents is optional by the
19 parties."

20 CHAIRMAN BABCOCK: No, Elaine? You don't
21 like that?

22 PROFESSOR CARLSON: Well, I don't think
23 that's what the rules suggest in 1.3 or the discussion we
24 just had about service being upon agreement of the
25 parties.

1 CHAIRMAN BABCOCK: Jody.

2 MR. HUGHES: I think that because these
3 rules only apply to, you know -- under 1.1, under "scope,"
4 it only applies to the JP courts that accept electronic
5 filing, so I think that it probably should be clarified to
6 say that it's optional on the party's part, but I would be
7 wary about putting in further restrictions that make it
8 sound like a court that already participates in electronic
9 filing can make it optional as to whether a party can
10 file, because once a court has indicated participation, I
11 think that it's wholly -- and I agree with striking
12 "wholly," but I think it should just say in 1.2(a),
13 "optional on the party's part" or something like that, and
14 I think that it's -- because the rules otherwise limit it
15 only to participating courts, I think that solves the
16 issue.

17 CHAIRMAN BABCOCK: Okay. Elaine.

18 PROFESSOR CARLSON: Jody, why doesn't 1.3(a)
19 suffice without 1.2?

20 MR. HUGHES: I think it does with regard to
21 the court accepting, but 1.2 would be clarifying that it
22 is always at a party's option, I guess that they certainly
23 have a right to e-file in a court that participates.

24 CHAIRMAN BABCOCK: Sarah.

25 HONORABLE SARAH DUNCAN: How about if we

1 moved -- if we made 1.3, 1.2?

2 CHAIRMAN BABCOCK: Uh-huh.

3 HONORABLE SARAH DUNCAN: And then add a 1.3,
4 "If a judge elects to participate in e-filing pursuant to
5 1.3, any party may e-file any document to be filed in that
6 court," "may e-file any document."

7 CHAIRMAN BABCOCK: Did you catch that,
8 Judge?

9 HONORABLE TOM LAWRENCE: 1.2 is really
10 designed to be for the parties. Maybe it's not as clear.
11 1.3 is supposed to be for the JP courts, so I think 1.2,
12 if we're -- needs to be about the party's ability.

13 HONORABLE SARAH DUNCAN: But first the court
14 has to elect to participate in e-filing. Once that's true
15 then any party may e-file, but unless that's true, no
16 party may e-file.

17 CHAIRMAN BABCOCK: Sarah says you've got the
18 cart before the horse. 1.3 ought to be 1.2, and 1.2 ought
19 to be 1.3.

20 HONORABLE SARAH DUNCAN: Except 1.3 ought
21 not to be in its current form.

22 CHAIRMAN BABCOCK: Well, we'll get to that.
23 By the way, we're going to be here Saturday.

24 PROFESSOR HOFFMAN: Did you say Sunday or
25 did you say Saturday?

1 CHAIRMAN BABCOCK: We're sticking at
2 Saturday right now. Richard.

3 MR. ORSINGER: I would suggest this: "In a
4 participating court, any party may electronically file any
5 court document" and then we define a "participating court"
6 as one that has elected to permit electronic filing. "In
7 a participating court any party may electronically file
8 any court document."

9 CHAIRMAN BABCOCK: Okay. Well, it does seem
10 to me to make some sense, Judge Lawrence, to have -- to
11 set it up so that everybody knows that there are going to
12 be certain courts that you can electronically file in it
13 and to start with that, so 1.3 ought to be 1.2, and then
14 you ought to say, "but, by the way, even in those courts
15 where it's allowed or permitted the parties don't have to
16 do it if they don't want to." Sarah, isn't that where
17 you're headed?

18 HONORABLE SARAH DUNCAN: Yeah, but I -- yes.

19 CHAIRMAN BABCOCK: Okay. So structurally
20 that's how we --

21 HONORABLE SARAH DUNCAN: But what Richard
22 then has done is precisely that, too, and it's just a
23 matter of preference.

24 HONORABLE TOM LAWRENCE: That's fine. I
25 don't have any problem with that. We followed the same

1 format as the county and district court, and that's why
2 it's in that order.

3 CHAIRMAN BABCOCK: Well, we'll get to them.

4 HONORABLE JANE BLAND: They're going to
5 start following your format.

6 MR. ORSINGER: By the way, Chip, Jody points
7 out to me we already defined "participating justice of the
8 peace court" to mean a court that has set up a TexasOnline
9 account, so we can use the phrase "participating" --

10 CHAIRMAN BABCOCK: "Justice of the peace
11 court."

12 MR. ORSINGER: Yeah.

13 CHAIRMAN BABCOCK: Okay. Why don't we go to
14 current 1.3?

15 HONORABLE TOM LAWRENCE: What are we doing
16 with 1.2? Are we coming back to that or --

17 CHAIRMAN BABCOCK: Well, what I hear is that
18 we're going to revise 1.2 to say basically that filing is
19 optional by the parties.

20 MR. ORSINGER: In a participating court.

21 CHAIRMAN BABCOCK: In a participating court.

22 MR. ORSINGER: I think you ought to make
23 that explicit rather than leave that implicit.

24 CHAIRMAN BABCOCK: In a participating
25 justice of the peace.

1 HONORABLE TOM LAWRENCE: When you say "we"
2 does that mean Jody is going to do this after the meeting
3 next week?

4 CHAIRMAN BABCOCK: Yeah. He's furiously
5 writing.

6 HONORABLE TOM LAWRENCE: All right. "1.3,
7 justice of the peace to individually determine
8 participation in electronic filing. (a), Each justice of
9 the peace in Texas may determine whether the court over
10 which the justice of the peace presides will accept
11 electronically filed documents. These rules do not
12 require any individual justice of the peace to accept
13 electronically filed documents. Documents may be
14 electronically filed and served only in those justice of
15 the peace courts that have set up a TexasOnline account to
16 accept electronically filed documents and have notified
17 the county clerk in the county where the justice of the
18 peace court is located that the court participates in
19 electronic filing."

20 So, first of all, the court must decide to
21 allow electronic filing. Secondly, they must set up an
22 account with TexasOnline, which of course, is going to
23 come through the county, the county is going to have to do
24 that, and Mike Griffith is here and DRI to talk about that
25 if there are any questions. And then, furthermore, in

1 order for people to be able to figure out which courts are
2 doing it we're going to require the county clerk to
3 maintain a list of those courts that are doing it. Later
4 on in the rules there is a requirement that if you opt out
5 you notify the county clerk, etc., but for right now
6 that's simply the mechanism by which you decide to do it
7 and let everybody know what you're doing. Yes.

8 PROFESSOR HOFFMAN: My thought would be that
9 a lot of that is logistical detail that probably doesn't
10 fit in a rule and that I would just have that first
11 sentence of (a) and drop everything else.

12 HONORABLE TOM LAWRENCE: Well, if you drop
13 everything else then you wouldn't have any mechanism by
14 which someone would know if a court accepts e-filing or
15 not other than by calling an individual court, so we would
16 require that it be on the county clerk's website, if they
17 have a website, that the county clerk maintain a list.

18 PROFESSOR HOFFMAN: I guess, maybe, but that
19 doesn't seem very likely. I mean, I would think that any
20 court that does accept electronic filing, that it's in the
21 clerk's -- it's in everybody's interest to put that on the
22 website and that in any event that, again, sounds like
23 kind of a logistical how do we operationalize this and
24 less like a rule.

25 HONORABLE TOM LAWRENCE: Well, but that's

1 what these rules are. I mean, these are the logistics and
2 the nuts and bolts of how it occurs. This is the only set
3 of rules that will be in existence that talk about this,
4 and, you know, again, the county and district court rules
5 are just about as detailed as this, if not more so in some
6 respects.

7 CHAIRMAN BABCOCK: Okay. Any other comments
8 about this? Richard Orsinger.

9 MR. ORSINGER: Yes, sir. On 1.3(a), I see
10 that that concept of file and serve has crept in there
11 also, and I think it would be wise for us to take the "and
12 served" out of there in the fifth line, fourth line, and
13 deal with service in a rule that's entirely related to
14 service because of its optional nature.

15 HONORABLE TOM LAWRENCE: Well, Rule 5 talks
16 about service. We're going to get to that a little bit
17 later.

18 MR. ORSINGER: That's why I'm saying why are
19 you talking about service in Rule 1.3.

20 CHAIRMAN BABCOCK: Well, because 1.3, this
21 rule is just setting up mechanically about which courts
22 are going to allow it at all.

23 HONORABLE TOM LAWRENCE: We're just saying
24 the general scope of these rules, and we're trying to be
25 as general as -- so everybody has a clear understanding.

1 That's why that's in there.

2 CHAIRMAN BABCOCK: Sarah.

3 HONORABLE SARAH DUNCAN: If that's all this
4 is designed to do is determine scope then let's just have
5 a section or a subsection or a rule that says "scope of
6 these rules."

7 HONORABLE TOM GRAY: That would be Rule 1.1.

8 HONORABLE SARAH DUNCAN: I thought so. I
9 think the second sentence of (a) is redundant and
10 unnecessary and ought to come out. I think the third
11 sentence ought to be modified somewhat to say -- to follow
12 the first sentence. "If the court elects to participate
13 in e-filing, the court must set up a TexasOnline account,"
14 if that sentence -- mechanical, operation sentences is
15 going to stay in.

16 CHAIRMAN BABCOCK: Lamont.

17 MR. JEFFERSON: I was just going to echo
18 Richard's concern. I'm concerned about that "and served"
19 and what that does to -- the Court really doesn't need to
20 get involved in that part of it at this point. I think
21 what they're saying is if something -- I think what we're
22 trying to get at here by the rule is if something is
23 electronically filed, what's the appropriate method for
24 service, but what this seems to say is parties can't agree
25 to serve each other electronically unless it's authorized

1 by rule, and I don't think what's what the rule is
2 intended to do.

3 HONORABLE SARAH DUNCAN: Right. Good point.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE TOM LAWRENCE: Well, we're trying
6 to give all the pro ses, all the attorneys, and everybody
7 else as much information as possible.

8 CHAIRMAN BABCOCK: Alan wants to say
9 something behind you, Judge.

10 HONORABLE TOM LAWRENCE: Oh, I'm sorry.
11 Excuse me.

12 MR. MARTIN: That's okay. Somebody
13 mentioned logistics a minute ago, and the cooperation of
14 the county is key to the success of this for the JP
15 courts. My understanding is the budget for JP courts and
16 many other things and the flow of any fees that would
17 support those JP courts and the county that we would pass
18 that would allow them to collect an additional \$2 or
19 whatever it is to cover their costs for electronic filing
20 has to go through the county, so there needs to be some
21 kind of language in there that ties that JP court to their
22 county to make this thing work right. So, you know,
23 again, you-all can finesse the language, but the county
24 component in there is going to have to be a necessity, the
25 way we look at it.

1 CHAIRMAN BABCOCK: Sarah.

2 HONORABLE SARAH DUNCAN: So if I want to
3 e-serve someone I have to go through TexasOnline?

4 MR. HUGHES: No.

5 HONORABLE TRACY CHRISTOPHER: No.

6 HONORABLE SARAH DUNCAN: No.

7 MR. HUGHES: Although that was something
8 that the group, that the task force debated, and that --
9 and I think Richard's point about "and served" may be a
10 vestige of that original writing that it had to go through
11 TexasOnline. The group talked about it and then decided
12 the parties ought to be able to agree just to send it my
13 e-mail to yours directly, although there is --

14 HONORABLE SARAH DUNCAN: Without cost.

15 MR. HUGHES: Without cost, although there
16 are some issues about that that we'll get to, but I think
17 that for simplicity it might be better to take out "and
18 served" in 1.3(a) just because service is dealt with
19 elsewhere, and, I mean, but there is a policy question
20 here of do we want this rule to restrict the ability of
21 parties even in JP courts that aren't participating to be
22 able to e-serve with each other by agreement?

23 CHAIRMAN BABCOCK: Sarah.

24 MR. ORSINGER: The answer to that was "of
25 course not."

1 HONORABLE SARAH DUNCAN: I'm sorry, Richard,
2 what did you say?

3 MR. HUGHES: Then maybe --

4 MR. ORSINGER: Of course we don't want to
5 preclude people from serving each other by consent outside
6 the e-filing system.

7 HONORABLE SARAH DUNCAN: Right.

8 MR. HUGHES: Because it's not otherwise
9 covered under 21a, and so but I think if we leave --
10 again, I think this is your point, if we -- that language
11 right now would preclude it, so I would suggest we take it
12 out and deal with service in 5.1.

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH DUNCAN: I would suggest
15 that the title of this 1.3 should just be "Electronic
16 filing by election of the court and parties" or something
17 like that. It shouldn't have anything to do with service.

18 CHAIRMAN BABCOCK: The heading on 1.3 is
19 limited to filing.

20 HONORABLE SARAH DUNCAN: The heading of 1.3
21 right now says "Electronic filing and service optional
22 unless ordered by court."

23 CHAIRMAN BABCOCK: On 1.3?

24 HONORABLE SARAH DUNCAN: Oh, I'm sorry.

25 CHAIRMAN BABCOCK: That's 2.

1 HONORABLE SARAH DUNCAN: That's 1.2. Okay.
2 Sorry.

3 HONORABLE TOM LAWRENCE: The captions on
4 these different parts was, again, taken from the county
5 and district court rules in an attempt to try to make
6 these as consistent as possible with those, so it would
7 not be too confusing for attorneys or parties that file in
8 all three levels, so that's why we -- that's really where
9 these captions come from.

10 HONORABLE SARAH DUNCAN: I've missed a few
11 meetings, I know. Have we voted on adoption of statewide
12 county and district court e-filing rules?

13 HONORABLE NATHAN HECHT: No.

14 CHAIRMAN BABCOCK: No.

15 HONORABLE SARAH DUNCAN: Then I'm not in
16 favor of patterning these rules --

17 HONORABLE NATHAN HECHT: Well, but we have
18 the pattern in 27 counties?

19 MR. HUGHES: More than that. 29 or 30.

20 HONORABLE NATHAN HECHT: So most -- I think
21 which covers like 80 percent of the litigation in the
22 state or something.

23 MR. HUGHES: All the big counties.

24 HONORABLE NATHAN HECHT: All the big
25 counties are using the pattern rules at this point.

1 HONORABLE SARAH DUNCAN: Okay.

2 CHAIRMAN BABCOCK: Richard.

3 MR. ORSINGER: Are we limited to just
4 paragraph (a) or can we talk about (b) also?

5 CHAIRMAN BABCOCK: Well, I think everybody
6 seems to think that taking service out of (a) is a good
7 idea. Anything else about (a)? And then we can talk
8 about (b). Professor Dorsaneo.

9 PROFESSOR DORSANEO: I had a question based
10 upon what was just said to Judge Christopher, who
11 apparently carefully reworked the rules for her court. Is
12 everybody doing that? Do we have any information about
13 what other judges are doing?

14 HONORABLE TOM LAWRENCE: With regard to
15 ordering e-filing in their courts?

16 PROFESSOR DORSANEO: Pro se people, etc. I
17 mean, do we have any -- is this working well in 27, 28, 30
18 counties?

19 MR. ORSINGER: You're talking at the
20 district level, he's talking at the JP level.

21 PROFESSOR DORSANEO: Yeah.

22 HONORABLE TOM LAWRENCE: Well, we had -- the
23 district clerks that were there indicated that it was
24 working pretty well, Travis County and -- you might
25 contradict that, but Travis County, Bexar County.

1 HONORABLE STEPHEN YELENOSKY: I'm happy to
2 contradict whatever you want me to.

3 CHAIRMAN BABCOCK: That's his role in this
4 meeting.

5 HONORABLE TOM LAWRENCE: They all said it
6 was working. Bonnie, you had it in Williamson County?

7 MS. WOLBRUECK: No, we did not do it in
8 Williamson County.

9 HONORABLE TOM LAWRENCE: Oh, you don't have
10 it? I don't think that there are any significant
11 problems. There is some modifications. There is the
12 template, which is the statewide rule, but in the county
13 and district courts there is a mechanism that you can
14 through the local rules process amend that and change it
15 slightly, but Rule 3(a) doesn't apply to JP courts. So
16 except for Harris County, which has legislative authority,
17 no other JP courts in the State of Texas can promulgate
18 local rules, so we had to figure out a different way to do
19 this that didn't go through the local rule process. Also,
20 these rules are not in the Rules of Civil Procedure.

21 Now, Peter Vogel, who is the head of the
22 JCIT committee, thinks that they ought to be -- thinks the
23 county and district court rules and these rules ought to
24 be somewhere in the Rules of Civil Procedure, but I'm sure
25 that's something the Court will look at later, but these

1 are currently on the JCIT website, and I presume -- I
2 don't know what the Court's going to do with these, but I
3 presume these are going to be there also or maybe they're
4 going to be somewhere else. I don't know.

5 CHAIRMAN BABCOCK: Justice Hecht.

6 HONORABLE NATHAN HECHT: You know, just
7 maybe we need to recap just a second that a few courts
8 started using electronic filing about 10 or 12, 15 years
9 ago, mostly in Beaumont.

10 MR. LOW: Yeah.

11 HONORABLE NATHAN HECHT: Judge Mahaffy, but
12 elsewhere in Montgomery County and some other places, and
13 so then the state wanted to move in that direction more
14 generally and that involved TexasOnline, and this
15 committee adopted the template for county and district
16 court procedures for electronic filing after it was
17 proposed by the Office of Court Administration, and we
18 talked about it a couple of times. No?

19 MR. HUGHES: This predated me, but --

20 HONORABLE NATHAN HECHT: Anyway, and then it
21 has been implemented in these various counties, and
22 Professor Dorsaneo asked whether it's working well. Well,
23 it's hard to know what well means. It seems to be working
24 largely without complaint, but the idea, the hope of JCIT
25 and TexasOnline, of course, which is helping facilitate

1 all of this, is that we will move the bar in this
2 direction more forcefully as time passes, so that just as
3 the Federal courts are going to e-filing, we, too, will
4 migrate in that direction, not in a way that keeps these
5 courts or others from being user-friendly or anything like
6 that, but we need to sort of get everybody thinking about
7 this being a way of -- principal way of filing and serving
8 papers in the future.

9 But we're a ways off from that, and we have
10 hesitated in asking this committee to think about
11 statewide rules that would be more or less mandatory, just
12 because we're sort of waiting for the culture to develop,
13 if you will, that this is a good idea and this is the way
14 it works and we're okay with that.

15 HONORABLE TOM LAWRENCE: We have Mike
16 Griffith here from TexasOnline who might be able to
17 respond to that.

18 MR. GRIFFITH: Just about the question about
19 how our mandate's working, we had -- Judge Christopher
20 noted she has certain case types, selected cases that she
21 has mandated in. In Hidalgo County the multi-district
22 litigation case for the Hurricane Rita bus fire, that was
23 mandated as electronic filing/electronic service case, and
24 within Travis County there is a pilot ongoing right now
25 with the Travis district courts civil cases, hand-selected

1 case types that they require electronic filing and
2 electronic service in. That's as far as I know the extent
3 of what we have right now within Texas.

4 CHAIRMAN BABCOCK: Sarah.

5 HONORABLE SARAH DUNCAN: Judge Christopher,
6 do the people in your cases that have to do the e-filing
7 or get to do e-filing, do they do it through TexasOnline?

8 HONORABLE TRACY CHRISTOPHER: Yes.

9 HONORABLE NATHAN HECHT: You have to do it
10 through TexasOnline.

11 HONORABLE TRACY CHRISTOPHER: You have to do
12 it through TexasOnline by the rules that we've adopted,
13 that the Supreme Court said we had to adopt.

14 HONORABLE NATHAN HECHT: That's the
15 interface between -- it's not just us. I mean, it's
16 the --

17 HONORABLE TOM LAWRENCE: That's the
18 Legislature.

19 HONORABLE NATHAN HECHT: That's the
20 interface that the State itself has set up to facilitate
21 this. So it's an arrangement that -- between TexasOnline
22 and the State, too.

23 CHAIRMAN BABCOCK: Andy.

24 MR. HARWELL: And if I remember the
25 discussion we had several years ago, that was for the

1 uniformity --

2 MR. ORSINGER: Yeah.

3 MR. HARWELL: -- part of it. Now, in
4 McClennan County we offer electronic filing on our land
5 records, and we don't have anyone that we go through with
6 that. Title companies can sign up and work with us on
7 that. I do not have it on our court site just yet, but I
8 was curious about that same issue, if you have the -- what
9 is it called -- electronic service provider and you have
10 all of these rules and you have fees at different levels
11 as it meets -- goes to different levels, then why -- and
12 with all respect, why is there a middle man involved?
13 With TexasOnline.

14 HONORABLE TOM LAWRENCE: I think Mike can
15 probably answer that.

16 MR. GRIFFITH: The system of TexasOnline
17 e-filing system was set up really by the JCIT a few years
18 ago. They wanted to use TexasOnline, but they also
19 wanted, based upon some previous experiences in Texas, to
20 not tell attorneys which service provider they had to file
21 through, so that's why they created a tier of service
22 providers, and it would be a competitive market that the
23 attorneys could then shop it around and get whatever
24 services they required. That's how the framework was
25 created.

1 CHAIRMAN BABCOCK: Sarah.

2 HONORABLE SARAH DUNCAN: Well, this is just
3 my ignorance. Judge Christopher, why does my assistant
4 keep talking about filing through Lexis/Nexis if what he's
5 really going through is TexasOnline? Does he have to go
6 to Lexis/Nexis before he gets to TexasOnline or
7 TexasOnline before he gets to Lexis/Nexis?

8 MR. ORSINGER: Lexis/Nexis is your ESP.

9 HONORABLE TOM LAWRENCE: That's the service
10 provider.

11 MR. ORSINGER: It's your ESP.

12 HONORABLE TOM LAWRENCE: The service
13 provider files it with TexasOnline.

14 MR. ORSINGER: Every ESP has to go to
15 TexasOnline. You chose Lexis/Nexis as your ESP. I don't
16 have Lexis/Nexis as my ESP, but I still have to connect to
17 TexasOnline.

18 HONORABLE SARAH DUNCAN: Why do I need an
19 ESP to get to TexasOnline?

20 MR. ORSINGER: Because TexasOnline is a
21 government agency that receives electronic filings for all
22 of the courts in Texas. It's not a service that provides
23 a format for you to send documents that then get put into
24 uniform condition to file with the state, so you may be
25 sending Word Perfect documents, you may be sending Word

1 documents, he may be sending PDF files.

2 HONORABLE NATHAN HECHT: We don't want 254
3 counties to have to set up systems to --

4 HONORABLE SARAH DUNCAN: Standardize.

5 HONORABLE NATHAN HECHT: To either -- that
6 will force the lawyers to use it one way or else or to
7 accept whatever gets sent in. So they have -- TexasOnline
8 provides them the information, and they -- so they only
9 have to go about it one way. The lawyers can pick anybody
10 they want to to send the information --

11 HONORABLE SARAH DUNCAN: I see.

12 HONORABLE NATHAN HECHT: -- and then it's up
13 to TexasOnline and the service provider to work out the
14 details about how to get it.

15 HONORABLE SARAH DUNCAN: But there's a fee
16 at both ends; is that right?

17 HONORABLE NATHAN HECHT: Well, I don't know.
18 I guess there is probably.

19 MR. ORSINGER: There is.

20 HONORABLE SARAH DUNCAN: I'm just thinking
21 about the cost of this.

22 MR. ORSINGER: There is no way to eliminate
23 that cost, Sarah, because every district and county clerk
24 had their own computer system and was unwilling to change
25 to any other computer system. So in my personal opinion

1 -- and I was on the committee in a liaison capacity -- the
2 Legislature made a decision that everybody is going to
3 have to conform to one standard, and that's TexasOnline.

4 Now then, how do you connect to TexasOnline?
5 Are we going to force everyone in Texas to subscribe to
6 the state agency? No. We're going to let private
7 providers connect you to the state agency.

8 HONORABLE SARAH DUNCAN: Gotcha.

9 MR. ORSINGER: And there is no way to avoid
10 that money because this has to be a self-funding effort.
11 The Legislature wasn't willing to throw very many millions
12 of dollars at this project. Do you agree with that?

13 HONORABLE NATHAN HECHT: Yes.

14 CHAIRMAN BABCOCK: Carlos had his hand up
15 and then Judge Christopher and then --

16 MR. LOPEZ: Just a comment on what Sarah was
17 saying. Lexis is like one of your -- you can choose any
18 different kind of courier to take the courthouse. Lexis
19 is the electronic courier that you chose and then
20 TexasOnline is the actual electronic clerk, so I don't
21 know how you get rid of the fees.

22 CHAIRMAN BABCOCK: Judge Christopher.

23 HONORABLE TRACY CHRISTOPHER: Well, I was
24 just going to say that I was initially skeptical of the
25 fees also, but for most cases that use it on a regular

1 basis, they believe that it saves them money in terms of
2 certified mail, copy costs, service costs.

3 HONORABLE SARAH DUNCAN: And I have no doubt
4 about that. That was part of my concern about mandating
5 it, a judge being able to mandate it --

6 HONORABLE TRACY CHRISTOPHER: Right.

7 HONORABLE SARAH DUNCAN: -- in a smaller
8 case. If I'm going to be my own courier in a small case
9 and I'm going to take it and get the signature, as a pro
10 se, it could be pretty much cost-free, but we're out of
11 that.

12 CHAIRMAN BABCOCK: Alan.

13 MR. MARTIN: The problem we have here for
14 this whole system is how do we provide a standard system
15 for the state and still give the the attorneys and all the
16 other parties that are -- to litigation the flexibility to
17 provide their documents however they want to, so -- and
18 the keyword that you said up there just a moment ago was
19 "self-funded." The only reason that there's fees involved
20 with this is that that's what funds e-filing and part of
21 TexasOnline. We try to keep those fees very, very small
22 so that these attorneys and the courts can enjoy some
23 savings over what would be normal courier costs and things
24 like that.

25 So how do you put out a standard without

1 forcing people through a, you know, smaller funnel than
2 we're already forcing them through? That's the reason we
3 left the EFSPs outside for the competition, because there
4 is always a sensitivity for all the things that the state
5 does whenever we start limiting the way people can do
6 business, and we just don't like to do that if we don't
7 have to. So we can say, yeah, let's give a standard to
8 the state, let's provide a fixed way that the state and
9 the courts can enjoy getting electronic filing but not
10 limit the competition or the availability of people to
11 provide other services to you along the lines of EFSP.
12 They may be providing you other services that are outside
13 the actual filing itself.

14 CHAIRMAN BABCOCK: Judge Lawrence.

15 HONORABLE TOM LAWRENCE: The Legislature set
16 up the Department of Information Resources to control all
17 of this. They supervise TexasOnline. There is a
18 mechanism in effect for the filing of these documents, and
19 we can't change that. Our rules have to conform with
20 that, so some of what is in these rules can't be changed,
21 if we want to have e-filing, just as the county and
22 district court rules have to comply with that. So, you
23 know, we have had to write this in such a way that it
24 conforms to the existing set of filing parameters that the
25 Legislature and DIR has set up and TexasOnline has set up,

1 so we -- you know, we have tried to comply with those so
2 the system is going to work.

3 CHAIRMAN BABCOCK: With that in mind, are
4 there any comments on 1.3(b)? Richard.

5 MR. ORSINGER: I'll note that in the first
6 line it says that "the county clerk must" and then down
7 five lines, "the justice of the peace must continue" and
8 then on the next page, second line, "the county clerk must
9 promptly update," but then the last sentence says, "Each
10 justice of the peace statewide is responsible for
11 notifying." First of all, I think each justice of the
12 peace is statewide, so we don't need the word, and
13 secondly, I don't like this kind of vague responsibility
14 of being responsible for something when everybody else
15 must do something. So I don't know if this was a special
16 delicate way to place a requirement on a judge, but I
17 think we ought to just say, "Each justice of the peace
18 must notify the county clerk."

19 CHAIRMAN BABCOCK: Judge Lawrence, did you
20 follow that?

21 HONORABLE TOM LAWRENCE: Yeah. Well, that's
22 fine. I guess we were trying to be polite.

23 MR. ORSINGER: Well, if the county clerks
24 can handle it, certainly the judges can handle it.

25 HONORABLE TOM LAWRENCE: I don't know.

1 MR. ORSINGER: Telling them that they "must"
2 do something.

3 HONORABLE TOM LAWRENCE: Well, that's fine,
4 if you want to change it to "must."

5 MR. ORSINGER: I just think it's a little
6 vague, and it's peculiar that all of these other
7 responsibilities are must do responsibilities and then
8 suddenly the key one is somebody is responsible to do
9 something.

10 CHAIRMAN BABCOCK: So you want to change "is
11 responsible for" to "must"?

12 MR. ORSINGER: Yeah.

13 CHAIRMAN BABCOCK: "Must notify"?

14 MR. ORSINGER: Yeah.

15 CHAIRMAN BABCOCK: Jody.

16 MR. HUGHES: The reason that's in there --
17 and I am probably responsible for the poor language -- is
18 that it is "must" in the sense that it says that the JP
19 has to keep accepting e-filings until they notify the
20 clerk and TexasOnline that they're out of it, not
21 participating, and the reason for the "responsible for"
22 was not trying to soft-pedal it or be polite as much as it
23 was simply to clarify is -- and I think it's pretty clear
24 in the preceding sentence, but it is to make it doubly
25 clear that it is up to the court, it's the court's

1 responsibility, to sever that tie and just to avoid the
2 situation where somebody goes in to e-file a document and
3 the court says, "Well, you know, I decided I wasn't going
4 to accept e-filing anymore and so your document is not
5 properly filed" and then they get into a debate where the
6 judge says, "Well, I told so-and-so I wasn't going to do
7 it anymore" and there was just some lack of clarity as to
8 exactly when the judge stopped participating in e-filing,
9 and the only purpose was to clarify it's up to the JP to
10 do it and to make it clear when it's done.

11 CHAIRMAN BABCOCK: Professor Hoffman.

12 PROFESSOR HOFFMAN: I didn't really like
13 this sentence the first time I saw it, but I'm not seeing
14 it again. I guess I don't get why we need it in two
15 places. The last part of the last sentence of (a) already
16 says that the JP courts that want to do this have to
17 notify the clerk. If you want to address your particular
18 last point, Jody, about, you know, if you're -- when
19 you're going to stop doing it you have to tell them that,
20 too, I would just incorporate that into that sentence, if
21 we're going to keep it. So, in other words, it seems like
22 we already said it and now we've said it again.

23 CHAIRMAN BABCOCK: Richard Munzinger.

24 MR. MUNZINGER: If I am a litigant who has
25 relied on the justice of the peace court's past acceptance

1 of electronic filing and the justice of the peace then
2 unilaterally determines that it will no longer accept
3 electronic filing and gives that notice, there seems to be
4 no time limit that would notify the litigant that that
5 decision has been made, and I don't know -- I don't
6 practice in the justice court, but are there filings that
7 are time-sensitive that have cut-offs so that a litigant
8 can be deprived of the right to timely file something that
9 must be timely filed by the decision of the justice court
10 to opt out of the program without notice to those who have
11 used it in the past? That may be a potential problem. I
12 don't know.

13 CHAIRMAN BABCOCK: Judge Lawrence.

14 HONORABLE TOM LAWRENCE: Well, I would think
15 that typically this is going to come up when somebody has
16 gone out of office and a new judge has come in and the new
17 judge decides they either want to stop doing electronic
18 filing or they want to begin doing it. I don't -- no JP
19 on the committee anticipated that anything was going to be
20 done so quickly that it would cut things off. There would
21 have to be some type of a deadline given, I would assume.
22 We didn't anticipate this as being a problem. I guess it
23 could theoretically come up.

24 CHAIRMAN BABCOCK: Okay. Is everybody in
25 favor of changing "is responsible for notifying" to "must

1 notify"? Any controversy about that?

2 MR. ORSINGER: There is a strong argument
3 can be made that that sentence does the same thing as the
4 last sentence in subpart (a) and that maybe in (a) you
5 ought to just add on there the concept of changing your
6 status.

7 CHAIRMAN BABCOCK: Okay. What else? Yeah,
8 Justice Gray.

9 HONORABLE TOM GRAY: I was just sitting here
10 working on some language to replace that last sentence
11 that can convey only the concept that Richard just
12 referred to, something along the lines, "A JP court cannot
13 refuse an electronic filing until 30 days after the county
14 clerk has been provided written notice that the JP court
15 no longer accepts electronic filing."

16 CHAIRMAN BABCOCK: Do you have to notify the
17 parties, too?

18 HONORABLE TOM GRAY: I would hope that you
19 would not have to do that individually, but --

20 MR. ORSINGER: Have them send an e-mail to
21 all of them.

22 CHAIRMAN BABCOCK: Okay. Andy.

23 MR. HARWELL: It talks about in here
24 notifying the county clerk, and the point I want to make
25 is if -- are we to keep a notice or an official type

1 record? I think it might be something that we might want
2 to look at changing from county clerk to commissioners
3 court.

4 HONORABLE TOM GRAY: Spoken like a true
5 county clerk.

6 MR. HARWELL: Well, I mean, no, because if
7 it's filed through commissioners court it would be then in
8 the court records, which in effect is in our -- I keep the
9 commissioners court records. Also, the timeliness of it,
10 aren't the JP fees addressed each year --

11 HONORABLE TOM LAWRENCE: Yeah, each two
12 years.

13 MR. HARWELL: -- through the commissioners
14 court?

15 HONORABLE TOM LAWRENCE: Well, most of them
16 are addressed by Legislature. Some on occasion the
17 commissioners court can change a fee, but usually it's
18 legislatively mandated.

19 MR. HARWELL: Well, and the only point I
20 would make there is if there was a timing issue with when
21 the JP court decided to drop the electronic filing, that
22 it can be done at a time when everybody might anticipate
23 that that could happen each year, but then you might have
24 a problem with computer -- their computers may be having
25 problems or something and they don't want to deal with

1 their vendor anymore or what have you.

2 HONORABLE TOM LAWRENCE: Well, but the court
3 costs that the court gets is going to be the same
4 regardless of whether something is handed over the counter
5 or mailed or filed electronically. The court is going to
6 get the same money. The convenience fee and the fee that
7 the service provider, TexasOnline, would charge, of
8 course, that wouldn't be there if it was not
9 charged electronically -- filed electronically.

10 MR. HARWELL: Well, I'm just talking about
11 the timing of when the JP court might decide that they
12 would want to cease taking documents electronically and
13 that that may be better handled through commissioners
14 court, and then it would be an official action then that
15 we would have on record in our files. I just don't know.
16 This just references that the county clerk will be
17 notified, and where am I going to -- where am I going to
18 keep that record? So if you tie it through commissioners
19 court it would be an official court -- an official
20 document. That's the only point I want to make.

21 MR. ORSINGER: 1.3(b) requires you to
22 maintain that in the clerk's office and to also -- if you
23 have a website, to put it on your website. The start of
24 (b) makes the county clerk maintain that.

25 MR. HARWELL: Right, but where will I

1 maintain it as?

2 MR. ORSINGER: I don't know, but you're
3 going to need to eliminate the first sentence of (b) if
4 you want to push this off on the commissioners court.

5 MR. HARWELL: Well, and I don't want to push
6 it off on the commissioners court. I'm just saying that
7 if it went through commissioners court it would be an
8 action that would be kept in our commissioners court
9 minutes in our office.

10 MR. HUGHES: But do they have websites?

11 MR. HARWELL: Ours has a website.

12 MR. HUGHES: Your commissioners court does?

13 MR. HARWELL: Yeah. I mean, our county has
14 a website.

15 MR. HUGHES: But that's why we didn't -- I
16 mean, do county clerks have separate websites or is it
17 usually just the county?

18 MR. HARWELL: They can.

19 MR. HUGHES: Yeah.

20 CHAIRMAN BABCOCK: A lot of them do.

21 MR. HARWELL: And if you do it through
22 commissioners court it would be a record in our office.
23 Otherwise I would just have a notice of a list of JPs that
24 would qualify?

25 CHAIRMAN BABCOCK: Alan had his hand up and

1 then Judge Christopher.

2 MR. MARTIN: The language needs to say when
3 they opt in and opt out, whether you put it in one clause
4 or two or whatever doesn't matter, but if a JP court were
5 to notify us, we could turn off their ability for people
6 to file with them in a heartbeat. The problem is, is
7 there may be people in between there like you're alluding
8 to that need to know that that's happened, and the reason
9 we kind of prefer it to go through the county is because
10 then the county at least knows and they're notifying us.

11 We've already had situations where we've
12 been queried on a day of record as to when something was
13 filed by attorneys that are not part of e-filing because
14 of a court case, and I could see in the future where we
15 might have a situation where a JP might say, "I'm not
16 going to use this anymore" but doesn't notify anybody but
17 us, we turn it off, and then, of course, somebody else
18 that's involved in the litigation didn't get some sort of
19 notice.

20 So, you know, establishing that chain of
21 notification, whether -- and to figure out how the county
22 or the JP court might notify litigants is really in
23 you-all's court, but as a program we would like to know
24 that at least the chain that we operate through, JP
25 courts, counties and whatever, that those are at least

1 notified. So that's important to us that the counties are
2 a part of that equation.

3 CHAIRMAN BABCOCK: Judge Christopher.

4 HONORABLE TOM LAWRENCE: The county court
5 was the obvious -- county clerk was the obvious place for
6 something like this to be filed, but nobody wanted to
7 dictate to the county clerk how they do it or where they
8 keep it and because that will probably be different from
9 county to county. We had a county clerk on our committee
10 that met and didn't seem to have a problem with that,
11 so -- but I don't know if the Court can dictate to the
12 county clerk how to do this, but we're hoping that the
13 county clerks will cooperate and maintain some type of
14 list for us.

15 MR. HARWELL: I think that they will. I
16 just think that the best mechanism to have it in the
17 county clerk's office is through the commissioners court.

18 HONORABLE TOM LAWRENCE: Well, then you're
19 adding another difficult part to that equation when you do
20 that.

21 CHAIRMAN BABCOCK: Carl. I'm sorry, Judge
22 Christopher had her hand up earlier.

23 HONORABLE TRACY CHRISTOPHER: Can I ask a
24 very dumb question? Why if the county has spent the
25 resources to -- and worked with the JP to get the

1 electronic filing system set up in their county why would
2 we ever let a JP say, "I don't want to do it anymore"?

3 HONORABLE TOM GRAY: Elected officials.

4 HONORABLE TRACY CHRISTOPHER: I mean, I as a
5 district court judge don't really have control over how
6 the court clerk keeps my records. So why should a JP
7 suddenly be able to change his or her mind once they've
8 opted into the system? I'm just asking. Why?

9 HONORABLE TOM LAWRENCE: Well, because the
10 JP doesn't have a county or district clerk. The JP has
11 their employees that function as clerks. In some cases
12 the JP does not have any employees. They are it. It is a
13 one person office.

14 HONORABLE TRACY CHRISTOPHER: Well, who
15 keeps the records?

16 HONORABLE TOM LAWRENCE: The JP does, and if
17 they're fortunate enough to have --

18 HONORABLE TRACY CHRISTOPHER: Then why do
19 you have to go through the county clerk in this
20 procedure --

21 HONORABLE TOM LAWRENCE: Someone has --

22 HONORABLE TRACY CHRISTOPHER: -- if the JP
23 is keeping the records?

24 HONORABLE TOM LAWRENCE: Someone has to set
25 up the account with TexasOnline. Someone has to pay for

1 the infrastructure to allow this filing, this electronic
2 filing.

3 HONORABLE TRACY CHRISTOPHER: Okay. So the
4 county has paid for it --

5 HONORABLE TOM LAWRENCE: Right.

6 HONORABLE TRACY CHRISTOPHER: -- for the JP,
7 so why would we let the JP opt out at that point?

8 HONORABLE TOM LAWRENCE: Because the JP is
9 an independently elected official, and by what mechanism
10 would you tell that JP how to run his office and under
11 what authority?

12 HONORABLE SARAH DUNCAN: The same way we
13 tell the Supreme -- the Supreme Court of Texas tells the
14 Supreme Court of Texas how it's going to process a
15 petition. I mean, what we're talking about are rules, and
16 judges are governed -- Judge Christopher, Judge Bland,
17 they're governed by rules, and that's what we're talking
18 about, is are we going to have a rule that governs JPs.
19 They are no more independently elected than Justice Hecht,
20 so I just don't see that as an issue here.

21 I agree with Judge Christopher, and I would
22 also say I don't think the point here is to notify the
23 county clerk. The point is to notify the party who wants
24 to file something tonight at 11:00 o'clock and there's a
25 deadline at midnight. That's the point. And if the

1 county clerk -- if the JP wants to discontinue e-filing in
2 his or her court, they can damn well send notice to every
3 litigant in every case in their court that's used
4 e-filing, in my opinion.

5 CHAIRMAN BABCOCK: Richard Munzinger.

6 HONORABLE TOM GRAY: No, you can't limit it
7 to just those who have used it. You would have to do it
8 to every litigant.

9 HONORABLE SARAH DUNCAN: That's fine. I
10 think that's a great idea, Chief Justice Gray.

11 CHAIRMAN BABCOCK: Richard.

12 MR. MUNZINGER: Well, unless I'm wrong, a
13 justice of the peace isn't told by the state where his or
14 her court will be held. I have been in JP courts that
15 have been in the living room of the judge, and so the
16 judge today is Judge Munzinger and he likes to hold court
17 in his living room because he doesn't have to put anything
18 on but his pajamas and a bathrobe, and tomorrow the judge
19 is a different judge who doesn't want to spend the money
20 on a computer and says, "To heck with that, I don't know
21 how to run computers." We've got 254 counties and God
22 knows how many JPs --

23 CHAIRMAN BABCOCK: 835.

24 MR. MUNZINGER: -- and how many of them know
25 how to use a computer or --

1 HONORABLE NATHAN HECHT: But I'm not God.

2 MR. MUNZINGER: So on Monday you've got a JP
3 that used one. On Tuesday you don't have and you have a
4 rule that says you have to have. I don't think it's a
5 rule -- if you were to make it mandatory that once a court
6 does it it must always do it, I don't think that that is
7 an enforceable rule given the realities of the state.

8 CHAIRMAN BABCOCK: Carl.

9 MR. HAMILTON: If a litigant files, e-files,
10 or tries to e-file something and the JP has said, "I don't
11 want to accept it anymore" --

12 CHAIRMAN BABCOCK: Right.

13 MR. HAMILTON: -- is there something going
14 to come up on the computer that says, "This can't be
15 filed," or how do we know that it's not going to be filed?

16 HONORABLE TOM LAWRENCE: Well, I'm assuming
17 that the court would have told TexasOnline to turn it off,
18 so it wouldn't go through. It's a practical matter.

19 MR. ORSINGER: How do you know it didn't go
20 through is Carl's question.

21 MR. MARTIN: Well, they would never get the
22 file. Once we turn off that JP or district clerk or
23 county clerk or whatever, the person that goes in to try
24 to file it, it's going to be rejected.

25 MR. ORSINGER: And you don't know why. You

1 don't know why. You're going through an electronic
2 service provider --

3 MR. MARTIN: Right.

4 MR. ORSINGER: -- and you can't get it
5 through, so you try it again, you try it again. You try
6 it for 30 minutes, you try it for an hour and a half, and
7 you're never told that the court has cut you off, so
8 you're calling your computer IT guy to run over on an
9 emergency basis to find out what's wrong with your
10 computer. Right? That's the way it works?

11 MR. MARTIN: Well, yes, basically, but the
12 EFSP knows that we can't accept it with the filer that --
13 with the court it's being filed with. So, again, the same
14 concern I raised earlier is that we need to -- the process
15 of notifying all the different people that somebody is no
16 longer accepting filing, we can turn it off, but we don't
17 necessarily have the visibility into who all is notified,
18 with the exception of the county. So, you know, there is
19 no other people we can notify. It's really at a lower
20 level that you-all have the visibility and all the
21 different people that might be involved in a case.

22 CHAIRMAN BABCOCK: Carlos.

23 MR. LOPEZ: I've got three separate
24 comments. First one would be in terms of notifying, which
25 kind of dovetails what you said. If you never signed up

1 for it, why do you need to be notified that it no longer
2 works because when you do go to sign up for it there won't
3 be anything to sign up for anymore? So my suspicion is
4 that as a practical matter when you send out electronic
5 notice to everyone who is currently signed out, which
6 ought to be easy to do because you're only sending it to
7 the universe of people that you can do it electronically,
8 you tell them it's no longer available. The ones who
9 never signed up, if you don't get that notice it's because
10 you never signed up. If you never signed up and it's no
11 longer working, how do you sign up? So I think as a
12 practical matter that's not as big a problem as it seems
13 like in theory.

14 My second comment is with regard to the
15 judge's comments about sort of forcing the JP, if you
16 will. In the limited counties that have signed on, not
17 giving the JP discretion to opt out, I kind of like that.
18 I mean, everybody has gone to the trouble, the taxpayers
19 have been billed for it, the system is there, why not --
20 if the argument is that the JP might not know how to run a
21 computer, that doesn't -- in today's world doesn't sit all
22 that well with me.

23 And with regards to retroactively taking it
24 off, once that JP does sign onto it, let's say someone
25 else runs for the office the next year. Well, they ran

1 for the office knowing that it ran this way, that it had
2 this computer, that it accepted electronic filing, so I
3 don't think that prospective litigant -- elected official
4 can say, "Gosh, I don't know how to run this, so I'm
5 turning it off." Well, you knew that's how it worked when
6 you ran for the position, so I don't see the huge problem.

7 CHAIRMAN BABCOCK: Okay. Judge Christopher,
8 then Hayes.

9 HONORABLE TRACY CHRISTOPHER: Again, just to
10 kind of understand, you can electronically file something
11 without agreeing to get electronic notices sent to you, so
12 it would not actually be as easy as pushing a button
13 saying, "Anybody who's filed with me I'm sending them
14 notice that they're not getting it," because it doesn't
15 work that way. You have to -- you can file electronically
16 without agreeing to accept services electronically. There
17 are two different things, and sending notices back out is
18 not an easy procedure under the current system.

19 CHAIRMAN BABCOCK: Hayes.

20 MR. FULLER: A version of this rule is
21 currently being used by the county and district courts now
22 who are using electronic filing; is that correct? Have
23 any of those courts quit using it, having decided to use
24 it, and if so, what has happened?

25 HONORABLE NATHAN HECHT: The current rule

1 doesn't say that they can opt out, but it doesn't say they
2 can't, but nobody has, I don't think.

3 MR. HUGHES: Well, under the district and
4 county court template it's done as a local rule that the
5 county applies for for all of the courts on a certain
6 level within that county, usually divided by district --
7 district courts and county courts because it's the
8 district clerks who handle filing for the district courts
9 and the county clerks who handle it for the county courts.
10 There are some slight variations on that because there are
11 courts where -- there is some statutory county courts, for
12 example, where the district clerk handles the filings in
13 family law cases for those courts, and so they will
14 usually apply as their own subset, but all those courts
15 are bound by it. They all come and go together, but there
16 is nothing in the rules that specifically talks about the
17 process of getting out. They would have to, I think --
18 well, I mean, they would have to ask to have their rule
19 rescinded.

20 MR. FULLER: But that has never happened?

21 MR. HUGHES: It's never happened that I know
22 of.

23 MR. FULLER: So we're worried about
24 something that has never occurred?

25 MR. HUGHES: Mike, has that ever happened?

1 Do you know?

2 MR. GRIFFITH: We've had no counties opt out
3 of electronic filing.

4 MR. HUGHES: But that's on a much -- I think
5 it's more likely to happen on the JP basis because it's
6 individual, but we talked originally about having it be
7 all or none kind of thing, and it was decided that that
8 would never fly.

9 CHAIRMAN BABCOCK: Sarah, then Judge
10 Lawrence.

11 HONORABLE SARAH DUNCAN: It was decided, the
12 famous passive voice.

13 MR. HUGHES: If you want to open up that
14 discussion, I --

15 HONORABLE SARAH DUNCAN: Well, and I guess I
16 kind of do, but first I want to show my ignorance again.
17 Who funds the JP's office?

18 HONORABLE TOM LAWRENCE: The county
19 commissioners.

20 HONORABLE SARAH DUNCAN: Do they buy the
21 equipment and the filing and pay for the storage and the
22 computers and -- Gary is shaking his head.

23 HONORABLE TOM LAWRENCE: That's right, and
24 if the judge is meeting in his living room it's because
25 the commissioners court hasn't provided him with a

1 courtroom, which they frequently don't do, or they haven't
2 given him a computer or hired any employees for him.

3 HONORABLE SARAH DUNCAN: And I accept that
4 division of funding, but my question then is why isn't
5 this the same, if the -- if what we're doing with the
6 counties courts, for instance, is that the county decides
7 whether the county courts in that county will accept
8 e-filing or participate in the e-filing system and then
9 funds that venture, why isn't the same true for JPs, if
10 the county is funding them to begin with?

11 HONORABLE NATHAN HECHT: Well, it's slightly
12 more complicated than that.

13 HONORABLE SARAH DUNCAN: I figured it was.

14 HONORABLE NATHAN HECHT: The county judges
15 decide if they want to do this or not. The judges who are
16 using the clerk to file cases decide would we like to do
17 this or not.

18 HONORABLE SARAH DUNCAN: All of the county
19 court-at-law judges?

20 HONORABLE NATHAN HECHT: If it's the
21 district court, it's the district judges; the county
22 judges, the county judges. If the county judges are using
23 the district clerk then they have to get together. The
24 clerk and the judges have to say, "Okay, we'd like to do
25 this." Okay. That's fine, but they don't have any money,

1 so then they've got to go to the county and say, "Would
2 you pay for this," and the county says "yes" or "no," and
3 if the county says "yes" then the judges adopt a local
4 rule that's like this template and then off we go.

5 HONORABLE SARAH DUNCAN: But it applies to
6 all the county judges.

7 HONORABLE NATHAN HECHT: We've never let --

8 MR. HUGHES: Within that subset. And, for
9 example, there can be like statutory county courts in
10 family cases can be their own subset of e-filing rules
11 that is different from the county courts generally in a
12 particular county, because of the way they're tied into
13 the clerk, because otherwise the other county courts
14 use -- can't use the county clerk for their filings. In
15 some counties statutory county courts use the district
16 clerk to handle family law filings. I'm not sure why, but
17 in some counties that's the way it is.

18 HONORABLE NATHAN HECHT: But the reason that
19 it's different is because -- which may not be a good
20 reason, but the difference is you have five courts that
21 are using one clerk to file, and so they all agree that
22 what goes to them through this clerk will come to them if
23 the county will pay for it; whereas, here the justice
24 courts have their own -- each justice court has its own
25 filing system.

1 HONORABLE SARAH DUNCAN: Filing system.

2 Okay. Thank you.

3 MR. ORSINGER: Once the county funds the
4 process does it become self-funding after that or does the
5 county have to put money into the system every year?

6 HONORABLE NATHAN HECHT: Probably the
7 latter, and probably it's justified, I'm just guessing,
8 that the justice of the peace goes over to the
9 commissioner's court and says, you know, "If you'll let us
10 do this and provide us the technology and stuff, everybody
11 will be happier and you'll be heroes and maybe we won't
12 need to grow the FTEs as much as we have over the years
13 and this will all benefit everybody and it's a good
14 government thing and you should do it," and then maybe the
15 county will do it and maybe they won't.

16 HONORABLE SARAH DUNCAN: I would think it's
17 also an offset by the storage costs.

18 HONORABLE NATHAN HECHT: Storage costs. The
19 JP courts generate a lot of fees, and so it can come out
20 of there, but, you know, it's a typical county budgeting
21 issue. And, you know, in the big counties, it's basically
22 a no brainer. There's just not any resistance to it at
23 the county level that we've found so far, but in the
24 smaller counties, you know, every \$10 is a big deal.

25 MR. HUGHES: And we started -- the task

1 force started on this with the idea that the counties
2 would essentially apply for it and then the question would
3 be how many JPs in a county would have to sign on, because
4 it would be a question of we don't want to be approving
5 under a local rule different versions of the JP rules for
6 each individual JP court that wanted to do it across the
7 state. We wanted to do it by county; and then there was a
8 debate about, well, should it be the majority of the JPs;
9 and then there was the issue, well, some JPs, even though
10 they could opt into the system, they might have a pocket
11 veto on the whole process in order to get some of their --
12 stop me, Judge, if I'm getting out of line on this, but
13 basically political issues of one judge being able to hold
14 up the whole system.

15 HONORABLE SARAH DUNCAN: Right.

16 MR. HUGHES: That was when the concept was
17 -- the task force voted to abandon the county approach and
18 just do it as a statewide set of rules with individual
19 opt-in for each court.

20 HONORABLE SARAH DUNCAN: Very helpful.
21 Thank you.

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: There seem to be two
24 competing visions around here. One is the vision of the
25 JP conducting court in his living room, and most people

1 don't like that, and we have the vision of replacing it by
2 the vision of all these pro se litigants using this
3 wonderful user-friendly system, litigating from their
4 living rooms, and I'm not sure that's such a good thing
5 frankly.

6 CHAIRMAN BABCOCK: It's certainly homey.

7 MR. GILSTRAP: And I'm a little concerned
8 about the possibility for abuse, and maybe this is outside
9 our kin here, but has any other state tried this or is
10 this something completely new? I mean, I've never heard
11 of anything like this. Do they do this in California or
12 Nebraska or anything like that? Or is this a pilot
13 project for planet earth?

14 MR. HUGHES: But the Legislature has said we
15 shall do this.

16 HONORABLE NATHAN HECHT: By January the 1st.

17 MR. GILSTRAP: Well, you know, and we're
18 trying to adopt the scope of the rules, and one of the
19 things we're trying to decide is, you know, how broadly we
20 institute this system, and there is something to be said
21 for putting it out there and letting some people opt in
22 and see if it works, because I'm not sure how it's going
23 to work, and I don't think anybody else is either.

24 HONORABLE TOM GRAY: What was the language
25 of the statute? I mean, it may eliminate the opt-in

1 provision. Does it?

2 HONORABLE NATHAN HECHT: No.

3 MR. HUGHES: No.

4 HONORABLE NATHAN HECHT: It says the Supreme
5 Court shall provide for --

6 MR. HUGHES: I pulled it out over there.
7 Here it is.

8 HONORABLE NATHAN HECHT: "The Supreme Court
9 shall adopt rules governing the electronic filing of the
10 documents in civil cases in justice of the peace courts,
11 not later than January 1st, 2008."

12 MR. ORSINGER: They probably assumed we
13 would adopt rules that apply.

14 HONORABLE NATHAN HECHT: Yeah. If we go
15 back and tell them the opposite, I don't know how that
16 would be received.

17 MR. GILSTRAP: It sounds to me like
18 extremely broad discretion has been given to the Court
19 about how fast to go with this thing, and that's what
20 we're talking about here, and maybe we just need to put
21 out a set of rules, let some JPs opt in and see if it
22 works out. The opting out is another question, but I
23 think that's the first question we're talking about here.

24 CHAIRMAN BABCOCK: Judge Lawrence.

25 HONORABLE TOM LAWRENCE: When the

1 Legislature passed this all they did was direct the
2 Supreme Court to come up with these rules. There was
3 nothing in the legislative history that said it would be
4 mandatory for the JP courts. Had there been there would
5 have been no bill. It would not have passed. So the
6 political realities are such that it's going to be
7 difficult to mandate a system where you're going to tell
8 every JP court they have to participate in this because
9 the counties are not going to want to fund that in many
10 cases.

11 A lot -- I shouldn't say a lot, but there
12 are a number of JPs that do not have computers or the JPs
13 may have computers in some courts, not others, but the
14 courts are not tied in with a central computer system for
15 every court. Now, many systems like Harris County and
16 Dallas are very sophisticated, and e-filing will be no
17 problem at all for those, but that's not the case for all
18 counties. A lot of what we've been talking about for the
19 last 15 minutes, there are political considerations to
20 that, and if we're trying to devise a system to encourage
21 the JPs to participate in this and to encourage the
22 counties to fund it, then we need to not try to make it a
23 mandatory provision. We need to allow them to opt in and
24 opt out, and that's what the subcommittee tried to do when
25 we passed this.

1 I think it's a very workable system we've
2 come up with. The notification, if you want to opt out, I
3 don't have a problem with putting some notification in
4 that. Nobody in the subcommittee perceived that as being
5 a particular problem. The political realities are such
6 that no JP is going to want to do anything arbitrary
7 that's going to upset his constituents that vote for him.
8 So I don't foresee that the JP is going to act in that
9 arbitrary manner, so if you want to put some protection
10 for that, that's fine, but I would urge you not to try to
11 make it mandatory.

12 CHAIRMAN BABCOCK: Okay. Let's take our
13 morning break for ten minutes, and when we come back let's
14 go on to Rule 2.1, specific terms.

15 (Recess from 10:33 a.m. to 10:50 a.m.)

16 CHAIRMAN BABCOCK: All right. Judge
17 Lawrence, we are moving right along to Rule 2.1, specific
18 terms. You want to take us through that?

19 HONORABLE TOM LAWRENCE: Sure.

20 HONORABLE NATHAN HECHT: Let me -- Judge,
21 just a second. I don't know that this point was made
22 clear earlier, but the thought was that if the task force
23 used what the committee had already approved for the
24 district and county courts, it would be smoother going
25 through, but obviously that was a mistaken idea, but keep

1 in mind that we are -- we do have a set of rules that the
2 district and county courts, a whole lot of them are
3 operating under that this system was patterned on to try
4 to make the differences as few as possible, so I just
5 wanted to say that.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: I had a very
8 disturbing break.

9 CHAIRMAN BABCOCK: Sarah, I don't know if --

10 HONORABLE TOM GRAY: With reality?

11 CHAIRMAN BABCOCK: -- you want this on the
12 record or not.

13 HONORABLE SARAH DUNCAN: Yeah, with reality
14 that we all should know about before we even consider
15 adopting any of these rules, I think. Apparently
16 TexasOnline is unable to interface with clerks' offices.
17 As a result, when Carl e-files a document into the Harris
18 County system that document has to be scanned and then
19 it's printed for a paper file, and Judge Christopher can't
20 access that document for several days while it's in the
21 scanning, at least. I don't know that printing would
22 interfere.

23 HONORABLE TRACY CHRISTOPHER: Actually, they
24 print first and then scan.

25 HONORABLE SARAH DUNCAN: They print first

1 and then the scanning process, and apparently the district
2 clerk in Bexar County, Mr. Hutton tells me, is getting
3 ready to adopt the same system but also pay for an imaging
4 system so that these documents can be imaged, but then
5 they can't interface with TexasOnline, so all we are doing
6 is shifting the cost of paper and printing supplies to the
7 counties and the states.

8 HONORABLE STEPHEN YELENOSKY: Not in Travis
9 County. We don't have to print it. It goes straight in.

10 HONORABLE TOM LAWRENCE: Well, Mike can
11 respond to that I think.

12 MR. GRIFFITH: If I may, TexasOnline
13 provides a standard export package of the document and all
14 of the details of the docketing piece. We in several
15 counties right now are interfaced with their back end
16 system, whether it be a case management or a docketing
17 management system. It varies by county because each
18 county may have its own unique case management or docket
19 management that they then have to build that bridge to
20 bring the documents in. We've worked with Harris County
21 district clerk's office to define what they want us to put
22 in our export. We've done that. They are building the
23 bridge into their document management system, but, yes, it
24 is -- there are cases and Harris is one of those where
25 they have to print and then scan the input. That's not --

1 HONORABLE SARAH DUNCAN: That's not the
2 ultimate goal. And Bexar County and Dallas County?

3 MR. GRIFFITH: Bexar County right now, you
4 can correct me if I'm wrong, they are still waiting to
5 make a decision as to what case management system they're
6 going to buy. Once that's in place we can interface with
7 it.

8 HONORABLE SARAH DUNCAN: And Dallas County?

9 MR. GRIFFITH: Dallas County bought the
10 Odyssey system during the previous district clerk's time
11 there. We were working with his vendor to build that
12 interface to them and then they decided for whatever
13 reason to halt that work. We're working now with that
14 vendor to make that interface in place in Collin County,
15 which also has Odyssey, and then that will be available
16 for everyone else.

17 HONORABLE SARAH DUNCAN: And are you
18 prepared to work with each of the justice of the peace in
19 the State of Texas to interface with their particular
20 system?

21 MR. GRIFFITH: We are prepared to provide
22 the export package. We can't build the interface to all
23 the proprietary systems that are out there, but we can
24 provide a hand off point that says this is how we're
25 presenting it to you, all you need to do is put that in

1 your system.

2 HONORABLE SARAH DUNCAN: And it's taken, I
3 understand, somewhere around two years thus far with
4 Mr. Bacarisse's office in Harris County to get to the
5 point you're at?

6 HONORABLE TRACY CHRISTOPHER: We still don't
7 have the interface system, even though it's been promised
8 for a long time.

9 HONORABLE TOM LAWRENCE: But that's a county
10 issue. That's not --

11 HONORABLE SARAH DUNCAN: It's an --

12 HONORABLE TRACY CHRISTOPHER: But that's --

13 HONORABLE SARAH DUNCAN: -- interface issue.

14 HONORABLE TRACY CHRISTOPHER: -- the flaw in
15 this system. I mean, I don't mean to be -- I like
16 electronic filing. I like having my documents in an
17 electronic file, but unlike the state system -- or the
18 Federal system that has, you know, a case management
19 system that, you know, all Federal courts use, we've got
20 this cobbled together, county-by-county system and, you
21 know, who knows what the JPs are going to be able to do.

22 HONORABLE SARAH DUNCAN: That's my point, is
23 why are we -- given that we can't even seem to mandate
24 this for all the JPs in the state, how do we really think
25 that we're going to have -- be able to interface as

1 opposed to just shift the printing costs to the individual
2 JPs.

3 CHAIRMAN BABCOCK: Andy.

4 MR. HARWELL: Mike, how many vendors in
5 Texas offer a complete case management system? Do you
6 know?

7 MR. GRIFFITH: I would say it's probably 40
8 to 50 different case management systems.

9 MR. HARWELL: Really, that many?

10 MR. GRIFFITH: Probably a handful of
11 document management systems, but there are certainly
12 leaders actually --

13 HONORABLE TRACY CHRISTOPHER: It's the
14 document management system that provides the interface,
15 and that's where the money is, and that's what our
16 commissioners court refused to fund because it was \$6
17 million plus yearly/monthly fees to the document
18 management company. Now, you know, maybe prices have gone
19 down, but that was the rub.

20 CHAIRMAN BABCOCK: Professor Dorsaneo.

21 PROFESSOR DORSANEO: These -- so these rules
22 don't really get to the question of document management
23 systems.

24 HONORABLE TOM LAWRENCE: No. It has nothing
25 to do with it.

1 PROFESSOR DORSANEO: Well, it has a lot to
2 do with it because I'm wondering what's going to happen to
3 the documents if they're just going to be kept in some
4 electronic file by an amateur.

5 HONORABLE TOM LAWRENCE: Well, I don't think
6 the Legislature gave the Supreme Court the right to
7 dictate to the counties how they do their document
8 management. All the Supreme Court can do is to promulgate
9 these e-filing rules, and correct me if I'm wrong, but
10 that's what we're working from.

11 HONORABLE NATHAN HECHT: The Supreme Court
12 is an awesomely powerful institution, but we can't tell
13 county commissioners what to do, so -- and that should be
14 obvious over the years, and so this -- I hear the
15 criticism of the system, but if you look at it from a
16 political perspective and from the Legislature's
17 perspective, there is no other way to do this, because
18 you'll never pass a law that says 254 counties have to do
19 this by week after next unless you give them the money,
20 and the state doesn't want to give them the money. So
21 they want the counties to come up with the money, but if
22 you tell the counties they have to come up with the money,
23 they'll go tell their Legislators to vote against it, and
24 I don't blame them.

25 So it's what you -- the operation thus far

1 has been to provide a mechanism that both sides, both the
2 users and the government can opt into and then hope that
3 if we build it they will come, but, you know, it's going
4 to be slow because you can't -- it is exactly true. It's
5 not like the Federal system where the AO says it's going
6 to be this way no matter what you think, and that's the
7 end of that.

8 CHAIRMAN BABCOCK: Judge Christopher, and
9 then Sarah.

10 HONORABLE TRACY CHRISTOPHER: But if
11 TexasOnline had the document management system, if the
12 cost was shifted to the state entity, then more counties
13 would be able to use it in a better way. Each county
14 could still have their individual case management system
15 that they either buy or build themselves, but it's the
16 document -- I don't understand it, but, you know, I keep
17 asking, "Can we get it electronically? Why can't you put
18 it electronically in my file" and they say, "Well, there's
19 this, you know, interface problem."

20 CHAIRMAN BABCOCK: Sarah.

21 HONORABLE SARAH DUNCAN: I'm not sure if we
22 build it they may come, but what it's sounding like to me
23 is we don't want them to come, if all we're doing is
24 shifting the cost. I mean, it's just like this committee.
25 You know, when I was at the court I was using a ream of

1 paper just about, half a ream, for every meeting to print
2 what used to be provided to me by the committee. If all
3 we're doing is shifting to the counties and the JPs, by
4 these rules, the cost of printing all of these documents
5 until 15 years from now when we finally get everybody
6 interfaced, that sounds like really backwards cost
7 efficiency to me, but it may be that we won't build the
8 interfaces until we do this, but I'm just not sure we want
9 them to come.

10 CHAIRMAN BABCOCK: Okay. Well, you think
11 the rule should say, "Sorry, Legislature, but we think
12 this is a bad idea, so there are no rules"? I mean, what
13 can we say?

14 HONORABLE SARAH DUNCAN: I'm thinking it
15 should be even -- what we can say is "pilot project" and
16 start looking at how we're going to interface with any
17 JP's computer system that isn't currently.

18 CHAIRMAN BABCOCK: Okay. Richard.

19 MR. ORSINGER: I think obviously we need to
20 design several rules. We've been told we have to, and
21 they need to be workable, and we already have a model of
22 workable rules. We just don't know how well the
23 understaffed and undersupplied JPs can do it, but we've
24 decided to allow them to opt in if they have the resources
25 and the willingness, and if they don't, they don't have

1 to, but we have to do something because the future is
2 forcing itself on us, and the rest of the world is going
3 electronic, and commerce is electronic. International
4 finance or even national finance is electronic.
5 Entertainment is electronic. I just read an article
6 yesterday that CD sales are down 50 percent because
7 everybody is running around with little digital music all
8 the time.

9 As often, the legal profession is way, way
10 behind the rest of the society, and this is a first step,
11 and we have to take it, and it's not going to be where we
12 end up, and it's not even going to be where we are going
13 to be in five years, but if we don't take the first step
14 we're just going to get left behind, and it's going to be
15 dysfunctional, and we end up with the private legal system
16 that operates through the -- through arbitration in an
17 effective manner and then we can just retire.

18 CHAIRMAN BABCOCK: Judge Yelenosky.

19 HONORABLE STEPHEN YELENOSKY: Is Judge Dietz
20 still coming on that MDL question today? Are we having
21 that?

22 CHAIRMAN BABCOCK: What?

23 HONORABLE STEPHEN YELENOSKY: Because I'm
24 just wondering if he's going to be here because --

25 MR. ORSINGER: Look behind you.

1 HONORABLE STEPHEN YELENOSKY: Because if
2 anybody can explain --

3 CHAIRMAN BABCOCK: The great Judge Dietz has
4 arrived.

5 HONORABLE STEPHEN YELENOSKY: -- can answer
6 any technical questions about electronic filing, this is
7 your man.

8 CHAIRMAN BABCOCK: Yeah. Judge Dietz, you
9 may have wandered into something that you're not ready
10 for. Okay. Well, yeah, Sarah.

11 HONORABLE SARAH DUNCAN: But doesn't -- it
12 certainly affects my view of whether a JP should be able
13 to opt out of this system once I know that I am shifting
14 the cost to the county and the JP's office to print all of
15 this stuff until an interface is developed, which may or
16 may not be within that JP's term and a new JP coming into
17 that office, and I do think we need to be very clear about
18 offices versus occupant of offices. Even if that office
19 and that county have devoted the resources necessary to
20 e-filing for one JP's term, if a new JP comes in and looks
21 at the system -- and, frankly, I think I would and realize
22 that all I've done is shift the cost from the lawyers and
23 their clients to the county to pay for paper and the
24 printing and the printers and the people to stand at the
25 printers, I might very well decide to discontinue e-filing

1 in my court, and it has completely changed my view of that
2 question that I think we were talking about before the
3 break.

4 CHAIRMAN BABCOCK: All right. Judge
5 Lawrence, Jim Perdue, and then we're going to shift over
6 to Hatchell for a second because Judge Dietz is here to
7 talk about that issue. Jim.

8 MR. PERDUE: I just -- my own -- is it
9 really the difference between Montgomery County, which has
10 full e-filing, and the difference between Harris County
11 just a commissioners court funding, and that's the
12 distinction? Then, I mean, you can have a philosophical
13 problem with unfunded mandates, but the Legislature does
14 it all the time.

15 CHAIRMAN BABCOCK: Yeah.

16 MR. PERDUE: And if they've told us you have
17 to -- it seems like we could have a philosophical
18 objection to what it is, but they do it and then you're
19 stuck with it, and it's a commissioners court question.

20 CHAIRMAN BABCOCK: Judge Lawrence, last word
21 for the moment. We'll be back.

22 HONORABLE TOM LAWRENCE: Well, the
23 Legislature told the Court to promulgate these rules. The
24 Court appoints a task force. We have an eight and a half
25 page document that went through a lot of consideration by

1 a lot of smart people, not me, but a lot of other smart
2 people, and now we're trying to get this done today
3 because the Court wants to meet the 60-day deadline to
4 publish it in the *Bar Journal* to give 60 days of comments,
5 which means you have to get it in September I guess to
6 meet the *Bar Journal* deadline, right?

7 So a lot of what we've been discussing is
8 interesting, but it doesn't have much to do with these
9 e-filing rules. We have to get these rules out or Jody is
10 going to have to do it all himself next week, so I think
11 the Court would like to know what we think about these,
12 and the idea of whether or not it's a good idea is really
13 kind of beyond our paper. The Legislature has already
14 decided we're going to do it, and the Court's got to do
15 it, so I would like to go ahead and get through these.

16 CHAIRMAN BABCOCK: Yeah. Well, Sarah's
17 point is that on the issue of opting in or opting out that
18 she's influenced by how the mechanics work, so that
19 there's been benefit to talking about the mechanics.
20 Judge Patterson, could you hold your comment until
21 Hatchell hatches through his point, because Judge Dietz,
22 the great Judge Dietz, I might add, is here to help us do
23 that?

24 HONORABLE JOHN DIETZ: It's because you won
25 one time, Babcock.

1 CHAIRMAN BABCOCK: That's true. There was
2 one victory.

3 MR. HATCHELL: Some weeks back the
4 subcommittee on the Rules of Judicial Administration
5 received a referral from Justice Hecht on two matters
6 involving the MDL rules, and I think that this is a matter
7 that should not occupy much length before the committee,
8 but --

9 CHAIRMAN BABCOCK: Famous last words.

10 MR. HATCHELL: -- you've proved us wrong on
11 many occasions. The first of those matters can be summed
12 up very quickly. The referral to us said an interim
13 meeting of the House Civil Practices Committee last summer
14 made a suggestion that Rule 13.6 of the Rules of Judicial
15 Administration be amended to permit a pretrial judge to
16 use a special master on the theory that special masters
17 might be helpful on small discovery and evidentiary
18 rulings.

19 When we received this referral we
20 immediately sought comments and input from our two MDL
21 judges, one of whom sits on this committee, Judge
22 Christopher, and we received the following response:
23 "Neither Mark Davidson, who handles the asbestos, nor I"
24 -- this is Judge Christopher -- "think a master is a good
25 idea in the MDL cases since the rule allows the panel to

1 appoint a second judge if needed."

2 Now, we think that is preferable. The
3 subcommittee voted unanimously with six members voting to
4 recommend that the rules not be amended to permit the use
5 of a master, with this caveat. The committee as a whole
6 did not see any particular disadvantage to amending the
7 rules in that regard, but we believe that the judges who
8 administer the MDL rules are in a much better position
9 than us to decide what is best, so the committee is
10 recommending unanimously that that suggestion be denied.
11 And that, I suppose, Mr. Chairman, is on the floor.

12 CHAIRMAN BABCOCK: All right. Judge Dietz,
13 any comments you'd like to make?

14 HONORABLE JOHN DIETZ: On the appointment of
15 the master?

16 CHAIRMAN BABCOCK: Yes, sir.

17 HONORABLE JAMES DIETZ: No, sir.

18 CHAIRMAN BABCOCK: Judge Christopher.

19 HONORABLE TRACY CHRISTOPHER: No.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE NATHAN HECHT: Could I ask, is
22 there a thought that an MDL judge does not have the
23 authority that's under 173 or 83 or whatever the rule is
24 to appoint a special master if he or she wants to, that
25 you would need specific authority in the Rule of Judicial

1 Administration?

2 HONORABLE TRACY CHRISTOPHER: Because of
3 some language in the -- in Rule 13 that says I'm the only
4 one who can do it, that I can't, like, have someone else
5 preside for me, I think that was probably the concern.
6 I'm not really sure who, you know, brought this issue up
7 to begin with, but that would be where I think the rub
8 might possibly be, that we're not allowed to have someone
9 sit in our spot.

10 HONORABLE NATHAN HECHT: And, of course, the
11 reason for that was to not have the sitting-for system
12 that we have in all the counties.

13 HONORABLE TRACY CHRISTOPHER: Right.

14 MR. HATCHELL: Well, I think the
15 subcommittee was also, your Honor, not convinced that the
16 power was not inherent.

17 The second matter is a little more
18 substantive. Although, let me tell you at the beginning
19 that the subcommittee is also recommending no change to
20 the rules, but the description of the referral is "Judge
21 Mark Davidson, whom the MDL panel assigned as pretrial
22 judge in asbestos MDL cases, has suggested that the Court
23 consider amending Rule 13.7 to allow a pretrial judge to
24 remand a case to a particular court in those counties that
25 use a central docket system to assign cases. Judge

1 Davidson indicates that it could be difficult to set a
2 trial date under Rule 13.6 of the RJA that works for a
3 particular trial judge if the pretrial judge doesn't know
4 which trial judge will hear the case. The Court seeks the
5 committee's recommendation."

6 We, again, were benefited by input from
7 Judge Christopher, and her response on this was somewhat
8 longer. She said, "The local rules of those counties with
9 central docket systems mandate that all trials go on the
10 central docket. A judge assigned the asbestos case from
11 the central docket may not have set enough time to try the
12 case. They are not setting it number one on the central
13 docket either, essentially ignoring the rule that requires
14 these cases to have priority. Some central dockets like
15 Austin allow for an assignment to a particular judge, but
16 apparently the presiding judge in Austin refuses" -- and
17 I'm going to tell you that's not true -- "to do that for
18 the asbestos case. What an MDL judge needs is something
19 in the rule that specifically says that when remanded to
20 the trial court that case will be tried by the judge in
21 which the case was originally filed, trumping any local
22 rules as to trial settings."

23 We did some investigation on this point, and
24 I think perhaps, like many urban legends, the problem has
25 been blown somewhat out of proportion. I had a very

1 useful conversation with Judge Dietz, who was candid to
2 say that the one incident seems to have prompted this
3 concern by -- and a legitimate concern, I'm sure, by our
4 MDL judges, but it was simply a matter of unfamiliarity
5 with the remand procedures and some misunderstanding,
6 perhaps, on the part of his staff that one case did not
7 proceed perhaps at the priority level that it should.

8 The committee took Judge Christopher's
9 comments, Judge Davidson's comment, and Judge Dietz's
10 comments into consideration at a telephone meeting this
11 week and -- or, actually, two weeks ago, and we decided at
12 that time that because of the nature of the referral we
13 should have a draft rule. Judge Gray was very forthcoming
14 in volunteering to do that rule. He spent a considerable
15 amount of time drafting a very complex rule, and we have
16 put that before you. It looks like this. I hope you have
17 it in your papers, but let me say, again, in a telephone
18 conference on Wednesday of this week, while we made some
19 fine-tuning to Judge Gray's otherwise very comprehensive
20 rule, the committee voted unanimously not to recommend its
21 adoption.

22 CHAIRMAN BABCOCK: Fair enough. Judge
23 Christopher, anything on this proposed rule?

24 HONORABLE TRACY CHRISTOPHER: No, other than
25 to say, I was just repeating Judge Davidson's comments

1 because I haven't yet had this problem myself.

2 MR. HATCHELL: So the committee understands,
3 there are only two central docket counties, and we are
4 fortunate to have both Judge Dietz and Judge Peeples who
5 administer those central dockets today, and I'm going to
6 get out of the way.

7 CHAIRMAN BABCOCK: Judge Dietz.

8 HONORABLE JOHN DIETZ: This is the facts, at
9 least as we know them. Mark made a referral, the first
10 one to us, and it was snake bit from the beginning, and
11 that was on May the 22nd, 2006. Unfortunately the file
12 from Houston did not make it to Austin on that Monday, and
13 it made trying the case very difficult, and Judge Cooper
14 reset the case, and it was at that time that Mark and I
15 had this discussion about the cooperative nature and what
16 we needed to be doing. The case was retried in June 7th.
17 Originally May the 22nd we set it for June the 7th, and
18 the jury deadlocked on the trial. Ultimately it settled.

19 Since that time we've set up a procedure for
20 Mark to call the court administrator directly. He has
21 given us six cases, none of which have ever announced
22 ready, and so I think it's if we need to move those cases
23 then it's more that those people need to announce ready on
24 our docket, and we will make sure or ensure that they will
25 be heard the week that they're given to us.

1 CHAIRMAN BABCOCK: Judge Peeples.

2 HONORABLE DAVID PEEPLES: I'm not aware that
3 we've had experience with this remanded cases that didn't
4 get taken care of. If that's happened, it has not come to
5 my attention.

6 CHAIRMAN BABCOCK: Judge Christopher, are
7 either yourself or Judge Davidson in favor of amending
8 Rule 13.7 either in accordance with this draft or in any
9 other way?

10 HONORABLE TRACY CHRISTOPHER: You know, I
11 feel like I'm sort of in between Judge Davidson and Judge
12 Dietz, and perhaps they've had some discussions since then
13 and have solved the problem. I'm not really sure what
14 this announcement of ready is. My understanding under the
15 rules is we call up, we say, you know, "We've got this
16 case, it's ready for trial. It needs to go to trial.
17 Here's the date," and the trial judge is supposed to give
18 it priority. So I'm not really sure what this
19 announcement of ready situation is and whether there's a
20 continuing problem, and I'm sorry. I tried to get a hold
21 of Judge Davidson before I came, but he had been out of
22 the office for a week due to a death in the family and
23 didn't get any further update from him.

24 CHAIRMAN BABCOCK: Okay. Well, how do you
25 personally feel about the need for an amendment to the

1 rule?

2 HONORABLE TRACY CHRISTOPHER: I don't like
3 to step on people's toes with a central docket system, but
4 it does seem to me that if a case is filed in one judge's
5 court that it ought to go back to that court, but, you
6 know, I know that's not the way it is in the central
7 docket system counties, but -- which was what we were
8 initially asking for, and I haven't looked at this draft
9 yet. It was just that, you know, if the case was set in
10 the 295th, regardless of whether there was a central
11 docket system in place or not, when the 295th was told
12 that the case is ready for trial on June 1, I could call
13 the 295th and say, "Are you available June 1" and work it
14 out with that individual judge versus here in the central
15 docket system, not knowing who that judge would be, which
16 of the judges it would be.

17 HONORABLE JOHN DIETZ: Mr. Chairman?

18 CHAIRMAN BABCOCK: Yes.

19 HONORABLE JOHN DIETZ: Judge Davidson and I
20 have good rapport. I have taken some matters from him off
21 of the MDL to hear in Austin and then given them back to
22 him. If you will allow us, I think we can work out any
23 problems that he's got, and if he wants to do and have
24 them announce ready there before him, then we'll take that
25 as an announcement of ready and we'll take care of it. I

1 just don't, quite frankly, see any need for a rule because
2 we've had heretofore really good rapport, and we don't
3 want to give up any more discretion than we have to.

4 CHAIRMAN BABCOCK: Thank you. Mike, was
5 there any additional thought of the subcommittee in its
6 unanimous recommendation not to amend the rule?

7 MR. HATCHELL: No. We just voted
8 unanimously based on our investigation of the problem, and
9 we determined that there was no problem and that these
10 matters are intricate enough that the cooperation that's
11 already been built we thought sufficed, and we don't
12 believe a rule would really be very useful.

13 CHAIRMAN BABCOCK: Okay. Justice Hecht, do
14 you need any further elaboration beyond what we've said
15 and the fact that you got a draft rule if you want one?

16 HONORABLE NATHAN HECHT: No. This is all we
17 asked you to do.

18 CHAIRMAN BABCOCK: How about this master in
19 chancery thing, which I had never heard of until last
20 week?

21 MR. HATCHELL: That's the first thing we
22 voted on.

23 CHAIRMAN BABCOCK: Oh, we didn't -- I'm
24 sorry.

25 MR. HATCHELL: And that completes our

1 referral.

2 CHAIRMAN BABCOCK: It wasn't a special
3 master, it was a chancery master.

4 MR. HATCHELL: Well, they're used
5 interchangeably sometimes.

6 CHAIRMAN BABCOCK: So it's a 117 issue.
7 Good. If there's nothing more on that --

8 MR. HATCHELL: We didn't vote, but --

9 CHAIRMAN BABCOCK: Huh? Well, do we need a
10 vote?

11 MR. HATCHELL: I don't know. You're the
12 chair.

13 CHAIRMAN BABCOCK: Anybody else got anything
14 on this issue? If not, Judge Dietz, thank you for joining
15 us, and you're welcome to stay for the JP electronic
16 filing rules, which we'll go back to right now, Rule 2.1.

17 HONORABLE TOM LAWRENCE: All right. Rule
18 2.1, covering some definitions. For the most part these
19 definitions are identical to those definitions in the
20 county and district court e-filing rules, and we tried to
21 keep those as identical as we could to avoid confusion
22 among those who file.

23 (a) is different, civil cases. Because of
24 the diverse jurisdiction of the JP courts we felt the need
25 to define a civil case. "All cases filed in small claims

1 court and all noncriminal cases filed in the justice
2 courts. The term does not include matters by a justice of
3 the peace acting as a magistrate."

4 Convenience fee, there was a little bit of
5 discussion about this. It's a fee that is charged in
6 connection with electronic filing that is in addition to
7 the regular filing fee. So you have the court costs that
8 Texas -- that are paid through TexasOnline, and then
9 TexasOnline sends that to the counties, and the county may
10 also charge a convenience fee, and this convenience fee as
11 charged by the justice of the peace court will be
12 considered as a court cost, and, Alan, I'll let you
13 explain the convenience fee because really DIR has to
14 approve that.

15 MR. MARTIN: Yes, we know that whenever we
16 put up something in place that either agencies or counties
17 or whoever has to work with, that those entities incur
18 costs, and so we've got a mechanism here for us to
19 reimburse the county by transactions. It's a transaction
20 fee over a period of time to recoup those costs. DIR
21 approves it based on what the county has sent us telling
22 us what their expenses are. I have one on my desk right
23 now which is all printing costs. I have another one which
24 we received several months ago which includes some
25 computer equipment and the like that they needed to put in

1 place for a different court.

2 There are some limitations to that, what
3 that fee can be used for. It cannot be used for employees
4 of the court. In other words, if you already employ
5 somebody to process this and we're giving you a different
6 method of processing it then you can't count that
7 employee's time as new costs; but if you have to bring in
8 a consultant to build an interface, for instance, for your
9 existing system, that would be able to be counted. So
10 what happens is we get what we call a CFO letter from the
11 political entity, in this case the courts, saying, "Here's
12 what these costs are to us, what we project for the next
13 two years," and then we will set the fee based on what we
14 will do to do the cost recovery of that.

15 Generally we have a two-dollar fee
16 pre-approved for any courts that need to use it. Now,
17 some courts have had up to a five-dollar fee. I know in
18 the case of Fort Bend County we had a two-dollar fee for
19 several years, and that was just recently rescinded
20 because the cost recovery had been completed. We do have
21 to review those every year to make sure that the counties
22 have reached that cost recovery, and so at whatever point
23 that they do then we will have to rescind that fee. Any
24 questions that I can answer on that?

25 CHAIRMAN BABCOCK: Richard Orsinger.

1 MR. ORSINGER: I guess I don't know when to
2 raise this, so I'll raise it now, and I wasn't clear what
3 we did about indigents in this system, but if someone
4 qualifies as an indigent litigant are they entitled to
5 e-file for no charge or are they just supposed to file by
6 mail or personal delivery to the court?

7 MR. MARTIN: I think that's by mail.

8 MR. ORSINGER: So there is no concept here
9 that charges for electronic filing are waived. If you
10 can't afford them then you just file conventionally,
11 right?

12 MR. MARTIN: At this time. I know we're
13 talking to OAG about indigent filings. We've had a fairly
14 long conversation about this, what we can do to help the
15 attorney general's office to move toward something that
16 could be done.

17 MR. ORSINGER: Do you think we ought to
18 mention at some point that if a court has opted in, that
19 the indigents -- that they're not obliged to provide the
20 electronic service free of charge, because I don't see
21 that that's mentioned anywhere how an indigent either fits
22 or doesn't fit into this set of rules?

23 MR. MARTIN: I think that idea should be
24 entertained. In other words, it's really up to you-all
25 whether you-all want that to be in there, because it

1 really affects the counties and what their costs are. You
2 know, we want to make sure that we help you-all reach the
3 ability to use the system, but how you use the system
4 within the county and how you apply it to the different
5 types of cases and the like is really not in our purview
6 to make that decision, but, you know, we do want to work
7 -- we have to work with the counties on an individual
8 basis to make sure that we address all of their issues,
9 and that may be one of them that they will need to look
10 at, and you may need to address it, too.

11 CHAIRMAN BABCOCK: Alan, I've got a
12 question. I was looking for it while you were talking.
13 There's nothing in these rules that sets out the amount of
14 the convenience fee or kind of what you said, what it's
15 intended to be; is that right?

16 MR. MARTIN: No. There's nothing in there.
17 I mean, again, there could be counties that would never
18 come to us for a fee. They are already in the process of
19 doing internal changes to their IT environment, and we
20 are -- you know, we're just meshing in with that very
21 well. There's other counties, as have been pointed out
22 here today, that really don't have a good IT
23 infrastructure, so for them to take advantage of e-filing
24 they need some additional equipment or consulting to help
25 them get to that place. And that's the whole idea behind

1 the convenience fee, is to give them an opportunity to
2 say, yes, we're going to have to pay to do this, but we
3 have a recovery mechanism for a period of time with which
4 to be reimbursed.

5 HONORABLE TOM LAWRENCE: The convenience fee
6 is in the DIR rules, right?

7 MR. MARTIN: It's in the DIR rules, and it's
8 considered to be a fee over and above the court fees. It
9 is a TexasOnline fee. The court portion of it, like the
10 e-filing fee of \$4, is our fee. The \$2 or whatever we
11 would allow for the courts is considered a court fee, and
12 it's done under our jurisdiction, and we have to pass it,
13 and we also have to rescind it.

14 CHAIRMAN BABCOCK: Jody.

15 MR. HUGHES: I was just going to point out
16 that in these rules this Rule 4.1(h) talks about it. It
17 doesn't say what the fee is. It just says it's approved
18 by the DIR board, but it gives a little more of the detail
19 that Alan just went into there about authorizing the --
20 the court can charge, that it's set by the DIR board and
21 in addition to other fees.

22 CHAIRMAN BABCOCK: Okay. Great. Okay. Any
23 other comments about -- thank you, Alan -- about the
24 convenience fee?

25 HONORABLE TOM LAWRENCE: All right. (c)

1 through (k) are identical to the county and district court
2 definitions, no change on those. (l), we define that a
3 justice of the peace court means a justice court or a
4 small claims court, because small claims court is defined
5 separately by the Legislature and the Government Code,
6 whereas the justice court rules are set in the Rules of
7 Civil Procedure.

8 (m), we get back into participating justice
9 of the peace court means one that has set up a TexasOnline
10 account. This is consistent with what we talked about
11 earlier. (n), we define "party." (o), "Registered
12 e-mailed address means an e-mail address registered
13 through TexasOnline for the transmission and receipt of
14 electronically filed documents."

15 "Regular filing fees, rules," it just
16 defines what these rules are. "Traditional court order"
17 is identical to the county and district court rules, and
18 "traditional filing" is additional to the county and
19 district court rules.

20 CHAIRMAN BABCOCK: Richard Munzinger.

21 MR. MUNZINGER: In definition (n), as in
22 November, you define "party." I have two questions about
23 it. The first is at the end of the definition you say
24 that an attorney is a party, and I don't -- that seems to
25 me to be unusual and would certainly expand upon an

1 attorney's liability, and I wonder if it would have
2 substantive effects elsewhere in the rules and possibly in
3 the matter before the court; and, secondly, party is
4 limited to person, which is an undefined term, and you may
5 want to do something about including nonhuman parties, but
6 entities, corporations, etc. But I am concerned about
7 making the definition of "party" include an attorney. I
8 don't know why it's done.

9 HONORABLE TOM LAWRENCE: Well, I think, we
10 did it that way to recognize the pro ses. We're not
11 trying to change any definitions of parties in the rules
12 of procedure, but within the rules we're trying to make it
13 clear that a party can either be a pro se or it can be the
14 attorney for that person, for that entity.

15 CHAIRMAN BABCOCK: Judge Lawrence, would it
16 be -- would you satisfy that concern then if you said,
17 "whether represented by an attorney or appearing pro se,"
18 period? That would solve Richard's problem.

19 HONORABLE TOM LAWRENCE: Is that in the
20 county and district court rules, or is that something we
21 added?

22 HONORABLE TRACY CHRISTOPHER: It's in there.

23 HONORABLE TOM LAWRENCE: Yeah, actually,
24 party is. It's identical in the county and district court
25 rules. We just parroted the same language.

1 CHAIRMAN BABCOCK: Richard wasn't here then
2 to spot that.

3 HONORABLE TOM LAWRENCE: So, you know, I
4 guess it kind of begs the question if we change this and
5 leave the other it's going to be confusing. We tried not
6 to do that.

7 CHAIRMAN BABCOCK: Justice Gray.

8 HONORABLE TOM GRAY: I was trying to place
9 this in the context of what was recorded in my memory and
10 was trying to remember if subsection (c), digitized
11 signature, was where we got in a long discussion of what
12 it meant to have a wet signature or a digitized signature.
13 Do you -- is that the context of subsection (c)?

14 HONORABLE TRACY CHRISTOPHER: I think that
15 was in connection with Rule 11.

16 HONORABLE TOM GRAY: Was that Rule 11?
17 Okay. I just could not remember where that occurred.
18 Thank you. That's fine.

19 CHAIRMAN BABCOCK: Any other comments about
20 the definitions?

21 HONORABLE TOM LAWRENCE: All right. 2.2,
22 application to pro se litigants, and that is identical to
23 the -- actually, we changed one word, I think. "The term
24 'attorney' shall apply to an individual litigant in the
25 event a party appears pro se." I think in the other rules

1 it's "counsel," and I don't remember why we changed it to
2 "attorney" other than the fact that it --

3 MR. HUGHES: I think the reason we changed
4 it was in the definition it said "counsel," but then we
5 realized sprinkled throughout the rule it used "attorney,"
6 and we just tried to make it consistent.

7 HONORABLE TOM LAWRENCE: Okay. That's
8 right.

9 CHAIRMAN BABCOCK: Any comments about that?

10 HONORABLE TOM LAWRENCE: Okay. 3.1,
11 documents that may be filed, that may be electronically
12 filed, and basically we -- what we do is just like they do
13 in the county and district court rules. We set out that
14 anything may be filed except for and then we list the
15 documents that can't be filed; and those things that are
16 excluded out are identical, I believe, to what is in the
17 county and district court rules. Citations, return of
18 citation, bonds, subpoenas, proof of service of subpoenas,
19 in camera documents, and documents sealed. And that's
20 identical to county and district; and then part (b),
21 although I can't recall any document ever having been
22 sealed in JP court, nonetheless, I guess theoretically it
23 could happen, so part (b) is also identical to county and
24 district court.

25 CHAIRMAN BABCOCK: Okay. Any comments on

1 3.1?

2 HONORABLE TOM LAWRENCE: All right. 3.2,
3 documents containing signatures. I'm comparing. This
4 looks like it is also, I think, identical to -- it's
5 identical to the county and district court rules except in
6 (d). We have two sentences that's slightly different than
7 the county and district court. "Where a filer has
8 electronically filed a scanned image under this rule, the
9 court may require a filer to file a document in a
10 traditional manner" and "a party may request the court in
11 which the matter is pending to allow inspection of a
12 document maintained by the filer." And that's really no
13 different than the common law or the Rules of Judicial
14 Administration. If you've got a document filed then
15 somebody can come in and look at it, and you're just
16 saying that if it's filed electronically then you've got
17 to give them the ability to look at that electronically.

18 MR. MUNZINGER: Chip?

19 CHAIRMAN BABCOCK: Yeah.

20 MR. MUNZINGER: The last sentence of
21 subparagraph (d) of 3.2, is that intended to apply only to
22 documents that were e-filed?

23 HONORABLE TOM LAWRENCE: Well, yeah, because
24 we already have all sorts of other rules that apply to
25 documents that are traditionally filed.

1 MR. MUNZINGER: The intent of that sentence
2 is if I filed something with your court electronically my
3 adversary has the right to force me to show my adversary
4 the document I filed?

5 HONORABLE TOM LAWRENCE: No, it's that the
6 court has to let that person come in and view it if they
7 come into the court.

8 MR. MUNZINGER: As it was electronically
9 filed?

10 HONORABLE TOM LAWRENCE: Yes.

11 HONORABLE TRACY CHRISTOPHER: No, no, no.
12 That second sentence is to allow you to look at the other
13 party's original document.

14 HONORABLE TOM LAWRENCE: Oh, I'm sorry.
15 Yeah, you're right. That's correct.

16 MR. MUNZINGER: Well, there's no limitation
17 that the right to view a document be limited to the
18 document that I filed electronically in the sentence.
19 That may be the intent of the paragraph, but it's not the
20 only interpretation one could draw from it.

21 HONORABLE TOM LAWRENCE: Well, that's the
22 same language we use in county and district. We tried to
23 -- once again, we tried to parrot that.

24 HONORABLE TRACY CHRISTOPHER: Well, by the
25 fact that it says "document maintained by the filer," that

1 does imply that because you are maintaining the original
2 when you electronically file something.

3 HONORABLE TOM LAWRENCE: See, (d) is scanned
4 images. (d) is not the original electronic document. (d)
5 is something that you've got the hard copy in hand and
6 you've scanned it and you've sent the scanned document in.
7 What this is saying is that you have to maintain the right
8 -- someone's right to come in and look at that original
9 document that you have scanned in as an attachment.

10 MR. JEFFERSON: I guess I've got a problem
11 with that, because once you've submitted a document
12 electronically the electronic version of the document
13 becomes the court document, I assume, and so if you want
14 to know what the document is you don't go back to the
15 filer. You go to the court document and print it off
16 whatever the court file is or look at it on whatever the
17 computer image is.

18 HONORABLE TRACY CHRISTOPHER: Well, you want
19 to be able to inspect the original to make sure it's a
20 real signed document, because all you see is a copy of it,
21 a scanned in -- you want to be able -- you have the
22 original if you've notarized something. You scan it and
23 file it, and your opponent ought to be able to come look
24 at the original notarized document.

25 MR. JEFFERSON: To my office?

1 HONORABLE TRACY CHRISTOPHER: To make sure
2 it was really notarized, just like they can look at the
3 court file to see a notarized document.

4 MR. JEFFERSON: To me that's completely
5 eliminating all of the advantages that you get from
6 e-filing something electronically in the first place.
7 You're turning something into a court document when you
8 submit it electronically, and now the electronic version
9 is the official version of the document.

10 HONORABLE TRACY CHRISTOPHER: It's just
11 the --

12 MR. JEFFERSON: And if you've not complied
13 with the rules in submitting it electronically then you
14 may be able to challenge the procedure, but you shouldn't
15 be able to challenge the integrity of the document that
16 has been accepted as a court document.

17 HONORABLE TRACY CHRISTOPHER: It's only the
18 verified, acknowledged, sworn-to document.

19 HONORABLE TOM LAWRENCE: We're talking about
20 scanned documents only here.

21 HONORABLE TRACY CHRISTOPHER: Documents
22 containing signatures, so that I can look at your
23 affidavit to see that your client actually signed it.

24 MR. LOPEZ: Or that he signed it before you
25 started looking at it.

1 CHAIRMAN BABCOCK: Carlos and then Pete.

2 HONORABLE TOM LAWRENCE: If you don't want
3 to maintain the document you can just file the document
4 itself with the court and not do it electronically, if you
5 don't want to have to maintain it. That's what you would
6 have to do otherwise.

7 CHAIRMAN BABCOCK: Carlos.

8 MR. LOPEZ: I'm not sure what the import of
9 this is. What if there is a discrepancy? You know, then
10 what happens then? I mean, whose version is right and how
11 does the person who, quote, maintained it prove that, in
12 fact, it hasn't been monkeyed with?

13 MR. MUNZINGER: Maybe it affects its
14 admissibility into evidence or authenticity or affects
15 whether the contract was signed on the date that it claims
16 it was signed. It could have substantive ramifications.

17 MR. LOPEZ: I agree with you that it does.
18 I'm saying how does whoever is asked to call upon that
19 dispute decide? I mean, how do we know who has the
20 official version and if the party, an interested party, is
21 somehow the custodian of what is considered to be the
22 official version? I think that, at least theoretically,
23 raises another whole set of problems. In highly contested
24 adversarial litigation you're going to say that my
25 opponent -- I'm supposed to trust them as to what it

1 looked like and that the notary really did notarize it on
2 that page? I've had issues in my court where the issue is
3 was the notary really there, did they follow the proper
4 procedures, and it gets heavily contested, and this just
5 seems to put the -- kind of put the fox in the hen house.

6 MR. JEFFERSON: It creates all kinds of, I
7 think -- it seems to me it creates all kinds of issues,
8 because if I maintain the document even if I'm the one
9 that submitted it electronically if I don't like the way
10 it looks in the court record then I can say -- I should be
11 able to say to the court, "That's not the real document,
12 I've got the real document, and so substitute"?

13 I mean, you know, once you've followed the
14 procedure, once you've gone through all of the electronic
15 submission procedures that are applied for in the rule,
16 then the document that is accepted is the document.
17 That's the court document, and you may be able to
18 challenge it, the weight of it or the persuasive ability
19 of it somehow, but you shouldn't be able to challenge the
20 fact that that is the document.

21 MR. MUNZINGER: I don't know that that rule
22 says that you can challenge the document, but what it does
23 say is the JP could say to me, "You go look at Lamont's
24 file," and "I want to look at Lamont's file, Judge. He
25 filed this document, and I think that notary signature is

1 fraudulent. I think that's Lamont's signature." Okay,
2 the JP under this rule says, "Go look at the original
3 document." Lamont has to show it to me, and now you and I
4 can have a fight in the trial before the JP as to the
5 authenticity of the document, but I have had the
6 opportunity to look at the document and satisfy myself
7 that what you filed with the judge is what the document
8 contains. That's the purpose of the rule.

9 HONORABLE TERRY JENNINGS: Yeah, and if you
10 can prove it's a forgery, it's tampering with government
11 records case.

12 MR. MUNZINER: Yeah, I mean, it preserves
13 evidence and it's a healthy rule. My only question was
14 the rule as written doesn't limit itself to scanned
15 documents that were filed.

16 CHAIRMAN BABCOCK: Gene, did you have a
17 comment?

18 MR. STORIE: Yeah, I did, and I think it was
19 maybe what Richard just mentioned, that the last sentence
20 there seems pretty open as to what a document is. In
21 theory that could allow inspection of your opponent's
22 computer if it was an original word processing document.
23 I think it certainly means just a scanned document or
24 paper document.

25 CHAIRMAN BABCOCK: Carlos.

1 MR. LOPEZ: Is the real issue we're arguing
2 about is how faithful a copy it is when it gets somehow
3 turned into the electronic version that Lamont suggests
4 should be the court version? I mean, if it is limited to
5 scanned documents I guess I fail to see -- unless the
6 argument is that it's not a faithful copy, in which case
7 any --

8 HONORABLE TOM LAWRENCE: This whole section
9 deals with scanned documents. We've got original
10 signatures on a docket, and you have to be able to get
11 that document somehow to the court so you scan it. That's
12 what this section deals with are those documents.

13 MR. JEFFERSON: What document is not a
14 scanned document?

15 MR. LOPEZ: I think that's a great idea, but
16 why shouldn't --

17 HONORABLE STEPHEN YELENOSKY: Pleading.

18 HONORABLE TOM LAWRENCE: Well, a pleading.

19 HONORABLE TRACY CHRISTOPHER: Pleadings, you
20 put an electronic signature on it versus signing it and
21 scanning it. The only things we're talking about here is
22 like an affidavit attached to a summary judgment or
23 something else that, you know, you're supposed to keep the
24 original of it for inspection.

25 HONORABLE TERRY JENNINGS: All this seems to

1 be doing, and correct me if I'm wrong, is it's allowing
2 you to see something that you would have normally seen
3 under the old ways of doing it when you just filed a hard
4 copy.

5 HONORABLE TOM LAWRENCE: Exactly.

6 HONORABLE TERRY JENNINGS: It's just
7 allowing you to see the hard copy that would have normally
8 been filed.

9 HONORABLE TOM LAWRENCE: In other words,
10 you're saying if you scan something, you can't destroy
11 your original. You have to keep the original in case the
12 other party wants to look at the original, and then in a
13 paper world it's going to be filed so it's going to be in
14 the court's record. You wouldn't have to worry about it.
15 They're just saying don't destroy the original signed
16 document. If you scan it electronically, keep it on file.

17 MR. LOPEZ: Which is only meaningful or
18 necessary unless there's some much bigger problem, which
19 is that the person that's going to the court's file is
20 somehow not trustworthy.

21 CHAIRMAN BABCOCK: Frank.

22 MR. LOPEZ: You're going to have a blue
23 signature instead of a black one when it gets scanned
24 anyway.

25 MR. GILSTRAP: Judge Lawrence, where does it

1 say that you've got to maintain the original?

2 HONORABLE TOM LAWRENCE: Well, I think the
3 implication, "A party may request the court in which the
4 matter is pending to allow inspection of a document
5 maintained by the filer."

6 MR. GILSTRAP: When you take that sentence,
7 that sentence is always true. I can ask the Court to see
8 a privileged document. It just doesn't have to give it to
9 me. I mean, that second sentence is bad. It needs to be
10 rewritten, and the fact that it's in the old rules I don't
11 think is a reason to keep it, not to change it. If there
12 is a requirement that you maintain the original, I think
13 it ought to be there.

14 CHAIRMAN BABCOCK: Yeah, I think we've
15 wandered away from stare decisis on the old rules, so --

16 MR. MUNZINGER: The rule as written only
17 requires the party to request the court to order an
18 examination. It doesn't require an examination or
19 production. It doesn't waive privilege. To me at least
20 it's a healthy thing to allow litigants to look at
21 underlying documents that have been filed with the court
22 which are claimed to be valid which may not be valid, if I
23 had a sincere doubt about it. We have FEDs that have lots
24 of money involved in them, you can, and that's a serious
25 litigation, and it's not a -- something you do in your

1 sleep.

2 CHAIRMAN BABCOCK: Justice Jennings.

3 HONORABLE TERRY JENNINGS: Well, I think
4 Frank's point is well-taken about the idea that there
5 ought to be something in the rule requiring the party
6 who's filing the scanned image to either file it, a hard
7 copy with the court, or the original with the court or
8 maintain it for inspection, and maybe that could be a
9 sentence added to subparagraph (a).

10 HONORABLE TRACY CHRISTOPHER: Just maintain
11 it. We don't want it filed separately. That would be a
12 mess.

13 HONORABLE TERRY JENNINGS: A document such
14 as that may be filed only as a scanned image and then the
15 second sentence, "The party must maintain the original in
16 their files or for inspection."

17 HONORABLE TOM LAWRENCE: Well, these
18 e-filing rules don't change the rules of procedure. I
19 mean, you wouldn't be able to destroy a document like this
20 under the rules of procedure, would you? I mean --

21 HONORABLE TRACY CHRISTOPHER: The original
22 is in the court file, though. You only keep a copy under
23 a traditional system. Now, you, the filer, have the
24 original, and the original needs to be made available for
25 inspection. Possibly.

1 HONORABLE TOM LAWRENCE: So you want to put
2 a sentence in saying that any scanned document must be
3 maintained?

4 MR. GILSTRAP: No, just certain scanned
5 documents, like the ones that have an affidavit.

6 HONORABLE TRACY CHRISTOPHER: Just the
7 verified, notarized, acknowledged --

8 HONORABLE TERRY JENNINGS: Under
9 subparagraph (a), "such a document must be maintained by
10 that party for inspection" or words to that effect.

11 CHAIRMAN BABCOCK: Carlos.

12 MR. LOPEZ: I guess if there's a raised
13 seal, you know, like the old days, there I see a physical
14 difference, but, absent that, I think the only difference
15 is the color of the ink. I mean, when you scan it it
16 looks like it's black.

17 HONORABLE TERRY JENNINGS: Well, if it's a
18 forgery and you have reasonable suspicion that it's a
19 forgery, I mean, your expert is going to want to look at
20 that original signature.

21 HONORABLE TRACY CHRISTOPHER: Signed
22 document, right.

23 MR. LOPEZ: In terms of how hard he pressed?

24 HONORABLE TERRY JENNINGS: Yeah, the
25 forensics person is not going to be able to tell from a

1 copy of a scanned image.

2 CHAIRMAN BABCOCK: Munzinger, then
3 Jefferson.

4 MR. MUNZINGER: Traditional subordination
5 rules ought to apply if it's an evidentiary issue, which
6 is the way I see this problem coming up. Lamont files his
7 lease, and I question the signature. The first sentence
8 says I could ask the judge to make him file the document
9 in the traditional manner. That's one way I could protect
10 myself. I still would be dealing with a photocopy of the
11 lease because people don't give up their original leases.
12 "A party may request the court in which the matter is
13 pending to allow the inspection of a document maintained
14 by the filer."

15 "I want to see the original, Judge, and I
16 want my forensics guy to look at the signature."

17 "Oh, well, I don't have that anymore."
18 Spoliation.

19 HONORABLE TERRY JENNINGS: Well, it's not
20 just spoliation, though. If someone is filing a forged
21 document there's also been a crime committed, and you need
22 to be -- if you can get that hard copy with the signature
23 on it and get proper expert testimony you can prosecute
24 them for tampering with or filing a forged document with
25 the court.

1 HONORABLE STEPHEN YELENOSKY: Aren't we
2 talking about things that are created for the purpose of
3 litigation like a verification on a temporary injunction?
4 Those aren't the things that usually get done
5 fraudulently. It's the contract, and that's the discovery
6 material, not this.

7 CHAIRMAN BABCOCK: Lamont.

8 HONORABLE TERRY JENNINGS: I don't
9 understand what the controversy is about making that party
10 who wants to take advantage of this system, wants to file
11 the scanned image, I don't understand the controversy or
12 the onerous burden placed upon them to make them maintain
13 the original.

14 MR. JEFFERSON: To me --

15 HONORABLE TERRY JENNINGS: For future
16 inspection.

17 MR. JEFFERSON: To me the question is what
18 is a court document, and if we say that the person
19 submitting the document has to -- has an obligation to
20 maintain custody of it then that says that what's filed
21 with the court is not as important as what he has in his
22 possession. What he has in his possession trumps what's
23 filed with the court, right? I think what -- the
24 suggestion that I'm hearing is what you've -- once it's --
25 I mean, if you scan it, scanned it and submitted it to the

1 court, to me that ought to be the document as it appears
2 in court. If you think that there's something wrong with
3 that, you have many other ways to attack the weight of the
4 evidence that has been submitted to --

5 HONORABLE TERRY JENNINGS: I'm not talking
6 about the weight of the evidence. What is the onerous
7 burden that's being placed on the person that's taking
8 advantage of this rule of saying if you're going to take
9 advantage of this rule for your ease, where is the burden
10 on you to maintain that original in your file?

11 MR. JEFFERSON: My concern is not a burden
12 concern. I'm not concerned about the burden that it
13 places on a litigant. My concern is the suggestion that
14 what's filed with the court is somehow less -- has less
15 integrity because you have to refer to some source outside
16 of the court document to determine whether or not it's
17 authentic.

18 CHAIRMAN BABCOCK: Carlos, then Judge
19 Yelenosky.

20 MR. LOPEZ: I'm kind of with Lamont in the
21 sense of that if it's that important maybe for those types
22 of papers we ought to mandate that the original get filed
23 with the court, because let me ask you a question. What
24 if in the old days before electronic filing you've got
25 this original signature that is somehow going to become

1 forensically important? Are you going to file that with
2 the court clerk and hope that it doesn't get lost,
3 misplaced, et cetera?

4 MR. ORSINGER: No.

5 MR. LOPEZ: You're going to file a copy.

6 HONORABLE STEPHEN YELENOSKY: How do
7 verifications ever become forensically important?

8 MR. LOPEZ: Back then before there was
9 electronic filing, was there some rule that told us we had
10 a duty to maintain the original?

11 HONORABLE STEPHEN YELENOSKY: But these are
12 verifications. This isn't -- tell me when you've ever had
13 a forensic examination of a verification on a temporary
14 injunction or anything like it.

15 HONORABLE TERRY JENNINGS: This is any
16 document containing a signature. Not just a verified
17 pleading. Any document.

18 HONORABLE STEPHEN YELENOSKY: Does it say
19 that?

20 HONORABLE TERRY JENNINGS: It says
21 "documents containing signatures."

22 MR. LOPEZ: I'm thinking about the
23 underlying contract in FED, for example. You know, in the
24 old days before electronic filing if I wanted to file a
25 copy because I wanted to make sure the original was

1 intact --

2 HONORABLE STEPHEN YELENOSKY: Well, but you
3 can get it through discovery.

4 MR. LOPEZ: If it exists.

5 HONORABLE STEPHEN YELENOSKY: Right. But
6 we're talking about filed documents, not if it also exists
7 as a discovery material then you're entitled to discover
8 it and look at the original. If we're talking about
9 something that only exists as a pleading, like a
10 verification, I don't know of any instance in which
11 somebody would look forensically at that kind of
12 verification, because all that ever happens is people
13 forget to verify and they come back and do it again.

14 CHAIRMAN BABCOCK: Well, and I can imagine
15 some circumstances, it might be rare, but if an affidavit
16 is filed in support of one party's position and later, you
17 know, somebody goes and talks to that witness and the
18 witness says, "I never signed any affidavit, what are you
19 talking about?" You might want to forensically look at
20 that signature to, number one, make sure it's a forgery to
21 substantiate what the witness says, "I never signed that,"
22 and number two, figure out who did sign it.

23 MR. LOPEZ: But how is that original less
24 important now that we do electronic filing than it ever
25 was?

1 CHAIRMAN BABCOCK: Well, it's not any less
2 important, but isn't the point that it's being filed
3 electronically and so somebody in order to examine it
4 would need access to the original.

5 MR. LOPEZ: They needed access to the
6 original back in the old days, too.

7 HONORABLE TRACY CHRISTOPHER: It was in the
8 court's file.

9 MR. LOPEZ: No, not necessarily.

10 HONORABLE TRACY CHRISTOPHER: Well, that's
11 what we're talking about, is things that are filed in the
12 court's file that have this that's verified, notarized,
13 acknowledged, or sworn to.

14 HONORABLE STEPHEN YELENOSKY: So it isn't
15 just signed.

16 CHAIRMAN BABCOCK: Maybe I'm missing it, but
17 isn't the problem that my affidavit, an example would be
18 if it's filed electronically the original would not be in
19 the court file?

20 HONORABLE TRACY CHRISTOPHER: Right.

21 CHAIRMAN BABCOCK: Right? So you want to
22 keep it and be able to inspect it. That's the point,
23 right?

24 HONORABLE TRACY CHRISTOPHER: Right.

25 HONORABLE TOM LAWRENCE: Right.

1 CHAIRMAN BABCOCK: I'm slow. Sorry.

2 MR. LOPEZ: I mean, I've been in a lot of
3 cases where, real estate, the underlying contract was
4 Exhibit A, and it wasn't an original that was filed with
5 the court because they didn't trust the court to keep the
6 original. They filed a copy, and if you wanted to see the
7 original signature you had to get it through discovery or
8 whatever.

9 HONORABLE STEPHEN YELENOSKY: Well, if it's
10 evidence then you're usually not -- I mean, if you're
11 filing it with the court it's subject to being examined.
12 People don't throw away the contract that's the subject of
13 the dispute, so I don't know why you need the rule.

14 MR. LOPEZ: And I'm not sure they're going
15 to start now.

16 HONORABLE TRACY CHRISTOPHER: No, but --
17 sure they will. I mean, the intent is we're not talking
18 about an original contract here. The intent behind this
19 was a particular pleading or document that had to be
20 verified, like an affidavit in support of a summary
21 judgment or certain pleadings that have to be verified,
22 and those are the sort of things that unless I require you
23 to keep the original and make it available for inspection,
24 there would be no other original anywhere else, but that
25 was the intent. Now, perhaps it's not well written in

1 terms of an original contract between the parties that was
2 notarized.

3 CHAIRMAN BABCOCK: Jody.

4 MR. HUGHES: I was just going to suggest
5 some language that might address some of these concerns.
6 At the end of the first sentence, inserting a new sentence
7 that says, "When a document filed as a scanned image under
8 Rule 3.2(a) or (b)" -- I'm sorry, "When a document is
9 filed as a scanned image under Rule 3.2(a) or (b), the
10 filer must maintain the original document," and then
11 adding a second sentence immediately after that that says
12 -- or replacing the last sentence in the existing rule
13 that starts "A party may request," replacing that with a
14 sentence that says, "Upon a party's request a court shall
15 require a party that electronically filed a scanned image
16 of a document under Rule 3.2(a) or (b) to allow another
17 party to inspect the original document."

18 CHAIRMAN BABCOCK: Lamont.

19 MR. JEFFERSON: Have we been down this road
20 before, Bill? I mean, with respect to just copies? Was
21 there a time when you had to have the original signed
22 document available in order to have a copy even admissible
23 in evidence? I mean, isn't this that same principle?

24 HONORABLE TRACY CHRISTOPHER: Lamont, when
25 you file a motion for summary judgment and you have an

1 affidavit attached you file the original with the court,
2 and now we're just requiring you to keep that so somebody
3 can look at it.

4 MR. JEFFERSON: You don't file your -- I
5 mean, in Federal court, for instance --

6 HONORABLE TRACY CHRISTOPHER: You sure
7 should.

8 MR. JEFFERSON: -- you file an electronic
9 version of your motion, and it's as good as the original.

10 HONORABLE TRACY CHRISTOPHER: It's not in
11 state court. That's the point. We're trying to keep the
12 authenticity of a signature through this point.

13 CHAIRMAN BABCOCK: Elaine.

14 PROFESSOR CARLSON: Rule 45 that deals with
15 pleadings does have at the last paragraph dealing with
16 copies, Lamont, in response to your question, "When a copy
17 of a signed original is tendered for filing copy, the
18 party or his attorney filing such copy is required to
19 maintain a signed original for inspection by the court or
20 any party incident to the suit should a question be raised
21 as to its authenticity."

22 MR. JEFFERSON: "Should a question be raised
23 as to its authenticity," and I think the default ought to
24 be there is no question raised as to authenticity, so
25 presume the court document to be the document unless there

1 is a reasonable reason to doubt that.

2 MR. LOPEZ: Elaine, can you tell us where
3 you're reading from?

4 PROFESSOR CARLSON: I'm sorry. It's Rule
5 45, which deals with pleadings, in the Texas Rules of
6 Civil Procedure, the last paragraph.

7 CHAIRMAN BABCOCK: Frank.

8 MR. GILSTRAP: I don't think we ought to get
9 hung up on what's the real court document. I mean, if
10 I -- if someone produces a pleading with my name on it I
11 can say it's a forgery, I mean, and that is the court
12 document, but I can still question it. I think we're
13 dealing with a situation in which we've got an unfamiliar
14 procedure. We've got electronically produced copies of
15 documents, and we're in some cases allowing electronic
16 signatures, and we've got a bunch of pro se litigants, and
17 it seems to me that, you know, maybe there might be some
18 capacity for chicanery here, and maybe we ought to do --
19 maybe we put these in place and it's no problem, but, you
20 know, I'm a little concerned by it, and I -- it doesn't
21 bother me to require the litigants to maintain the
22 original signature. You know, it's not forever. It's
23 just through the JP court case.

24 CHAIRMAN BABCOCK: Jody, could you read your
25 language again?

1 MR. HUGHES: It was to add a new sentence
2 after the existing first sentence.

3 CHAIRMAN BABCOCK: On 3.2?

4 MR. HUGHES: 3.2(d).

5 CHAIRMAN BABCOCK: Right.

6 MR. HUGHES: That says, "When a document is
7 filed as a scanned image under Rule 3.2(a) or (b)," comma,
8 "the filer must maintain the original document" and then
9 replacing -- adding a new sentence immediately after that
10 that replaces the last sentence of existing 3.2(d) that
11 says, "Upon a party's request a court shall require a
12 party that electronically filed a scanned image of a
13 document under Rule 3.2(a) or (b) to allow another party
14 to inspect the original document."

15 CHAIRMAN BABCOCK: What's wrong with that?
16 Judge Yelenosky.

17 HONORABLE STEPHEN YELENOSKY: Well, nothing
18 wrong with that. I was just going to argue against
19 myself. I was with Lamont and then I thought about this.
20 The verification, the other side should be able to rely on
21 the fact that what you say and verify to in a summary
22 judgment or whatever, if you're lying is enforceable as
23 perjury, and I don't think you could ever enforce a
24 perjury claim against somebody solely based on an
25 electronic version. Because, I mean, how would you, if

1 their lawyer filed it? They can just say, "I never
2 authorized that."

3 CHAIRMAN BABCOCK: Carlos.

4 MR. LOPEZ: I think perhaps if everybody is
5 philosophically agreed perhaps a quicker logistical fix
6 would be to make it clear that when you electronically
7 file a copy it is a copy for purposes of Rule 45 that
8 Elaine just read and then you have the safeguard that's in
9 Rule 45 which says -- which is news to some people -- that
10 you have to keep it. It says you have to keep it.

11 CHAIRMAN BABCOCK: That's another way to do
12 it. What do you think about Jody's language?

13 HONORABLE TRACY CHRISTOPHER: Good.

14 MR. LOPEZ: I mean, that's fine. I just
15 think let's not -- Rule 45 is there. Maybe there is a
16 disagreement as to whether Rule 45 covers this scenario.
17 It says if a copy is filed the party has to keep it.

18 CHAIRMAN BABCOCK: Jody.

19 MR. HUGHES: My only -- I think that's a
20 good point, but I think Frank made an excellent point
21 about the prevalence of pro se litigants here, and I think
22 the more we could spell it out in this rule, a pro se
23 litigant is not necessarily going to have a copy of Rule
24 45 or go look at it; whereas, if it's actually in these
25 rules, you know, they would be more likely to follow it.

1 HONORABLE TERRY JENNINGS: Chip?

2 CHAIRMAN BABCOCK: Yes.

3 HONORABLE TERRY JENNINGS: Just one more
4 comment about what Jody and Frank were talking about these
5 pro se litigants and so forth.

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE TERRY JENNINGS: I don't want to
8 open up another can of worms here, but since this is going
9 to be a pilot program and the idea is to adopt rules that
10 could be applied throughout the state eventually, has any
11 thought been given to limiting this situation, allowing
12 this kind of filing only where a party is represented by
13 counsel?

14 CHAIRMAN BABCOCK: That would be another can
15 of worms for sure.

16 HONORABLE TOM LAWRENCE: You're going to cut
17 out one of the biggest constituencies of e-filing, which
18 are apartment complexes which are typically not
19 represented by counsel.

20 HONORABLE TERRY JENNINGS: But that's
21 probably, you know, as this program goes forward, you
22 know, if you want to just kind of stick your foot in the
23 bathtub so to speak to test the waters and then after it's
24 up and running and working and then maybe allow it.

25 HONORABLE TOM LAWRENCE: No, we like to jump

1 all the way in.

2 HONORABLE TERRY JENNINGS: Okay. Just a
3 suggestion.

4 CHAIRMAN BABCOCK: Okay. Any more comments
5 about Jody's language? Justice Gaultney.

6 HONORABLE DAVID GAULTNEY: I like Jody's
7 language rather than a reference to a rule of procedure
8 for another reason, and I'm not sure the rules apply, Tom,
9 do they, to small claims court cases?

10 HONORABLE TOM LAWRENCE: Well, some Rules of
11 Procedure apply and some don't.

12 HONORABLE DAVID GAULTNEY: I think for that
13 reason as well I would like to have the language specific.

14 MR. LOPEZ: Rule 45 by its terms is limited
15 to district and county courts. Yeah, I was assuming we
16 could kind of --

17 CHAIRMAN BABCOCK: Okay. Let's move on to
18 4.1.

19 HONORABLE TOM LAWRENCE: All of part 4 are
20 filing mechanics. This is the mechanics by which you file
21 this, and in all regards every one of those or most of
22 these are set by statute or set by procedure through
23 DIR/TexasOnline. The only change is where it used to say
24 "county clerk" or "district clerk" and now it says
25 "justice of the peace." Otherwise they're identical.

1 CHAIRMAN BABCOCK: Comments about 4.1?

2 HONORABLE TOM LAWRENCE: Pardon me?

3 CHAIRMAN BABCOCK: Are there any? Carl.

4 MR. HAMILTON: Is there somewhere in
5 here where it -- oh, yeah. DIR, Department of Information
6 Resources. Okay. I found it.

7 MR. GILSTRAP: Chip?

8 CHAIRMAN BABCOCK: Yes, Frank.

9 MR. GILSTRAP: I mean, it's not mechanics.
10 It's electronics. I think we ought to take the
11 "mechanics" out of there and just call it "filing."
12 Really. I mean, you don't need it.

13 CHAIRMAN BABCOCK: You want to call it
14 "filing electronics"?

15 MR. GILSTRAP: Just call it "filing."

16 CHAIRMAN BABCOCK: Just call it "filing."
17 Okay.

18 HONORABLE TOM GRAY: "How to file."

19 CHAIRMAN BABCOCK: Richard, surely you have
20 comments.

21 MR. ORSINGER: I have a comment on 4.3.
22 I'll just wait.

23 CHAIRMAN BABCOCK: Well, bide your time
24 then.

25 HONORABLE TOM GRAY: This may be a good

1 section in which to add the clarification that fee-free
2 filing by indigent litigants is not available when
3 utilizing electronic filing.

4 CHAIRMAN BABCOCK: Say that again, Judge,
5 I'm sorry.

6 HONORABLE TOM GRAY: We were talking about
7 earlier whether or not a indigent person could use this
8 filing mechanism, and due to the fee requirements for the
9 convenience fee there appears to be no mechanism through
10 which you could do that. This may be a good place to put
11 a specific statement that says, "Fee-free filing by
12 indigent litigants is not available when utilizing
13 electronic filing."

14 CHAIRMAN BABCOCK: It was that phrase,
15 "fee-free filing" that --

16 HONORABLE TOM GRAY: Easy for you to say.

17 HONORABLE STEPHEN YELENOSKY: Say that ten
18 times.

19 HONORABLE TOM GRAY: But just a thought, if
20 they want to make it clear.

21 CHAIRMAN BABCOCK: Okay. What's everybody
22 think about that? Judge Lawrence, is that a good idea?

23 HONORABLE TOM LAWRENCE: Well, it doesn't
24 hurt anything to put it in.

25 CHAIRMAN BABCOCK: Well, it does if you're

1 not going to -- if you're going to allow indigents to
2 electronically file, but if you're going to do that then
3 you're going to have to have some other rules.

4 HONORABLE TOM LAWRENCE: Well, I don't think
5 the Legislature has provided for indigents to have the fee
6 waived, so it's kind of a moot point. They're not going
7 to file because they're not going to get it past
8 TexasOnline or the service provider.

9 CHAIRMAN BABCOCK: Yeah. Okay. So do you
10 think it would be a good idea to mention something here?

11 HONORABLE TOM LAWRENCE: Well, it may be
12 helpful to some indigents. There is really a relative
13 small percentage of people trying to file original suits
14 as indigents in the justice courts.

15 CHAIRMAN BABCOCK: Okay.

16 HONORABLE TOM LAWRENCE: I mean, we didn't
17 even think about putting something -- I think we talked
18 about indigents and then we didn't put anything in there
19 because you can't get past the threshold of TexasOnline.

20 CHAIRMAN BABCOCK: Buddy.

21 MR. LOW: Chip, I don't think we can just
22 strike and say "filing" because this is "filing
23 electronically" and there are other type filings. So you
24 would have to put "electronically" or something, because
25 "filing" just the traditional way wouldn't be covered in

1 this, so I would be careful when I strike out a word to
2 see what you've got when you do it.

3 CHAIRMAN BABCOCK: Yeah. Good point. All
4 right. Any other questions about 4.1? Let's go on to
5 4.2.

6 HONORABLE TOM LAWRENCE: 4.2 is identical to
7 the county and district court rules. This deals with the
8 digital signatures, explains the mechanism for how that
9 occurs, and that's done through -- you register through
10 TexasOnline and then there is a code I guess that you're
11 given, correct, Mike?

12 MR. GRIFFITH: That's correct.

13 HONORABLE TOM LAWRENCE: When you file you
14 would input that code and then your digital signature with
15 the computer.

16 CHAIRMAN BABCOCK: Okay. Richard Orsinger.

17 MR. ORSINGER: Tom, I notice that throughout
18 these rules there are a lot of cross-references to the
19 Rules of Civil Procedure, which made sense in the district
20 and county context, but here in 4.2(b) we cross-refer to
21 Rules 8, 13, and 57; 4.3 cross-refers to Rule 145; 4.6 to
22 Rule 57; 4.7 to Rule 45; 5.1 to Rule 21a. Are all of
23 those valid cross-references in the context of JP
24 procedure?

25 HONORABLE TOM LAWRENCE: Well, that's a good

1 question. Rule 523 says that the rules of the county and
2 district courts will apply insofar as they're applicable.
3 I don't know what that means. I've never been able to
4 find out from anybody what that actually means. You can
5 make an argument that these rules could be applicable.
6 Some specifically in county and district specifically say
7 county or district. Others you tend to apply and some you
8 don't apply. Where there's a void in the five hundred
9 series you sometimes apply those. Sometimes the five
10 hundred series are specific, so I would have to say
11 probably not, to answer your question.

12 MR. ORSINGER: Well, then we may be giving
13 you the authority you've been looking for, at least as to
14 the rules we specifically cross-refer to because these
15 rules essentially incorporate those rules, and so that
16 would theoretically mean they apply. However, some of
17 them are very generic. Like 5.3, "In addition to any
18 other requirements imposed by the Texas Rules of Civil
19 Procedure." I think there is one other real generic
20 referral to the entire rules, yeah, in 4.2(b), "imposed by
21 the Texas Rules of Civil Procedure or any other law."

22 So I'm totally okay with incorporating those
23 procedures into JP actions, but I think we should just be
24 sure that that's what we intend to do because I think
25 we're effectively doing that, and then when you globally

1 refer to all other rules or any other rule, then I don't
2 know, that may be incorporating all of the rules as to
3 that issue.

4 HONORABLE TOM LAWRENCE: Well, I think 13
5 and 57 are okay. And that's all we've got to so far,
6 right?

7 MR. ORSINGER: Yeah, that's right.

8 HONORABLE TOM LAWRENCE: I think 13 and 57
9 are okay.

10 PROFESSOR DORSANEO: Eight's okay, too,
11 right?

12 HONORABLE TOM LAWRENCE: Pardon me?

13 PROFESSOR DORSANEO: Attorney in charge
14 rule, not a great rule, but 8's okay, too, right?

15 HONORABLE TOM LAWRENCE: Yeah. I think 8's
16 okay. I don't think that would cause a problem.

17 CHAIRMAN BABCOCK: Frank.

18 MR. GILSTRAP: Well, I mean, you know, we
19 are preparing these for use by pro se litigants and
20 probably a cross-reference isn't too helpful to them. Do
21 the existing JP court rules contain this type of frequent
22 cross-referencing? I know that the rule says that the
23 district and county court rules apply to a certain extent,
24 but if you go through them are you referred to Rule 8 or
25 Rule 15?

1 HONORABLE TOM LAWRENCE: No. No. There are
2 a few references to some of the earlier rules in the five
3 hundred series, but I think that's only for summary
4 judgments, I think, and that may be it. No, there's not
5 much in the way of cross-reference.

6 MR. GILSTRAP: Probably it's too late to do
7 anything about this, but, you know, it seems to me that if
8 we are going to have pro se litigants use these that's not
9 a good thing to be doing, is frequently referencing the
10 Rules of Civil Procedure.

11 CHAIRMAN BABCOCK: Buddy.

12 MR. LOW: Chip?

13 CHAIRMAN BABCOCK: Yeah.

14 MR. LOW: This rule refers to a signature of
15 attorney. It doesn't say Rule 57 refers to signature of
16 attorney or a party representing himself, so this kind of
17 implies that this only applies to an attorney. It would
18 apply to a person, a pro se as well, would it not?

19 HONORABLE TOM LAWRENCE: Well, I think it
20 says "filer." 4.2 refers to "filers," and we define
21 "filers" under the rule, under the definition.

22 MR. LOW: Okay. But so --

23 HONORABLE TOM LAWRENCE: "A person who files
24 a document including an attorney."

25 MR. LOW: A pro se could not file

1 electronically if they wanted to?

2 HONORABLE TOM LAWRENCE: Yes. Yes, they
3 could. Pro se could file.

4 MR. LOW: But here it says "been deemed the
5 signature of the attorney." What deems it the signature
6 of the pro se?

7 MR. ORSINGER: Well, look at Rule 2.2. The
8 term "attorney" means an individual litigant if they're
9 pro se.

10 MR. LOW: Okay.

11 MR. ORSINGER: So we kind of defined our way
12 around that problem, haven't we?

13 HONORABLE TOM LAWRENCE: Yeah. That's why
14 we put that in there was for the pro ses.

15 MR. LOW: Okay. All right.

16 MR. JACKSON: Chip?

17 CHAIRMAN BABCOCK: Yeah, David.

18 MR. JACKSON: I'm looking in our
19 definitions, and we have this digitized signature, and I'm
20 reading this definition of that, but yet over here we talk
21 about digital signatures --

22 CHAIRMAN BABCOCK: Right.

23 MR. JACKSON: -- and those are two
24 completely different animals that we haven't defined
25 "digital signature," and that's probably a more important

1 definition than a digitized signature.

2 CHAIRMAN BABCOCK: Do we define that?

3 HONORABLE TOM LAWRENCE: Is there a
4 difference to TexasOnline? Would you elaborate?

5 MR. GRIFFITH: The digitized signature is to
6 be a graphic representation of your signature or a photo
7 basically that you append to the document. The digital
8 signature is by virtue of having logged on and
9 authenticated yourself you don't have to actually put a
10 wet signature on the document.

11 MR. HUGHES: And just to clarify, that's --
12 in the end of the last sentence of 4.2(a) defines "digital
13 signature," whereas, "digitized signature" is defined in
14 2.1(c).

15 MR. GILSTRAP: They're different?

16 MR. HUGHES: They are different.

17 MR. JACKSON: There is a big difference.

18 MR. GILSTRAP: Well, pro ses will pick that
19 up.

20 CHAIRMAN BABCOCK: Okay. Anything else on
21 4.2? All right. 4.3.

22 HONORABLE TOM LAWRENCE: 4.3, the timing and
23 filing of the documents. (a) talks about filing it
24 through an EFSP to TexasOnline 24 hours a day. That's the
25 same as the county and district clerk. (b) is I think the

1 same -- no, is this where we made a change in that? Let's
2 see.

3 MR. HUGHES: The big change was in (e).

4 HONORABLE TOM LAWRENCE: Yeah, I think (b),
5 (c), and (d) -- (e) was where we -- where we decided to --
6 what was the change in (e), Jody?

7 MR. HUGHES: That was the one where the --
8 it had to do with the court having an active duty to make
9 a decision on whether the document is filed and the
10 problem being that JP courts, due to their different
11 levels of staffing, would not be as a practical matter
12 able to be processing documents within that time period,
13 and so we eliminated the first sentence of the old rule
14 that said "not later than the first business day after
15 receiving the document the clerk has to decide whether the
16 document is accepted for filing."

17 We kept the one-day period in place in order
18 to satisfy the parties and lawyers who wanted to know that
19 their document that they e-filed was -- you know, that it
20 was properly filed, but we took away the burden on the
21 court to do it -- to actually examine it within the day
22 and just made it a default rule that if it's not rejected
23 within a day then it's deemed accepted.

24 HONORABLE TOM LAWRENCE: Yeah, some of the
25 larger courts had a concern that their clerks would have

1 to sit there and read every document within a one-day time
2 period and accept them or reject them, and they complained
3 that they just didn't have the time for their clerks to do
4 that with their case load. We removed it from being an
5 affirmative duty. If you don't reject it it's deemed to
6 be accepted.

7 MR. HUGHES: Or actually deemed filed. We
8 got rid of "accepted" because we also had a big debate
9 about what does it mean for a document to be accepted for
10 filing, and we thought it would be simpler to use the term
11 "filed."

12 CHAIRMAN BABCOCK: Andy.

13 MR. HARWELL: Tom, I think (b) did change.
14 I remember that on the county and district side that it
15 was deemed filed at the time it -- that TexasOnline
16 received the document. Is that not -- and the clerk had
17 like 10 days -- was that changed?

18 HONORABLE TOM LAWRENCE: On (b)?

19 MR. HARWELL: On (b).

20 MR. HUGHES: Yes, that 10-day provision was
21 taken out.

22 MR. HARWELL: I remember the 10-day, and I
23 thought also that it was deemed filed whenever TexasOnline
24 received it, not the vendor that was sending it to
25 TexasOnline. Yes.

1 CHAIRMAN BABCOCK: Buddy.

2 MR. GRIFFITH: The way that -- I'm sorry.
3 Go ahead.

4 MR. LOW: No, the Appendix C reflects the
5 changes; is that correct? Isn't that the original draft
6 applied to district and county courts and then you've
7 shown -- you've struck out and underlined what you've
8 added. Isn't that the purpose of Appendix C, to see what
9 the changes were?

10 HONORABLE TOM LAWRENCE: Well, Appendix C is
11 kind of the draft after our meeting, wasn't it, Jody?

12 MR. HUGHES: No, Buddy is correct, I think.
13 Appendix C is a redlined version showing the differences
14 between our recommendation and the district and county
15 court template.

16 MR. LOW: So if you have a question of
17 what's changed, I've been looking at that, and if I'm
18 looking at the wrong thing, well, that won't be the first
19 time.

20 MR. HUGHES: You're correct, Buddy.

21 MR. LOW: Okay.

22 CHAIRMAN BABCOCK: Yeah, Bill.

23 PROFESSOR DORSANEO: Accepting other
24 comments about (e)?

25 CHAIRMAN BABCOCK: Yes.

1 PROFESSOR DORSANEO: I really have a
2 question. What's that second sentence all about? I don't
3 see anything in Rule 145 that talks about handling
4 documents other than a sentence that says, "Upon the
5 filing of the affidavit the clerk must docket the action,
6 issue citation, and provide such other customary services
7 as provided any party." I don't understand what that
8 sentence is meant to mean. The justice of the peace, and
9 I realize it says the same, says "the clerk" in their
10 template, but I don't understand it.

11 MR. HUGHES: I think the purpose of it was
12 to say, basically, that you -- under these rules, the
13 clerk, in this case it's actually the court, is not to
14 treat electronically filed documents that are filed by an
15 indigent filer differently solely because they're
16 electronically filed, if they had the wherewithal to
17 e-file but were otherwise indigent.

18 PROFESSOR DORSANEO: I think it ought to say
19 that then. Because when you go to look at Rule 145,
20 you're not -- it doesn't really say what it implies, that
21 "by documents" -- I mean, it says you're going to handle
22 the case the same way and presumably until the contest is
23 sustained or whatever, but it doesn't fit together well.

24 MR. HUGHES: Well, I thought -- and maybe
25 this wasn't very well done, was that 145 has a number of

1 provisions in it, and rather than try to incorporate all
2 of them we were trying to incorporate the whole rule by
3 reference, but if there's pieces of it that are
4 particularly important, maybe we should look at
5 incorporating that.

6 CHAIRMAN BABCOCK: Are you going to have a
7 potential conflict by what you -- what we talked about
8 adding earlier where you say that if you're indigent,
9 don't bother messing with these rules?

10 MR. HUGHES: Well, we didn't have that in
11 the original.

12 CHAIRMAN BABCOCK: I know, but if you add
13 that is this going to be in conflict with that?

14 MR. HUGHES: Yes.

15 CHAIRMAN BABCOCK: Seems like it is. Gene.

16 MR. STORIE: I think there is another
17 cross-reference issue, too, because Rule 572 provides an
18 affidavit of inability for an appeal, so you may want to
19 add that in.

20 CHAIRMAN BABCOCK: Right.

21 HONORABLE TOM LAWRENCE: But I think this
22 refers to the initial filing.

23 MR. STORIE: Does it?

24 CHAIRMAN BABCOCK: Richard Orsinger.

25 MR. ORSINGER: On a slightly different

1 point, does subdivision (e) fit with subdivision (b),
2 because I always thought if you electronically file that
3 you're deemed filed when it's received by the EFSP, but
4 (e) suggests to me that it's not deemed filed until after
5 the court accepts it or one day has passed, and if you're
6 filing an answer on Monday morning, that could make a
7 difference, and so I'm wondering if -- are these two
8 different timetables; or does it appear to be that we have
9 deemed filing occurring at two different times; or does
10 (e) mean that it's not deemed filed by extending (b)
11 unless the court says it's deemed? I mean, what if the
12 court doesn't doesn't accept it? Is it deemed filed or is
13 it not deemed filed? So is there a -- is there a cross?

14 MR. HUGHES: I think the way they work
15 together is that (b) says for purposes of your timing of
16 filing it, its filing time is when it's received by the
17 EFSP, but (e) gives the court a day to reject it even if
18 it was timely filed for other reasons. Although, the task
19 force, we had a pretty good debate about what are the
20 reasons a court or a clerk -- because they're acting
21 really in the capacity that a clerk acts in in other
22 courts, what reasons they could legitimately sort of
23 bounce a document.

24 MR. ORSINGER: Well, let's assume that
25 somebody files through an EFSP and the justice court does

1 nothing. What day is it deemed filed? Is it deemed filed
2 on the day it was received by the EFSP or is it --

3 PROFESSOR DORSANEO: Yes.

4 MR. ORSINGER: -- deemed filed one business
5 day later?

6 MR. HUGHES: The former.

7 PROFESSOR DORSANEO: Former.

8 MR. ORSINGER: Why is that?

9 MR. HUGHES: Under (b).

10 MR. ORSINGER: Under (b), right. But it
11 says, "If the justice of the peace court fails to reject
12 or accept a document within one business day the document
13 is deemed to have been filed."

14 MR. HUGHES: But it doesn't say it's deemed
15 to have been filed on that --

16 MR. ORSINGER: It's retroactive to when it
17 was filed with the EFSP?

18 MR. HUGHES: Correct.

19 MR. ORSINGER: Okay.

20 MR. HUGHES: I mean, if that's not clear
21 maybe we should --

22 MR. ORSINGER: It may be just me.

23 PROFESSOR CARLSON: I think we are clear.

24 MR. WATSON: It's not clear.

25 CHAIRMAN BABCOCK: Justice Hecht.

1 HONORABLE NATHAN HECHT: Let me ask, I know
2 we debated this before, but now that we've had some
3 experience, has a clerk ever refused to accept a filing
4 within a day or however much time they've got?

5 HONORABLE TOM LAWRENCE: I remember you had
6 said something about that, and I asked that question at
7 the task force meeting, and the answer was, yes, that they
8 had refused acceptance because it's not the right county
9 or something like that. That was one of the examples
10 given I remember, Jody. Do you remember anything else
11 or --

12 MR. HUGHES: That was the one I remember.

13 MR. HARWELL: What about fees were not paid?

14 MR. HUGHES: The fees, though --

15 HONORABLE TOM LAWRENCE: The fees aren't a
16 problem because TexasOnline collects those and remits them
17 to the county. So if you don't pay the fees properly then
18 it never gets to the county.

19 MR. HUGHES: And aren't those picked up by
20 the EFSP, and if the party doesn't ultimately pay the EFSP
21 that's an issue between those two? I mean, the county is
22 not the one who gets left holding the shorter stick, it's
23 the EFSP.

24 MR. MARTIN: If someone misfiles with the
25 wrong jurisdiction, I think it's considered that they made

1 the mistake and those fees are not refundable; and just
2 the county not accepting it, I mean, "Well, this isn't our
3 jurisdiction, you should have been filing over here."
4 That's a matter for the courts to make the ruling on.
5 With us, it's -- we were going to deliver it to wherever
6 they told us to deliver it.

7 HONORABLE TOM LAWRENCE: Generally, it's the
8 practice in the justice courts for the clerks not to
9 operate as a gatekeeper. We tell them simply to accept
10 for filing; and if there's a problem it will be resolved
11 later; but we typically don't allow the clerks to tell the
12 parties, "No, you can't file this. We're going to reject
13 it," so usually if they come in and want to file something
14 then we accept it, and if there's a problem with it it's
15 resolved later.

16 CHAIRMAN BABCOCK: Bill.

17 PROFESSOR DORSANEO: I'm going back to that
18 145 sentence. I think it should say, "The justice of the
19 court must accept electronically transmitted documents in
20 connection with a 145."

21 MR. HUGHES: Instead of "shall handle"?

22 PROFESSOR DORSANEO: Instead of "shall
23 handle," because I think that's what has to happen. You
24 can't just throw them away.

25 MR. GILSTRAP: I handled it.

1 PROFESSOR DORSANEO: Well, 145, it's more in
2 connection with 145 because 145 doesn't say anything about
3 how to handle documents except for that thing that I read,
4 which says you act as if somebody paid until you get this
5 resolved.

6 CHAIRMAN BABCOCK: Skip.

7 MR. WATSON: I don't understand the point of
8 the last sentence. I'm sorry. I was trying to figure out
9 why it was changed from "accepted" to "filed" and then I
10 was trying to figure out why is it in there. I mean, if
11 it's -- if from (b) it's filed, it's filed, and I -- I
12 don't know why we're saying that any -- what have I
13 missed?

14 CHAIRMAN BABCOCK: If the JP court fails to
15 accept a document within one business day the document is
16 deemed to have been filed, but if they don't accept it
17 then they don't accept it right away.

18 MR. HUGHES: The idea was sort of that
19 district and county clerks -- oh, go ahead.

20 CHAIRMAN BABCOCK: No, go ahead.

21 MR. HUGHES: They serve a role as acting as
22 this gatekeeper function that's sort of harder for the JP
23 courts to do because they may have a clerk that's their
24 employee, but they don't necessarily have this separate
25 office set up. And there are certain circumstances where

1 obviously a document can be filed and that doesn't imply
2 anything about what the court is going to grant relief
3 under or anything later on, but there are also
4 circumstances where a district or county clerk would not
5 allow somebody to file something, maybe because of a fee
6 issue without an indigency certificate or maybe because it
7 was so obviously in the wrong jurisdiction or something,
8 they would say, "Hey, bud, you need to take this to the
9 other county."

10 MR. WATSON: What does that have to do with
11 filing it? If it's filed in the wrong jurisdiction, then
12 it's filed. The court just doesn't have the authority to
13 do anything except sign an order saying, "I'm dismissing
14 this for want of jurisdiction," but I don't understand
15 where the notion of accepting and filing comes in. To me
16 it's an alien concept to me, and I know it's there for a
17 reason, but for the life of me I can't figure it out.

18 MR. HUGHES: Well, in terms of accepting, we
19 tried to -- I think for the reasons you're discussing,
20 we -- the task force voted to eliminate accepting, the
21 concept of accepting, because it raises this question of
22 what does it mean to accept the document. So the
23 accepting language came from the old template. It's not
24 in, I don't think, the language of the JP.

25 MR. WATSON: I'm going back to Richard's

1 question except I'm going a step further. I mean, to me
2 (e) and (b) are inherently contradictory. It's either
3 filed when it's done or it's filed a day later retroactive
4 to when it was done, and I still don't get why we're
5 saying it's filed a day later retroactive when it was
6 originally done. What is the object of that sentence?

7 CHAIRMAN BABCOCK: Well, part of it I can
8 understand, but I understand your point. But if I hit the
9 send button and it goes and it goes through and I get a
10 receipt that says, you know, it's been filed and the JP a
11 couple of hours later looking at this and says, "No, no,
12 no, no, no, I'm not going to accept this," and hits some
13 button that says, "This is unfiled," then it's unfiled;
14 but if the JP waits 24 hours and, you know, 28 hours after
15 it's been filed hits the button and says, "This is
16 unfiled," then this rule says, "No, huh-uh, that's not
17 right."

18 MR. WATSON: Well, when would you do that?
19 Let's say it's in the wrong court, he doesn't have
20 jurisdiction. He suddenly gets jurisdiction after 24
21 hours when he doesn't have it otherwise?

22 HONORABLE TOM LAWRENCE: Well, let's say a
23 case is filed and it's not signed. The Small Claims Court
24 Act says that the petition has to be signed, so what if
25 it's filed and not signed? Arguably that could be a

1 situation where you might not accept it.

2 MR. WATSON: Wouldn't --

3 CHAIRMAN BABCOCK: But Skip's point about
4 not accepting is I hit my send button, and it goes --

5 MR. WATSON: It's either there or it's not.

6 CHAIRMAN BABCOCK: Yeah, and if you refuse
7 to accept it then there's no one day about it. It's just
8 not accepted right away.

9 HONORABLE TOM LAWRENCE: Well, but the
10 concept is if you walk up to the counter then the clerk is
11 immediately going to see that there's a problem and tell
12 you "no." So you don't get a free pass to try to slip
13 something through just because you do it electronically.
14 There's got to be some opportunity to correct that
15 problem.

16 HONORABLE NATHAN HECHT: But Skip's point is
17 you do get a free pass.

18 HONORABLE TOM LAWRENCE: Pardon?

19 HONORABLE NATHAN HECHT: As I hear it, it is
20 that you do get a free pass because if nobody catches it
21 for 24 hours then you can do what the guy who walked up to
22 the window couldn't do.

23 MR. WATSON: I'm just saying you ought to be
24 able to enter an order saying that we're kicking this back
25 at any time, but you do need to enter an order to do that,

1 you see.

2 HONORABLE TOM GRAY: What about that Federal
3 stamp that goes over the file stamp that just says
4 "unfiled"? I mean, they have them. I've seen them.

5 MR. WATSON: Oh, I've gotten them.

6 CHAIRMAN BABCOCK: They've got a bunch of
7 them. Carlos and then --

8 MR. LOPEZ: The passage of 24 hours in Judge
9 Lawrence's example doesn't automatically put a signature
10 on the document. It's still a defective document that we
11 can argue about when it was really filed. I mean, what if
12 -- what if the answer -- the litigant says, "Sure, it was
13 signed, I don't know what -- I don't know what their
14 clerks did with it, but it was signed when I filed it."
15 How do you prove it wasn't if you rejected it? I mean,
16 that document that you've got in your file now says, "Here
17 it is." I mean, you've just rejected it. You kind of
18 have -- you open up a swearing match about what was and
19 wasn't intended to be filed.

20 CHAIRMAN BABCOCK: Richard, then Bill.

21 MR. ORSINGER: I know that my comment
22 applies equally to the district court rules, but when you
23 produce or present a document to the district or county
24 clerk and they reject it, they'll just hand it right back
25 to you and you know that there is some deficiency, but I

1 don't see any mechanism in here for the party that filed
2 electronically to be advised that a document has been
3 rejected by the court.

4 HONORABLE TOM LAWRENCE: Well, there is in
5 the county and district court rules. It's the same
6 language. We took this language --

7 MR. ORSINGER: I know. But my criticism or
8 my concern is the same for these rules as the other rules,
9 even though they're already enforced and there's nothing
10 we can do about them, and that is how does someone know
11 that their document has not been accepted when it's been
12 filed electronically since we have no -- we have nobody
13 handing it back to them and we have nobody sending an
14 e-mail and we have nobody sending a letter and --

15 HONORABLE NATHAN HECHT: (g).

16 MR. ORSINGER: -- we have nobody making a
17 phone call.

18 HONORABLE NATHAN HECHT: (g). The answer is
19 (g).

20 HONORABLE TOM LAWRENCE: Mike can answer
21 that.

22 MR. ORSINGER: (g)? Okay.

23 HONORABLE TOM LAWRENCE: Mike can answer
24 that.

25 MR. GRIFFITH: The question on how does a

1 filer know if a document has been filed or rejected, if
2 it's rejected the clerk, or in this case the court, will
3 send a comment back to the filer telling them why that
4 document has not been accepted.

5 MR. ORSINGER: At the e-mail address listed
6 on the document then?

7 MR. GRIFFITH: Right.

8 MR. HARWELL: And you're saying it goes back
9 to the filer. Does it go through TexasOnline and then
10 back to the EFSP?

11 MR. GRIFFITH: That's correct. Yes.

12 MR. HARWELL: Is there a time lag between
13 when it leaves TexasOnline and could be sent back to
14 the --

15 MR. GRIFFITH: Nothing significant, no. You
16 know, it's a matter of seconds. It generates an e-mail
17 message back to the filer.

18 CHAIRMAN BABCOCK: Okay. Who's hungry?
19 Everybody's hungry. Let's take a lunch break.

20 (Recess from 12:31 p.m. to 1:39 p.m.)

21 CHAIRMAN BABCOCK: Judge Lawrence, if you'll
22 stand at ease for just two seconds, we have a -- we're
23 going to try to jump over to item six real quickly, even
24 though Jeff Boyd is not here right now, but maybe he'll be
25 here in a second. As everybody knows, a couple of months

1 ago, a couple of meetings ago, Chief Justice Jefferson and
2 Justice Hecht asked us to look at different ways we might
3 be able to make the civil justice system in Texas more
4 user-friendly and stop this outflow of dispute resolutions
5 to alternatives such as arbitration or other forms of ADR
6 and, frankly, cases being sent to other states, so Jeff's
7 subcommittee has been looking at different things.

8 They have looked at the rocket docket,
9 focusing on the Eastern District of Virginia and the
10 Eastern District of Texas and other rocket dockets, and
11 we've discussed that two or three times at our meetings,
12 and it looks like there's not a whole bunch of enthusiasm
13 among the broad committee or even the subcommittee for
14 that proposal. Last week Justice Jefferson and Justice
15 Hecht asked -- Chief Justice Jefferson and Justice Hecht
16 asked Jeff's subcommittee to look at this complex
17 litigation, complex case issue that is used in some
18 states. I'm personally familiar with that system in
19 Philadelphia, where the Philadelphia Court of Common Pleas
20 has two judges who are designated for, quote, complex
21 cases.

22 If anybody else is on the subcommittee, you
23 can tell me, but I think there has been no substantive
24 work done on that yet, but that we had a telephone
25 conference with Jeff, me, Justice Hecht, and Chief Justice

1 Jefferson Wednesday or Thursday of last week; and the
2 Chief asked the subcommittee to just look and study and
3 see what other states are doing in that regard and report
4 back to us, hopefully by our October meeting; and since
5 that time I've gotten a couple of letters from members of
6 the Legislature saying they think it's kind of a bad idea
7 since they considered it, it was very controversial, and
8 they didn't implement it into legislation and, you know,
9 what the hell are we doing studying it if they thought it
10 was a bad idea.

11 I know the Chief and Justice Hecht have
12 talked to Senator Wentworth and told him what we're doing,
13 and I've talked to some people that have called me, so
14 that's where we stand on it. Is there anybody here from
15 the subcommittee in Jeff's absence? Yeah, Judge
16 Yelenosky, and, Judge Bland, was that your arm --

17 HONORABLE JANE BLAND: Yes.

18 CHAIRMAN BABCOCK: -- that went up? You got
19 any comments about this? Justice Bland, you're the --

20 HONORABLE STEPHEN YELENOSKY: She's senior
21 to me, I think she should speak.

22 CHAIRMAN BABCOCK: You can -- you're the
23 appellate judge.

24 HONORABLE JANE BLAND: The subcommittee was
25 uncertain of our charge, and we had lots of reservations

1 about jumping in and creating some rule when there was
2 demonstrated legislative inaction, and so -- is that fair,
3 Stephen?

4 HONORABLE STEPHEN YELENOSKY: Absolutely.

5 HONORABLE JANE BLAND: So we -- I think
6 that's why Jeff called you, to get some guidance about
7 whether we were to do research, which I think we're more
8 than happy to do, and report back research or whether you
9 wanted advice about a rule or actually just wanted us to
10 draft a rule.

11 CHAIRMAN BABCOCK: Yeah. Yeah. There was
12 considerable misinformation, undoubtedly spread by the
13 ill-informed press, that we were going to take up a rule
14 today, and that was never -- that was never the case
15 unless you guys work quicker than our subcommittees are
16 customarily working.

17 HONORABLE JANE BLAND: Well, our committee's
18 charge might have given that misimpression because the
19 memos that we were reviewing were more looking like rule
20 memos than research and discussion memos, but we are happy
21 to do whatever the chair asks us to do.

22 CHAIRMAN BABCOCK: Well, and I'm just doing
23 what the Court asks us to do, so just so there is clarity
24 here, you guys look at the issue of complex case referrals
25 and see what other states are doing and whether they're

1 doing it by rule or by legislation or a combination,
2 combination thereof, and see if it's working anywhere. As
3 I say, I've got experience with it in Philadelphia where
4 it seemed very visentine to me, but maybe that's just
5 because I was an outsider.

6 MR. KELLY: Chip?

7 CHAIRMAN BABCOCK: Yeah, Hugh Kelly.

8 MR. KELLY: The Legislature never voted on
9 the bill because it was killed in the latter stages
10 through a point of order.

11 CHAIRMAN BABCOCK: Through a point of order?

12 MR. KELLY: A point of order.

13 CHAIRMAN BABCOCK: Okay.

14 MR. KELLY: There was no vote, no anything.
15 The bill was not going to pass because it just had
16 tremendous hair on it, but --

17 CHAIRMAN BABCOCK: Unlike yourself.

18 MR. KELLY: But one other point I might add,
19 during the research I did and connected with that there
20 may be about 15 states that have something like this, and
21 all of them did it by rule. Legislature has never done
22 it. So they also tell you that you shouldn't take -- you
23 shouldn't take your furniture-making to a guy with a
24 chainsaw. So --

25 CHAIRMAN BABCOCK: I've always tried to

1 follow that rule myself. Judge Yelenosky.

2 HONORABLE STEPHEN YELENOSKY: Well, in
3 looking at it, one of the things we have to do in looking
4 at other states is see where there are parallels and where
5 there are not, and so that's one thing we've already
6 discussed. I don't know how many of those 15 states have
7 an elected judiciary, for instance.

8 CHAIRMAN BABCOCK: Yeah, well, Philadelphia,
9 for example, they elect their judges. I mean Pennsylvania
10 does, and the way Philadelphia has organized its court
11 systems, they've got a special guy for class actions and
12 they've got two guys for complex cases and then they have
13 a number of people for commercial cases, and it's very --
14 it's very bizarre the way they do it, but anyway, Richard.

15 MR. ORSINGER: I'm going largely on what
16 I've been told, but I just want to lay this out for the
17 subcommittee's assessment and to also explore the charge.
18 What you said was how do they handle referrals on the
19 complex cases, and there is an assumption there that the
20 case needs to be assigned around because it's complex and
21 it's in a certain court, and that certainly is what Senate
22 Bill 1204 did. It made the assumption that somebody was
23 in a position to decide that an elected judge was not
24 knowledgeable enough to handle a certain kind of case. I
25 don't know how they would determine that. I don't know

1 whether the judges are going to take a test.

2 CHAIRMAN BABCOCK: Well, if you were a
3 judge, for example.

4 MR. ORSINGER: Yeah, okay. All right. And
5 anyway, there is a lot of problems with Senate Bill 1204,
6 but it's my understanding that in the Senate, as this bill
7 went through the committee process it evolved into a
8 different approach to complex litigation, which was if a
9 case is complex and a court is overwhelmed that they were
10 going to provide additional resources for that judge, who
11 is a duly constitutionally elected or whatever, to handle
12 the complex litigation, and that it actually passed the
13 Senate, I have been told. Someone here may know
14 differently, and I don't want the record to be inaccurate
15 if you know, but it's my understanding that as the bill
16 evolved away from a transfer concept to a send resources
17 to help the judge concept, that it actually got the vote
18 of the Senate.

19 So it goes over to the House, and as it's
20 evolving through the House it picks up a bunch of
21 amendments by people who would like to have their own pet
22 projects stuck on the back of that bill, and by the time
23 it gets to the floor of the House -- which, by the way, is
24 an achievement of its own for the bill to get to the floor
25 of the House -- it had so much stuff on it that it died to

1 a point of order because there was a lot of stuff stuck in
2 there that wasn't in the caption or whatever the rule is
3 where you can kill it on a point of order.

4 So I'm not sure that we should say that the
5 Legislature has taken no action. Admittedly there is no
6 bill that passed both houses and was signed by the
7 Governor, but it does appear that the Senate passed a
8 bill, and that's noteworthy. I think that whatever
9 version the Senate voted out is worth looking at, and
10 secondly, verify that what I'm saying is right in the
11 House, and if I am right, then there does seem to be a
12 legislative willingness to consider that the solution to a
13 particular judge being overwhelmed by a certain kind of
14 lawsuit is to give him or her additional resources rather
15 than to set up a super committee of peers to decide that
16 they're not knowledgeable enough to handle the case and
17 then send somebody they consider to be smarter or more
18 knowledgeable. Now, Lisa, you were going to say
19 something.

20 MS. HOBBS: Well, I would just add to your
21 description of what the engrossed version that passed the
22 Senate, Senate Bill 1204, included in that judicial
23 resources provision was the allowance for a visiting
24 judge, an active or retired judge, to take over that case,
25 but I believe that it required the consent of the trial

1 judge.

2 HONORABLE STEPHEN YELENOSKY: That's
3 correct.

4 CHAIRMAN BABCOCK: Yeah, Bill.

5 MR. WADE: If I might say something, I
6 visited at some length with my partner, Senator Duncan,
7 yesterday about this, and he said that I had his
8 permission to state to the committee that his opinion of
9 that is far from a dead issue in the Legislature, and he
10 feels that they made a great deal of progress, and he
11 thinks it's, you know, something that they're going to
12 revisit and get something done on.

13 CHAIRMAN BABCOCK: Judge -- Justice Bland,
14 and then Buddy.

15 HONORABLE JANE BLAND: If I could get some
16 guidance or if we could get some guidance about which
17 direction you want us to look. I mean, obviously I think
18 you want us to research other jurisdictions and see how
19 it's done other places, look at the interplay between the
20 fact that we're constitutionally elected officials. Do
21 you want us to look at solutions that are more along the
22 line of the final product that came out, which involved
23 resources and a visiting judge with the consent of the
24 trial judge or some earlier version of that bill? Because
25 I think there probably wasn't as much concern on the

1 subcommittee with the latter, but we were thinking that
2 our charge was more to look at the former.

3 CHAIRMAN BABCOCK: Well, not as far as I was
4 concerned, but I'll defer to Justice Hecht on that issue,
5 but it seems to me that we ought to see how it works in
6 other places, and Judge Yelenosky raises a good point. I
7 mean, it might be different in a jurisdiction that elects
8 its judges versus appoints them. For example, in the
9 Federal system there's -- I know I've got experience with
10 a case where they just took one judge from a Federal
11 district court and gave him like these 200 cases. They
12 gave him an extra law clerk, they gave him extra
13 resources, they dedicated a U.S. magistrate to him, but
14 they, quote, took all those cases from other judges,
15 which, you know, may be appropriate, maybe not, but that's
16 the type of thing that goes on. But, Justice Hecht, does
17 that --

18 HONORABLE NATHAN HECHT: Yeah, I mean, the
19 concern -- the Court's concern is that we investigate
20 everything we can to be sure that the civil justice system
21 is operating as efficiently and as helpfully to the public
22 as it should; and just as with the rocket docket, when we
23 started, sort of the initial inquiry is what does this do,
24 how does it help, what are its objectives, and what are
25 its benefits and detriments; and then if we had gotten

1 further, which we didn't, it would have been to work
2 hammering out the details, like many would, point by point
3 by point, how it would operate in a given place.

4 So I think we start the same way here and
5 just look at the question of how cases which are -- which
6 require more judicial time and energy, are they being
7 handled as efficiently as they could be and not really
8 look at any particular version of the legislation, but
9 just try to look at the problem.

10 And I talked to Senator Wentworth about this
11 yesterday, and it may be, as they seem convinced now or
12 some seem convinced now, that this is a legislative matter
13 rather than a rule matter; but as most of the members of
14 this committee will recall, we have been called upon in
15 the last several years to help implement legislative
16 policies through rules that we had been studying for a
17 year or two before that directive came; and if we hadn't
18 been, it really would not have been possible to comply
19 with the request within the time frame specified.

20 What we're working on now, the e-filing is
21 an example of that. If we didn't have the templates for
22 the district and county courts already working in
23 essentially 30 counties and have some idea what the
24 experience was, it would not be possible to provide for
25 electronic filing at 835 courts with all sorts of

1 jurisdiction, all sorts of counties between now and
2 January the 1st. So we need to be sure that we're
3 thinking about this and have discussed it enough that if
4 it does look appropriate at some point to propose rule
5 solutions that we're in a position to do that.

6 Now, one other factor is that the bar, State
7 Bar of Texas, wants to look at this, too, and I understand
8 has formed or will shortly form a group to do so; and Gib
9 Walton, the president of the bar, came by this week and
10 said that they expect to work very hard at this, not just
11 from a research kind of position, but also from trying to
12 bring together differing views on the issues and see where
13 they can find consensus. So they sort of have a broader
14 view of the problem, if there is one, than others might,
15 and I think because the bar has resources to do that and a
16 number of people who are willing to do that, we should
17 take advantage of their work and monitor it and not try to
18 duplicate it or do work that they're already going to
19 undertake, and Jeff Boyd was on our conference call this
20 week, and he's amenable to being part of the State Bar
21 group and performing that function.

22 So I think our goal is to stay abreast of
23 those developments and to have in mind the advantages and
24 disadvantages of various approaches and whether they
25 require legislation or don't and so we would be in a

1 position to assist in this process if called upon to do
2 so.

3 CHAIRMAN BABCOCK: Jeff Boyd has joined us.
4 Jeff, sorry, we jumped your committee here.

5 MR. BOYD: I don't want to be here for this
6 discussion anyway.

7 CHAIRMAN BABCOCK: That's what we figured.
8 Anything you want to add to what Justice Hecht said?

9 MR. BOYD: I'm sorry that I was gone. I had
10 another meeting I couldn't miss, and I only caught the
11 very end of what he said, but so I don't want to repeat
12 whatever may have been said. The assignment was relayed
13 to us, and I put a draft memo together for the committee
14 to chew on, and we had our first meeting as a subcommittee
15 and, as we always do, raised issues about, now, what is it
16 exactly we're being asked to do and why are we being asked
17 to do it.

18 We have started gathering background
19 information as a subcommittee to -- as subcommittee
20 members to understand the various issues that this concept
21 has raised and in particular understand what other states
22 have done in addressing those issues, and that's really
23 all we've done, and then we did have the conference call
24 with Justice Hecht and Chief Justice Jefferson for me to
25 clarify further what -- and what I heard Justice Hecht

1 just say is what he told me on the phone a couple of days
2 ago.

3 CHAIRMAN BABCOCK: And while you were out
4 Hugh Rice Kelly said that he had done some research on
5 this, and so he may be able to shortcut what you-all have
6 done. Tom, and then Carl.

7 MR. RINEY: I'm on the State Bar committee,
8 as is Alex, Alistair Dawson, perhaps other members from
9 this committee. It was actually formed during the last
10 legislative session as part of the litigation section
11 that's now being continued. It's a large committee that
12 has a lot of enthusiasm. There have been countless
13 numbers of e-mails this week on the topic when they found
14 out this committee was going to consider it.

15 By the way, it's much like deciding to
16 modify Social Security. It generates a lot of interest
17 rather quickly, but I think it's a good committee. I
18 think they have very much the intent of being very
19 thorough in their study, and I think the proposal of Jeff
20 working with that committee is a very good idea.

21 CHAIRMAN BABCOCK: When you get done with
22 this would you take on Social Security and get that fixed?

23 MR. ORSINGER: But get us out of Iraq first.

24 CHAIRMAN BABCOCK: Yeah, right, get us out
25 of Iraq.

1 MR. HAMILTON: I'm not sure that I
2 understand what the problem is that you referred to. Is
3 it one of resources to handle complex cases or one of the
4 ability of the judge or just what is it?

5 HONORABLE NATHAN HECHT: I don't know. I
6 don't know enough about it to know. I know in some
7 states, as Chip has said and as came out during the
8 legislative session, that there are states that have more
9 specialized courts than Texas does, and I don't know if
10 that's a good idea or a bad idea, if it helps move cases
11 that are otherwise a burden on the system. I know when I
12 was on the trial bench in Dallas if somebody got stuck
13 with a big case and the judge didn't want the case, we
14 talked among ourselves and transferred it to somebody that
15 did. We set up an asbestos docket because we didn't think
16 it made sense for 13 of us to be handling asbestos cases,
17 before there was an MDL. When the South Texas Nuclear
18 Power Plant case came to Dallas County for trial because
19 of transfer from Travis County, we had a number of
20 meetings trying to find a judge who wanted to spend four
21 months working on nothing but that case and how were we
22 going to help that judge with his docket if that happened.
23 So I don't know if it's resources or maybe
24 there's not a problem at all, but if more resources would
25 help expedite those cases or prevent inefficiencies, waste

1 of time, then that's something we ought to report back to
2 the Legislature. If any other changes in procedures or
3 statutes could help that part of our system then I think
4 we need to explore those, but at this point, it's hard to
5 know whether anything needs to be done and if so, what, as
6 far as I'm concerned.

7 CHAIRMAN BABCOCK: Anybody have any
8 experience with a specialized court like that anywhere
9 else in the country?

10 MR. GILSTRAP: We've all got experience with
11 family law and criminal law courts. Those are
12 specialized.

13 MR. ORSINGER: You know, occasionally in
14 some of the counties that I practice in --

15 CHAIRMAN BABCOCK: All you had to do was say
16 "family court."

17 MR. ORSINGER: Occasionally in some of the
18 counties I practice in they've decided that they would
19 specialize the juvenile cases in one judge, and in my
20 experience that hasn't been done by the Legislature
21 designating the court. It's been more one of the local
22 district judges would volunteer. I think, Steve, that
23 you-all went through this phase in Travis County where you
24 had somebody to step up and take all of the juvenile cases
25 for awhile? I think they've done that in San Antonio a

1 couple of times, and somebody does it until they get
2 burned out on it and then they go back to spreading it
3 around again, and there is no doubt that if you are
4 familiar with Child Protective Services or something like
5 that that there's going to be a lot of efficiencies
6 because you'll see the same professionals, you'll see the
7 same prosecutors and whatnot, but then there's also
8 implications about our governments and about the elected
9 process and constitutionality and that kind of thing.

10 CHAIRMAN BABCOCK: Lisa, and then Hugh.

11 MS. HOBBS: I would just point out that --
12 and there maybe others, but at least Travis County and
13 Bexar County have some sort of local complex litigation
14 local rule kind of procedure whereby they designate
15 something as complex and it gets some sort of special
16 treatment.

17 MR. ORSINGER: But it gets assigned out at
18 random. It doesn't get assigned to what a committee of
19 five judges thinks may be the best judge for the case, and
20 pick from those who are sitting, those who are retired, or
21 those who -- I don't know whether under this bill you
22 could have even lost an election and still be qualified --
23 be better qualified than the assigned judge.

24 MR. BOYD: Do we have -- Judge Yelenosky, we
25 have a complex --

1 HONORABLE STEPHEN YELENOSKY: Yes. Local
2 Rule 2.6 essentially allows anybody to ask the local
3 administrative judge, Judge Dietz, to specially assign a
4 case to a judge, and Judge Dietz then makes that
5 determination on his own or in consultation with other
6 judges, and if it is to be assigned, there is a rotation
7 that's kept by staff, and it's simply the next judge who's
8 up to get a 2.6 assignment.

9 MR. BOYD: But it's really a feature of the
10 central docket. It's a way to take it off the central
11 docket and have it assigned to a particular judge, not
12 really a complex case special judge type of assignment.

13 HONORABLE STEPHEN YELENOSKY: Yes. It is to
14 take it off the central docket, and it is not based on the
15 assumption that any of the ten sitting civil district
16 judges have more resources or capabilities. It's simply
17 to take it off the central docket and allocate it at
18 random to one particular judge because the case merits
19 having one particular judge all the way through for
20 whatever reason.

21 MR. BOYD: And the exception to that is that
22 at one point Judge Paul Davis was designated as the
23 asbestos judge, similar to what happened in Dallas, where
24 he handled all the pretrial matters on asbestos cases.

25 CHAIRMAN BABCOCK: Okay. Hugh, you had your

1 hand up a long time ago.

2 MR. KELLY: Well, I was going to say in the
3 1970s I don't know how they went about doing it, but only
4 certain district judges in Travis County heard complex
5 administrative appeals. Certain judges, I suspect it was
6 preference because those cases could be very boring if you
7 don't have any background in, say, rate base of Houston
8 Lighting & Power Company or rate base of gas pipeline and
9 company, but there were just a certain number of those
10 judges that heard those cases. They would be assigned and
11 they would stick to it, so they were doing something that
12 was complex.

13 HONORABLE STEPHEN YELENOSKY: I can't speak
14 to the 1970s because I was in junior high and high school.

15 CHAIRMAN BABCOCK: Thanks for pointing that
16 out. Frank.

17 MR. GILSTRAP: It's been said.

18 CHAIRMAN BABCOCK: Okay. Steve Bresnen has
19 been here. You want to -- I know we're passing out your
20 letter. You want to --

21 MR. BRESNEN: Yes, sir, I just want to say
22 briefly because you've got the letter, and I know this
23 e-filing deal is going to bog you down. I apologize I
24 missed the early part of the conversation, because I
25 thought you were still bogged down, but I'm here.

1 CHAIRMAN BABCOCK: This is a welcome relief,
2 so --

3 MR. BRESNEN: I'm here on behalf of the
4 Family Law Foundation. We opposed Senate Bill 1204 as
5 filed during the session. I worked -- followed that bill
6 all the way through. One of the reasons we opposed it is
7 because there are ways under current law that you-all are
8 all identifying now to address these by local elected
9 judges making choices rather than having an administrative
10 judge somewhere up the chain of command pull the case from
11 them. The approach that we supported had broad support in
12 the Legislature. I don't think the support that the bill
13 as filed in the complex case provisions or the approach
14 outlined in the document that I saw that had talked about
15 what the assignment was, I don't think that had very much
16 support at all in the Legislature. The Legislature's
17 approach was to direct additional resources to the courts
18 when they needed them.

19 There was recognition that some courts might
20 need additional briefing attorneys, file cabinets,
21 whatever, in the case of -- in a given case, and that is
22 the approach that we support. We work with elected judges
23 all over the state, our members do. We think it's most
24 appropriate for them to exercise the jurisdiction as
25 granted to them by the constitution and statutes of the

1 state and not have a case plucked administratively from
2 them. Thank you.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: We had one case that lasted four
5 months. It was in Federal court, and we had one judge
6 that ruled on all objections, preliminary matters. They
7 do that the day before, so there were no objections during
8 the trial. We had another judge that took care of the
9 legal points, and we had a trial judge, so but the trial
10 judge was the same trial judge that we started out with,
11 so we just added, and it went rather smoothly.

12 CHAIRMAN BABCOCK: Great. Anybody else?
13 Okay. Tracy. Sorry.

14 HONORABLE TRACY CHRISTOPHER: Well, I think
15 what's important to note in all of the ideas that have
16 been thrown around is that they for the most part
17 originated from the judges and not from the parties, and I
18 would be opposed to any system where the parties were in a
19 position to change their judge.

20 CHAIRMAN BABCOCK: Okay. I don't -- well,
21 maybe that's part of this. I know there are many
22 jurisdictions that the parties get to strike judges. I
23 mean, they get --

24 HONORABLE TRACY CHRISTOPHER: I would be
25 opposed to that, too.

1 CHAIRMAN BABCOCK: I'm not saying it's a
2 good thing, but there are a lot of jurisdictions where you
3 can do that. Justice Bland.

4 HONORABLE NATHAN HECHT: In fact, Chief
5 Justice Phillips was making a speech last week, just
6 coincidentally, he said there were nine states that allow
7 strikes of acting judges. I was not aware of that, and
8 California was one. I was not aware of the other ones.

9 CHAIRMAN BABCOCK: Illinois is another one.
10 Justice Bland.

11 HONORABLE JANE BLAND: I was just going to
12 say that a couple of my trial court colleagues suggested
13 that we should first take a look at developing a complex
14 litigation appellate panel.

15 They were kidding. I'm laughing. It's a
16 joke.

17 CHAIRMAN BABCOCK: I was thinking maybe you
18 were running for chief of that court.

19 HONORABLE JANE BLAND: No, to get away from
20 me.

21 HONORABLE NATHAN HECHT: That's what the
22 word "reversed" is used for.

23 HONORABLE JANE BLAND: Oh, they did. Their
24 thinking is, you know, before we look at taking any cases
25 away from trial judges, you know, what about the appellate

1 judges, so --

2 PROFESSOR HOFFMAN: Isn't that the Federal
3 circuit?

4 CHAIRMAN BABCOCK: Yeah, that's the Federal
5 circuit. Good point. Any other comments about this?
6 Enough good quotes for you, Mary Alice?

7 MS. ROBBINS: It wasn't the media that
8 started it, though, Chip.

9 CHAIRMAN BABCOCK: Just the media reporting
10 on it.

11 HONORABLE NATHAN HECHT: Are you going to
12 put that in the story, Mary Alice?

13 CHAIRMAN BABCOCK: Okay. Moving along, and
14 not to denigrate at all the hard work that Judge Lawrence
15 and his task force put into the e-filing rules, let's get
16 back to them.

17 HONORABLE TOM LAWRENCE: For the record, I
18 prefer the term "carefully analyzed" over "bogged down."

19 CHAIRMAN BABCOCK: Carefully analyzed.

20 HONORABLE TOM LAWRENCE: All right. We are
21 at 4.3 over on page 11 of the handout. (f) talks about
22 what happens if a JP decides that they're going to accept
23 it. (g) talks about what happens if the JP decides
24 they're going to not accept the filing, and (h) talks
25 about attachments, garnishments, sequestrations, distress

1 proceedings that may not be filed on a Sunday, but that's
2 all consistent with the county and district court rules.

3 CHAIRMAN BABCOCK: Yeah, Bill.

4 PROFESSOR DORSANEO: Well, notwithstanding
5 the template, and I remember talking about this at some
6 point and making the same point then, I have a lot of
7 difficulty with the concept that a clerk or a justice of
8 the peace acting as his own clerk has any authority to
9 reject something that's submitted for filing. I think
10 that notion is unacceptable within most circumstances.

11 CHAIRMAN BABCOCK: Elaine, and then Sarah.

12 PROFESSOR CARLSON: I absolutely agree with
13 Bill on that point.

14 CHAIRMAN BABCOCK: Sarah.

15 HONORABLE SARAH DUNCAN: I would like to ask
16 the clerk -- well, Andy's left. Bonnie, my understanding
17 is that it was the law -- and I was using a Splenda packet
18 at lunch, and if I walk into your office and I want to
19 file my Splenda packet in a particular cause number, you
20 have no discretion to refuse to file my little Splenda
21 packet. Is that your understanding?

22 MS. WOLBRUECK: To my knowledge there is
23 some case law that says whatever document is tendered the
24 clerk shall file.

25 HONORABLE SARAH DUNCAN: Whether it's on

1 toilet paper or a Splenda packet, whatever.

2 MS. WOLBRUECK: In fact, I had a clerk that
3 had one filed on toilet paper.

4 HONORABLE SARAH DUNCAN: Okay. I completely
5 agree with the professors.

6 MS. WOLBRUECK: But, again, one of the
7 reasons that that's in the rule is for misdirected
8 filings, and let's say you had an original answer that was
9 due today and you filed it with me and it was supposed to
10 be in Travis County. You would know -- you would want to
11 know that that's been rejected or that this was a
12 misfiling. The purpose of it is to take care of
13 clerical error on submitting a document for electronic
14 filing. I think that's the main purpose of that being in
15 the rule.

16 CHAIRMAN BABCOCK: Okay. Yeah, Justice
17 Gray.

18 HONORABLE TOM GRAY: I don't see what the JP
19 courts see, but at the appellate level we are routinely
20 faced with the question of -- and, of course, we don't
21 have the electronic filing, but we are routinely faced
22 with the question of whether or not the litigant has sent
23 us a document that they want filed. We don't even know
24 they want it filed. It may be a communication to the
25 clerk. It may be anything, and I mean, we get a lot of

1 pro se, a lot of prisoner stuff, indigent appeal, and so
2 at the threshold, we're -- and, of course, it's a little
3 bit easier in the electronic area because obviously
4 they've gone through the mechanics of getting it
5 electronically filed; and I can understand the professors'
6 point of view in connection with something that's gone
7 through this process of where they have actively sought to
8 file it, much like somebody standing at the counter who
9 says, "I want to file it." But there is and I think has
10 to remain room in the filing or presentation of documents
11 at the counter primarily through the mail system that an
12 initial determination has to be made whether or not they
13 intend to file something in the first instance.

14 CHAIRMAN BABCOCK: Justice Hecht.

15 HONORABLE NATHAN HECHT: Let me add to that
16 if I may. Some of the premise of our discussion has been
17 that the clerk is going to deny you some opportunity or
18 right to file something, which is a problem that we need
19 to think about. But most of the time our experience is
20 like Judge Gray's. We're trying to help people. They
21 file stuff in our court that they mean to file in the
22 Court of Criminal Appeals, and rather than just let it sit
23 there or deny it or send them on their way, we send it
24 over to the Court of Criminal Appeals so that they will --
25 so the Court of Criminal Appeals can deny it.

1 And we get -- we routinely get things that
2 prisoners want filed in the Fifth Circuit, and we can't do
3 anything about that, but we do usually notify them that
4 they filed something that they probably -- that looks on
5 its face to be intended to have been filed in the Fifth
6 Circuit and if that's what they want, that's not what they
7 did. And then another, we get things that people want --
8 they say they want filed, but do they really want filed?
9 We had a pro se this week send us her tax return because
10 she claimed that she really was injured and, see, she
11 couldn't make any money, and so, you know, you don't have
12 to file your tax return to prove that, and maybe you don't
13 really want to, and so the clerk is going to write her
14 back and say, you know, "You don't have to file this if
15 you don't want to. This doesn't do any good, and you may
16 not want your Federal income tax return to be a matter of
17 public record," so you do get a lot of mistakes where the
18 clerks are just trying to point out to you that if it just
19 sits there and you don't know and nobody tells you, the
20 clock may be ticking on some right.

21 CHAIRMAN BABCOCK: Bill.

22 PROFESSOR DORSANEO: Notwithstanding the
23 attempt to make this sentence about acceptance into kind
24 of a friendly thing, it does pretty strongly suggest the
25 first sentence in (e) that a justice of the peace can

1 reject something that doesn't comply with all filing
2 requirements, you know, whatever filing requirements
3 you're talking about. I think earlier someone suggested
4 that it's -- if a document wasn't signed, well, that might
5 be a basis for not accepting it, and I just don't think
6 that's right. I think that a much better way is what
7 Justice Hecht suggested. If something is misdirected,
8 maybe have it sent and have some -- I don't know if I want
9 to call it duty, but some way to get it to the proper
10 court, and we have a rule like that in our appellate rules
11 for notices of appeal, and that seems like a much better
12 way to do things than to have it not accepted, whatever
13 that ends up meaning.

14 CHAIRMAN BABCOCK: Judge Lawrence. Any
15 thoughts about that?

16 HONORABLE TOM LAWRENCE: Well, I don't want
17 to have any duty or burden whatsoever on myself to have to
18 try to figure out where something is supposed to go. I
19 don't think that the courts want to accept any type of
20 burden if something is misdirected or misfiled to figure
21 out who we're supposed to send it to or forward it to.
22 That needs to be the filer that has that burden. I think
23 there may be a perception that the judges are going to use
24 this provision as a way to disenfranchise filers or
25 prevent them from filing, and I don't think that there is

1 anybody that can suggest that that's the case now.

2 A clerk can reject something for someone
3 that comes to the window or send something back in the
4 mail now in the justice courts just as they could reject
5 this, but that's just not the practice. I think that very
6 rarely, if ever, happens. Anecdotally I don't hear
7 anybody telling me about uniformly rejecting stuff, and
8 it's taught at the JP schools that whatever is filed you
9 accept and, you know, you sort it out later, so I don't
10 perceive this as being some tool to try to disenfranchise
11 people.

12 CHAIRMAN BABCOCK: Sarah had her hand up
13 first, if you still want to speak, Sarah. And then Skip
14 and then Justice Jennings and then Justice Gray.

15 HONORABLE SARAH DUNCAN: Just a couple of
16 things. I appreciate how well-intentioned and decent
17 everybody around this table is and their employees, their
18 clerks; and I'm all for getting things filed where they
19 need to be filed; but at the same time, I'm really big on
20 people bearing consequences of their actions; and what I
21 would like to see and I don't know if it's technically
22 doable, but I would think that it is, is if I tried to
23 file something and it's rejected, for whatever reason,
24 that there's just a popup window that says my filing's
25 been rejected and if I have an issue with that, here's who

1 to talk to.

2 And as well-intentioned as everybody around
3 this table and all of their employees are, the fact
4 remains that in the history of the world and the judicial
5 system there have been people who have not been as
6 well-intentioned, and the taking care of other people is
7 so frequently a justification for doing bad things to
8 people, and I don't want to see us get in the situation
9 with the rules where we're going to decide because we care
10 so much about you where this thing -- we're not going to
11 file it. We'll decide where it needs to be filed, and
12 we'll send it there, because then somebody bad can get in
13 and say, "I'm going to take care of you. I'm not going to
14 file it in my court. I'm going to send it over to
15 Professor Dorsaneo's court where it has no business being
16 because then it's not on file in my court." That's the
17 problem with paternalism, is it can be used for
18 illegitimate purposes.

19 CHAIRMAN BABCOCK: A bad daddy.

20 HONORABLE SARAH DUNCAN: They exist.

21 CHAIRMAN BABCOCK: Did I say Skip next?
22 Skip.

23 MR. WATSON: My concern is just how we deal
24 with the thing that shouldn't have been filed, but the
25 premise that we seem to be dealing with is we're standing

1 at the clerk's window deciding whether it should be filed,
2 that the clerk is making that decision. My premise is
3 just the opposite, that in (b) we have made that decision.
4 It has been file stamped when the send button was sent.
5 We are no longer presenting it to the clerk. It has been
6 filed. I understand this problem arises because the JP
7 wears both the clerk and the judge's hat, and that's what
8 we're trying to grasp, but when we made the decision that
9 it's filed when the button is sent, the clerk's hat went
10 away. It is now in the judge's hands and the operative
11 point is what do we do when something should not have been
12 filed but was filed?

13 And the way we traditionally handle that is
14 to say, "We're sending you a message back. You filed this
15 on such and such a day. It is invalid, or it has these
16 problems because it should have been in another court or
17 it wasn't signed or you didn't send in the money," and you
18 say, "You have 36 hours," or some reasonable period of
19 time, "to correct this deficiency with a proper document
20 or an order striking the filing will be entered." That's
21 all I'm trying to address, is just we deal with this
22 situation the way we deal with every other situation in
23 which something has been filed but has a problem. We give
24 notice, we give opportunity to cure, and then if it
25 doesn't happen we strike, period.

1 CHAIRMAN BABCOCK: Justice Jennings and then
2 Justice Gray and then Bill.

3 HONORABLE TERRY JENNINGS: Just looking at
4 the appellate rules, I don't know if this will provide
5 some guidance, but under appellate Rule 9.2, "A document
6 is filed in an appellate court by delivering it to the
7 clerk of the court in which the document is to be filed"
8 or, of course, you can deliver it to a justice who is
9 willing to accept delivery, so under the appellate rules
10 if you've delivered it to the clerk it is filed. And
11 then, of course, in regards to the clerk's duties, "The
12 clerk must safeguard the record and every other item filed
13 in the case." So it seems to me that -- that seems to be
14 working in the appellate rules.

15 I'm assuming that there is probably a
16 similar rule in place with regard to district court clerks
17 and so forth, but by definition as soon as you deliver it
18 to the clerk it is filed and then at that point in time
19 the clerk has a duty to safeguard it. And then, of
20 course, the appellate rules do provide that if it's a
21 nonconforming document, et cetera, then and only then can
22 the judges strike it, but they have to send out the letter
23 saying what's wrong with the document and giving you an
24 opportunity to fix it.

25 CHAIRMAN BABCOCK: Yeah, Sarah.

1 HONORABLE SARAH DUNCAN: And then I have
2 something to appeal. I have an order striking my document
3 that I wanted filed to appeal; whereas, if it's just the
4 clerk or a machine somewhere deciding not to file
5 something I have nothing to appeal.

6 HONORABLE TERRY JENNINGS: Under our rules
7 it's --

8 HONORABLE SARAH DUNCAN: I'm SOL.

9 HONORABLE TERRY JENNINGS: It's filed when
10 delivered and the clerk has a duty to safeguard it.

11 CHAIRMAN BABCOCK: I jumped Justice Gray.
12 I'm sorry, Judge.

13 HONORABLE TOM GRAY: My turn?

14 CHAIRMAN BABCOCK: Yeah, it's your turn.

15 HONORABLE TOM GRAY: Under 9.5 of the TRAPs
16 there's a phrase that kind of goes contrary to what the
17 rule that Justice Jennings read and it says, "Proof of
18 service may appear on or be affixed to the filed document.
19 The clerk may permit a document to be filed without proof
20 of service, but will require the proof to be served
21 properly." Certainly that indicates that the clerk does
22 not have to allow it to be filed if it doesn't have the
23 proof of service.

24 The two rules in the appellate procedures
25 that basically kind of deal with the issue like Skip wants

1 to do it, which I support, is 38.9(a), which addresses it
2 with regard to briefs that are not in substantial
3 conformity and the process for striking those; and then
4 Rule 4.3, which deals with defects in procedure, and you
5 can't dispose of an appeal based upon a defect in
6 procedure without notice and opportunity for the litigant
7 to cure it; and so I think that would deal with a lot of
8 the problems of both the use of the term "accepted for
9 filing," that type language, and then what do you do with
10 a document that is defective.

11 Because as Skip said, what we have done here
12 is we have removed the window, and the document has
13 already passed that threshold and is filed at the moment
14 that the send button is clicked, and we've just got to
15 deal with it electronically at that point of what are we
16 going to do and how are we going to get it out of the
17 process, if it's defective.

18 CHAIRMAN BABCOCK: Okay. Bill.

19 PROFESSOR DORSANEO: Well, what -- Skip,
20 what kind of things were you thinking about that shouldn't
21 have been filed? Or what kind of problems? Because there
22 are a lot of documents that would -- that are filed that
23 don't satisfy the rules that govern the documents. In
24 fact, probably better than half have some difficulty
25 satisfying the requirements of pleading a cause of action

1 or some other matter. It seems to me that there's no
2 stopping point if you say, well, you look at the Rules of
3 Civil Procedure to see whether this document measures up,
4 and I find that unacceptable.

5 MR. WATSON: That wasn't the point. My
6 point was that if there is a document that the judge, the
7 justice of the peace in this instance, believes should not
8 have been filed, not that it's defective, that he believes
9 should not have been filed, whether it's because it wasn't
10 signed -- well, electronic signing, because the money
11 didn't come with it, because it was in the wrong court, or
12 any of the examples that have been used where -- as an
13 example where something would not be accepted under the
14 current rule, but the not being accepted only has a
15 24-hour window or it's going to stay.

16 That judge at that point sua sponte can say
17 48 hours later or four years later, whatever it is, "We
18 have found this document. This is a problem with it. Fix
19 the problem or it's going to be stricken." The problem is
20 going to get fixed, or if it's not, the case goes away,
21 but there's notice and opportunity to cure. That's all
22 I'm saying.

23 PROFESSOR DORSANEO: I don't see why the
24 judges get involved with this kind of worrying about
25 whether the document measures up. I mean, filing fees,

1 that's a different matter altogether. But I'm -- I mean,
2 documents are filed frequently --

3 MR. WATSON: Bill, it's not going to come up
4 unless the judge raises it.

5 PROFESSOR DORSANEO: -- without the filing
6 fees being paid.

7 CHAIRMAN BABCOCK: Richard.

8 MR. ORSINGER: I can't find any trial court
9 rule that gives the clerk or the court the explicit
10 authority to refuse to accept a filed document, so I'm
11 assuming that what we're doing is we're creating a
12 different regime for the JP courts where their clerk or
13 their judge can refuse to accept it.

14 HONORABLE TOM LAWRENCE: No. This rule is
15 exactly the same as the county and district court.

16 MR. ORSINGER: I know that, but I'm talking
17 about the Rules of Civil Procedure, so what's happened is
18 through the electronic filing process, rather than it
19 being identical to the physical filing process, we've
20 actually introduced some kind of unmentioned discretionary
21 act on the part of someone who's not specifically given
22 that duty to refuse to accept the document, and then if
23 you look at the term here, "misdirected," I think the most
24 frequently misdirected document is one that has the wrong
25 cause number on it.

1 That's certainly been my experience in my
2 practice, that somebody hits an extra digit in the cause
3 number or whatever and it goes into the wrong file, or,
4 you know, maybe it has too many numbers on there and it
5 doesn't have any file assigned to it. It's my
6 understanding that if you file the document with the right
7 clerk, even if it's got the wrong cause number on it, it's
8 still a valid filing and considered timely. Is that not
9 right, Sarah? Isn't that right?

10 So it seems to me like what we ought to be
11 discussing here is whether electronic filing should be
12 treated as somehow so different from physical filing that
13 we have this step of the acceptance and rejection process,
14 because if we're not going to have that then let's quit
15 debating who's going to reject it based on what ground and
16 what notice they have to give when they reject it, and
17 let's just treat it like it was physically filed, for
18 better or worse.

19 CHAIRMAN BABCOCK: Skip, your proposal was
20 to get rid of (e)?

21 MR. WATSON: Yeah.

22 HONORABLE NATHAN HECHT: And (g).

23 MR. WATSON: Well, and a lot of (f).

24 CHAIRMAN BABCOCK: Okay. First things
25 first. Okay. Judge Patterson, you had your hand up, I

1 thought.

2 HONORABLE JAN PATTERSON: I did. I do think
3 there may be additional information that the clerks might
4 provide us, because I think there is a universe of
5 documents that are received, not filed, which may be a --
6 if not a rejection, it's a temporary hold, but it's not a
7 filing. It's something different than that which is
8 filed.

9 CHAIRMAN BABCOCK: Okay.

10 HONORABLE JAN PATTERSON: For example,
11 something that is -- somebody tries to file without
12 permission, either they don't file a motion to submit a
13 supplementary brief, that might be received but not filed
14 until a judge rules on it. Various kinds of motions may
15 be received, not filed, and so I think we're probably
16 proceeding under not an entirely correct assumption, but I
17 don't know what that rule is.

18 CHAIRMAN BABCOCK: Judge Christopher, and
19 then Sarah.

20 HONORABLE TRACY CHRISTOPHER: Well, I mean,
21 we do have a Rule of Civil Procedure about discovery
22 materials not being filed, and when people show up at my
23 clerk's office with discovery materials, we give it back
24 to them and say, "Go away, we don't want these things.
25 You're not supposed to file them anymore." So, I mean,

1 there are things that we do reject by rule.

2 HONORABLE TERRY JENNINGS: But they are
3 specific things.

4 HONORABLE SARAH DUNCAN: It's a class of
5 documents.

6 HONORABLE TRACY CHRISTOPHER: It is, but I
7 mean, that would be an example of something that walks in
8 that we refuse.

9 HONORABLE SARAH DUNCAN: Right, and I don't
10 have any problem if there's a class of documents that
11 we're not going to file, but my problem is when it's not
12 an entire class, it's a person making individual
13 determinations of what he or she will and won't file. The
14 only rule I'm aware of, and it kind of ties in with what
15 you're saying, is TRAP Rule 37.2 that gives the court --
16 the clerk discretion of what to file and that's in judging
17 whether the clerk and reporter's record conforms to the
18 Supreme Court/Court of Criminal Appeals requirements for
19 records. The clerk has discretion to say this does or
20 doesn't conform to those requirements and I will or I
21 won't file it, but to me it's a completely different thing
22 when it's a class of documents.

23 And I have to follow up a little bit. There
24 was some not inconsiderable disagreement at the Fourth
25 Court of Appeals when I got there over whether a document

1 that shouldn't have been filed, and I'm putting that in
2 quotes, was going to get received or filed or given back.
3 The court cannot consider whatever it doesn't think was
4 properly filed, but to say that it doesn't get filed
5 gives -- puts the cart before the horse.

6 CHAIRMAN BABCOCK: Judge Lawrence, and then
7 I think after he talks maybe we should vote on Skip's
8 motion to delete (e).

9 HONORABLE TOM LAWRENCE: Well, one example
10 that comes to mind in the JP courts is the issue
11 of evictions. It's not just a venue problem because the
12 Government Code -- and I can't recall if there is any in
13 the constitution, but the Government Code specifically
14 says that you can't try an eviction case unless it's in
15 your precinct, unless the property is in your precinct, so
16 I suspect that across the state there probably are more
17 than a few occurrences where some clerk would not take
18 that eviction case in because nothing would ever happen to
19 it, and they would probably tell them "You're in the wrong
20 precinct. You need to go to a different precinct," so
21 because otherwise nothing's going to happen on the case
22 and they will have wasted the filing fee. So that's one
23 example off the top of my head I can think of.

24 I think the example Bonnie gave where that's
25 not even in your court would be another good example of

1 why it would be nice to have that ability to reject that
2 just to prevent that mistake from being made.

3 CHAIRMAN BABCOCK: Precisely Sarah's point.
4 Okay. Everybody that's in favor of deleting subparagraph
5 (e) raise your hand.

6 Okay. Everybody in favor of keeping it,
7 raise your hand. Vote of 13 to 8 in favor of keeping it.
8 So let's march on.

9 HONORABLE TOM LAWRENCE: Do we want to march
10 on to 4.4? Did we beat 4.2 to death?

11 CHAIRMAN BABCOCK: I think 4.4 needs some
12 discussion, maybe not much, but --

13 HONORABLE TOM LAWRENCE: 4.4 says that --
14 and this is really probably more a TexasOnline issue. "A
15 filer may include only one document in an electronic
16 transmission to TexasOnline," but that document under (b)
17 may include another attachment, and this is also right out
18 of the -- right out of the county and district court
19 e-filing rules.

20 CHAIRMAN BABCOCK: What do people think
21 about this? Any problems? Any issues? Bill.

22 PROFESSOR DORSANEO: Well, what is it meant
23 to mean? I mean, a document -- we talk about instruments
24 and pleading, and document is defined earlier to cover
25 about anything you would want to talk about. We have a

1 rule in our civil procedure rules that says that petitions
2 and answers should be in one instrument. What is meant to
3 be accomplished here is what I'm asking about? Is this
4 some sort of a fee thing or what?

5 MR. HUGHES: Yes.

6 HONORABLE TOM LAWRENCE: We'll let
7 TexasOnline answer that.

8 MR. GRIFFITH: It is. That's exactly
9 correct. It's tied to the fees that go with these
10 particular type of filings, so the intent was not to not
11 provide a means for a filer to skip fees by filing
12 multiple documents or multiple pleadings, petitions,
13 whatever, on one filing.

14 PROFESSOR DORSANEO: So let's say I had a
15 pleading, in terms of pleadings I wanted to file -- I want
16 to file a special appearance motion, and I don't want to
17 include it in my answer. I want to do it as a stand-alone
18 document, and I'm going to file an answer along with that.
19 If I staple them differently they're two documents, is
20 that it? How do you tell that there is a different
21 document?

22 MR. GRIFFITH: Well, it's really part of the
23 clerk review process when they're looking at the documents
24 that have been filed. If you have, for example, two
25 counterclaims on one filing then that's not allowed.

1 MR. ORSINGER: What does a clerk do if that
2 happens?

3 MR. GRIFFITH: That would be an opportunity,
4 I guess, for a --

5 MR. ORSINGER: They refuse to accept it
6 then?

7 MR. GRIFFITH: And they send the notice
8 back, an e-mail message back to the client.

9 MR. ORSINGER: So this is all a revenue
10 issue then, huh? Sorry. If you had told me that, I
11 wouldn't have even debated it.

12 PROFESSOR DORSANEO: But it's an irrational
13 revenue issue because a document can be, you know, really
14 thick or consist of -- or several documents that
15 accomplish essentially the same thing can be just a few
16 pages.

17 CHAIRMAN BABCOCK: Okay. Any other
18 comments?

19 HONORABLE TOM GRAY: Am I right in thinking
20 from what is written that, for example, they couldn't
21 combine a motion to compel and a motion for protection and
22 a motion to strike and a plea to the jurisdiction and a
23 motion to transfer venue, a special exception and original
24 answer all in the same pleading?

25 MR. ORSINGER: No. If you do it in the same

1 pleading it's one document, but if you do it in separate
2 motions and pleas then it's more than one document.

3 PROFESSOR DORSANEO: It must be if you
4 repeat the style and caption.

5 HONORABLE TOM GRAY: So if I have multiple
6 captions and signatures and proof of certificates of
7 service then it's multiple documents and prohibited?

8 CHAIRMAN BABCOCK: Sounds like it.

9 HONORABLE TOM GRAY: But I can group it all
10 together in one document and it's a-okay.

11 MR. HUGHES: Isn't that the case now? I
12 mean, in filings if you -- the clerk might charge you two
13 motion filings if you charge a motion for this and a
14 motion for that, if you put it into a motion for this and
15 that they'll say that's \$10 and you just file it that way.

16 CHAIRMAN BABCOCK: Yeah, Richard Munzinger.

17 MR. MUNZINGER: I'm not sure I understood
18 the response. If you include multiple pleadings in one
19 filing, does TexasOnline accept it or reject it?

20 MR. ORSINGER: They won't even know what it
21 is, they're just getting a digital file that complies with
22 their standards and they turn around and deliver it to the
23 clerk. It's the clerk that would reject it. Isn't that
24 right, Mike?

25 MR. GRIFFITH: Right.

1 MR. ORSINGER: So the clerk is expected
2 to -- the TexasOnline is an automatic process. They don't
3 have somebody that looks at it and puts it from here to
4 there. So the clerk is the first person that will
5 evaluate the contents of what got filed unless it's the
6 JP, in which event it's the judge.

7 CHAIRMAN BABCOCK: Okay. Any other comments
8 about this? Before we go onto 4.5, I just wanted to see
9 if Mr. Bastian was here to talk to us about the home
10 equity loan foreclosure task force. We could talk for
11 probably another 20 minutes or so, Mr. Bastian, about the
12 Rule 4 and then take a break and hear from you and then go
13 to rule -- go back to Rule 5? Is that okay with you?
14 It's probably going to take another 20 or 30 minutes.

15 MR. BASTIAN: I'm at your disposal.

16 CHAIRMAN BABCOCK: Well, if that --

17 HONORABLE TOM LAWRENCE: I don't think the
18 rest of Rule 4 is going to take that long. Famous last
19 words.

20 CHAIRMAN BABCOCK: Famous last words.
21 Tommy, if you don't mind waiting until we get through Rule
22 4, that will be a natural break for us, so let's see if we
23 can get through Rule 4.

24 HONORABLE TOM LAWRENCE: All right. 4.5 is
25 very simple. A JP court's file for a particular case may

1 contain a combination of electronically filed documents
2 and traditionally filed documents, and then (b), the JP
3 court may maintain and make available electronically filed
4 documents in any manner allowed by law, which may mean
5 coming in and physically inspecting the file or looking at
6 the electronically filed document in a dumb terminal,
7 whatever is provided for in that court, and that's 4.5.

8 CHAIRMAN BABCOCK: Any comments about 4.5?

9 HONORABLE TOM LAWRENCE: 4.6, in addition to
10 the --

11 CHAIRMAN BABCOCK: Moving right along to
12 4.6.

13 HONORABLE TOM LAWRENCE: I'm sorry. Did --

14 CHAIRMAN BABCOCK: No, nobody said anything.

15 HONORABLE NATHAN HECHT: Go for it.

16 CHAIRMAN BABCOCK: Quick.

17 HONORABLE TOM LAWRENCE: All right. "In
18 addition to the information required on a pleading by Rule
19 57 a filer must include the filer's registered e-mail
20 address on any electronically filed document." Remember,
21 the filer is choosing to file it electronically. They're
22 making that decision, so what we're saying is that if you
23 choose to do it then put your e-mail address on that
24 document that you file.

25 And 4.7 is just simply that anything filed

1 must meet the TexasOnline format, and electronically filed
2 pleading under 4.7 is deemed to comply with Rule 45.

3 MR. GILSTRAP: Whoa.

4 CHAIRMAN BABCOCK: Frank.

5 MR. GILSTRAP: Well, (b) needs to come out
6 of there, because the 45 doesn't apply to justice court,
7 and I don't think that the pleadings in the justice court
8 should have to meet the requirements of 45, which, for
9 example, says there is a certain form and content
10 requirements of 45 like it's got to state a concise
11 statement of the claim or something like that, because in
12 justice court I don't think that's the rule. I think the
13 law is still that you should plead in justice court
14 orally.

15 HONORABLE TOM LAWRENCE: Well, actually, the
16 law is that you must be plead orally in a justice court
17 suit, although that is ignored uniformly throughout the
18 state. Nobody does that.

19 No, there is no equivalent rule in the
20 justice courts. Remember, this rule that says you shall
21 plead orally goes back to about 1876, I think. It hasn't
22 been changed since then, so we still have a few older
23 rules in our system, but as a practical matter, if you
24 came and tried to file something orally, the JP would
25 accept it and they would just simply reduce it to writing

1 and put it in the docket book, but I haven't heard of
2 anybody filing anything orally in 20 years.

3 MR. GILSTRAP: Well, at the same time I
4 don't think there's any need to impose the requirements of
5 45. Indeed I'm not even sure that (b) should even be in
6 the district and county court rules because you could read
7 it to say that a pleading that says "Kilroy was here"
8 meets 45. I mean, that's what it says, if it's filed
9 electronically it meets 45.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: Following on what
12 Frank said, how do you deem something filed electronically
13 to comply with the second sentence of 45(b) that an
14 allegation be evidentiary or be a legal conclusion, shall
15 not be grounds for objection when fair notice to the
16 opponent is given by the allegations as a whole. How is
17 an electronic filing in and of itself going to decide that
18 an evidentiary or legal conclusion gives fair notice to
19 the opponent?

20 MR. GILSTRAP: I think the -- I think the
21 intent was to say that it will comply with 45(b), which
22 says it's got to be in writing and on paper, and obviously
23 that's not going to be a requirement. It certainly
24 doesn't need to say that it complies with 45. But, again,
25 why do we even need it in justice court? I mean, do you

1 ever throw pleadings out? You can't throw pleadings out
2 because they don't comply with 45 because 45 doesn't apply
3 to justice courts.

4 HONORABLE TOM LAWRENCE: Well, I think that
5 they're trying to give the attorneys an indication that if
6 you file it like that you're going to comply with 45(d),
7 which is the eight and a half by eleven provision. I
8 don't know that it's intended -- and, Jody, I don't know
9 if you have dealt with this, but I don't know that that's
10 intended to apply to anything other than that one
11 provision about the size, is it? Is it, Mike?

12 MR. GRIFFITH: The size is a key issue. If
13 a document is formatted for legal size when it's shrunk
14 down in the clerk's system the file stamp all but
15 disappears.

16 HONORABLE TOM LAWRENCE: I think we're just
17 trying to tell the attorneys that if you file it like this
18 you're going to be okay with that size provision. It's
19 not meant to imply anything else.

20 PROFESSOR DORSANEO: Well, why don't we say
21 what it's meant to mean rather than say something that it
22 doesn't say?

23 HONORABLE TOM LAWRENCE: Well, because we
24 followed the language that this committee approved several
25 years ago and thought that was okay.

1 HONORABLE NATHAN HECHT: I mean, the answer
2 to your question is what idiot wrote this?

3 PROFESSOR DORSANEO: Who did it?

4 CHAIRMAN BABCOCK: The idiots are us.

5 PROFESSOR DORSANEO: Let's go back and check
6 the records to see whether we need to nunc pro tunc this.

7 CHAIRMAN BABCOCK: Richard Orsinger.

8 MR. ORSINGER: Admittedly the
9 cross-reference that was originally made is a clumsy one,
10 but at least it made sense because we were governing
11 pleadings filed electronically in district and county
12 courts, so it's natural to cross-refer to the pleadings
13 rule that applies to those courts, but we've now picked up
14 that cross-reference and used it for a court where the
15 pleadings rule doesn't apply, and that's even more clumsy,
16 and so what we ought to do is we ought to just take the
17 45(d) part that we like and say that you have to comply
18 with eight and a half by eleven, signed by a party, and
19 everything and just leave it be, because cross-referring
20 to a pleading rule that doesn't apply, it just doesn't
21 make any sense.

22 CHAIRMAN BABCOCK: There we go.

23 MR. ORSINGER: Simple enough.

24 CHAIRMAN BABCOCK: Got that, Jody?

25 Okay. Let's take another break from the JP

1 e-filing rules, and this is item five, I think, on our
2 agenda, and some of you will remember that a number of
3 years ago we had a special task force on home equity and
4 reverse mortgage rules, chaired by Mike Baggett, and they
5 did a bunch of really good work and came and talked to us,
6 and we made some recommendations. Tommy Bastian, excuse
7 me, who is from the Dallas area, is here, and he wrote
8 Chief Justice Jefferson suggesting that perhaps it was
9 time to update those rules and that perhaps another task
10 force was in order. The chief wrote Tommy back and said,
11 "Well, we're having an SCAC meeting August 24th, why don't
12 you come talk to them about it," and so that's what he's
13 here to do. So if you've got a minute to share your
14 thoughts, that would be great.

15 MR. BASTIAN: Yes. My name is Tommy
16 Bastian. Mike Baggett, who I'm sure most of you-all know,
17 wished he was here making the presentation, but he just
18 had his hip replaced and he's kind of immobile. Plus
19 every organization has to have its generals and then
20 somebody has to be kind of the first sergeant, and I'm the
21 first sergeant, so he figured he would send me to the
22 lines.

23 If you recall, home equity came to Texas
24 about nine years ago. The Legislature passed the home
25 equity. When it got passed by the citizens of Texas

1 everybody kind of looked at the home equity law, and there
2 was a provision that says the Supreme Court had to come up
3 with the rules on how you're going to foreclose one of
4 these things, and I think it was a surprise to a lot of
5 folks. Well, the Supreme Court put together a task force
6 and said you've got about two months to get together and
7 put a rule in place that's going to work, and that
8 original task force was chaired by Mike Baggett. I think
9 it had about 12 different people. That task force really
10 ended up being -- I think when it started out there were
11 folks that represented just about every part of the
12 industry that might be affected by home equity foreclosure
13 rule. There were title people there, there was the
14 consumer bar people there. The secondary market
15 representative was there. There were judges, there were
16 trade associations.

17 When it first started I think a lot of
18 people had agendas, but before it was all over this group
19 operated as statesmen, everybody trying to figure out what
20 kind of rule can we put in place that works for everybody.
21 The idea is it's not going to be a good rule unless it's
22 good for everybody, and that rule has been in place for
23 about nine years. There has been a couple of pieces of
24 legislation that have taken place since then. For
25 example, we had reverse mortgage, and there was a task

1 force put together to take care of the foreclosure of the
2 reverse mortgage, which is a subset of home equity. That
3 task force was made up of basically the same people. The
4 rule has been in place on reverse mortgages I think for
5 about seven years.

6 In this legislative session the Legislature
7 came up with a provision that deals with investor tax
8 liens or transferred tax liens. A lot of people call them
9 a lot of different things, but it may be a surprise to the
10 folks in this room in Senate Bill 1520 it says if you're
11 going to foreclose under these investor tax liens it's
12 going to have to be under Rule 736, and there is nothing
13 under Rule 736, which is the home equity foreclosure rule,
14 that would even -- I don't even know if you could
15 manipulate it to take care of one of these investor tax
16 liens.

17 There have been a number of changes over in
18 the foreclosure statute. Its definitions that probably
19 would be applicable. Now people are using words like
20 mortgage servicer. Mortgage servicer is the entity that
21 basically handles all of the low level information that's
22 over in the foreclosure statute, but it's not over in the
23 home equity, and it might be time to kind of make those
24 two -- those two provisions kind of coincide.

25 And then over a nine-year period there's

1 been unintended consequences that have shown up. The rule
2 has shown a little bit of age, and it might be, again,
3 time to sit down and take a look at it and make some more
4 recommendations to the Supreme Court and come back and see
5 if people would be happy with it, and I would be open to
6 any of your questions. I see a whole lot of judges in
7 this room who probably have handled home equity
8 foreclosures. Our particular law firm keeps kind of a
9 list of all the different requirements of different judges
10 in the state when it comes to a home equity. I mean, we
11 have this rule where we have a hundred -- well, it's
12 really 104 different courts that have different
13 requirements that you have to go through if you're going
14 to file a home equity application in their court, so I'm
15 open to any questions that you have.

16 CHAIRMAN BABCOCK: Yeah, Carl.

17 MR. HAMILTON: You mentioned some rules were
18 written on the reverse mortgage foreclosure?

19 MR. BASTIAN: Yes, it's all part of Rule 735
20 and 736, really just adding the term "reverse mortgage."
21 Right now we have the constitutional provision. There is
22 four maturing events that allow you to do a foreclosure.
23 In two of those if somebody -- if both obligors are dead
24 you can do a nonjudicial foreclosure, if you will, and if
25 the loan sold to somebody, you can do a judicial

1 foreclosure. That never happens because at closing
2 somebody is going to pay that off, but then if you have
3 the situation where the obligor has abandoned the property
4 or they have failed to pay the taxes or the insurance, in
5 those particular cases you can come in and foreclose, and
6 you have to get a court order, so that's where the reverse
7 mortgage comes in upon Rule 735 and 736.

8 And I failed to mention -- and I think
9 that's the first thing if you have the letter in front of
10 you. We also have home equity lines of credit. Home
11 equity lines of credit aren't even mentioned in Rule 735
12 and 736. It surprises a lot of folks that -- who really
13 don't get involved in this area of the law, and they go to
14 Rule 735 and 736 and they don't see the word "home equity
15 line of credit," and so they go do a nonjudicial
16 foreclosure, and it's real clear that you have to have a
17 court order to foreclose upon a home equity line of
18 credit. It's just not listed in 735 and 736.

19 CHAIRMAN BABCOCK: Justice Hecht.

20 HONORABLE NATHAN HECHT: The Court is
21 inclined to appoint a task force like we did before and
22 get a recommendation for this committee. We just wanted
23 to get the committee's view on that before we did it, and
24 we would be inclined to go back to the original membership
25 or something like it, which as Tommy says, represented a

1 wide range of interests, and certainly Tommy and his firm
2 are maybe the state's experts on this, and Mike Baggett's
3 done a lot of real estate law for a long time, and so we
4 don't have any reason not to use that input again, but we
5 just wanted to see if the court -- if the committee had
6 any reaction to it.

7 CHAIRMAN BABCOCK: Any reaction or thoughts
8 or further questions? As opposed to this task force doing
9 it and reporting to us or us doing it and reporting to us,
10 you want to take a vote on that? So that's good.
11 Anything else?

12 Tommy, thank you very much for coming. I
13 hope we didn't inconvenience you too much.

14 MR. BASTIAN: Not at all.

15 CHAIRMAN BABCOCK: So let's get back to the
16 e-filing in the JP rules. And we're onto Rule 5 now.

17 HONORABLE TOM LAWRENCE: 5.1 starts on page
18 12, goes over to page 13. All right. (a) talks about
19 that in addition to the traditional means of serving
20 documents under Rule 21a a filer may also serve documents
21 upon another party by electronically transmitting the
22 document to that party. We're now getting into not the
23 initial filing of the documents but serving of documents
24 after that initial filing. They can either do it through
25 TexasOnline to the party's registered e-mail address or

1 directly to the party at the e-mail address provided by
2 that party upon agreement to receive electronic service.
3 So you wouldn't have to necessarily go through
4 TexasOnline. You could go directly to the other party if
5 the other party has agreed to that and has provided the
6 e-mail address. And that's (a).

7 CHAIRMAN BABCOCK: Any comments about (a)?
8 Richard.

9 MR. ORSINGER: I have a question, Tom. It's
10 purely voluntary to expose yourself to service by e-mail,
11 right?

12 HONORABLE TOM LAWRENCE: Yes.

13 MR. ORSINGER: And is there a special thing
14 called "agreeing to receive" or is this something that
15 could occur in a letter or a telephone, or is it something
16 you sign and file with the court?

17 HONORABLE TOM LAWRENCE: Jody, help me with
18 this. We had some discussion about having some sort of a
19 document or mechanism, but as I recall what we ended up
20 deciding was that the party would agree through the court,
21 wasn't it, Jody, that they would be amenable to electronic
22 service?

23 MR. HUGHES: No, I think what we ended up
24 agreeing with is you can simply agree in whatever format
25 you wanted to, and you provided an e-mail address and

1 said, "I agree to receive e-mail service in this case," I
2 think, or multiple cases.

3 The issue I think that came up that Mike
4 raised was he suggested it would be helpful that even if
5 you weren't going to electronically file documents, you
6 should have to register with TexasOnline if you wanted to
7 receive e-service, and you wouldn't pay any cost to do so
8 because it would allow the court and the parties then to
9 have this list of registered e-mail addresses for everyone
10 that was kind of handy, and you wouldn't then have
11 possible disputes about, "I gave permission to e-serve,
12 receive e-service" and "No, I didn't."

13 The concern I had is that if you do that
14 then does that create a trap where one party says to
15 another, "Here, I agree to e-service," give the other
16 party their e-mail address but they don't then turn around
17 and register with TexasOnline. The other party then
18 electronically serves them and that party turns around
19 later and says, "That wasn't valid service because I never
20 registered with TexasOnline." We were just trying to, I
21 think, make this as simple as possible and, you know, to
22 allow for people to do direct e-mail service between each
23 other and leave the exact mechanism of how they prove that
24 up to individual circumstances.

25 HONORABLE TOM LAWRENCE: But it's all

1 voluntary. I mean, you don't have to agree to do that.

2 CHAIRMAN BABCOCK: Sarah.

3 HONORABLE SARAH DUNCAN: So I'm reading this
4 wrong. There is not such a thing as court-ordered
5 participation in e-service?

6 MR. MUNZINGER: Paragraph (b) says the court
7 can order it.

8 HONORABLE TOM LAWRENCE: Well, that's
9 correct. That was what was in the task force draft, and
10 we discussed this earlier this morning about court-ordered
11 service.

12 MR. HUGHES: Right.

13 CHAIRMAN BABCOCK: Richard.

14 MR. MUNZINGER: Well, my question was
15 whether or not that remains. The phrase "or where the
16 court has ordered the serving party to electronically
17 serve parties," does that remain the rule or has that been
18 removed?

19 CHAIRMAN BABCOCK: Well, I think that the
20 consensus this morning was pretty much that that's not a
21 good idea, right?

22 HONORABLE TOM LAWRENCE: Yeah.

23 MR. HUGHES: If that's the case that should
24 come out.

25 HONORABLE TOM LAWRENCE: So wherever it says

1 "court-ordered" in the rules, that's going to be -- Jody,
2 you will have to do a search on that.

3 MR. HUGHES: Right.

4 CHAIRMAN BABCOCK: Okay.

5 HONORABLE TOM LAWRENCE: (b), "documents may
6 be electronically served upon a party only where the party
7 has agreed to receive electronic service or where the
8 court has ordered" and obviously "the court has ordered"
9 has to come out.

10 (c) talks about where we --

11 MR. ORSINGER: Before we go on, can I say
12 that, of course, that's already in the model rule for
13 district and county courts, that the judge can require you
14 to accept service by e-mail. We're just treating JP
15 courts differently from district and county courts, right?

16 CHAIRMAN BABCOCK: And as the discussion
17 this morning I think revealed, the character of the JP
18 docket and its litigants is much different than district
19 or county court. I mean --

20 HONORABLE TOM LAWRENCE: Now, you know, I
21 heard that and it depends on where you are. If you're in
22 Harris County or Dallas County you're going to have a
23 substantial percentage of attorney cases. If you're in a
24 smaller county then you may have very few attorneys
25 involved in it. It depends on where you are. You can't

1 make that characterization across the state.

2 CHAIRMAN BABCOCK: Well, you know, but even
3 in Harris County, Judge Lawrence, where you have a lot of
4 attorneys appearing in JP court, the percentage as
5 compared to county or district court I would think would
6 be still significant.

7 HONORABLE TOM LAWRENCE: Oh, of course. Of
8 course, yeah.

9 CHAIRMAN BABCOCK: And that's the point I
10 think that was raised this morning. Richard.

11 MR. ORSINGER: Can I ask another question?
12 Do justices of the peace ever have multiparty cases?

13 HONORABLE TOM LAWRENCE: Oh, yeah.

14 MR. ORSINGER: Well, multiparty cases in my
15 experience are the ones where the district judges require
16 you to serve by e-mail because it just gets too difficult
17 to keep track of it sending out 20 or 30 and all that. Do
18 they sometimes get cases of that magnitude where you'd be
19 sending 20 or 30 copies of the same thing out to different
20 people?

21 HONORABLE TOM LAWRENCE: Yeah. Sometimes my
22 cases consist of the pleading, the citation, and the
23 answer, and that's about it. Other times my file is that
24 thick. It's two inches or three inches thick because I've
25 got multiple parties, multiple motions, and it goes on

1 forever and ever, and being able to order electronic
2 filing is something that the parties would like because
3 there are attorneys on all sides and something that I
4 would like, but admittedly, that is a small percentage of
5 the cases I try.

6 MR. ORSINGER: What if we were to have a
7 rule that said the court could order that you could have
8 e-mail service on any party represented by a lawyer so
9 that we protect the pro ses, but we allow the rest of the
10 litigants who are in your court to be handled efficiently?

11 CHAIRMAN BABCOCK: Sarah.

12 HONORABLE SARAH DUNCAN: Does every lawyer
13 have an e-mail address in Texas? Is that required?

14 MR. ORSINGER: Well, I mean, if they're
15 practicing in district and county court they're exposed to
16 that, so why shouldn't they be exposed to that in JP
17 court?

18 HONORABLE SARAH DUNCAN: Only if they're in
19 an electronic filing case.

20 MR. ORSINGER: No. I mean a judge can order
21 that you -- I have judges do this. They can order that
22 you serve stuff by e-mail under the rules that are in
23 effect under the model rules. Well, I've had judges do it
24 that aren't even under the model rules. I'm not going to
25 tell them they can't do that. Maybe you might.

1 HONORABLE TOM LAWRENCE: Well, that lawyer
2 would then have to have a TexasOnline account, which they
3 may or may not --

4 MR. ORSINGER: No, no, no. Everybody is
5 required to submit an e-mail address, and they keep it up
6 to date, and that's the one you send your notices to.

7 HONORABLE TOM LAWRENCE: Well, that's going
8 a little beyond the scope of what we're supposed to be
9 doing.

10 MR. ORSINGER: I guess my only point is the
11 experience I've had where you do have a court order is
12 where there are multiple parties to the same lawsuit, and
13 if you have those in JP court maybe we ought to allow the
14 JP to do that for people who are represented by lawyers
15 and when there's 20 or 30 parties on one side and just
16 ought to protect the pro ses because those are the ones
17 that may not have the computers and the e-mail accounts.
18 That's all I'm saying.

19 HONORABLE TOM LAWRENCE: Yeah, it would be
20 nice to have that. I don't know that I would use it much.
21 I'd like to have it. I probably can accomplish the same
22 thing just by getting the parties together and saying,
23 "How would you-all like to do this electronically as
24 opposed to filing it?"

25 CHAIRMAN BABCOCK: I'm not ordering you to

1 do this, but I sure would be pleased. Yeah, Buddy.

2 MR. LOW: Richard, there are lawyers up in
3 Kuntz and different places, they don't have e-mail, they
4 don't plan to get e-mail. They just handle a few cases
5 and so forth, and why would you require them to do
6 something by e-mail? There are lawyers that are kind of
7 retired, they don't -- they just handle a few things, but
8 they still have a law license. I mean, I know lawyers
9 that way. Country lawyers.

10 CHAIRMAN BABCOCK: Okay.

11 MR. GILSTRAP: That's getting about as much
12 sympathy as the judge holding court in his living room.

13 HONORABLE SARAH DUNCAN: I'm not sure that's
14 true.

15 CHAIRMAN BABCOCK: Well, no, you got a lot
16 of sympathy for that, whoever said that. Munzinger said
17 that, and you seconded, Frank, as I remembered.

18 MR. GILSTRAP: I stand corrected.

19 CHAIRMAN BABCOCK: Tom, on subsection (c)?

20 HONORABLE TOM LAWRENCE: All right. If you
21 choose to electronically file or serve a document or agree
22 to receive electronic service then you're also agreeing to
23 provide information regarding any change of your e-mail
24 address to TexasOnline, to the courts, and to any other
25 parties within 24 hours of the change.

1 CHAIRMAN BABCOCK: Any comments on this
2 rule?

3 HONORABLE TOM LAWRENCE: E-mails change so
4 much it doesn't do anybody any good if you don't notify of
5 changes.

6 CHAIRMAN BABCOCK: Right.

7 MR. HUGHES: It should say "the party," not
8 "the filer."

9 HONORABLE TOM LAWRENCE: (d), "a party who
10 electronically files a document is not required to
11 electronically serve documents upon other parties unless
12 the court has ordered the party to electronically serve
13 documents," so I'm not sure we need that in view of what
14 we did earlier.

15 CHAIRMAN BABCOCK: Right.

16 HONORABLE TOM LAWRENCE: (e), "a filer may
17 electronically serve a document in instances where the
18 document is traditionally filed as well as the instances
19 where the document is electronically filed."

20 CHAIRMAN BABCOCK: Yeah, Frank, on that.

21 MR. GILSTRAP: There's got to be a better
22 word than "traditionally filed." I mean, does that mean
23 oral pleadings?

24 HONORABLE TOM LAWRENCE: Well, we --
25 "traditionally filed" is in our definitions.

1 MR. GILSTRAP: Is it in the definitions?

2 HONORABLE TOM LAWRENCE: Yes.

3 MR. HAMILTON: I don't understand what that
4 means.

5 CHAIRMAN BABCOCK: Carl.

6 MR. HAMILTON: I don't understand what that
7 means, "the filer may serve," "may electronically serve."

8 MR. HUGHES: It just means that you can
9 e-serve documents -- the documents you can e-serve are not
10 only the ones that you e-file. You could traditionally --
11 you could file a paper document and then e-serve it if the
12 other side has agreed to e-service.

13 MR. ORSINGER: That qualification isn't on
14 the other side, assuming the other side has agreed to
15 e-service. This appears to be a stand-alone authorization
16 to e-serve something you've filed traditionally.

17 MR. HUGHES: Well, but that's -- (e) --

18 MR. ORSINGER: Subordinate to some other
19 rule?

20 MR. HUGHES: -- is limited by the general
21 rule in (b) that says you can only electronically serve
22 where it's been agreed to. All (e) is really trying to do
23 is expand the universe of documents that can be
24 electronically served and say it's not limited to the ones
25 you e-file. Because a party might want to traditionally

1 file something but then for cost reasons they've got
2 everyone's agreement to send it out by e-mail, for
3 whatever reason they chose not to e-file it.

4 CHAIRMAN BABCOCK: Alan.

5 MR. MARTIN: You may have a situation where
6 something that's filed in a court or jurisdiction that
7 does not have e-filing yet, that's been filed the
8 traditional way, but the litigants to that particular case
9 may be on e-filing and use that service in an adjoining
10 county or whatever. You know, there's an attempt to say
11 you can still serve us a copy to those individuals even
12 though the original case may not have been filed in that
13 county. I mean, this is a service to get the documents to
14 all the appropriate parties, not necessarily just to serve
15 the county in these things.

16 CHAIRMAN BABCOCK: Frank.

17 MR. GILSTRAP: Well, I know that traditional
18 court order and traditional filing, I now know that they
19 are in the definitions, but that still doesn't make them
20 good usage. You could say "paper filing" or something.
21 It's like "traditional summary judgment," which isn't
22 traditional at all. It refers to a codified procedure
23 that's existed since the 1930s. It's hardly traditional.

24 CHAIRMAN BABCOCK: Where's Dorsaneo?

25 MR. ORSINGER: When does it become

1 traditional, when it's 90 years old?

2 MR. GILSTRAP: Well, I don't know. It's
3 just not a tradition. When you say traditional you put a
4 lot of baggage on this. Well, we used to do this that
5 way, and that makes it the law.

6 CHAIRMAN BABCOCK: You could make a Broadway
7 show tune out of that.

8 MR. GILSTRAP: I mean, I just don't -- if we
9 can keep it out, I think we ought to keep it out at this
10 point and not let it creep in the way "traditional summary
11 judgment" crept into the cases.

12 CHAIRMAN BABCOCK: Okay. Any more comments
13 about (e)? All right. How about 5.2?

14 HONORABLE TOM LAWRENCE: Completion of
15 service and date of service. "Service shall be complete
16 when electronic transmission is -- of the filer to the
17 party. Except as provided the date of service shall be
18 the date the electronic service is complete." When it's
19 after 5:00 p.m. then the date of service will be deemed to
20 be the next day that's not a Saturday, Sunday, or legal
21 holiday. So you can't file something on 5:10 and have it
22 on that date. It will be deemed the next day.

23 CHAIRMAN BABCOCK: How about late filing in
24 places like Harris County, Judge Lawrence?

25 HONORABLE TOM LAWRENCE: What do you mean,

1 late filing?

2 CHAIRMAN BABCOCK: Well, if you go down to
3 the district clerk in Harris County at 7:00 o'clock at
4 night it's deemed filed that day, isn't it?

5 HONORABLE TOM GRAY: Filing versus service.

6 MR. ORSINGER: Yeah, this is service.

7 CHAIRMAN BABCOCK: Oh, service. Okay. I'm
8 with you. I'm with you.

9 HONORABLE TOM LAWRENCE: Most JP courts
10 close at 5:00 o'clock, the civil departments at least.

11 CHAIRMAN BABCOCK: Richard.

12 MR. ORSINGER: Maybe we ought to have in the
13 record what happens if the e-mail transmission bounces
14 back and you can see that it was not received.

15 HONORABLE TOM LAWRENCE: Is that an issue?

16 MR. GRIFFITH: It can be an issue if the
17 filer or the party does not keep a current e-mail address
18 and the service goes to an e-mail address that's no longer
19 valid.

20 MR. ORSINGER: Well, I mean, I have problems
21 periodically with my server being down and my e-mail
22 address is as valid as can be, but I can't get e-mails for
23 24 hours, and this says -- this creates if not a
24 presumption maybe it's an irrebuttable presumption that
25 when you send it it's received and yet you have evidence

1 back that it was not received, and so my question is what
2 happens when you send it but then it comes back and so you
3 know that it was never received, the other side doesn't
4 know about it? What happens then?

5 HONORABLE TOM LAWRENCE: But it's the date
6 the service provider gets it, right?

7 MR. ORSINGER: No, this is service. This is
8 not e-filing. This is service. So I can have service
9 directly to their e-mail if they have no TexasOnline
10 account. So now I've just sent somebody an e-mail, and so
11 under this rule they've been served, and I've got a
12 hearing at 9:00 o'clock three days from now and then I get
13 an e-mail bounced back in 45 minutes saying that it didn't
14 go through because of something is wrong with the e-mail
15 system. I don't know what all the technology is, but
16 there's reasons why e-mails bounce, and it's not just
17 because you change your e-mail address. So my question is
18 what happens when you find out that they weren't served?
19 Does this not go away?

20 HONORABLE TOM LAWRENCE: Well, that was one
21 of the arguments for only having service through
22 TexasOnline, so you wouldn't have this problem, as I
23 recall. Wasn't that correct, Jody?

24 MR. HUGHES: I think that's right, but under
25 the scenario Richard raises I think service there is not

1 complete, and so the serving party hasn't discharged their
2 duty to --

3 MR. ORSINGER: Why is it not complete?

4 MR. HUGHES: Because it has not been
5 transmitted by the filer to the party.

6 MR. ORSINGER: I don't interpret (a) to mean
7 that at all. I interpret (a) to mean the mailbox rule,
8 that when you put the envelope in the mailbox with the
9 postage it's served; and when I say electronic
10 transmission, admittedly this is ambiguous, but to me that
11 means when you send the electronic signal, not when the
12 other side receives the electronic signal. You're
13 interpreting transmission to be a complete connection
14 between the sender and receiver, and I see this as a
15 mailbox rule that service is complete upon pressing the
16 send button.

17 MR. HUGHES: I certainly agree that it's
18 ambiguous.

19 MR. ORSINGER: Well, do you see how it could
20 be interpreted?

21 MR. HUGHES: I agree. I mean, I agree it's
22 ambiguous.

23 MR. ORSINGER: Well, then we ought to decide
24 if this is really a mailbox rule applied to e-mail boxes.

25 MR. HUGHES: But I don't think we want a

1 mailbox rule for the reason that you raise, because then
2 what happens if it bounces back? And can the sender just
3 raise up their arms and say, "Well, I tried. I did my
4 part, and even though it bounced back, it's no longer --
5 you know, I completed service"?

6 MR. ORSINGER: Then we should say, "Service
7 shall be complete upon a party's receipt of an electronic
8 transmission of documents."

9 MR. HUGHES: That would be better.

10 MR. ORSINGER: Is that the rule we really
11 want?

12 HONORABLE SARAH DUNCAN: So if I'm the
13 lawyer for the party and I just don't give it to my
14 client, it will never be served?

15 CHAIRMAN BABCOCK: Alan.

16 MR. MARTIN: We've already had one situation
17 where a service of copy went to an EFSP and an attorney
18 failed to pick it up. It's the same scenario as if you
19 put something in the mail, you legally stamped it, so with
20 the proper postage. It's properly addressed. It's been
21 going through the legitimate recognized delivery service
22 of the United States Postal Service. It gets to the
23 person's address and they don't open it or it sits on
24 their desk or their receptionist desk or whatever.

25 We guarantee the delivery to this point, and

1 it's time/date stamped and all that business, but, you
2 know, many times electronic delivery gets held to a higher
3 standard than our older standards of the manual processes,
4 and we just have to be careful that, you know, it's your
5 intention to get this out and get it filed and get it
6 presented and you've done everything that you should do by
7 the handling of the physical mail.

8 This is kind of the same situation for the
9 electronic. You've sent it, it's gotten through the
10 system, but you can't make them read it. So, you know,
11 just because it got there or if you get a bounce back
12 saying their address is no good, that's far more
13 information than you might have had if you had mailed it
14 off. You know, they may have moved from that address and
15 they're not there anymore. So it's really kind of the
16 same situation off to the side where that demark is, and
17 we've traditionally -- we've looked at it from the side of
18 saying you legitimately provided it in the manner that's
19 prescribed.

20 MR. ORSINGER: That is a mailbox rule. See,
21 he's interpreting this as a mailbox rule.

22 CHAIRMAN BABCOCK: Professor Hoffman.

23 PROFESSOR HOFFMAN: I'm sympathetic that we
24 ought to treat e-service as much as possible like paper
25 service so that I think we ought to track the mailbox rule

1 as best we can, but actually, what I was thinking of was
2 you send this e-mail and you immediately get this bounce
3 back that says it didn't get through. That's the
4 equivalent of -- there's a case that came out of the U.S.
5 Supreme Court a couple of years ago called Jones vs.
6 Flowers and this is a Mullane due process case, and the
7 issue that they raise is, well, what would happen if you
8 put your -- you know, your service into the hands of the
9 postal worker and you watched that postal worker drop it
10 into the gutter or something, you know. You know that
11 your letter ain't going to get there. Can you say it was
12 reasonably calculated to effect service?

13 And the Court says, "No, no, no, no way.
14 That wouldn't work," even though you sort of did what you
15 needed to do, and I would say a bounce back seems a whole
16 lot like, you know, the post -- you know, you have
17 information; and so what I would suggest is I like the
18 idea of having the rule consistent with the mailbox rule
19 so that transmission is what you need to do; and if you
20 address that letter wrong, just like if you typed the
21 e-mail address wrong, well, that's on you and you've got
22 to be careful about how you type that e-mail address; but
23 if you've got information like a bounce back that says it
24 didn't get through, you're on notice that something was
25 wrong right then and there, and you can't rely on that

1 being a defect at their end that's their problem.

2 MR. MARTIN: Well, in this case with the
3 electronic you can prove that you've done what you need to
4 do. If nobody saw you drop that in the mailbox, you know,
5 and put the proper postage on it and address it properly
6 and it goes off into the ether and it never gets
7 delivered, you've got no audit trail. In our case you
8 have an audit trail. You know when it went in and you
9 know when it got to the EFSP, and if it didn't get picked
10 up from the EFSP or it got picked up but not read by the
11 receiving party, that's a different problem. Okay. So
12 that's the way we've always addressed it.

13 CHAIRMAN BABCOCK: Sarah.

14 HONORABLE SARAH DUNCAN: I thought we were
15 just going to do this with e-mail and not with an EFSP.

16 MR. ORSINGER: Well, the EFSPs will handle
17 e-mails also.

18 HONORABLE SARAH DUNCAN: But they don't have
19 to.

20 MR. ORSINGER: No, I know that.

21 HONORABLE SARAH DUNCAN: You can just use an
22 ISP.

23 MR. ORSINGER: You're exactly right. They
24 had considered requiring everyone to use an EFSP so there
25 would be a paper trail for all of these disputes, but

1 without that how am I going to know that you sent me an
2 e-mail that bounced back because I never got it?

3 HONORABLE SARAH DUNCAN: Right. How are you
4 going to know that my law firm had pretty significant
5 e-mail problems this last 10 days? I don't know which one
6 of my e-mails went through. I know which ones I got an
7 e-mail message back from the help desk saying "your
8 message has been delayed," but I don't know if it ever
9 ultimately went through, and at this point I don't know if
10 it's bounced because everybody's holding up our e-mails.

11 So if I don't have to go through an IFSP?

12 HONORABLE NATHAN HECHT: EFSP.

13 HONORABLE SARAH DUNCAN: EFSP, but I can
14 just use my own e-mail account, why can't I just delete
15 all of those bounce back e-mails and say, "Well, I never
16 got notice that my e-mail bounced back, I pressed send and
17 it got sent, so they must have deleted it on their end"?

18 MR. ORSINGER: You know, sometimes --

19 CHAIRMAN BABCOCK: Because you're an honest
20 person.

21 MR. ORSINGER: Sometimes you can request a
22 confirmation to see if your e-mail was opened.

23 HONORABLE SARAH DUNCAN: You can always
24 request.

25 MR. ORSINGER: The way I do this, and I do

1 probably 90 percent of my service on other lawyers by
2 e-mail, is I only send it by e-mail -- or I send it by
3 e-mail alone only to lawyers that I trust. If it's a
4 lawyer I don't trust, I send it to him by e-mail, plus fax
5 or hand-delivery.

6 PROFESSOR HOFFMAN: Is that before the
7 e-mail got there?

8 MR. ORSINGER: That's the way I police it.

9 CHAIRMAN BABCOCK: What percentage?

10 MR. ORSINGER: 90 percent.

11 CHAIRMAN BABCOCK: You don't trust?

12 MR. ORSINGER: No, 90 percent I do trust.

13 CHAIRMAN BABCOCK: Oh.

14 HONORABLE SARAH DUNCAN: But he works in one
15 area of the law.

16 MR. ORSINGER: Admittedly, with people I see
17 over and over again.

18 HONORABLE SARAH DUNCAN: And we're creating
19 a statewide system, and can I make one other comment?

20 CHAIRMAN BABCOCK: Certainly.

21 HONORABLE SARAH DUNCAN: On (a), why are we
22 going to start serving parties instead of lawyers?

23 MR. ORSINGER: A party is a lawyer if
24 they're pro se.

25 HONORABLE SARAH DUNCAN: It includes? Okay.

1 Under the definition. That answers that question.

2 CHAIRMAN BABCOCK: Judge Lawrence.

3 HONORABLE TOM LAWRENCE: If you're concerned
4 that the other side is going to play some game then you
5 don't send them the e-mail directly to them. You send it
6 through the service provider through TexasOnline because
7 then you've got a record of it. You've got a way to prove
8 that it was sent and that they received it.

9 MR. MARTIN: Yeah. You may not have as easy
10 a time getting records from an internet service provider
11 because of privacy issues about whether or not your e-mail
12 was delivered or whether or not you received an e-mail,
13 and these bounce backs that we talked about, those are
14 reported just like any other e-mails. So, I mean, the
15 records are generally there, but your ability to get at
16 them is far more limited with a private internet service
17 provider that's sorting your e-mails going through than it
18 is from a public entity like TexasOnline, because we are
19 subject to Open Records.

20 CHAIRMAN BABCOCK: Carl.

21 MR. HAMILTON: If you send an e-mail without
22 going through the provided service how do you prove that
23 the recipient got it? Is there some kind of a --

24 MR. GILSTRAP: That's the question that
25 Richard raised, is should we require proof of receipt and

1 we --

2 MR. HAMILTON: But how do you know it
3 generally if you send somebody an e-mail?

4 MR. ORSINGER: There are some instances in
5 which when they open the e-mail it will send back a signal
6 telling you that the e-mail was open, but I think there is
7 ways to get around that.

8 MR. GILSTRAP: But we don't do that with
9 regular mail. It's served when it's sent, and you've got
10 a mailbox rule, and the problem with proving receipt is
11 you can't prove it. I mean, what if it wound up in a spam
12 filter or something, he didn't get it. I mean, what is
13 that? I don't think we can put in a requirement that
14 requires you to prove that they received the e-mail.

15 CHAIRMAN BABCOCK: And, I mean, there are a
16 lot of times when you've got somebody, as Richard says,
17 you don't trust, and you send them a letter or send them a
18 certified letter and they won't pick it up, and then
19 you've got to find out another method of serving them so
20 you can prove that you served them. Yeah, Jody.

21 MR. HUGHES: Well, the analogy that the task
22 force was thinking of when it decided to include just
23 straight e-mail transmission between parties was sort of
24 between just dropping a pleading in the mail to somebody
25 versus sending it by registered or certified mail, which

1 is the same way here, you get that added documentation if
2 you go through TexasOnline; but the group thought, well,
3 if it's between lawyers that trust each other and they
4 don't want to be forced to incur the extra expense, just
5 like you might not want to incur the extra expense of
6 certified mail to somebody that you know and trust,
7 there's the cheaper option. But I'm troubled by your
8 example of where the address is correct but it still
9 bounces back and whether --

10 MR. ORSINGER: That happens periodically to
11 everybody.

12 MR. HUGHES: Right, and whether the rules
13 should impose a duty to do something further.

14 MR. ORSINGER: Well, I like the suggestion
15 that was made down here, which is that we ought to have a
16 mailbox rule unless you have evidence that the mailbox
17 rule failed, in which event you have a duty or you then
18 have an ethical obligation as well as an obligation under
19 the rules to find some other way to give them notice; and
20 if you're going to do it in any way based on receipt we're
21 going to have to have a real long discussion here about
22 what constitutes receipt, because for purposes of criminal
23 prosecution for intercepting e-mails receipt occurs at
24 your ISP level, like AOL or hotmail.com or even if it's
25 your own server inside of your own law firm. Even if you

1 don't open the e-mail message up or download it from the
2 remote receiver, it's still considered received, or are we
3 going to say receipt is only when you download your
4 e-mails and then that's receipt or is it when you download
5 your e-mails and look at them, is that receipt?

6 If we don't want to get into that debate,
7 which I think would take us more time than we have the
8 rest of the afternoon, it would be better to do it on the
9 basis of sent and then if you receive notice that the
10 sending is a failure then it's not sent. Otherwise assume
11 that it is.

12 CHAIRMAN BABCOCK: Lamont, then Carlos.

13 MR. JEFFERSON: I was going to say that I
14 think just about the same thing. You should always be
15 able to show that you sent something electronically.
16 You're not going to be able to show that the other side
17 received it, and you can't have -- at least through
18 Outlook you can ask for a read receipt, but the other side
19 doesn't have to give you a read receipt. If you say, "I
20 don't want to give" -- even if you got the e-mail you can
21 still read the e-mail and accept the e-mail and say, "I
22 don't want the other side to get a read receipt."

23 So I think we ought to track the mailbox
24 rule as closely as we can. The party serving
25 electronically can always show that they -- and the other

1 thing to keep in mind is this is all by agreement, right?
2 I mean, so first of all, the parties are going to all have
3 to have agreed to this electronic service process and
4 presumably agreed to e-mail address, so as long as you can
5 show that you served something electronically to a
6 designated e-mail address and you can do that through your
7 own computer with no cooperation from the other side, then
8 you should be able to show that that's -- that should be
9 effective service.

10 The one instance that makes it interesting
11 is the immediate bounce back, and if you get an immediate
12 bounce back then what's your obligation, and you can go
13 one of two ways. You can say you've got an obligation
14 then to do something else, but if you don't do that
15 something else because you don't get the bounce back
16 because you're out of the office or whatever, does that
17 mean that you haven't served in the first place? And I
18 think that creates problems that maybe we don't want to
19 create, and so the other option is to say -- is to just
20 track the Rule 21a and say even if you can show that you
21 served it, that from your end everything looks like it was
22 fine, nothing prevents the other side from proving that
23 they didn't get it, which is the typical fight that you
24 have if someone says, "You may say you sent it, but I
25 never got it. I don't care if you do have a signed green

1 card. "

2 CHAIRMAN BABCOCK: Carlos.

3 MR. LOPEZ: Well, I'm struggling to try to
4 figure out what to do with Lamont's very, very last
5 example where the signed green card has got obviously a
6 signature and they're still saying they didn't get it.
7 You know, I kind of focus on what he talked about, which
8 is it's by agreement, and so, I mean, if you affirmatively
9 said, "Here's my e-mail address for which I agree to be
10 bound for service purposes," and it bounces back because
11 there is a problem on their end, but you have clearly sent
12 it to the right e-mail address at which they told you to
13 send it, I don't see how that's the sender's problem or
14 why it should be the sender's problem.

15 I mean, I think it's a little different than
16 the analogy of you watched the post office guy drop it in
17 the gutter. I think it's a little bit different because
18 here they caused the problem, presumably. I mean, there
19 may be some cases where they didn't, but I think it's
20 different where -- I think it's analogous to the postman
21 is trying to knock on the door, they're inside, they won't
22 open it, so they finally got tired and then threw it in
23 the gutter.

24 MR. JEFFERSON: But I don't think it's as
25 simple as knowing that it's the sender's problem or the

1 recipient's problem. I mean, it might be the sender's
2 problem. It might be your exchange server on your end
3 that's not getting the e-mail out like you thought it was,
4 and so --

5 MR. LOPEZ: Right.

6 MR. JEFFERSON: -- you as a sender hitting
7 send, as far as you know it's gone --

8 MR. LOPEZ: I'm limiting my example, and
9 that's just one application, to where you've done
10 everything right and it still didn't get there at the
11 place they pre-ordained for you to send it. There I have
12 a real problem with why that wouldn't be considered
13 service, at least constructively.

14 CHAIRMAN BABCOCK: Are we pretty much agreed
15 that we ought to try to have a mailbox rule? I mean, is
16 there a consensus on that?

17 MR. GILSTRAP: But what portion of the
18 mailbox, the one that says you can prove you didn't get
19 it? That part of the mailbox rule? Not the three-day
20 rule.

21 CHAIRMAN BABCOCK: I was thinking --

22 PROFESSOR HOFFMAN: "Shall be complete upon
23 deposit of the paper."

24 CHAIRMAN BABCOCK: Sarah.

25 HONORABLE SARAH DUNCAN: When we first

1 resolved the Jody/Richard disagreement on what electronic
2 transmission is, I note that it's not defined, and I
3 considered them both to be reasonable individuals.

4 CHAIRMAN BABCOCK: I think it is defined.

5 MR. ORSINGER: No, it isn't.

6 HONORABLE SARAH DUNCAN: I consider them
7 both to be reasonable people, so have I electronically
8 transmitted something when I pressed send or when it's
9 received?

10 MR. ORSINGER: Well, if you say received
11 we're going to have to debate what received is because
12 it's not like a letter dropped in your mailbox. There's
13 about three or four different ways or levels. There's
14 successive levels of receipt.

15 CHAIRMAN BABCOCK: You know, it plays into
16 the electronic services that I was thinking of, which is
17 defined, and this may have been said before, but the
18 definition is "electronically transmitting the document to
19 that party's e-mail address," which sounds sort of like
20 the mailbox rule to me.

21 HONORABLE SARAH DUNCAN: It depends on how
22 you define "electronically transmitted."

23 CHAIRMAN BABCOCK: "To that party's e-mail
24 address."

25 HONORABLE SARAH DUNCAN: Jody interprets

1 that to mean that it was received in the mailbox --

2 CHAIRMAN BABCOCK: Right.

3 HONORABLE SARAH DUNCAN: -- of the
4 recipient. Richard interprets that to mean it was sent to
5 the mailbox.

6 CHAIRMAN BABCOCK: That's the way I --
7 Richard and I are on the same page on that, so --

8 HONORABLE SARAH DUNCAN: Neither one of
9 y'all was on the task force.

10 MR. HUGHES: And I'm coming around to it,
11 too.

12 CHAIRMAN BABCOCK: We're convincing him.

13 MR. HUGHES: But I wonder if pro ses and
14 others who read this are going to appreciate that. I
15 mean, I think part of the reason everyone here appreciates
16 it is because we're used to the mailbox rule, but I don't
17 know. I mean, if there is a way -- I'm not disagreeing
18 there should be a mailbox rule. I'm just trying to think
19 of a way to phrase it to make it clear.

20 MR. ORSINGER: When I first read that I
21 thought it meant that the transmission was successfully
22 completed, and that was why I asked the question, was are
23 you meaning send or received and you meant received and I
24 thought it meant sent, but I agree that you could
25 interpret it either way, and I don't think we should send

1 this out. We ought to take a position. It's either sent
2 or it's received.

3 HONORABLE SARAH DUNCAN: And I think they
4 both made a good point. If someone who wasn't familiar
5 with the mailbox rule had just listened to the last three
6 minutes of discussion, they would think we were crazy,
7 that there is a -- that there is a difference between and
8 significance of sent versus received.

9 CHAIRMAN BABCOCK: Well, how many people are
10 sent people, as opposed to received people?

11 HONORABLE TRACY CHRISTOPHER: Are you still
12 on sent?

13 HONORABLE JANE BLAND: Sent. Sent people.

14 CHAIRMAN BABCOCK: How many people are
15 received people?

16 So 21 to 1, with the chair not voting.

17 MR. ORSINGER: There's one that can't make
18 up her mind.

19 CHAIRMAN BABCOCK: Feels strongly both ways.

20 HONORABLE SARAH DUNCAN: And part of why I
21 can't make up my mind is because there is not at present a
22 definition of "electronic transmission."

23 CHAIRMAN BABCOCK: The reason for that vote
24 I think is to give Jody and Judge Lawrence a sense of the
25 committee's view that it ought to be sent and not received

1 so the language can be drafted to reflect that -- to
2 reflect that feeling if the Court thinks that's
3 worthwhile. Judge Christopher.

4 HONORABLE TRACY CHRISTOPHER: I just don't
5 think we should worry too much about the bounce back rule.
6 It's just like if you mail something to someone's address
7 and, you know, it comes back to you a week later, you know
8 they haven't gotten it, and there's nothing in our rules
9 that says, "Oh, well, go try to find out a good address
10 for them," but that's what we do as lawyers. So if you
11 get a bounce back e-mail address you'll call them up.
12 This is all by agreement anyway and say, "What's the deal,
13 your e-mail bounced?"

14 HONORABLE TOM GRAY: Or you're going to go
15 to a hearing and they're not going to be there and you're
16 going to call them from the courthouse and say, "Where are
17 you?"

18 HONORABLE TRACY CHRISTOPHER: "Why aren't
19 you here?"

20 CHAIRMAN BABCOCK: Carl.

21 MR. HAMILTON: Frank mentioned a moment ago
22 about the three-day rule not applying, but I think it
23 should apply. It's the same thing as a fax transmission,
24 and the three-day rule applies to that.

25 CHAIRMAN BABCOCK: Yeah.

1 MR. HAMILTON: But we don't say anything
2 about that.

3 MR. ORSINGER: It sure doesn't, and there is
4 an after 5:00 p.m. add one day rule on the faxes, too.

5 HONORABLE SARAH DUNCAN: Speaking of the
6 after 5:00 p.m. how can (b) and (c) co-exist? But then
7 this problem was not a problem back --

8 CHAIRMAN BABCOCK: Is that existential or --

9 HONORABLE SARAH DUNCAN: -- on filed but not
10 filed, not accepted for filing.

11 MR. ORSINGER: Before we go on to that, for
12 the old mailbox rule for what we call traditional service,
13 if you don't mind my using that term, Rule 21a has a
14 sentence saying, "Nothing herein shall preclude a party
15 from offering proof that it was not received." They say
16 that service shall be complete upon deposit and postpaid,
17 properly addressed wrapper, but we allow somebody to come
18 in. Here we're saying service is complete and we don't
19 allow them to come in and prove and I'm wondering if we
20 shouldn't.

21 CHAIRMAN BABCOCK: Yeah. Good point. Dee
22 Dee's squirming, according to Angie, and so let's take our
23 afternoon break and be back in 10, 15 minutes.

24 (Recess from 3:33 p.m. to 4:04 p.m.)

25 CHAIRMAN BABCOCK: Judge Lawrence, you got

1 anymore in you?

2 HONORABLE TOM LAWRENCE: I do.

3 CHAIRMAN BABCOCK: All right. Where are we?

4 HONORABLE TOM LAWRENCE: 5.3, page 13.

5 CHAIRMAN BABCOCK: 5.3 on page 13.

6 HONORABLE TOM LAWRENCE: This is simply the
7 certificate of service and the parameters. There are four
8 things that you have to put on it, the filer's e-mail
9 address and the fax if it's available, recipient's e-mail
10 address, daytime electronic service, and the last
11 statement that the document has been electronically served
12 and that the electronic transmission was reported as
13 complete or that the document is being electronically
14 served concurrent with the electronic filing of the
15 document. So either you serve the document, then do a
16 certificate of service afterwards, or you can do it all at
17 the same time. So that's consistent both with the regular
18 certificate of service and with the county and district
19 court.

20 CHAIRMAN BABCOCK: Comments? Yeah, Justice
21 Gray.

22 HONORABLE TOM GRAY: Yes, since we have
23 spent a good deal of today focused on the template, I
24 think it's worth noting that Rule 5.3 in the template had
25 been deleted in its entirety, which is the adding three

1 days, and just make sure that everybody is aware of that.
2 I personally would leave that in there.

3 CHAIRMAN BABCOCK: Why was it taken out,
4 Judge?

5 HONORABLE TOM GRAY: I think that was the
6 one that was taken out because electronic service is
7 viewed as being somewhat immediate, and the three days was
8 in there for the mailbox or the time of mailing, and
9 that's my recollection of the explanation, but --

10 HONORABLE TOM LAWRENCE: Well, the task
11 force talked about it, and the task force -- because the
12 transmission is made and the service is effected
13 instantaneously, the three days didn't seem to make any
14 sense to us. That's why we took it out.

15 CHAIRMAN BABCOCK: Well, but when you fax
16 something that's instantaneous, and don't you get three
17 days on that?

18 HONORABLE STEPHEN YELENOSKY: And that's as
19 backward.

20 HONORABLE TRACY CHRISTOPHER: That's just as
21 dumb, too.

22 CHAIRMAN BABCOCK: Sarah.

23 HONORABLE SARAH DUNCAN: You can turn the
24 fax machine off at 5:00 o'clock. I can't turn off my
25 e-mail at 5:00 o'clock. I'm getting it right now. I'm

1 required to carry this, so --

2 CHAIRMAN BABCOCK: By whom?

3 HONORABLE SARAH DUNCAN: The firm.

4 CHAIRMAN BABCOCK: Really?

5 HONORABLE SARAH DUNCAN: Yeah.

6 CHAIRMAN BABCOCK: Oh.

7 MR. ORSINGER: That's life at the
8 plantation, Sarah.

9 HONORABLE SARAH DUNCAN: It's a whole new
10 world.

11 MR. ORSINGER: You can be a sole
12 practitioner if you want to.

13 HONORABLE SARAH DUNCAN: What?

14 MR. ORSINGER: You can be a sole
15 practitioner if you want to.

16 CHAIRMAN BABCOCK: Richard likes bossing
17 himself around.

18 HONORABLE SARAH DUNCAN: We had this same
19 discussion when we adopted fax service, and I believe it
20 was Carl, but I'm not going to name names, there is a
21 concern --

22 CHAIRMAN BABCOCK: Other than Carl's.

23 HONORABLE SARAH DUNCAN: I didn't say any
24 last names. There is a concern of invidious attempts to
25 serve when everybody will know that there is not going --

1 the lights may be home, but no one's home.

2 CHAIRMAN BABCOCK: Judge Yelenosky reacts
3 strongly to that.

4 HONORABLE STEPHEN YELENOSKY: I said to
5 somebody, I think Lamont, during the break that the 21a
6 for fax machines is sort of judging how long it takes to
7 get somewhere today by how long it would take by horse,
8 and that still does apply for snail mail, but it really
9 doesn't make a lot of sense if -- and at some point we
10 look at the three-day rule, which is probably too short,
11 not because of transmission problems, and were to lengthen
12 that to like 10 days and then cut the fax rule and the
13 electronic service to instantaneous, like hand-delivery,
14 that would make more sense to me.

15 HONORABLE JAN PATTERSON: But, of course,
16 that's not before us today.

17 HONORABLE STEPHEN YELENOSKY: Oh.

18 MR. ORSINGER: Well, but since everyone here
19 really is interested in technological issues or they
20 wouldn't be here, this is probably the best time for us to
21 take a vote on getting rid of the three-day rule for
22 faxes.

23 HONORABLE TOM GRAY: My point was we have it
24 in the rules for faxes, we have it in the rules for
25 district and county court proceedings under e-filing.

1 This would be the exception rather than the rule, and I
2 think we ought to fix it all at the same time and to have
3 to put it in here. We know it's there and then when we
4 come back and revisit the three-day rule we fix it all at
5 the same time. That was my observation. Now we can move
6 on.

7 HONORABLE SARAH DUNCAN: And the
8 counter-argument to me is that as long as you've got (c)
9 it shouldn't matter when it lands on the floor in the fax
10 room or the floor of the e-mail -- you're protected by
11 5.2(c), right? That's what gives you time off. Isn't
12 that right?

13 CHAIRMAN BABCOCK: Richard.

14 MR. ORSINGER: I'd like to leave it in here
15 so that when we debate this again in two or three years we
16 can say, "Look, we've already made this change in the JP
17 court and it didn't destroy the judicial system as we know
18 it, so let's go ahead and implement it for district and
19 county courts."

20 MR. HUGHES: And, actually, when this came
21 up in the task force the whole history of the fax filing
22 rule and presence, the task force deliberately took it out
23 of this rule, recognizing that it would be different; and
24 the argument was raised it should be consistent, it's
25 going to cause problems; and the proponents on the task

1 force who wanted to change it said, "Let's be the pilot,
2 let's be the ones who break the, you know" --

3 CHAIRMAN BABCOCK: You said a bad word.

4 HONORABLE TOM LAWRENCE: We wanted to raise
5 a voice of common sense in these rules.

6 CHAIRMAN BABCOCK: Sarah.

7 HONORABLE SARAH DUNCAN: That's what
8 concerns me about all of these, is I have a feeling -- I'm
9 going to sound like a conspiracy theorist, but I predict
10 that when the district and county court e-filing rules
11 come to this group, the courts in which people around this
12 table actually practice, that we will be told we've
13 already approved this in the JP court rules.

14 MR. ORSINGER: I'll be sure to say that if
15 I'm here.

16 HONORABLE SARAH DUNCAN: Okay. That way I
17 would be a prognosticator.

18 CHAIRMAN BABCOCK: Well, are you a leave
19 5.3, the old 5.3 out, or you a leave it in?

20 MR. ORSINGER: I think it makes no sense to
21 add three days for faxes, so I think it doesn't make any
22 sense to add three days for e-mail.

23 HONORABLE SARAH DUNCAN: So this is his
24 beginning assault on the three-day fax rule.

25 CHAIRMAN BABCOCK: Okay. And are you a

1 leave it in person?

2 HONORABLE SARAH DUNCAN: Yeah, I think I
3 probably am.

4 CHAIRMAN BABCOCK: Okay. Well, let's take a
5 vote on that, because that would be interesting. How many
6 people think we should not add three days for e-filing,
7 raise your hand?

8 MR. HAMILTON: Just in the JP rule we're
9 talking about.

10 HONORABLE SARAH DUNCAN: Just in the JP
11 rules, Carl, so it's okay if it's just in the JP rules,
12 right?

13 CHAIRMAN BABCOCK: And how many people think
14 that we should have the three days added when you
15 electronically serve?

16 HONORABLE SARAH DUNCAN: Just in the JP
17 rules.

18 CHAIRMAN BABCOCK: Just in the JP rules.

19 HONORABLE SARAH DUNCAN: I don't practice in
20 JP court.

21 MR. ORSINGER: Okay. All you guys in the
22 big cities.

23 CHAIRMAN BABCOCK: 21 to 2 in favor of doing
24 what the task force recommended, which is delete the old
25 5.3 from the district court and county court rules. So

1 that answers that.

2 So we're back to the new 5.3, which Judge
3 Lawrence was going through, and any other comments about
4 it?

5 Yeah, Judge Christopher.

6 HONORABLE TRACY CHRISTOPHER: Well, I think
7 the use of the word "completion" is a little unclear,
8 especially in light of all of our sending verses
9 receiving, so I think we should -- when we change it it
10 should say "sent," not "completed."

11 HONORABLE TOM LAWRENCE: In 4 point --

12 HONORABLE TRACY CHRISTOPHER: In 5.2,
13 completion of service.

14 CHAIRMAN BABCOCK: Okay.

15 HONORABLE TOM LAWRENCE: Oh, 5.2.

16 HONORABLE TRACY CHRISTOPHER: "Service shall
17 be complete upon electronic transmission." Just if we're
18 going to change it to have it mirror the mailbox rule then
19 we should use that sort of language.

20 CHAIRMAN BABCOCK: Okay.

21 HONORABLE TRACY CHRISTOPHER: Whatever it
22 is.

23 CHAIRMAN BABCOCK: Any comments -- thanks.
24 Any comments on 5.3, certification of service?

25 MR. MUNZINGER: Well, given the discussion

1 that just took place, what's the reason to talk about
2 completion in subparagraph (iv)?

3 HONORABLE TOM LAWRENCE: Well, what you're
4 saying by use of the word "complete" is that the document
5 has been -- whatever the document is, has been sent and
6 received, what you're saying.

7 MR. MUNZINGER: Well, but that's the problem
8 about the mailbox rule. You're bringing the concept of
9 receipt back into the question of service.

10 HONORABLE TRACY CHRISTOPHER: Right. I
11 think we should delete that first sentence in (iv).

12 CHAIRMAN BABCOCK: Yeah. Any other
13 comments? Going once.

14 HONORABLE TOM GRAY: Well, consistent with
15 you-all's prior vote, why on earth would you want the
16 filer's telecopier number?

17 MR. ORSINGER: Because if the e-mail bounces
18 back we want to be able to fax it conveniently.

19 CHAIRMAN BABCOCK: Okay. Next, Judge.

20 HONORABLE TOM LAWRENCE: 6.1. This deals
21 with the court and how the court signs electronic
22 documents. (a) says that a JP may electronically sign an
23 order by applying his or her digitized signature to the
24 order, but they are not required to electronically sign
25 orders. So if the judge just wants to physically sign

1 orders and not electronically sign it, they can do it. If
2 they want to do it electronically then they can do that
3 also.

4 (b) talks about upon electronically signing
5 an order the JP may maintain the electronic order as an
6 official copy of the order or print it and treat the
7 printed order as an official copy of the order.

8 (c), "The JP court may electronically scan a
9 traditional court order." So you can either leave the
10 paper document in the file or you can scan the paper
11 document if you want to, and the scanned court order may
12 then serve as the official copy of the court order. "The
13 court is not required to electronically scan traditional
14 court orders in order to create official electronic court
15 orders. Electronic scanning of the traditional court
16 orders is at the option of the court." So it just gives
17 the court a lot of options as to how they're going to
18 maintain their orders.

19 CHAIRMAN BABCOCK: Any comments on that?

20 MR. HAMILTON: Question.

21 CHAIRMAN BABCOCK: Yeah, Carl.

22 MR. HAMILTON: What do we see on the order
23 that's electronically signed? What does it say?

24 HONORABLE TOM LAWRENCE: Mike.

25 MR. GRIFFITH: With digitized signature

1 you'll actually see a facsimile of the judge's signature,
2 just a graphic image on there.

3 MR. ORSINGER: It's like a rubber stamp,
4 only it's an electronic stamp.

5 CHAIRMAN BABCOCK: Richard Munzinger.

6 MR. MUNZINGER: Are the computers that the
7 justices of the peace use either for their clerks or for
8 themselves, are they owned by the county or are they the
9 personal property of the justice of the peace?

10 HONORABLE TOM LAWRENCE: They're owned by
11 the county.

12 MR. MUNZINGER: All over the state?

13 HONORABLE TOM LAWRENCE: Yeah. I mean, some
14 JPs may have a personal computer in their office, but the
15 official computers they use, I don't know of any that are
16 personally owned. They're all going to be purchased by
17 the county.

18 CHAIRMAN BABCOCK: Okay. Judge Patterson.

19 HONORABLE JAN PATTERSON: Well, if Frank is
20 not going to speak up against "traditional" here, I'm not
21 sure what that adds and would suggest that we just delete
22 the word "traditional" in both of those.

23 CHAIRMAN BABCOCK: I'm sorry, I didn't hear
24 what you said, Judge.

25 HONORABLE JAN PATTERSON: Delete the word

1 "traditional" in those two sentences in (c).

2 CHAIRMAN BABCOCK: Okay.

3 HONORABLE TOM LAWRENCE: How are you going
4 to distinguish an electronic court order from a paper
5 court order then?

6 MR. TIPPS: Say "paper."

7 HONORABLE JAN PATTERSON: Because you can't
8 scan -- you can only scan one of those, right?

9 HONORABLE TOM LAWRENCE: One of them?

10 HONORABLE STEPHEN YELENOSKY: You scan
11 paper.

12 HONORABLE JAN PATTERSON: You scan paper.

13 HONORABLE TRACY CHRISTOPHER: Just say
14 "paper."

15 HONORABLE TOM LAWRENCE: Well, but, I mean,
16 we've defined "traditional" as being a paper document in
17 the definitions.

18 HONORABLE STEPHEN YELENOSKY: Well, I guess
19 the suggestion is to go back and change the definitions.

20 HONORABLE TRACY CHRISTOPHER: Wants it out.

21 CHAIRMAN BABCOCK: Yeah.

22 MR. TIPPS: I just like "paper" better than
23 "traditional." I don't know why we're defining paper as
24 traditional and using the word "traditional" rather than
25 just say "paper order" as opposed to a electronic order.

1 HONORABLE TOM LAWRENCE: Well, I don't know
2 why we did that four years ago, but we're trying to keep
3 it consistent so as to not cause confusion among the
4 attorneys that file in all three. It's not a big deal one
5 way or the other, but we're just trying to keep everything
6 as consistent as possible.

7 MR. TIPPS: Okay.

8 CHAIRMAN BABCOCK: Any other comments?
9 Okay. Judge, you want to go to 6 point --

10 HONORABLE TOM LAWRENCE: 6.2, viewing of
11 electronically filed documents. (a) simply says that the
12 court has to maintain those documents and ensure that they
13 can be viewed in some format. "(b), independent of the
14 TexasOnline system the requirement of viewing access
15 described in (a) above, the JP court may choose to provide
16 for both filers and the general public to electronically
17 view documents or court orders that have been
18 electronically filed or scanned. Where such provisions
19 have been made, persons may electronically view documents
20 or court orders that have been electronically filed or
21 scanned." And "nothing in this rule allows for the
22 viewing of documents or court orders in any form that are
23 legally confidential, like mental health proceedings, or
24 otherwise restricted by a judicial rule or order."

25 So that's pretty straightforward. Basically

1 whatever documents you have you can look at if they've
2 been filed electronically, and we've got all sorts of
3 Judicial Administration Act and the Open Records Act that
4 apply to what you have anyway, so this is consistent with
5 all of that and consistent with county and district court
6 e-filing rules.

7 HONORABLE JAN PATTERSON: I think we usually
8 say "without charge" instead of "for free."

9 HONORABLE TOM LAWRENCE: Okay.

10 CHAIRMAN BABCOCK: Sarah.

11 HONORABLE SARAH DUNCAN: The -- I can't
12 remember what we called them, all those rules designed to
13 present identity theft that the court adopted.

14 HONORABLE TOM GRAY: Sensitive data.

15 HONORABLE SARAH DUNCAN: Sensitive data.
16 Those haven't been adopted?

17 CHAIRMAN BABCOCK: Have not been adopted,
18 right.

19 HONORABLE SARAH DUNCAN: Okay.

20 MR. ORSINGER: When they are adopted there
21 will be a rule that makes them confidential. By that time
22 there will a be rule making that separate information
23 sheet confidential.

24 CHAIRMAN BABCOCK: This subpart (c),
25 "Nothing in this rule allows for the viewing of documents

1 or court orders in any form that are legally
2 confidential." So if I e-mail somebody a pleading that
3 might have something subject to a protective order, this
4 doesn't apply, I take it, if I e-mail to my opponent --

5 MR. ORSINGER: If it's a protective order it
6 will be restricted by judicial rule or order.

7 CHAIRMAN BABCOCK: So my opponent can't read
8 it?

9 MR. ORSINGER: No, your opponent,
10 theoretically your opponent would be within the scope of
11 people that can read it by the terms of the order.

12 CHAIRMAN BABCOCK: Okay.

13 HONORABLE STEPHEN YELENOSKY: Why can't we
14 just say in (a) "by law or statute or court order"?

15 HONORABLE SARAH DUNCAN: Is the --

16 HONORABLE TOM LAWRENCE: I don't know where
17 (c) came from. This is, again, an existing county and
18 district e-filing rule, but to me what they're trying to
19 say is, you know, if it's something that the public cannot
20 look at like a mental health proceeding, since the JP
21 court's do that, and notwithstanding anything else, you
22 can't allow the public access to that. I think it's just
23 setting up some restrictions.

24 HONORABLE STEPHEN YELENOSKY: But (a) says
25 that.

1 CHAIRMAN BABCOCK: Yeah, it just --

2 MR. ORSINGER: It doesn't really say that.

3 (a) says that you're required to do it for
4 nonconfidential, but it doesn't prohibit you from doing it
5 for confidential. You can infer that that's prohibited.

6 CHAIRMAN BABCOCK: You just except those.
7 Now, the thing that jumped out at me on (c) was could you
8 restrict a party who would be entitled to see it through
9 (c), but that's not a reasonable interpretation.

10 MR. ORSINGER: If there was a court order
11 you could.

12 HONORABLE SARAH DUNCAN: But --

13 MR. ORSINGER: I've had judges that would
14 say that certain psychological test results or drug test
15 results can't be shown to the parties. It may be
16 unconstitutional, but it happens.

17 HONORABLE STEPHEN YELENOSKY: This is a rule
18 as to access to the court file. It doesn't even speak to
19 communications or transfers between attorneys, is my
20 understanding, and so why are you worried about that?

21 CHAIRMAN BABCOCK: Sarah.

22 HONORABLE SARAH DUNCAN: I just hesitate to
23 even hold up my hand anymore, but I have a similar
24 question. How can (a) and (c) co-exist? (a) says they've
25 got to enable viewing in some format unless it's

1 confidential or privileged by law or statute. (c) says
2 this rule doesn't permit people to look at things that are
3 legally confidential or restricted or access is restricted
4 by rule or order. Well, those aren't coterminus bodies of
5 law. Law and statute over here, legally confidential -- I
6 think that probably incorporates law or statute, judicial
7 rule or order.

8 HONORABLE STEPHEN YELENOSKY: Well, order,
9 that's why I was saying just add in (a) "court order," you
10 know, if you don't consider that to be law, and then they
11 are coterminus or completely synonymous.

12 HONORABLE SARAH DUNCAN: Okay.

13 HONORABLE STEPHEN YELENOSKY: Because a
14 judicial rule certainly is law, and we have to spell out
15 regulations and everything else that are law.

16 HONORABLE SARAH DUNCAN: Well, to avoid
17 confusion, why don't we just use the same terms in (a) and
18 (c)?

19 HONORABLE STEPHEN YELENOSKY: Well, I'm just
20 saying why do we to add them? Why do you need (c) at all?

21 HONORABLE SARAH DUNCAN: Maybe I misread it.
22 I thought what (c) was trying to say is if you can't look
23 at the piece of paper because it's legally confidential or
24 is protected by judicial rule or order, this rule doesn't
25 authorize viewing of it because it was filed

1 electronically.

2 HONORABLE STEPHEN YELENOSKY: Well, how
3 could a rule do that anyway if the exception in (a) is
4 it's made confidential by law, statute, or court order?
5 The rule couldn't override that.

6 HONORABLE SARAH DUNCAN: But I think that's
7 precisely what this rule is saying, is that it's not
8 intended to trump a pre-existing law or statute that makes
9 something legally confidential or judicial rule or order
10 that makes something confidential.

11 HONORABLE STEPHEN YELENOSKY: Well, and it's
12 not important to what --

13 HONORABLE SARAH DUNCAN: Is that what it was
14 intended --

15 HONORABLE STEPHEN YELENOSKY: I'm saying
16 it's unnecessary to say that.

17 HONORABLE SARAH DUNCAN: -- to do, was say
18 nothing in this rule is going to enable access of
19 something to which I couldn't have had access before? Is
20 that what it's meant to do in the pilot rules?

21 MR. HUGHES: I think that's what the
22 original one was, but I wasn't around when they did the
23 template for district and county, but that's my
24 understanding of what the provision says. I think you're
25 correct.

1 CHAIRMAN BABCOCK: Carl.

2 MR. HAMILTON: Does that mean that if we
3 file something electronically that's not for public
4 viewing we have to somehow tell the filing people they've
5 got to put that in a separate file or something so people
6 can't see it?

7 CHAIRMAN BABCOCK: I would guess so. I
8 mean, just like when you file something under seal, you've
9 got to make sure the clerk knows that.

10 HONORABLE TOM LAWRENCE: If something is
11 filed in a civil suit then the court is going to presume
12 that the public can see whatever it is.

13 CHAIRMAN BABCOCK: Right.

14 HONORABLE TOM LAWRENCE: There would be no
15 way that we would necessarily know that some document was
16 privileged that a plaintiff files.

17 MR. HAMILTON: But if we file something and
18 we tell you it's not to be seen, what do you physically do
19 with it?

20 HONORABLE TOM LAWRENCE: Well, I guess my
21 first question would be under what authority can I not let
22 someone look at it?

23 MR. HAMILTON: Maybe it's a trade secret or
24 something.

25 MR. ORSINGER: Better have a court order if

1 you're going to file a trade secret.

2 HONORABLE STEPHEN YELENOSKY: Yeah.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: Chip, how does all of this come
5 within 76a, you know, 75 and 76a, they say everything is
6 open to the public unless, you know, it's sealed, and you
7 have to go through a procedure of sealing it. How does
8 this comport to that?

9 HONORABLE STEPHEN YELENOSKY: It's no
10 different from "traditional," or as we like to call it,
11 "paper."

12 MR. LOW: But 75a says that, you know, that
13 anybody interested in it can see all the papers and orders
14 in the court that are part of the records, except then 76a
15 makes an exception.

16 HONORABLE STEPHEN YELENOSKY: Right. I
17 mean, well, interpreting 76a with respect to paper is
18 sometimes a problem even for lawyers, who can just bypass
19 it by agreement, but it's the same problem. And what the
20 clerk does, the clerk looks for an order.

21 MR. LOW: But, see, like if something is
22 confidential I claim, I'll mark it "privileged." We'll
23 agree, the parties will agree, it will be privileged. It
24 really won't be filed or something, and until we go
25 through the process then it doesn't become a part, but

1 once -- I've always been of the opinion once it becomes of
2 record the only way I can keep Adam and Eve and everybody
3 else from seeing it is to seal it. And here -- and I'm
4 sure there must be in family cases or health cases orders
5 that are confidential. I have a lot of trouble finding
6 any order unless it's by statute confidential.

7 CHAIRMAN BABCOCK: Judge Lawrence.

8 HONORABLE TOM LAWRENCE: Well, to me there's
9 a difference between (a) and (c). (a), "except those made
10 confidential or privileged by law or statute." That's
11 narrower to me, so there's got to be either a law or a
12 statute that says that something is confidential or
13 privileged.

14 (c) is a little broader. It just says that
15 are legally confidential. To me there's a little more
16 room to argue something should be confidential under (c).

17 HONORABLE STEPHEN YELENOSKY: Well, as a
18 practical matter, what does the clerk do? The clerk looks
19 for an order that says "sealing," right?

20 MS. WOLBRUECK: That's right. Unless it's
21 confidential by law.

22 HONORABLE STEPHEN YELENOSKY: Unless it's
23 confidential by law.

24 HONORABLE TOM LAWRENCE: Well, I don't know
25 if this makes any difference, but I can't ever remember

1 having a document filed by a plaintiff or defendant in a
2 civil case that was confidential or privileged. Now,
3 other records that I maintain, like mental health stuff
4 would be, but that's not going to be part of a civil suit
5 that I can think of. So I don't know what -- as a
6 practical matter I can't think of what would come under
7 this.

8 MR. BOYD: Doesn't Rule 12 of the Rules of
9 Judicial Administration address all court records and
10 confidentiality?

11 MR. HUGHES: No. That only applies to --
12 that applies to noncase records. That's only
13 administrative records.

14 HONORABLE STEPHEN YELENOSKY: 76a is --

15 MR. BOYD: 76a is sealing.

16 HONORABLE STEPHEN YELENOSKY: Sealing.

17 MR. LOW: 76 says they're all open to --

18 HONORABLE STEPHEN YELENOSKY: It defines,
19 yeah, what's a court record and then the exceptions, all
20 family law cases. Anything arising under the Family Code
21 is an exception and then they get certain others.

22 MR. LOW: Yeah, but that's by statute or by
23 code.

24 CHAIRMAN BABCOCK: Alex. Alex, did you have
25 a comment?

1 PROFESSOR ALBRIGHT: It just seems like this
2 is not a problem that's created by these rules. This is a
3 problem that's there with the paper record, too, is if you
4 file something and it's confidential, whoops, you
5 shouldn't have done that, and so you have to get an order
6 sealing it, and it would be the same thing when you file
7 it electronically or in paper. Right?

8 HONORABLE STEPHEN YELENOSKY: That's right.

9 CHAIRMAN BABCOCK: Well, is there a problem
10 with (c) or not?

11 HONORABLE TOM LAWRENCE: No.

12 CHAIRMAN BABCOCK: Judge Lawrence says "no."
13 Anybody else say "yes"?

14 MR. ORSINGER: In my view the problem is
15 with (a) and not with (c).

16 CHAIRMAN BABCOCK: Well, the question was
17 (c).

18 MR. ORSINGER: I know.

19 HONORABLE SARAH DUNCAN: I think there's a
20 problem with the interface between (a) and (c).

21 CHAIRMAN BABCOCK: The interface between.
22 You guys have a solution? Richard?

23 MR. ORSINGER: I would make them parallel,
24 similar to (c), because it seems to me like (c) is broader
25 than (a), and it seems to me they ought to be coterminus,

1 to borrow that word.

2 HONORABLE SARAH DUNCAN: I can't imagine
3 providing for viewing in some format of a document that's
4 made confidential by court order.

5 MR. ORSINGER: That's why I think "order"
6 ought to be added to (a) and then that brings (a) into
7 alignment with (c), even though "legally confidential" is
8 not the same as "confidential or privileged by law or
9 statute."

10 HONORABLE STEPHEN YELENOSKY: Well, if you
11 want the substance of (c) in there and you don't want to
12 take it out, although I still think it's suspenders to
13 (a)'s belt, just put it in (a), rather than separating it
14 by (b) that has nothing to do with it.

15 CHAIRMAN BABCOCK: Yeah. That's not a bad
16 idea.

17 HONORABLE TOM LAWRENCE: That will be fine.

18 CHAIRMAN BABCOCK: Okay. Let's go to 7.1.

19 HONORABLE TOM LAWRENCE: 7.1 says that if
20 there is a dispute the JP who presides over that court
21 will resolve it. 7.2 is the rule I've been looking for
22 all day. "These rules shall be liberally construed so as
23 to avoid undue prejudice to any person on account of using
24 electronic filing system or sending or receiving
25 electronic service in good faith." Kind of a catch-all,

1 do the right thing.

2 CHAIRMAN BABCOCK: Richard Munzinger.

3 MR. MUNZINGER: The only concern I have with
4 7.2 is that it doesn't say that you can't prejudice a
5 person who doesn't electronically file, and we've been
6 concerned all day long about the constituents of the
7 people that use justice courts in many instances not using
8 or having computers or what have you, and the prejudice
9 portion here tends to tilt toward the use of the
10 electronic filing, distinct from whether you use it or
11 not.

12 CHAIRMAN BABCOCK: Justice Gray.

13 HONORABLE TOM GRAY: Well, I was just going
14 to say, but this is consistent with the template.

15 HONORABLE NATHAN HECHT: Which this
16 committee wrote.

17 MR. ORSINGER: Which is, by the way, the
18 traditional version of this rule.

19 HONORABLE NATHAN HECHT: Which this
20 committee wrote.

21 MR. GILSTRAP: Chip?

22 CHAIRMAN BABCOCK: Yes?

23 MR. GILSTRAP: We're in the last stages.

24 CHAIRMAN BABCOCK: Are we in the last
25 stages?

1 MR. GILSTRAP: We're in the last stages.

2 CHAIRMAN BABCOCK: Yeah, we are in the last
3 stages. It's true. Okay. Well, Judge Lawrence, thank
4 you. Thank you very much. Sorry about all the
5 wisecracks.

6 HONORABLE TOM LAWRENCE: Well, I want to add
7 one thing, that really the key person in all of this is
8 Jody Hughes. He did a tremendous job in putting all of
9 these documents together, taking notes, and working on it.
10 He was just invaluable through the whole process.

11 CHAIRMAN BABCOCK: So the beating will be
12 administered to --

13 MR. HUGHES: All the problems in it are
14 caused by me.

15 MR. ORSINGER: Was that a compliment or were
16 you just passing the blame?

17 HONORABLE JAN PATTERSON: He just wants you
18 to keep working, Jody.

19 HONORABLE STEPHEN YELENOSKY: Thanks for
20 your work.

21 CHAIRMAN BABCOCK: He will be the subject of
22 the beatings tomorrow. By the way, I know that we are on
23 a very short time fuse. Jody, I know you're going to go
24 and revise the rules based on these comments. Does
25 anybody want to see another draft of these things before

1 they go out for public comment?

2 MR. BOYD: Can we plan a special meeting?

3 MR. TIPPS: Special meeting for now.

4 HONORABLE JAN PATTERSON: I think a
5 conference call would suffice.

6 HONORABLE DAVID PEEPLES: Special Saturday
7 meeting.

8 CHAIRMAN BABCOCK: Justice Gaultney.

9 HONORABLE DAVID GAULTNEY: I didn't want to
10 see a copy of the rules. I did want to make the point for
11 the record that I think one problem with using the
12 template is that it was -- it is a supplement in the
13 district courts to rules they already have and apply, so
14 to the extent the rules reference a Texas Rule of Civil
15 Procedure, we need to be mindful that Rule 523 in the
16 justice of the peace court doesn't make all the rules
17 applicable, and secondly, in the small claims court I'm
18 not sure any of these rules are applicable. So my
19 suggestion would be that when a rule is referenced that
20 perhaps the intent of the rule, the reason it's being
21 referenced, be stated rather than actually referencing the
22 rule number itself.

23 CHAIRMAN BABCOCK: Okay.

24 HONORABLE STEPHEN YELENOSKY: What about
25 attaching the rule?

1 HONORABLE DAVID GAULTNEY: I don't know.
2 Just small claims courts litigants are not generally going
3 to have or work off Rules of Procedure and the justices
4 don't apply them in those circumstances.

5 HONORABLE STEPHEN YELENOSKY: Well, there's
6 only, what, how many rules referenced in there?

7 MR. ORSINGER: About a dozen.

8 HONORABLE TOM LAWRENCE: In the e-filing?

9 MR. ORSINGER: About a dozen, I think.

10 HONORABLE TOM LAWRENCE: Not that many. I
11 didn't count. Five or six maybe. I'm not sure. The same
12 one is referenced more than once.

13 HONORABLE DAVID GAULTNEY: But the
14 implication there is that those rules may apply in small
15 claims court. If there is a specific part of the rule
16 that is intended to apply and still maintain the easy
17 access involved in small claims, perhaps that could be
18 stated. That's all I'm suggesting. I didn't mean to open
19 up this discussion for another hour, but I think that is
20 an important distinction between small claims courts, JP
21 courts, and what -- and the template that's being applied
22 in district courts.

23 CHAIRMAN BABCOCK: Okay. To the extent Jody
24 feels comfortable in sending a redraft out to everybody he
25 will do it, and if you don't get it then you'll know he

1 didn't feel comfortable doing it.

2 HONORABLE SARAH DUNCAN: How do I know that
3 he didn't feel comfortable doing it as opposed to it
4 bounced back? I'm serious.

5 CHAIRMAN BABCOCK: You're just going to have
6 to take it on faith.

7 MR. HUGHES: If I see it bounce back I'll
8 resend it.

9 CHAIRMAN BABCOCK: Okay. Let's see what
10 we've got left. Richard, you've got this --

11 MR. ORSINGER: I can get a partial
12 presentation out if you'd like.

13 CHAIRMAN BABCOCK: Yeah, that'd be good.

14 MR. ORSINGER: This is on 3 -- this is on --
15 pardon me.

16 CHAIRMAN BABCOCK: Draft 7.2, right?

17 MR. ORSINGER: No. Well, you could call it
18 that. Would you-all look at the document that's titled
19 "Proposed TRCP regarding automatic substitution of current
20 state officers as successors in suits."

21 CHAIRMAN BABCOCK: And before you get going
22 on that, let's just see what else we have. Rule 6 got
23 taken care of. Jody, are you going to handle proposed new
24 Rule 9.8?

25 MR. HUGHES: I can, because I think Bill

1 told me he's not going to be here.

2 CHAIRMAN BABCOCK: He's not going to be
3 here, but you can handle that? Judge Lawrence, are you
4 prepared to go into these garnishment rules? Tomorrow, of
5 course, but --

6 HONORABLE TOM LAWRENCE: Oh, yeah. I'm
7 ready.

8 CHAIRMAN BABCOCK: And, Alex, you have some
9 stuff from the oversight committee?

10 PROFESSOR ALBRIGHT: Yeah, I do. We're
11 ready to go.

12 CHAIRMAN BABCOCK: Richard, let's get
13 started on your --

14 MR. ORSINGER: Okay. The problem is someone
15 had noticed that our appellate rules provide for lawsuits
16 involving public officers when the identity of the officer
17 changes while the suit is proceeding, like a class action
18 against the attorney general and the new attorney general
19 is sworn in. You don't deal with that in the trial rules
20 even though we deal with it in the appellate rules. The
21 Federal Rules of Civil Procedure deal with it, and the
22 Federal Rules of Appellate Procedure deal with it, and my
23 particular subcommittee was fairly indifferent to the
24 oversight.

25 So what I had tried to do is to bring to you

1 the alternatives, because I think we could rapidly reach a
2 consensus, and my suggestion of the way to approach this
3 problem is for you to open pages two and three so that
4 they're side by side, and let's look at the Federal civil
5 procedure rule and the Federal appellate rule so that we
6 can see those concepts. Then look at the Texas appellate
7 rule and decide on the Texas trial rule.

8 On the left-hand side of the page two is
9 Federal Rule of Civil Procedure 25. Subdivision (d) has
10 to do with public officers, death or separation from
11 office. On the right-hand page is appellate Rule 43,
12 Federal appellate Rule 43, and you can see that
13 subdivision (c) is for public officers, identification,
14 and substitution. I want to show you some parallels in
15 here and then point out how we really differ in Texas
16 practice. The first thing I note is that the trial rules
17 on the left, subdivision (2), (d)(2), is the same as
18 subdivision (c)(1) in the appellate rules. So they really
19 provide the same concept, they just change the location.

20 Another thing I'd like to point out is they
21 use the term "public officer" without defining it, but the
22 Federal people seem to be satisfied that "public officer"
23 includes the people we should be concerned with about
24 moving in and out of office. I would also point out that
25 in both the Federal trial rule and the Federal appellate

1 rule they describe the proceeding as an action. Not a
2 cause or a suit, it's an action. That's what the Federal
3 rules relate it to. The Federal trial rule on the left
4 triggers when the public officer dies, resigns, or
5 otherwise ceases to hold office, and the appellate rule on
6 the right, subdivision (2), does the same thing, "dies,
7 resigns or otherwise ceases to hold office."

8 There is another concept that's important,
9 and that is that both the trial rule in the second line
10 and the appellate rule, subdivision (2), third line,
11 provides that the suit does not abate, and then the
12 appellate rule breaks into two sentences about not abating
13 and about the successor being automatically substituted.
14 The trial rule has them all in one sentence, so generally
15 speaking, these rules are very, very similar with this
16 concept of public officer dies, resigns, or otherwise
17 ceases, the use of the word "action," the statement it
18 does not abate, the concept that if you don't -- you don't
19 have to mention them by name, but if you do, the court can
20 order you to mention the attorney general or the public
21 officer by name, but if you fail to do it, it doesn't make
22 any difference.

23 Okay. If you'll take those concepts in mind
24 and flip back to the first page, we have attempted to
25 address this in our Texas Rules of Appellate Procedure,

1 and you can see that instead of calling them "Public
2 officers, death or separation or substitution," it's
3 called "Public officers, automatic substitution of
4 officer."

5 "When a public officer is a party in an
6 official capacity to an appeal or original proceeding" --
7 now, it doesn't say "action" like either one of the
8 Federal rules. It says "appeal or original proceeding."
9 "If that person ceases to hold office before the appeal or
10 original proceeding is finally disposed of, the public
11 officer's successor is automatically substituted as a
12 party, if appropriate."

13 I would like to say at this point that we do
14 not say that the suit does not abate and the public
15 officer successor is automatically substituted. That
16 concept of having it that it's not abated and is
17 automatically substituted is not in subdivision -- is not
18 in TRAP 7.2(a). The reason is, is that we have a special
19 abatement rule in 7.2(b), and that special abatement rule
20 is that if you have an original proceeding, which
21 primarily is going to mean mandamus, then the appellate
22 court is required to abate the mandamus proceeding and to
23 send the matter back down to the trial court so that the
24 new judge, who is now an -- is a public officer who is a
25 litigant because a mandamus is against them, the new judge

1 has to be given an opportunity to rule again on the order
2 that led to the mandamus.

3 Now, that's a concept that we introduced
4 into the Texas appellate rules that are not in the Federal
5 trial rules or in the Federal appellate rules, this idea
6 that a mandamus must be abated to give the new
7 officeholder to rerule on the order, because the mandamus
8 will issue against the new judge even if it was a ruling
9 from the old judge, but other than that you'll see that
10 the appellate rule on the Texas side is conceptually
11 similar to both the Federal trial rule and to the Federal
12 appellate rule.

13 Having said all that, you go back to the
14 Texas trial level and you find out we don't have a trial
15 rule for substituting official or public officers. It's
16 just missing, and it's the series of Rules 151 through 161
17 that talks about all the substitution of parties and death
18 of parties and everything else that we just simply have
19 never included what happens when you have a public officer
20 that's a party to a lawsuit and then they're replaced. So
21 if you care to do something about this oversight we could
22 take the language of the Texas appellate rule, which is a
23 little bit modernized from either the Federal trial rule
24 or the Federal appellate rule, but fold the concept of the
25 suit does not abate back into it and use our Texas

1 language at the trial level that's like our Texas language
2 at the appellate level.

3 Now, actually, any of these rules would be a
4 serviceable substitute, but remember, on the Federal side
5 they use the word "action" to describe the court
6 proceeding, and in Texas Rules of Procedure 151, 152, 153,
7 155, 158, 159, 160, and 161 we refer to it as a "suit."
8 So if we were to use the Federal pattern we would use the
9 word "suit." If we wanted to pick up the TRAP rule, we
10 would not use "an appeal or original proceeding." We
11 would use "in an official capacity to a suit," "as a party
12 in an official capacity to a suit."

13 So my proposal, which doesn't have the
14 support of my subcommittee, which doesn't have an official
15 position on this change, is that we would take the TRAP
16 rule and make a few changes to it, and I think it would be
17 serviceable. We could say, "Automatic substitution of
18 officer. When a public officer is a party in an official
19 capacity to a suit," comma, "and if that person ceases to
20 hold office before the suit is finally disposed of,"
21 comma, "the suit does not abate, and the public officer's
22 successor is automatically substituted as a party, if
23 appropriate. Proceedings following substitution are to be
24 in the name of the substituted party, but any misnomer
25 that does not affect the substantial rights of the parties

1 may be disregarded. Substitution may be ordered at any
2 time, but failure to order substitution of the successor
3 does not affect substitution," and then obviously we would
4 have no subdivision (b) regarding abatement of original
5 proceedings, because although technically a district judge
6 can mandamus the city clerk or the mayor or something, I
7 don't think we really want to involve ourselves in that
8 esoteric lawsuit.

9 So that's my proposal, is they're all kind
10 of conceptually similar, but the Federal language is a
11 little bit different and that we ought to just use our
12 TRAP rule as a model, take it back down to the trial court
13 level, call it a suit, include the concept that the suit
14 does not abate, and then let's adopt that as 159a, TRCP
15 159a. That's what I have to say.

16 CHAIRMAN BABCOCK: All right. Carl.

17 MR. HAMILTON: Will we still need that word
18 "if appropriate" in there?

19 MR. ORSINGER: You know, if we took it out
20 it would still be in the appellate rules and not in the
21 trial rules, so I don't know why it's in the appellate
22 rules. It's kind of like Jody being blamed for the stuff
23 that we did two years ago. It's in the appellate rules.
24 We thought they were great when we promoted them.

25 MR. HAMILTON: When would it not be

1 appropriate to substitute?

2 MR. ORSINGER: I wish Dorsaneo was here.
3 I'm sure he could tell us. We've lost all our law
4 professors. Oh, no.

5 HONORABLE STEPHEN YELENOSKY: Hey, hey.

6 MR. ORSINGER: Okay, Alex. When would it
7 not be appropriate?

8 PROFESSOR ALBRIGHT: There's Lonny, too.

9 MR. ORSINGER: I withdraw my statement.
10 Would you-all help us and tell us?

11 PROFESSOR HOFFMAN: I have no idea.

12 MR. ORSINGER: When would it not be
13 appropriate?

14 PROFESSOR ALBRIGHT: Well, Lonny, I'll let
15 you answer that one.

16 PROFESSOR HOFFMAN: Thank you, Professor
17 Albright.

18 HONORABLE NATHAN HECHT: Well, when it's
19 going out the door, when it's on a motion for rehearing,
20 and the court's still got jurisdiction but don't want to
21 fool with it anymore. There are lots of instances. Say
22 somebody's filed a motion for rehearing and you're going
23 to deny it. Are you going to change the caption?
24 Probably not.

25 CHAIRMAN BABCOCK: Professor Hoffman.

1 PROFESSOR HOFFMAN: The only thing I would
2 add to what you said earlier would be that you've got the
3 old version of the Federal rules that you were reading
4 from.

5 MR. ORSINGER: Uh-oh.

6 PROFESSOR HOFFMAN: The restyled rules that
7 are about to go in effect in December are almost exactly
8 what you just read that you wanted the rule to be except
9 the word "action" is in there. So I guess I would just
10 direct you to the restyled rules. I think they do exactly
11 what you want them to do, and there were a whole lot of
12 wise wordsmiths who tried to clean it up already.

13 HONORABLE NATHAN HECHT: But the restyled
14 appellate rules are already in effect, right?

15 PROFESSOR HOFFMAN: The appellate rules are
16 in, yes.

17 MR. ORSINGER: Are you talking about the
18 restyled trial rules, Federal trial rules?

19 PROFESSOR HOFFMAN: Yeah, right, the Federal
20 Rules of Civil Procedure.

21 HONORABLE NATHAN HECHT: Right. I think we
22 took the Texas appellate rule from the restyled Federal
23 appellate rule, which is what you quoted there.

24 PROFESSOR HOFFMAN: And it's almost
25 identical.

1 MR. ORSINGER: Well, yeah, to me personally
2 I would rather pattern my trial rule after my appellate
3 rule than after a new Federal trial rule, but that's just
4 personal. To me I would rather see a consistency between
5 our state and appellate rules rather than to see an
6 inconsistency that might give rise to all kinds of
7 arguments and committees and courts.

8 CHAIRMAN BABCOCK: Judge Yelenosky.

9 HONORABLE STEPHEN YELENOSKY: It may not
10 matter based on what you are proposing, Richard, I'm not
11 sure, but the rule as it exists now for appellate courts
12 says it must abate, but it doesn't say how long, and is
13 that an issue and why would it abate?

14 MR. ORSINGER: No, it doesn't abate. I'm
15 proposing that there be no subdivision (b) at the trial
16 level and that instead it say that the suit does not
17 abate.

18 HONORABLE STEPHEN YELENOSKY: Right. I'm
19 just curious at the appellate level.

20 MR. ORSINGER: The reason they want an
21 abatement at the appellate level is that trial judge No.
22 1, I should say the older one or the traditional trial
23 judge, is the one that makes the wrong ruling on the
24 discovery, and so the mandamus is against him or her.

25 HONORABLE STEPHEN YELENOSKY: Right. I

1 mean, now they say "in re," right?

2 MR. ORSINGER: Now they do, but they're
3 still the respondent, aren't they?

4 HONORABLE STEPHEN YELENOSKY: Right.

5 MR. ORSINGER: Okay. So the lawsuit is
6 against them, and I know that a lot of district judges
7 don't like getting mandamused for a decision they never
8 had a chance to make.

9 HONORABLE STEPHEN YELENOSKY: We only get
10 conditionally mandamused.

11 MR. ORSINGER: Well, that's true. But
12 that's the purpose for the abatement, is just --

13 HONORABLE STEPHEN YELENOSKY: But my point
14 is just it may be time sensitive, and if the new judge can
15 act quickly and change the decision perhaps it becomes
16 moot, but what's the direction to the appellate court?
17 And maybe it doesn't matter because this rule's been
18 around forever.

19 MR. ORSINGER: No, it's not an issue for us
20 because we're not changing the appellate rule, we're
21 changing the trial rule, and there's no reason to --

22 HONORABLE STEPHEN YELENOSKY: I know. I
23 just want to bring up things today that we're not supposed
24 to work on.

25 MR. ORSINGER: Okay. Oh, you're saying

1 maybe the appellate rule ought to be changed?

2 HONORABLE STEPHEN YELENOSKY: Yeah.

3 MR. ORSINGER: I'm sorry. I missed that.

4 CHAIRMAN BABCOCK: Richard Munzinger.

5 MR. ORSINGER: Not my department.

6 MR. MUNZINGER: Is there problem or a
7 potential problem if a public officer is a party in his
8 official capacity and in his individual capacity?
9 Suppose, for example, that a person who is in charge of
10 a -- of the prison or of the juvenile detention home is
11 alleged to have had carnal knowledge with one of the
12 inmates as well as permitting others to do so, and so
13 there are official issues, but now there are also personal
14 issues, and he dies or she dies. Should the rule somehow
15 recognize that possibility and account for it?

16 MR. ORSINGER: Well, does it, because it
17 starts out by saying, "When a public officer is a party in
18 an official capacity"?

19 MR. MUNZINGER: No, I understand, but then
20 that raises the question to the practitioner when you've
21 limited it to the official capacity, so I'm sitting here
22 and I'm saying what if I've sued somebody in his official
23 and individual, how does this affect it? We don't say in
24 his individual capacity Rules 151, et cetera. I'm not
25 saying you have to. I'm just wondering whether we need to

1 at least think about it.

2 CHAIRMAN BABCOCK: Judge Christopher, and
3 then Gene Storie.

4 HONORABLE TRACY CHRISTOPHER: I think that's
5 a good point, too, and I was unclear on whether we were
6 going to make this 159 big A as in another rule or 159
7 little a.

8 MR. ORSINGER: No, it has to be a separate
9 rule, Judge, because --

10 HONORABLE TRACY CHRISTOPHER: Because I
11 think we ought to rewrite 159 to make it parallel with the
12 TRAP rule.

13 CHAIRMAN BABCOCK: Gene.

14 MR. STORIE: You know, I think that may be
15 what the "if appropriate" language is for. You would
16 substitute the new official for the ex-per diem or
17 official liability claim, but the previous official would
18 stay in the suit, of course, for the individual claim.

19 CHAIRMAN BABCOCK: Anybody else? Yeah,
20 Judge Gray.

21 HONORABLE TOM GRAY: In both of the Federal
22 rules they contain a major provision that has always
23 seemed reasonable to me that -- this has always been
24 frustrating to me that it's not in the state rules and
25 that's you can sue them by their title only and not have

1 to worry about their death or subsequent substitution, and
2 our rule does not provide for that, and it should. You
3 can sue the Governor of the State of Texas by that caption
4 and not have to put who the Governor is, and then if they
5 change offices or, you know, whatever, you don't have that
6 problem.

7 The words in the trial court are "by the
8 officer's official title rather than by name" and in the
9 appellate rule it says "may be described as a party by the
10 public officer's official title rather than by name," so
11 both of them have essentially the same concept in the
12 Federal rule that's completely absent in the state rule.

13 MR. ORSINGER: Good point. It's absent in
14 our TRAP rule as well as -- I mean, it's absent in our
15 TRAP rule.

16 MR. MUNZINGER: But isn't there case law
17 that suggests that you have to sue -- for example, the
18 chairman of the Department of Transportation, you have to
19 name that person as an individual as well as in their
20 official capacity to have jurisdiction over the agency. I
21 think there is some cases that cause some problems about
22 that. I'm not sure the committee should just immediately
23 adopt a rule that says sue by title and it's okay without
24 somebody doing some legal research to make certain that
25 that's correct.

1 I once avoided a malpractice case by asking
2 someone to look that up, and they came back and said, "God
3 almighty, you have to sue the person individually," and I
4 was stunned by it, and I can't remember the agency at the
5 moment. It was some years ago, but there were cases that
6 address this, and we need to be careful. We need to think
7 about it.

8 MR. LOW: You know, I've never seen a suit
9 like that that didn't include in their official capacity
10 as individually as well. I've never seen one that didn't
11 do that.

12 MR. MUNZINGER: We need to be careful about
13 saying we can just wholesale rewrite the Texas rule
14 without looking at some of those older cases --

15 MR. LOW: Right.

16 MR. MUNZINGER: -- in my opinion.

17 MR. BOYD: Are you talking about declaratory
18 judgment actions?

19 MR. MUNZINGER: No.

20 MR. BOYD: I know there is old cases that
21 say you have to name the agency. I mean, that you have to
22 name the individual agency head, but the more recent cases
23 have said that it's sufficient to name just the agency.

24 MR. MUNZINGER: I confess it was some years
25 ago, and I'm just concerned that we not believe that we

1 can wholesale amend a rule that may cause some confusion
2 if some cases are read.

3 HONORABLE STEPHEN YELENOSKY: I guess you
4 could have a Federal claim that's not removed under 1983,
5 but you ought to know then that you have to name the
6 individual regardless of what the Texas rule says, but
7 that's an example.

8 HONORABLE JAN PATTERSON: Isn't it really
9 more endorsing a current practice? Isn't what we're
10 doing?

11 MR. ORSINGER: My proposal is to take what's
12 functioning at the TRAP level, except for the abatement to
13 allow a new ruling, which makes no sense at the trial
14 court level, just buy into it totally. I would do it just
15 take out "appeal on original proceeding" and replace it
16 with "suit" and then take out the subdivision (b) on
17 abatement to let the trial judge rule on the mandamus
18 matter again and put in "the suit does not abate" and then
19 the rules are identical except for those two areas.

20 MR. LOW: But, Richard, would that be
21 misleading to somebody that sued someone in their
22 individual capacity as well and you don't even mention
23 that?

24 MR. ORSINGER: Well, you know, nobody else
25 is mentioning it on the Federal side either.

1 MR. LOW: No, just because somebody hadn't
2 done it before -- a lot of things I haven't done before,
3 but doesn't mean that, you know, we're right.

4 MR. GILSTRAP: Yeah, but the suit, I mean,
5 the suit -- if an officeholder leaves the office and you
6 sued him individually for some wrong, that suit continues
7 against him even though he's out of office.

8 MR. LOW: But like you'd sue a prison
9 warden, say, individually and in his official capacity
10 then to follow and so forth and then this comes up and you
11 say, "Well, it's abated, now we go to the new warden."
12 The new warden says, "Wait a minute. I'm not individually
13 liable."

14 MR. GILSTRAP: So you want to make sure that
15 this does not apply to an individual capacity?

16 MR. LOW: I don't want it confused like to
17 mean that, well, you can't sue somebody in the individual
18 capacity.

19 MR. ORSINGER: Well, this only applies to
20 them in their official capacity. It says so.

21 MR. LOW: I know it. I know it. I know it
22 says that, and maybe that is --

23 MR. ORSINGER: You want to add another
24 sentence on there that says this doesn't apply to somebody
25 in their individual capacity?

1 MR. LOW: I'm not answering the question.
2 I'm just raising it. I don't know. I'm asking you for an
3 answer.

4 CHAIRMAN BABCOCK: Gene, what do you think?

5 MR. STORIE: Well, I had the idea
6 originally, so everyone who is bored by it can blame me,
7 but honestly, I just saw it as a simple housekeeping sort
8 of matter because what we do in my practice at the
9 attorney general's office is we simply put in the
10 successor. So I get a suit that's filed against Carol
11 Strayhorn, she's not comptroller anymore, so when I file
12 pleadings or especially if I'm filing a judgment I'm just
13 going to say "Susan Combs, as successor to Carol
14 Strayhorn, Comptroller of Public Accounts," and what this
15 will do will do a couple of things potentially. It will
16 keep an appellate court from wondering if all the parties
17 have been disposed of if I forget to put that little bit
18 of language into my judgment, and I think it's just going
19 to make everyone's life easier to know who's really in
20 charge of the suit. I doubt there is any political
21 consequence to it, but it was really that simple of an
22 idea.

23 CHAIRMAN BABCOCK: Well, Buddy and Frank are
24 worried that if Carol Strayhorn in your example has been
25 sued individually and because of this rule some lawyer

1 just substitutes Susan Combs and then drops Carol
2 Strayhorn out altogether, that they will lose a claim that
3 they intended to bring, and the answer to that seems to me
4 that if you're a lawyer that's smart enough to know that
5 you've got two claims against Strayhorn, one individually
6 and one in an official capacity, this rule change is not
7 going to cause you to all of the sudden get stupid and
8 drop her out of the lawsuit if you've got an individual
9 claim against her.

10 MR. LOW: Well, I just don't want somebody
11 to think that this -- that once that happened it merges
12 now into one official because I defended Bill Hobby and
13 Clarence Cain and all of them when Waggoner Carr sued when
14 they closed down Artesia Hall. Every one of them got sued
15 in their -- Hobby, everybody, in their official capacity
16 and individually.

17 CHAIRMAN BABCOCK: Right.

18 MR. LOW: And some of them changed and the
19 individual -- well, okay, maybe I'm not as smart as I
20 might be.

21 CHAIRMAN BABCOCK: Judge Patterson.

22 HONORABLE JAN PATTERSON: I'm not aware that
23 it's been a problem in the appellate courts. This seems
24 to have worked fine, so that leads me to believe that it
25 would work --

1 CHAIRMAN BABCOCK: In the state.

2 HONORABLE JAN PATTERSON: -- the same in the
3 trial courts.

4 CHAIRMAN BABCOCK: All right. It's a
5 legitimate question, though, so does everybody -- let's
6 vote on Richard's proposal, which would not contain this
7 language that Buddy and Frank are worried about. So
8 everybody in favor of Richard's proposal raise your
9 hand.

10 MR. LOW: I'll vote on it. There ought to
11 be a note anyway.

12 MR. ORSINGER: It's in the record, Buddy,
13 now.

14 MR. LOW: Huh?

15 MR. ORSINGER: It's in the record, and they
16 put this on the internet, so it will exist forever.

17 CHAIRMAN BABCOCK: Who is opposed?

18 Well, that's a good way to end the day, with
19 a 23 to nothing unanimous vote. Nicely done, Richard. So
20 we'll be back tomorrow at 9:00, and we'll go on from
21 there.

22 (Meeting was recessed at 5:02 p.m. and
23 continued the following day, as reflected in
24 the next volume.)
25

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2 **REPORTER'S CERTIFICATION**

3 MEETING OF THE

4 SUPREME COURT ADVISORY COMMITTEE

5 * * * * *

6

7

8 I, D'LOIS L. JONES, Certified Shorthand

9 Reporter, State of Texas, hereby certify that I reported

10 the above meeting of the Supreme Court Advisory Committee

11 on the 24th day of August, 2007, Friday Session, and the

12 same was thereafter reduced to computer transcription by

13 me.

14 I further certify that the costs for my

15 services in the matter are \$_____.

16 Charged to: The Supreme Court of Texas.

17 Given under my hand and seal of office on

18 this the _____ day of _____, 2007.

19

20

21 **D'LOIS L. JONES, CSR**

22 Certification No. 4546

23 Certificate Expires 12/31/2008

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#DJ-188